

DCPS filed a Response to the original Complaint on November 29, 2011, denying the allegations. On December 12, 2011, DCPS held a resolution meeting on the original Complaint, and the parties were unable to reach an agreement. The parties also did not agree to end the 30-day resolution period early. *See Resolution Period Disposition Form (12/12/2011)*.

On December 22, 2011, an initial Prehearing Conference (“PHC”) was held to discuss and clarify the issues in the Complaint. At the 12/22/2011 PHC, it was agreed and ordered that Petitioner would file an Amended Complaint to correct certain errors and omissions in the original Complaint, which would operate to restart the IDEA timelines. An Amended Complaint was then filed on 12/22/2011.

On December 29, 2011, DCPS advised that the Amended Complaint did not cause any change or addition to its 11/29/2011 Response.

On January 10, 2012, a further PHC was held; and on January 13, 2012, a Prehearing Order was issued. The statutory 30-day resolution period on the Amended Complaint ended January 21, 2012, and the 45-day timeline for issuance of the Hearing Officer Determination (“HOD”) expires on March 6, 2012. Timely five-day disclosures were filed by both parties.

The Due Process Hearing was held in Hearing Room 2006 on January 23, 2012. Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence:

Petitioner’s Exhibits: P-1 through P-26.²

Respondent’s Exhibits: R-1 through R-12.

In addition, the following Witnesses testified on behalf of each party:

Petitioner’s Witnesses: (1) Parent-Petitioner; (2) Educational Advocate (“EA”); and (3) Clinical Psychologist.

Respondent’s Witnesses: DCPS presented no witnesses.

Oral closing arguments were submitted by both parties thereafter.

² Petitioner’s Exhibits P-4 (03/02/2011 advocate meeting notes), P-5 (02/25/2011 advocate meeting notes), and P-8 (04/08/2008 IEP) were admitted over DCPS’ objections for the reasons stated on the record at hearing.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP"). The statutory HOD deadline is March 6, 2012.

III. ISSUES AND REQUESTED RELIEF

The following issues were presented for determination at hearing:

(1) **Failure to Develop Appropriate IEP** — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (*i.e.*, one that is reasonably calculated to confer educational benefit) as of **March 3, 2010, February 25, 2011, and/or November 9, 2011**? The specific grounds alleged in the Amended Complaint (pp. 6-12) are as follows:

(a) ***Sufficient specialized instruction and accommodations, supports, or services.*** — Petitioner claims that Student's needs require full-time special education services in an outside general education setting, including "accommodations, assistive technology, supports or services to address academic deficits in light of evaluation recommendations and limited progress."

(b) ***LRE.*** — Petitioner claims that the IEPs fail to provide Student with his least restrictive environment ("LRE").

(2) **Failure to Evaluate** — Did DCPS deny the Student a FAPE by failing to comprehensively evaluate the Student? Specifically, Petitioner claims (*Amended Complaint*, pp. 13-14) that DCPS should have conducted an:

(a) ***Adaptive Assessment***, to rule out or confirm a diagnosis of intellectual deficiency: and

(b) ***OT Assessment***, in light of deficits in the area of visual perception.

(3) **ESY Services** — Did DCPS deny the Student a FAPE by failing to consider and provide ESY services during the 2010 and 2011 summers?

Petitioner requests that the Hearing Officer make appropriate findings and order DCPS to: (a) fund a Vineland adaptive assessment and OT evaluation; (b) amend the Student's IEP; (c) place and fund the Student in a private placement selected by the parent, with transportation; and (d) award compensatory education for denials of FAPE that have occurred.

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. 5-E DCMR §3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Petitioner also had the burden of proposing a well-articulated plan for compensatory education, in accordance with the standards of *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

IV. FINDINGS OF FACT

Based upon the evidence presented at the due process hearing, this Hearing Officer makes the following Findings of Fact:

1. The Student is a -year old student who is a resident of the District of Columbia. Petitioner is the Student's mother. *P-1; Parent Test.*
2. The Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA, and he has received services from DCPS for the past several years. *P-1; P-8; Parent Test.* His primary disability is Specific Learning Disability ("SLD"). *Id.*
3. The Student currently attends the 6th grade at Middle School, which is his neighborhood DCPS school. *P-1; Parent Test.* Prior to that, the Student attended his neighborhood elementary school. *Id.*
4. On or about March 3, 2010, DCPS convened a meeting of the Student's multi-disciplinary team ("MDT") to review evaluations ³ and to develop an IEP for the Student. *P-7.* The IEP developed at the 03/03/2010 meeting provided 15 hours per week of Specialized Instruction in a General Education setting and one (1) hour per week of Speech-Language Pathology Services in a General Education setting. *Id., p. 7.* Extended school year (ESY) services were determined not to be required for the Student. *Id., p. 10.* Parent signed the IEP, and checked the box indicating agreement with the contents of the IEP. *Id., p. 1. See also Parent Test.*
5. On or about February 25, 2011, DCPS convened another meeting of the Student's MDT/IEP Team to review the Student's progress and to review his IEP. *P-5; P-6.* The

³ Prior assessments of the Student included a 04/29/2009 Report of Psychological Re-evaluation (*P-12*) and an 08/03/2009 Educational Evaluation (*P-16*).

MDT determined to maintain the same services. *P-6, p. 7*. Again, the MDT determined that ESY services were not required. *Id., p. 10*.

6. On or about October 25, 2011, DCPS completed an updated educational evaluation of the Student using the Woodcock-Johnson III Tests of Achievement. *P-12*. When compared to the scores earned by others at his grade level, the results of the evaluation showed that the Student's overall level of achievement was very low (GE 2.0, with norms based on grade 6.2). His fluency with academic tasks and his ability to apply academic skills were both within the very low range. *Id., p. 2*. When scores for a selected set of achievement areas were compared, the Student demonstrated a significant weakness in broad reading (GE 1.6). *Id.* The evaluation also provided detailed recommendations for specialized instruction strategies and interventions. *Id., pp. 2-7*.
7. On or about November 9, 2011, DCPS convened another meeting of the Student's MDT/IEP Team to review the Student's progress and to review his IEP. *See P-2; P-3; R-6; R-7*. The meeting was designated as an annual review. *See R-6; R-7*. At this meeting, the MDT revised the Student's IEP to provide for his Speech/Language Pathology Services to be provided in an Outside General Education setting, and to provide for one hour of Behavioral Support Services in an Outside General Education setting. *Id.* With respect to Specialized Instruction, the IEP document dated 11/09/2011 continued to provide for 15 hours in a General Education setting. *R-7, p. 7*. However, the MDT appeared to determine at this meeting that the Specialized Instruction services would be changed to an Outside General Education setting. *See R-6 (11/09/2011 MDT meeting notes); P-2 (advocate meeting notes)*.⁴ The MDT decided that it would meet again in January 2012 to review progress. *P-2, p. 5*.
8. Also on November 9, 2011, DCPS issued a Prior Written Notice proposing that the Student continue to receive specialized instruction and related services at his neighborhood school, the Middle School, as a learning disabled student in a combination setting. *R-8*.
9. On or about January 10, 2012, subsequent to the filing of the Amended Complaint in this matter, DCPS completed a revised and corrected IEP. *P-1; R-5*. The 01/10/2012 IEP

⁴ The DCPS Response agrees with the 11/09/2011 MDT meeting notes. *R-1, p. 2*.

includes the content agreed to at the 11/09/2011 meeting and provides for 15 hours of Specialized Instruction in an Outside General Education setting. *P-1, p. 7; R-5, p. 7.*

V. DISCUSSION AND CONCLUSIONS OF LAW

For the reasons discussed below, the Hearing Officer concludes that Petitioner has met her burden of proving by a preponderance of the evidence that DCPS has denied the Student a FAPE⁵ under Issues 1, 2, or 3, in part, to the extent described herein.

A. Issues/Alleged Denials of FAPE

1. **Failure to Provide Appropriate IEPs (Specialized Instruction)**

The “primary vehicle” for implementing the goals of the IDEA is the IEP, which the statute “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). An IEP is a comprehensive written plan that must include, among other things: (1) “a statement of the child’s present levels of academic achievement and functional performance, including ... how the child’s disability affects the child’s improvement and progress in the general education curriculum”; (2) “a statement of measurable annual goals, including academic and functional goals, designed to ... meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum...and meet each of the child’s other education needs that result from the child’s disability”; (3) “a description of how the child’s progress toward meeting the annual goals...will be measured”; (4) “a statement of the special education and related services and supplementary aids and services ...and a statement of the program modifications or supports for school personnel that will be provided for the child”; and (5) an explanation of the extent, if any, to which the child will not participate with non-disabled children in any regular classes. 20 U.S.C. 1414(d)(1)(A)(i) (emphasis added). *See also* 34 C.F.R. 300.320; DCMR 5-E3009.1.

