

**DISTRICT OF COLUMBIA OFFICE OF THE STATE SUPERINTENDENT  
STATE ENFORCEMENT AND INVESTIGATION DIVISION**

-----X  
a minor, by and  
through his Parent(s), I

**HEARING OFFICER  
DETERMINATION**

Petitioners,

SHO Case No.

- against -

Deusdedi Merced, Hearing Officer

District of Columbia Public Schools,

Respondent.

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**INTRODUCTION**

This matter comes before the undersigned Hearing Officer on Petitioners Notice of Due Process Complaint (hereinafter, "Complaint"), filed on or about April 28, 2009. HO 1.<sup>1</sup> I was appointed shortly thereafter. HO 2. The parties agreed to waive the resolution process. HO 1, 3. A pre-hearing conference in the matter was scheduled for, and held on, May 7, 2009. HO 4. The Pre-Hearing Conference Summary and Order was issued on May 7, 2009. HO 4. Respondent's Response to the Complaint was filed on or about May 8, 2009. HO 5.

A hearing was held on May 19, 2009, and continued on June 2, 2009 and June 5, 2009.<sup>2</sup> It was a closed hearing, and the Petitioners were represented by Donna L.

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<sup>1</sup> The Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioners Exhibits will be referred to as "P" followed by the exhibit number; and, Respondent Exhibits will be referred to as "R" followed by the exhibit number.

<sup>2</sup> Petitioners presented the testimony of the parent, \_\_\_\_\_, Ph.D., \_\_\_\_\_, M.A., CCC-SLP, The \_\_\_\_\_, M. Ed., The \_\_\_\_\_ and \_\_\_\_\_ M.S. Respondent presented the testimony of \_\_\_\_\_ special education teacher and Acting Special Education Coordinator and \_\_\_\_\_ general education teacher. Witness testimony will be referred to as "Testimony of" followed by the name of the witness.

Wulkan, Esq. and Sabrina Austin, Esq. Respondent was represented by Laura George, Esq. Petitioners entered into evidence exhibits 1 to 32, 34 to 36, and 38<sup>3</sup>; Respondent entered into evidence exhibits 1 to 2 and 4 to 17.<sup>4</sup>

### **JURISDICTION**

The due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter, "IDEIA"),<sup>5</sup> 20 U.S.C. § 1400 *et seq.*, its implementing regulations, 34 C.F.R. § 300 *et seq.*, and the District of Columbia Municipal Regulations, Title 5, Chapter 30, Education of Handicapped (2003).

### **BACKGROUND**

The student is      years old and attending a      grade class in  
located in the District of Columbia. See HO 1, 10, 11. His current Individualized Education Program (hereinafter, "IEP") is dated January 26, 2009. P 11. He is classified as having a Specific Learning Disability, P 11-1, and is recommended to receive 10 hours per week of specialized instruction outside the general education environment, P 11-3.

The parent believes that the IEPs in effect for the 2008 – 2009 school year are inappropriate and that the student is in need of a full-time special education and related services program in a non-public school. See HO 1. The parent seeks, inter alia, placement of the student in, and funding for,      an approved non-public school. HO 1, P 27-3. This appeal ensued.

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<sup>3</sup> Petitioners Exhibits 33 and 37 were excluded by the undersigned.

<sup>4</sup> Respondent Exhibit 3 was excluded by the undersigned. Respondent Exhibit 11 initially had 10 pages in total. However, the undersigned excluded R 11-7 – 11-10.

<sup>5</sup> In 2004, Congress reauthorized the Individuals with Disabilities Education Act (hereinafter, "IDEA") as the IDEIA. See Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005.

## ISSUES

The issues presented to the undersigned for determination are as follows:

1. Whether the student's October 30, 2008 Individualized Educational Program (hereinafter, "IEP") complies with the Individuals with Disabilities Education Improvement Act's (hereinafter, "IDEIA"), 20 U.S.C. § 1400 et seq., procedural requirements and is "reasonably calculated to enable the student to receive educational benefits." Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 207 (1982).
2. Whether the student's January 26, 2009 IEP complies with the IDEIA procedural requirements and is "reasonably calculated to enable the student to receive educational benefits." Rowley, 458 U.S. at 207.
3. Whether Respondent denied the student a free and appropriate public education (hereinafter, "FAPE") by not providing the student with the special education and/or related services mandated in the October 30, 2008 IEP and the January 26, 2009 IEP, as well as Respondent's failure to provide an appropriate program for the 2008-2009 school year.
4. Whether Respondent failed to evaluate the student in all areas of suspected disability consistent with 34 C.F.R. § 300.304.
5. Whether the student is entitled to compensatory education services to remedy the alleged denial of FAPE resulting from the student not being provided with the special education and/or related services mandated in the October 30, 2008 IEP and the January 26, 2009 IEP, as well as Respondent's failure to provide an appropriate program for the 2008 – 2009 school year.

### FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The student is      years old and attending a      grade class in      located in the District of Columbia. See HO 1, 10, 11; Stipulation of the Parties; Testimony of Parent.
2. The student presented with developmental concerns as early as two years old. Testimony of Parent. The student's pediatrician at the time referred the parent to the Children's National Medical Center. Id.
3. A Speech and Language Evaluation was completed by the Children's National Medical Center on May 29, 2002. See P 15. The student was three years old. P 15-1.
4. The parent reported to the examiner that the student's speech was difficult to understand and that the student had difficulty understanding directions. Id.
5. The student presented as having normal hearing. Id.
6. Behavioral observations during the testing revealed that the student presented with "some receptive and expressive language deficits." P 15-2.
7. On formal measures, the student obtained a standard score of 79 in receptive language, placing him in the mild delayed range. Id. The average range is from 86 – 115. Id.
8. On formal measures, the student obtained a standard score of 76 in expressive language, placing him in the mild delayed range. Id.

9. The student's pragmatic (social) language skills were age-appropriate. P 15-3.
10. The student presented with a mild articulation disorder. Id.
11. Overall, the student presented with a mild receptive language disorder and a moderate expressive language disorder. P 15-4. The examiner recommended speech and language services at least one to two times per week for 60 minutes each session. Id.
12. While in pre-school in \_\_\_\_\_ a District of Columbia Public School, the student struggled with retaining information and socializing. Testimony of Parent. The student was provided with speech and language services. Id.
13. While in Kindergarten in Scottsdale, Arizona, the student struggled with retaining information, reading, and writing. Testimony of Parent. He was provided with speech services, and was placed in general education.
14. While in first through third grades, while in school in the Maryland Public Schools, the student struggled with retaining information, being misunderstood (i.e., articulation, word retrieval difficulties) and comprehending information. Testimony of Parent. The student was provided with speech and language services and was placed in an inclusive setting (i.e., a general education teacher and a special education teacher co-taught the class). Testimony of Parent; P 16-2.
15. On September 27, 2007, when in the third grade, the student underwent psychological testing in Prince George's County Public Schools. See P 16<sup>6</sup>; Stipulation of the Parties.

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<sup>6</sup> Respondent's Exhibit 7 is a duplication of Petitioners' Exhibit 16. Reference is made only to Petitioners' Exhibit.

16. The student was referred for testing by the Student Intervention Team for “concerns with reading, math, language arts and attention to task.” P 16-1.

17. A review of the student’s educational history by the examiner revealed that the student took the Maryland State Standardized Test in May 2005 when he was in the second grade, seventh month of that school year. The student obtained following scores in grade equivalents: Reading 1.2; Language Arts .5; Math 1.8; Total 1.1. P 16-2. The student was functioning below grade level.

18. The examiner also learned from the student’s educational records that he had a history of difficulty with focusing his attention to tasks, completing work, and processing information. Id.

19. The examiner also opined that, although the Student Assistance Team worked with the student in modifying his work, the student did not “make the progress expected of him.” Id.

20. The Woodcock-Johnson Psych-educational Battery – Third Edition was administered to the student. Id. The student’s academic achievement in broad reading and written language was at the first percentile, and at the 46 percentile in broad math. Id.

21. The student general cognitive ability was determined to be in the Low Average range of intellectual functioning; his overall thinking and reasoning abilities exceeded those of approximately 19% of children his age. Id.

22. The student’s reading fluency was compromised:

On a curriculum based reading fluency examination, [the student] was asked to read passages from 1<sup>st</sup> grade and 3<sup>rd</sup> grade reading books. On the 1<sup>st</sup> grade passage he was able to read 40 words per minute correct, and on the 3<sup>rd</sup> grade passage he was able to read only 7 words per minute correct.

For his age and grade he should be reading about 60 words per minute correct on a 3<sup>rd</sup> grade level....

P 16-4.

23. Connors' Teacher Rating Scales – Revised: Long administered to the student's classroom teacher revealed that the student "would have significant concerns in both the passive and active areas of attention." Id.

24. A classroom observation of the student by the examiner on November 22, 2007 in a small group reading class, with one teacher and eight students, was significant for the examiner's observation that the student was on task "66% of the time compared to an average classmate who was on task 85% of the time." P 16-2. The student was sitting right next to the teacher. Id.

25. The student also demonstrated difficulty following directions, spacing his words during written work, and focusing his attention to task. Id. He was usually the last to complete assignments. Id.

26. The classroom reading teacher shared with the examiner that the student has to sit next to her "in order to hold his attention to task." Id. The reading group had only eight students. Id.

27. The student's general education teacher shared with the examiner that the student "is one of the five lowest students in the reading and math groups." Id.

