

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

[STUDENT],¹
through the Parent/Guardian,*

Petitioner,

v

DCPS,

Respondent.

Date Issued: 4/13/11

Hearing Officer: Seymour DuBow

Case No:

Hearing Date: 3/21/11 Room: 2009

2011 APR 14 AM 9:08
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STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

The student is a year-old male who is currently attending

He has been found eligible for special education and related services with the disability classification of Specific Learning Disability. On February 11, 2011 counsel for petitioner filed a due process complaint alleging the following issues: 1. Did DCPS fail to provide the student with a Free Appropriate Public Education (FAPE) when it failed to implement the services on the student's IEP? 2. Did DCPS deny a FAPE by failing to provide an appropriate IEP based on the severity of his disability? 3. Did DCPS deny a FAPE by failing to provide the student with an appropriate placement? On February 25, 2011 counsel for respondent DCPS filed a Response denying the allegations. On February 28, 2011 the parties concluded a Resolution Meeting and failed to reach an agreement. The forty-five day time line began to run on March 1, 2011 and the

¹ Personal identification information is provided in Appendix A.

HOD is due April 14, 2011. On March 8, 2011 a pre-hearing conference was held by telephone with counsel for petitioner Alana Hecht and counsel for the respondent DCPS Tanya Chor. A pre-hearing Order was issued on March 12, 2011, after waiting a few days to receive an IEP from counsel. The Order stated that above three issues were to be addressed at the due process hearing.

The due process hearing convened at 9 a.m. on March 21, 2011 in Room 2009 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Alana Hecht represented the petitioner and Tanya Chor represented the respondent DCPS at the hearing. The hearing was closed. At the outset of the hearing, both the petitioner's documents P-1-26 and respondent's documents DCPS-1-14 were admitted into evidence without objection. All witnesses were sworn under oath prior to testifying. Counsel for petitioner called as witnesses the student, guardian/grandmother, and educational advocate who testified in person and tutor- and of who testified by telephone. Counsel for respondent DCPS called as her witness the reading teacher at who testified by telephone. Both counsel agreed to admit into evidence the written notes between the grandmother and the student made at the hearing marked as exhibit R-15.

JURISDICTION

The hearing was convened on March 21, 2011 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004 (hereinafter referred to as IDEA), Title 34 of the Code of Federal Regulations, Part 300 (2006) and Title V-E of the District of Columbia Municipal Regulations.*

BACKGROUND

The student is a _____-year-old male who has been found eligible for special education and related services. The student has the disability classification of Specific Learning Disability. The student had been attending _____ until the end of October 2010. The student was performing significantly below grade level with a first grade equivalent in reading and a third grade equivalent in math. _____ had tried a variety of interventions with the student, but the student demonstrated little growth in reading and writing. The student was in regular classes and failing all his classes. _____ developed an IEP for the student on September 29, 2010 that called for twenty hours of specialized instruction outside of general education. Because _____ could not offer a combination setting outside of general education, the student's placement was changed from _____ to _____ with a Prior Written Notice of Placement dated October 27, 2010. The student began to attend _____ on November 1, 2010. Since that time, _____ has only provided ten hours of specialized instruction outside of general education with 80 minutes a day of pull outs in reading and writing and 40 minutes a day in math. Petitioner claims that DCPS denied a FAPE to the student in not fully implementing the student's September 29, 2010 IEP. The petitioner further claims that because of the student's significant deficits, he needs an IEP that calls for full-time out of general education services. Finally, petitioner claims that DCPS has denied a FAPE by not providing an appropriate placement at _____. Counsel for Petitioner seeks the relief of placement at _____.

assessment in 2010 the student scored at a first grade level in reading and a third grade level in mathematics. The letter further stated that attempted a number of interventions for the student during the 2009-2010 school year including the Wilson Reading Program, the LiPS Program by Lindamood-Bell, and one-on-one “reading recovery style” instruction for two hours per day with the academic support teacher. Mr. Tuch noted in his letter that the student demonstrated little growth in the area of Reading and Writing. The letter concluded: “Given [student’s] present level of academic performance and the failure of numerous interventions provided by