⁵ Under the IDEA, FAPE means “special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...” 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child, but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.” *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176,200,207 (1982); see also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). Judicial and hearing officer review of IEPs is “meant to be largely prospective and to focus on a child’s needs looking forward; courts thus ask whether, at the time an IEP was created, it was ‘reasonably calculated to enable the child to receive educational benefits.’” *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207); see also *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008) (IEP viewed “as a snapshot, not a retrospective”). And the issue of whether an IEP is appropriate is a question of fact for hearing. See, e.g., *S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003).

In this case, Petitioner claims that DCPS failed to provide an appropriate IEP on either March 3, 2010, February 25, 2011, or November 9, 2011, in that they fail to contain “sufficient instructional services and accommodations, supports or services to address his academic deficits in light of evaluation recommendations and lack of appropriate progress,” and fail to provide the Student with his LRE. *Amended Complaint*, p. 5-6, 9-11. Petitioner points out (*inter alia*) that DCPS’ August 2009 psychological re-evaluation assessed the Student’s cognitive/intellectual functioning to be within the mild mentally retarded range as indicated by the KABC-II Mental Processing Index (MPI) standard score; that the testing data showed the Student as having “severe processing problems in the areas of working memory, executive function, auditory perception, and visual perception”; and recommended that the MDT should consider providing the Student with a “more intensive educational program since he continues to make exceptionally slow progress in the areas of reading, math, and written language.” *P-12*, pp. 4-6. In light of this evaluative data, Petitioner argues that DCPS’ refusal to provide the Student with an out of general education setting for his specialized instruction, along with necessary accommodations, resulted in an inappropriate IEP that did not confer meaningful educational benefit beginning in March 2010.

In response, DCPS presented no meeting notes to document the MDT’s considerations in March 2010 or February 2011, and DCPS offered no witnesses to explain how any of the

programs addressed the Student's educational needs. That essentially leaves the Hearing Officer to compare the evaluative data with the written programs, along with what can be gleaned from the other available documentary evidence (*e.g.*, EA meeting notes, IEP progress reports, Nov. 2011 notes) and the uncontroverted testimony of Petitioner's witnesses.

The Parent testified that she expressed concerns at the IEP meetings regarding the need for more special education classes outside the general education setting given the Student's academic deficits. *Parent Test.* However, at the February 2011 meeting, the special educators informed the MDT that slow but steady academic improvements were being made when the Student was exposed to the curriculum in an inclusionary (general education) setting and that his behaviors had improved greatly. *P-5, p. 1.* The SEC also provided the Team with his IEP progress reports demonstrating progress under the 03/03/2010 IEP. *Id.; see R-11.* As a follow-up action, the Team planned to determine whether there was a need for a "change in service delivery model" for middle school (*i.e.*, "does he need more support"?). *P-5, p. 4.* The Hearing Officer interprets this comment in the EA meeting notes to refer to the possibility of a change in setting (to Outside General Education) for the Student's specialized instruction and/or other services as he transitioned to a more challenging middle school curriculum.

By the November 2011 meeting, with the Student now in Middle School, he was still reading at a 1st grade level and was struggling almost as much in math. *See P-2* (11/09/2011 EA meeting notes). The Middle School SEC also stated that "they are playing catch up," apparently because they had just received certain educational records. *P-2, p. 4.* At this time, the MDT recognized that "corrections need to be made on IEP to reflect outside general education" setting. *Id., p. 2.* The DCPS meeting notes are cryptic, but confirm this basic determination. *R-6, p. 2* ("Correct the general ed – put outside general ed"). For some reason, however, the 11/09/2011 IEP was not immediately revised to provide specialized instruction in an Outside General Education setting. *See R-7, p. 7.* It was not until January 2012 that these additional services were formalized in a written, complete IEP document. *R-5, p. 7. Cf. N.S. v. District of Columbia, 709 F. Supp. 2d 57 (D.D.C. 2010); Alfonso v. District of Columbia, 422 F. Supp. 2d 1, 6 (D.D.C. 2006).*