28. In reviewing the Confidential Psychological Report completed in Prince George's County Public Schools, a District of Columbia psychologist determined, in October 2008, that the student presented with "a syndrome of social problems and [attention deficit hyperactivity disorder (hereinafter, "AD/HD").]" P 18-3.<sup>7</sup> The

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<sup>7</sup> Respondent's Exhibit 9 is a duplication of Petitioners' Exhibit 18. Reference is made only to Petitioners' Exhibit.

reviewing psychologist further opined that the student “should be provided with specialized instruction as a student with borderline Working Memory, and low average verbal abilities and deficient achievement in reading and writing.” Id.

29. An Educational Assessment was completed by the District of Columbia Public Schools on or about October 9, 2008. See P 17.<sup>8</sup>

30. The Woodcock-Johnson III Tests of Achievement was administered to the student. P 17-2. The student’s academic achievement in broad reading was at the 13<sup>th</sup> percentile; the student’s academic achievement in broad math was at the 33<sup>rd</sup> percentile; and, the student’s academic achievement in broad written language was at the 17<sup>th</sup> percentile. Id.

31. The student, who was      years old at the time of the testing, scored one to five years below age expectancy in the 15 subtests administered, with the exception of one subtest where he scored at age expectancy. See P 17-4.

32. An IEP Team meeting was held on October 30, 2008. P 10; Stipulation of the Parties. The parent was in attendance, but did not indicate agreement with the contents of the IEP. P 10-1; Stipulations of the Parties.

33. The student was classified as having a Specific Learning Disability, P 10-1, and recommended for five hours per week of specialized instruction outside the general education classroom, P 10-3; See Stipulation of the Parties.

34. The IEP includes general statements of the student’s present levels of academic achievement and functional performance. See 10-2.

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<sup>8</sup> Respondent’s Exhibit 8 is a duplication of Petitioners’ Exhibit 17. Reference is made only to Petitioners’ Exhibit.

35. The IEP Team drafted one annual goal for mathematics, one annual goal for reading, and one annual goal for written expression for the student. P 10-2.

36. The IEP does not include any baseline data and/or information for each of the annual goals. See id. Nor does the IEP include the results of any educational testing that were administered to the student prior to the IEP date. Id. Educational testing was available. See P 16, P 17.

37. However, each of the annual goals requires the student to “demonstrate one year’s growth” in each skill. P 10-2.

38. The IEP does not include a description of how the student’s progress toward meeting the annual goals will be measured. See P 10.

39. The IEP does not include a description of the student’s socio-emotional functioning. Id.

40. A Speech and Language Progress Assessment was conducted by Respondent on or about November 11, 2008. See P 24.<sup>9</sup> The parent requested the assessment. Stipulation of the Parties.

41. The examiner administered one assessment, the Comprehensive Assessment of Spoken Language (hereinafter, “CASL”). P 24-1. The CASL assesses oral language. Id.

42. The student’s subtest standard scores were, for the most part, in the average range. See P 24-4 – 24-5.

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<sup>9</sup> Respondent’s Exhibit 6 is a duplication of Petitioners’ Exhibit 24. Reference is made only to Petitioners’ Exhibit.

43. The examiner concluded that the student “is able to receptively understand oral language, however, he exhibits very mild difficulty with expressive communication.” P 24-5.

44. The student was not recommended for speech and language services. Id.; Stipulation of the Parties.

45. On December 18, 2008, the parent and her educational advocate from Hope and a Home met with school officials, including the student’s then special education teacher and the principal. P 38-1; Testimony of

46. The purpose of the meeting was to address the parent’s concern that the student was not getting sufficient special education services. Id.

47. The Special Education Coordinator was not available for the meeting despite numerous attempts by the parent and/or the parent’s educational advocate to secure her participation in the meeting. Id.

48. The special education teacher admitted that the student was not receiving all of the special education services recommended in the October 2008 IEP but placed “blame” on the student for not coming down to her class. Id.; Testimony of Parent. The special education teacher explained that she could not always pick up the student from his class because she had other students in her class. P 38-1; Testimony of

49. The special education teacher informed the parent that she would be leaving the school, and eventually did so resulting in the student, yet again, not receiving all of his special education services recommended in the October 2008 IEP. Id.; Testimony of

50. On January 26, 2009, prior to the student's second IEP Team meeting, also scheduled for that day, the student's general education teacher completed a Teacher Evaluation of Student Strengths and Needs for the Testimony of see P 35.

51. The student's general education teacher assessed the student's math skills at a 2.8 grade level; his reading in the second half of the second grade; and his spelling skills at an early second grade level. Testimony of P 35-1.

52. The student's general education teacher also provided a detailed summary of the student's math, reading, and written skills, as well as recommended specific goals for each of these skill areas. P 35-1 – 35-2.