Bruce Prep, the MDT team submits that [student] needs to be provided with academic interventions outside of the General Education setting that include but are not limited to: a reading specialist; math and reading coaches that will assist the content teacher; and intense small group instruction in all subjects. In addition, the MDT recommends that [student] receive counseling services (30 minutes/week) to address frustration issues that derive from his current inability to access grade-level material.” (P-20-1)

3. On September 29, 2010, the MDT at agreed on an IEP calling for 20 hours per week of specialized instruction outside of general education and one hour per week of behavioral support services outside of general education. (P-22- at p.6)
4. The student received all failing grades on his first quarter report card for the 2010-2011 School Year at (P-21-at p.13)
5. On October 27, 2010, sent out a Prior Written Notice of Placement to the grandparent/guardian that the student’s placement has been changed to DCPS’s

MacFarland Middle School for the reason that a combination setting was accepted as an appropriate placement. CCPCS did not have a combination setting. (R-4)

6. On November 1, 2010 the student began attending
(Testimony of Case Manager and Reading Teacher)
7. Since November 1, 2010, the student has been provided ten hours of specialized instruction a week outside of general education at _____ with 80 minutes a day of pull-outs in reading and 40 minutes a day of pull-outs in math. The student is in regular classes for the rest of the school day. The regular classes include approximately twenty students. (Testimony of Case Manager/Reading Teacher)

_____ failed to implement the September 29, 2010 IEP requiring twenty hours of specialized instruction outside of general education.
8. On February 2, 2011 the MDT at _____ developed a new IEP providing for ten hours a week of specialized instruction outside of general education. (R-11) The ten hours would include the same division of time stated above in Findings of Fact #7. The IEP states in the area of reading that the student “needs a committed portion of the day where he can receive direct instruction related to his remedial needs...[the student’s] disability prevents him from successfully participating in the general education setting using grade level texts.” (R-11 at p.3) The grandparent did not sign agreement with the February 2, 2011 IEP. (R-11 at p.1) No justification was given by the MDT team for reducing the student’s hours from twenty hours outside of general education to ten hours. The MDT Notes do not indicate that the MDT team was even aware of the September 29, 2010 IEP. The MDT Notes state: “He will continue to receive 10 hours a week of Specialized Instruction.” (R-10 at .3)

9. On January 12, 2010 a psycho educational evaluation was conducted on the student by Dr. Binita Amin at The student was at that time in the sixth grade at

A cognitive assessment found the student obtained an overall Full Scale IQ of 92. The student's performance on the Woodcock-Johnson III Achievement Test were on letter word identification a standard score of 58 grade equivalent 2.1; reading fluency a standard score of 56 grade equivalent 1.7; calculation a standard score of 93 grade equivalent 5.5; math fluency a standard score of 66 grade equivalent 2.2; spelling a standard score of 56 grade equivalent 1.7; passage comprehension a standard score of 40 grade equivalent 1.2; applied problems a standard score of 92 grade equivalent 4.7; writing samples a standard score of 68 grade equivalent 2.0; and word attack a standard score of 77 grade equivalent 2.1 (P21-at p.24) The student's performance was extremely low average on reading, writing skills and math fluency. (P-21-at p.21) The evaluator concluded: "Based on the results of this evaluation, [student] appears to demonstrate significant deficits in his reading and written language skills, particularly in comparison to his cognitive ability. As such, a diagnosis of Reading Disorder and Disorder of Written Expression are being given at this time." (P21-at p.21)

10. A comprehensive independent psychological evaluation was conducted on the student on December 10, 2010. The evaluator tested the student's cognitive ability using the Woodcock Johnson III Test of Cognitive Abilities. The test has a mean score of 100 and a standard deviation of 15. The test results were a score of 82 which is in the low average range when compared to others in his age range. (P-6 at p.6) The