Based on all of the evidence adduced at hearing, the Hearing Officer concludes that the 11/9/2011 IEP should have provided at least 15 hours of specialized instruction in an Outside General Education setting, as the Student's LRE, consistent with the MDT's discussion and

determination at that time. Indeed, the evidence suggests that DCPS should have acted more quickly (*i.e.*, before the start of the 2011-12 school year, or at least within 30 days of Middle School enrollment) to discuss a different setting for specialized instruction. *See P-5 (2/25/2011 MDT meeting notes)*, p. 5 (“need for change in delivery model in MS ... to be addressed before end of school year”); *EA Test*. DCPS’ failure to do so hindered the Student’s progress as he transitioned from elementary to middle school. To this extent, at least, the Hearing Officer concludes that the Student was deprived of educational benefit and denied a FAPE. However, the Hearing Officer concludes that Petitioner failed to prove that the earlier IEPs were not reasonably calculated to provide educational benefit – in terms of the LRE and setting for specialized instruction – based on the information then available to the MDT in March 2010 and February 2011, respectively.

2. Failure to Evaluate

As part of either an initial evaluation or re-evaluation, DCPS must ensure that the child “is assessed in all areas related to the suspected disability,” and that the evaluation is “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.” 34 C.F.R. §300.304 (c) (4), (6); *see also Harris v. DC*, 561 F. Supp. 2d 63, 67-68 (D.D.C. 2008). Thus, evaluations are to be conducted to determine both a child’s disabilities and the content of the child’s IEP. 34 C.F.R. §300.304 (b) (1). Moreover, where an IEP team determines that additional data is not needed, parents have a right to request particular assessments to determine whether their child has a disability and the child’s educational needs. *See, e.g.*, 34 C.F.R. 300.305 (d); *see also Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005).

In this case, Petitioner claims that DCPS should have conducted an adaptive behavior assessment, to rule out or confirm a diagnosis of intellectual deficiency, and an OT assessment in light of deficits in the area of visual perception. *See Amended Complaint*, pp. 13-14. Dr. Nelson testified (as an expert clinical psychologist) that she believes the Student’s cognitive functioning scores warrant administration of a Vineland or other adaptive behavior test, notwithstanding his substantially higher non-verbal scores as measured on the C-TONI. *See Psych. Test.; P-12*. She also testified that she believed the visual perception and visual-motor integration deficits justified

an OT assessment of the Student. *Id.* DCPS did not call the April 2009 evaluator as a witness, and did not offer the testimony of any other expert to rebut Dr. Nelson's opinions. On the other hand, Petitioner did not allege or prove that she requested assessments in these two areas prior to the filing of the Complaint. *Cf.* 34 C.F.R. 300.305(d).

The Hearing Officer concludes that, while such evidence appears insufficient to establish a prior denial of FAPE, in order to meet its evaluation responsibilities under 34 C.F.R. §300.304 (c) (4) & (6), DCPS should now either conduct adaptive behavior and OT assessments or authorize independent evaluations by Petitioner.⁶

3. Extended School Year Services

ESY services "must be provided only if a child's IEP Team determines, on an individual basis...that the services are necessary for the provision of FAPE to the child." 34 C.F.R. §300.106(a)(2); *see also* DCMR 5-3017.2; 71 Fed. Reg. 46,582 (Aug. 14, 2006) ("The inclusion of the word 'only' is intended to be limiting."). The purpose of ESY services generally is to prevent substantial regression of skills over the summer break and a failure to recoup those lost skills within a reasonable period of time.

The Hearing Officer concludes that Petitioner has not met her burden of proving that ESY services were necessary to provide FAPE to the Student during the 2010 summer, but concludes that Petitioner has met her burden of proving that DCPS improperly denied such services for the 2011 summer. While States "have considerable flexibility in determining eligibility for ESY services," 71 Fed. Reg. 46,582 (Aug. 14, 2006), by the time of the February 2011 MDT meeting, I find that the information available to the MDT substantially supported the likelihood of a significant drop in the Student's skill level over the summer break between elementary and middle school and his inability to recoup those lost skills in a reasonable time due to significant working memory deficits. *See P-5; P-16; Psych. Test.; EA Test.*

⁶ *See* 71 Fed. Reg. 46,707 (Aug. 14, 2006) (hearing officers continue to have discretion to make rulings on matters in addition to those concerning provision of FAPE, such as matters identified in §300.507(a)(1) relating to identification, evaluation or educational placement of a child with a disability).