student was than administered the Wechsler Individual Achievement Test (WIAT-III) The student's standard score on Basic Reading was a 52 which falls in the very low range of functioning. The evaluator found: "Currently, his reading abilities fall between a 1st and 2nd grade level of functioning. [Student] is in need of intensive and immediate reading interventions." (P-6 at p.8) The student's standard score on Written Expression was 56 which falls in the low range of functioning. The report states: "The examiner had to ask him to relate what he had written because it was unintelligible." (P-6 at p.8) The student had a standard score on Mathematics of 87 which falls in the average range of functioning. (P-6 at p.8) On the subtest of Math Fluency which measures his ability to complete simple addition, subtraction and multiplication with speed and accuracy he received a standard score of 66 on addition, 71 on subtraction and 79 on multiplication. The evaluator concluded: "Overall, his math fluency suggest that [student] is accurate but slower than his peers in computing simple addition, subtraction and multiplication problems. His Math Fluency functioning falls between a 2nd and 4th grade level." (P-6-at p.9) The evaluator recommended special education services on a full-time basis because of his severe deficits in reading, writing and math fluency. (P-6 at p.15, Testimony of

The evaluator did the testing at the student's school for three and half hours, but did not observe the student in his classrooms. The evaluator talked to his math teacher, but not to the special education reading teacher. The student was administered the WIAT-III and not the WJ-III Achievement Test because he was tested on WJ-III within a year and it would not be valid to use WJ-III twice within a year. (Testimony of _____ The test results from _____ December 2010

evaluation are similar and consistent with the test results of Dr. Amin in her January 2010 evaluation. Dr. Nelson's test results show there was no progress since Dr. Amin's evaluation in the areas of reading, writing and math fluency. (P-6 at p.8 & 9)

11. The student's report card at _____ of January 21, 2011 showed the student received all Fs his first advisory in all his classes and in his second advisory a grade of D in English, a C in Reading Workshop and a C in Science. The grade in math for the second advisory was not readable. (R-14)
12. The special education reading teacher at _____ provides a pull out of eighty minutes a day with this student and one other student. The reading teacher provides consultation to the regular education English teacher, but does not provide direct services in the regular education class. (Testimony of Reading Teacher)
13. An educational assessment, the District of Columbia Benchmark Assessment (BAS), was generated on the student on March 11, 2011 at MacFarland. In the area of reading the student went from below basic in January 2011 answering correctly seven out of forty questions to basic in March 2011 answering ten correctly out of forty questions. The student still answered wrong three fourths of the forty questions. (P-1-1, Testimony of Reading Teacher) In the area of mathematics, the student went from below basic in November 2010 answering eleven out of forty questions correctly to basic in January 2011, answering nineteen out of forty questions correctly. (P-1-2) At the present time, the student is still at the first grade level of just learning to read. The student is still scoring below basic overall in reading. (Testimony of reading teacher)

14. On November 2, 2010 the parties entered into a settlement agreement on a prior October 15, 2010 due process complaint. The parties agreed in part that DCPS would fund 2.5 hours a week for seven months (no more than 70 hours total) of tutoring by an independent provider of the parent's choice, at a rate not to exceed dollars per hour, at the expense of the District of Columbia. (R-5)
15. An independent tutor, who is also a special education teacher, has had four sessions with the student as of the date of the hearing. The tutor has coordinated his instruction with the teachers at including the reading teacher. The tutor found that the student has very poor decoding skills. Reading is a very slow process for the student. The tutor found the student at the first to second grade level in reading. The student has made some progress in sounding out letters. The student is making more progress in math with just a couple of levels below grade level. The tutor is working with the February 2011 IEP, but testified the student needs additional help especially in reading than is provided for in that IEP. The seventy hours of tutoring will help the student make much progress in math, reading and writing skills. (Testimony of

This hearing officer's Findings of Fact as to the second issue of failing to provide a full-time specialized instruction out of general education IEP are as follows:

II. Finding of Fact I. # 9, #10, #13 and #15 are incorporated into this section.

This hearing officer's Findings of Fact as to the third issue that _____ is not an appropriate placement are as follows:

III.

1. The student has been attending _____ since November 1, 2010. Since that time to the present the student has been receiving ten hours of specialized instruction outside of general education. Six of those hours of specialized instruction are in reading and writing and four hours of specialized instruction are in math. (See Findings of Fact I.#7 above)
2. The results from the January 2010 psycho-evaluation compared with the results of the December 2010 psycho-evaluation show no progress in the areas of the student's major deficits of reading and writing. The student continues to be at the first to second grade level of functioning in reading and his writing is unintelligible. (See Findings of Fact I. #9 and #10)
3. On the student's report card for the first advisory at _____ the student received failing grades in all subjects. The student did make some gains in the second advisory receiving a D in English, a C in Reading Workshop and a C in Science. (R-14) The grade in mathematics was not legible, (R-14) but the student made progress in the BAS assessment in math from November 2010 to January 2011 going from below basic to basic. (Findings of Fact I. #13.)
4. On the BAS assessment of March 11, 2011, in the area of reading the student went from below basic in January 2011 answering correctly seven out of forty questions to basic in March 2011 answering ten correctly out of forty questions. The student still answered wrong three fourths of the forty questions. P-1-1, Testimony of Reading Teacher) The student is

still reading at below basic level and on the first grade level. (See Findings of Fact I. #13)

Since mid-January, the reading teacher designed and has been using a new reading intervention program from the Fountas & Pinnell readers literacy program because the previous 180 reading intervention program was not successful. Over a month later, the reading teacher did a Core Phonics Assessment and the student improved from 16 to 25 consonant sounds and improved on decoding tests from 69 % accuracy to 91% on consonant sounds and from 30% on short vowels to 100% and from 20% on two letters making one sound to 70%. (Testimony of reading teacher)

5. The student's special education tutor is providing up to seventy hours of tutoring pursuant to a settlement agreement that would help the student make progress in reading, writing and math.(See Findings of Fact I. #15)

6. the student's expert witness who performed the comprehensive psychological evaluation in December 2010, recommended special education services on a full-time basis because of the student's severe deficits in reading, writing and math fluency. (P-6 at p.15, Testimony of

7. Since the student attended in November 2010, the student is in regular classes with twenty or more students except for his ten hours of pull-outs. The reading teacher provides consultation to the regular English teacher, but not direct services in the regular English class.(See Findings of Fact I. #7)

8. The student has been accepted at a private day special education program. The school serves disabled students ages 5-21. The school has a middle school which is located in the school building close to the elementary school. The school serves students with emotional disturbance as well as students with learning disabilities. There is a

reading specialist on staff and an additional reading class to the regular English class. The school can provide one on one teaching by a special education teacher in reading. There are related service providers on staff including a licensed social worker. The student would be placed in a seventh grade class with six students- two female and four males- also with learning disabilities. The class is taught by two special education teachers. He would go to a higher functioning seventh grade math class with students who have learning disabilities.

(Testimony of

CREDIBILITY FINDING

A hearing officer is responsible for assessing the credibility of witnesses. *See Shore Regional High School Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3rd Cir. 2004) This hearing officer found the lengthy and detailed testimony of the reading teacher at very credible based on his extensive data collection on the student and his in depth knowledge of various reading intervention programs. He was also very forthcoming that previous reading interventions tried at including the 180 reading program were not successful and that he designed a new reading program to meet the unique needs of this student that is beginning to show some recent gains. This hearing officer also found the testimony of the reading tutor very credible based on his working directly with the student for several one on one sessions and coordinating with the student's teachers at This hearing officer found his testimony credible on the needs of the student especially that he needed more hours of specialized instruction than the ten hours provided in the February 2011 IEP to make progress. This hearing officer also found his testimony credible that with the seventy hours of tutoring he is providing pursuant to a settlement agreement the student will make

much progress in math, reading, and writing skills. This hearing officer also found the testimony of _____ credible as of the time of her evaluation in December 2010.