B. Appropriate Relief

The IDEA authorizes the Hearing Officer to fashion “appropriate” relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations,” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005). One of the equitable remedies available to a hearing officer, exercising his authority to grant “appropriate” relief under IDEA, is compensatory education.

Under the theory of ‘compensatory education,’ courts and hearing officers may award ‘educational services...to be provided prospectively to compensate for a past deficient program.’” *Reid v. District of Columbia*, 401 F. 3d at 521 (quotations omitted). “In every case, however, the inquiry must be fact-specific and, to accomplish IDEA’s purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” 401 F. 3d at 524. *See also Henry v. District of Columbia*, Civ. No. 09-1626 (RBW) (D.D.C. Nov. 12, 2010), slip op. at 7 (quoting *Reid*, 401 F. 3d at 518) (remand to hearing officer “to permit her in the first instance to conduct the ‘fact-specific exercise of discretion’ required by *Reid*, and to craft an award that ‘aims[s] to place [Student] in the same place [he] would have occupied but for the school district’s violations of [the] IDEA’”); *Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a “‘qualitative, fact-intensive’ inquiry used to craft an award ‘tailored to the unique needs of the disabled student’”). Thus, compensatory education awards are equitable in nature. They should be qualitative; they should be flexible; and they should be crafted so as to address the educational harm suffered by the Student as a result of the violation/denial of FAPE.

In this case, Petitioner has met her burden of establishing harm caused by the failure to provide ESY services during summer 2011 and the failure to change the delivery of the Student’s specialized instruction to a more intensive, pull-out setting by the beginning of the 2011-12 school year. Petitioner has also met her burden of proposing a well-articulated compensatory education plan that can remedy the harm. *See P-11; EA Test*. However, the plan requires

adjustment to correspond to the more limited denials of FAPE found herein, over a more limited six-month period of time (*i.e.*, July-December 2011).

Data is not available to measure the Student's academic achievement levels precisely at the beginning and end of the above time period. However, the data markers that do exist suggest that the Student has made very little, if any, progress over this period, especially in reading. As Petitioner points out, in February 2011, the MDT found that he was functioning at the 1st grade level in reading and writing and at the 2d grade level in math. *See P-6, pp. 2-4; P-11.* By the November 2011 meeting, the MDT found that the Student was "on a late Kindergarten reading level." *R-7, p. 3.* He was having continuing to have "difficulty with sight words, decoding skills and comprehension." *Id.* The MDT also found that the Student's "deficits in reading negatively impact on [his] performance in a general education classroom setting," *id.*, which became more pronounced as he transitioned from elementary to middle school and supported the need for the change in setting that belatedly took place in January 2012. *See R-5, p. 8* (noting "student can only make progress on IEP goals and objectives by being removed from the general education classroom to receive these services"); *EA Test.* (describing Jan. 2012 home visit/observation).⁷

Petitioner proposed 250 hours of academic tutoring to remedy all alleged denials of FAPE dating back to March 2010. *P-11, p. 2.* The Educational Advocate who prepared the proposal testified that approximately 200 of the tutoring hours were allocated to the denial of ESY over both summers (2010 and 2011). *See EA Test.* Given the determination that DCPS denied a FAPE only with respect to summer 2011 ESY and the setting of specialized instruction for the 2011-12 school year, an appropriate adjustment in these hours is necessary. The Hearing Officer finds that 150 hours of academic tutoring would be sufficient to provide the educational benefits that likely would have accrued from the special education services that the Student missed during this period. At least 100 of these hours should be devoted to intensive reading instruction, given the Student's very significant deficits in that area. The Hearing Officer finds that these services are well suited to remedy the specific harm suffered by the Student and are supported by the record evidence.

⁷ *See also R-12, p. 8* (10/25/2011 W-J III test results, indicating 1.6 GE in Broad Reading, 1.9 GE in Broad Written Language, and 2.8 GE in Broad Math). Overall, the Student has shown minimal progress in reading since April 2009, while appearing to progress a couple of grade levels in math during that same time frame. *P-12, p. 6.*

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).