_____ however, did not interview the reading teacher and did not gain data on how the student has been doing since her December 2010 evaluation which decreases the weight to give to her recommendation that the student needs a full-time out of general education program.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows on issue one failure to implement the September 29, 2010 IEP:

There is no factual dispute that the student's September 29, 2010 IEP called for twenty hours a week of specialized instruction outside of general education and that

_____ has only provided ten hours of specialized instruction outside of general education since the student began attending _____ on November 1, 2010. The legal standard that applies to whether an implementation failure amounts to a denial of a FAPE, as recently stated in *Wilson v. D.C.* (Civil Action 09-02424 March 18, 2011) by Judge Henry Kennedy, is whether the aspects of the IEP not followed were "substantial or significant" or whether the deviations from the IEP's stated requirements were "material". Judge Kennedy relied on the above quoted language in the Fifth Circuit decision of *Houston Independent School District v. Bobby R.*, 200 F. 3d 341 at 349 (5th Cir. 2007). The Ninth Circuit Court of Appeals in *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5 J, 502 F. 3d 811 at 822 ((9th Cir. 2007) stated: "[A] material failure to

implement an IEP violates IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP.”; accord *S.S. ex rel. Shank v. Howard Road Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008), *Catalan v. D.C.*, 478 F. Supp. 2d 73 (D.D.C. 2007). The student's educational progress, or lack of it, may be probative of whether there has been a significant shortfall. In *Catalan*, the district court found that missing a few speech and language sessions was not enough to constitute a substantial deviation from the IEP and a denial of a FAPE. In *Wilson*, the same federal judge who decided *Catalan*, held that the District's delay in arranging transportation services caused a nine-year-old boy to miss three weeks of his four week ESY program amounted to a material implementation failure resulting in a denial of a FAPE.

In this case, the failure of DCPS to implement the September 29, 2010 IEP calling for twenty hours of specialized instruction outside of general education and instead providing only ten hours is material. The student's prior school of _____ tried several interventions with the student without any progress in the general education setting. The

MDT agreed the student needed an IEP with twenty hours of specialized instruction outside of general education to address the student's severe deficits in reading, writing and math fluency. Because _____ could not provide a combination setting, the student's placement was changed to _____. Ever since the student has attended _____ starting November 1, 2010, the student has only received ten hours of specialized instruction outside of general education. The student's report card for the first advisory at _____ showed him failing all his subjects, but still provided only half of the hours of specialized instruction outside of general

education required by his IEP. The psycho-educational evaluation conducted in January, 2010 and the subsequent psycho-educational evaluation of December 12, 2010 both show the student performing at very low levels in reading, written expression and math fluency with the student remaining at the first grade level in those areas. (See Findings of Fact I. #9 and #10) The reading teacher at _____ while noting some progress on the March 2011 BAS assessment, still found the student performing overall at the first grade level in the above areas. On the BAS assessment, the student went from answering 7 out of 40 questions correctly in January 2011 to 10 out of 40 questions correctly in March 2011. While the reading teacher testified this was a change from below basic to basic, the student still got three-fourths of the questions wrong. (See Findings of Fact I. #13) The reading tutor also found the student performing in reading and written expression at extremely low levels of first to second grade and recommended more services especially in reading than on the February IEP calling for ten hours of specialized instruction outside of general education. (See Findings of Fact I. #15) All of the above indicate that the failure to fully implement the student's September 29, 2010 IEP resulted in a significant shortfall denying a FAPE to this student.

The second issue to be addressed is whether DCPS denied a FAPE to the student because the IEP did not require a full-time out of general education program. In determining if an IEP meets the substantive requirements of the IDEA, The United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) held that courts must determine "is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-07. In *Polk v. Central Susquehanna Intermediate Unit 16*, 853

F.2d 171 (3d Cir. 1988) *cert denied*, 488 U.S. 1030 (1989), The Third Circuit held that appropriateness under *Rowley* as applied to a student with severe disabilities means more than trivial educational benefit. The Court held in *Polk* that "...using *Rowley*'s own terminology, we hold that Congress intended to afford children with special needs an education that would confer meaningful benefit." *Polk* at p.184 Other Circuits have endorsed the *Polk* court's interpretation of educational benefit in *Doe v. Smith*, 441 IDELR 544 (6th Cir. 1989); *Fort Zumwalt School District v. Clynes*, 26 IDELR 172 (8th Cir. 1991); *Roland M. v. Concord School Comm'n*, 16 IDELR 1129 (1st Cir. 1991) and *Hall v. Vance County Board of Education*, 557 IDELR 155 (4th Cir. 1985) In *Ridgewood Bd. of Educ. v. N.E.*, 30 IDELR 41,44 (3d Cir. 1999) and *T.R. v. Kingwood Township Board of Education*, 32 IDELR 30 (3d Cir. 2000) the Third Circuit held that an IEP must provide significant learning and "meaningful benefit." *See also A.I. Iapalucci v. D.C.*, 402 F. Supp. 2d 152 (D.D.C. 2005) ("...the appropriate focus of the court's review should be on whether DCPS is providing A.I. with an IEP that is reasonably calculated to provide meaningful educational benefit." *Id.* at p.167)

The September 29, 2010 IEP developed at _____ was based on their knowledge of the student and the failures they experienced with various interventions in the regular classroom. _____ IEP required that the student receive twenty hours of specialized instruction outside of general education. Because _____ was a full inclusion setting and _____ could not provide a combination setting, the student's placement was changed to _____ to implement the September IEP. As found above on the discussion on failure to implement the IEP, _____ only provided ten hours of specialized instruction outside of general education since the student began attending on November _____

1, 2010. If the student was provided the services required in the September 29, 2010 IEP, he may have made more gains and that IEP would have provided meaningful educational benefits to the student. Instead, [redacted] reduced his hours of specialized instruction in half without apparent justification which limited the gains the student might have made. The reading tutor testified that the student needed more hours of specialized instruction especially in reading and writing than the ten hours being offered in the February 2011 IEP. He indicated progress could be made with more hours, but he did not recommend a full-time out of general education IEP. While Dr. Nelson recommended a full-time out of general education IEP, she did not interview the reading teacher or tutor or have recent information since her December 2010 evaluation on the student's progress at [redacted] since new reading interventions were implemented. The petitioner's request for a full-time out of general education IEP may maximize the potential of the student, but IDEA "does not necessarily guarantee the child [with a disability] the best available education." *Holland v. District of Columbia*, 71 F. 3d 417, 419 (D.C. Cir. 1995) Nor does the IDEA ensure that a FAPE will consist of the precise plan that the parent desires. *Shaw v. District of Columbia*, 238 F. Supp 2d 127 at 139 (D.D.C. 2002) An appropriate education under *IDEA* as interpreted by *Rowley* only requires that an IEP is reasonably calculated to provide educational benefit. The IEP does not have to maximize the potential of a disabled child. *See Rowley*, 458 U.S. at 189-90. This hearing officer concludes that the September 29, IEP providing for twenty hours of specialized instruction outside of general education was reasonably calculated to provide educational benefit. The MDT's failure to include full-time specialized instruction in the IEP does

not amount to a denial of a FAPE. *See Long v. District of Columbia*, (Civil Action 09-2130, D.D.C. March 23, 2011)

The third issue raised by counsel for petitioner is whether the student's current placement at _____ is an appropriate placement. A guiding principle in determining whether a placement is appropriate is provided in the U.S. Department of Education interpretative guidelines to the 1999 Regulations that : "educational placements under Part B must be individually determined in light of each child's unique abilities and needs, to reasonably promote the child's educational success." *Appendix A to 34 C.F.R. Part 300 Question 1*

The student was placed at _____ because it was a combination setting that could implement the student's September 29, 2010 IEP. Since attending _____ in November 2010, _____ failed to implement that IEP, instead only provided ten hours of specialized instruction outside of general education. The student has made gains in math at _____ but still struggles with reading and writing. While the student failed his classes the first advisory, he made gains in his report card in the second advisory. (See Findings of Fact III. # 3) The student has also made more recent gains in reading since the reading teacher initiated a new reading intervention program in mid-January to meet the unique needs of the student. (See Findings of Fact III. #4) The combination setting at _____ with additional hours of specialized instruction as required in the September 2010 IEP would "reasonably promote the child's educational success." This hearing officer concludes that counsel for the petitioner has failed to meet her burden of proof that _____ is an inappropriate placement. "[I]f there is an 'appropriate' public school program available...the District need not consider private

placement, even though a private school might be more appropriate or better able to serve the child.” *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C.Cir. 1991)

This hearing officer has found that DCPS’s failure to implement the student’s September 29, 2010 IEP resulted in a denial of a FAPE. Compensatory education is an equitable remedy for the denial of a FAPE. In *Reid v. District of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005), this Circuit set out the standards for an award of 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. *Id.* at 522 Designing a compensatory education remedy requires “ a fact-specific exercise of discretion by either the district court or a hearing officer.” *Id.* at 524 To assist the court or hearing officer’s fact specific inquiry, “ the parties must have some opportunity to present evidence regarding [the student’s]specific education deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits.” *Id.* at 526 DCPS may be required to “offer proof that the placement compensated for prior FAPE denials in addition to providing some benefit going forward.” *Id.* at 525

In this case, counsel for petitioner did not present a plan for compensatory education on the failure to implement the student’s IEP, but instead argues that placement at _____ will compensate the student for a denial of FAPE. The parent has the burden of “propos[ing] a well-articulated plan that reflects [the student’s] current education abilities and needs and is supported by the record.” *Phillips v. District of Columbia*, 2010 WL 3563068, at *6, 55 IDELR 101 (D.D.C. Sept. 13, 2010) Neither party has requested an extension of time beyond the 45-day timeline to supplement the

record. The hearing officer cannot unilaterally extend the 45-day timeline. *34 C.F.R. Section 300.515 (c)*. “Choosing instead to award [the parent] nothing does not represent the ‘qualitative focus’ on [the child’s] ‘individual needs’ that Reid requires.” *Phillips* at *6 quoting *Nesbitt I*, 532 F. Supp. 2d at 125. The hearing officer can determine the amount of compensatory education that a student requires if the record provides him with sufficient “insight about the precise types of education services [the student] needs to progress.” *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 130 (D.D.C. 2008) Findings to assist the hearing officer to tailor the compensatory education award to the student’s unique needs should include the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services requested and the student’s current educational abilities. *Branham v. District of Columbia*, 427 F. 3d 7 (D.C. Cir. 2005) The Findings of Fact in this case show that the student has severe deficits in reading, written expression and math fluency. He is functioning on a first to second grade level in reading and written expression. (See Findings of Fact I. #10 #13 #15) After trying various reading and writing interventions in the general classroom, the MDT team at _____ concluded the student needed twenty hours of specialized instruction outside of general education to meet his deficits. (See Findings of Fact I #2 #3) From the time the student began attending _____ in November 2010 through the middle of January 2011, the reading interventions using the 180 reading program were not successful. The reading teacher has from mid-January 2011 implemented a new reading intervention program from the Fountas & Pinnell readers literacy program that is beginning to improve the student’s reading deficits as shown on the BAC assessment and Core Phonics assessment

done in the middle of March 2011. The student has also been receiving within the last month one on one tutoring from _____ based on a compensatory education award of seventy hours of tutoring from a settlement agreement entered on November 2, 2010.

_____ is coordinating his tutoring with the reading and math special education teachers at _____. The tutoring is beginning to show some positive gains for the student. The combination of the previously awarded seventy hours that the tutor testified will provide much progress with an additional sixty hours of compensatory education should enable the student to continue to make progress in the areas of his severe deficits “to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Reid*, 401 F. 3d at 524. The form of compensatory education for this student should be individual tutoring as well as more intensive specialized instruction at school using the new reading implementation program. These are “the precise types of education services [the student] needs to progress.” *Mary McLeod Bethune Day Acad. Pub. Charter Sch.*, at 130.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

The student’s IEP shall be changed to twenty hours of specialized instruction outside of general education with fifteen of those hours to be in reading and written expression. An MDT meeting shall be convened at _____ by April 29, 2011 to revise the student’s IEP to update his present levels of performance and his annual goals and comply with this Order. If _____ cannot provide the above twenty hours of specialized instruction outside of general education with fifteen hours to be in reading

and written expression, DCPS shall find another placement that can implement the above ordered IEP.

The student is awarded sixty hours of compensatory education to be provided in the form of individual tutoring by an independent provider of the parent's choice at a maximum of

This compensatory education award is to be fully provided by September 1, 2011. The sixty hours of compensatory education is based on the progress the student should make in combination with the existing seventy hours of tutoring previously awarded to provide him the educational benefits DCPS should have provided in the first place.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state 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 Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: 4/13/11

Seymour DuBow
Hearing Officer