53. With respect to his behavior and social skills, the student's general education teacher commented:

[The student] always makes initial attempts at following directions. He loses focus quickly, however, and is not able to complete tasks with heavy support from his teacher. [The student] has a few very good friends who look out for him and step in to help him with his work. Transitioning to different activities is successful only with the aid of a time or oral announcements of the countdown. [The student] attempts to be tolerant of frustration but is usually unable to work through it. His attention wanders after about 5, 10 minutes and he is unable to continue tasks on his own. He is easily distractible when working on tasks that do not lend themselves to his spatial or kinesthetic strengths.

P 35-2.

54. The student spends approximately five hours in the general education environment. Testimony of The general education teacher spends 50 to 70 percent of this time working with the student one-on-one or in a small group with one to two other students. Id. There are 18 students in total in the general education class. Id.

55. Teaching techniques that have proved helpful with the student in the general education classroom include small group instruction, one-on-one instruction, modified assignments, seating near teacher during assignments, and representing concepts through drawing or modeling. P 35-2.

56. A second IEP Team meeting was held on January 26, 2009. P 11. The parent was in attendance, but did not indicate agreement with the IEP. P 11-1; Stipulation of the Parties.

57. The student was classified as having a Specific Learning Disability, P 11-1, and recommended for 10 hours per week of specialized instruction outside the general education classroom, P 11-3; Stipulation of the Parties.

58. The IEP includes general statements of the student's present levels of academic achievement and functional performance, and the statements are identical to the statements in the October 30, 2008 IEP. Compare P 11-2 with P 10-2.

59. Not all of strengths and weaknesses identified in the Teacher Evaluation of Student Strengths and Needs for the \_\_\_\_\_ which had been completed by the general education teacher prior to the IEP Team meeting, were included in the student's IEP. Compare P 35 with P 11-2.

60. The IEP Team drafted one annual goal for mathematics, one annual goal for reading, and one annual goal for written expression for the student. P 11-2. With the exception of the math annual goal, the reading and written expression annual goals are identical to the reading and written expression annual goals in the October 30, 2008 IEP. Compare P 11-2 with P 10-2.

61. The IEP does not include any baseline data and/or information for each of the annual goals. See P 11-2. The IEP does, however, include math standard scores for an educational assessment administered to the student on October 15, 2008 and standard scores for a speech and language assessment administered on December 8, 2008. P 11-10.

62. However, like the October 30, 2008 IEP, each of the annual goals requires the student to “demonstrate one year’s growth” in each skill. P 11-2.

63. The IEP does not include a description of how the student’s progress toward meeting the annual goals will be measured. See P 11.

64. The IEP does not include a description of the student’s socio-emotional functioning. Id. The information was available at the time. See P 16, P 35-2.

65. Not all of the teaching techniques that have proven helpful to the student, as identified by the general education teacher in the Teacher Evaluation of Student Strengths and Needs for the \_\_\_\_\_ were included in the student’s IEP. Compare P 35-2 with P 11.

66. The student’s recommended specialized instruction hours are “low.”  
Testimony of \_\_\_\_\_

67. On April 9, 2009, the student underwent a Comprehensive Speech and Language Assessment at The \_\_\_\_\_ by \_\_\_\_\_  
see P 25, which was required as part of the acceptance process to the school.<sup>11</sup> P 19-1.

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<sup>10</sup> \_\_\_\_\_ is the Senior Speech-Language Pathologist at the \_\_\_\_\_, where she has been since 1996. P 31-1. She is also an Adjunct Professor in the College of Arts and Sciences at American University. Id. She holds an M.A. in Speech-Language Pathology from the University of Maryland, an M.A. in Interpretative Speech from Bob Jones University, and a B.A. in Voice Performance from Bob Jones University. Id. \_\_\_\_\_ has her Certificate of Clinical Competence and is licensed as in Speech-Language Pathology in the District of Columbia and the Commonwealth of Virginia. Id.

68. The assessment was authorized and paid for by Respondent. See P 22, 23;

Stipulation of the Parties.

69. Respondent's November 2008 Speech and Language Progress Assessment was deemed insufficient by the examiner:

This evaluation did not examine [the student's] articulation, phonology, auditory processing and auditory memory skills, nor did it analyze the application of phonological awareness skills in contextual reading and writing.

P. 25-2.

70. The student's classroom teacher completed a strengths and weaknesses form, and reported the following:

[The student] has strong listening comprehension skills and strong spatial reasoning skills. Although he has demonstrated success with systematic phonics instruction and understands stories read aloud, he 'doesn't comprehend what he reads on his own,' and his reading difficulties interfere with completion of assignments. Concerning written language, he 'can edit a paragraph orally for capitalization, punctuation, subject-verb agreement,' but in his own writing 'fails to observe mechanics of capitalization, punctuation, and paragraph structure.' He demonstrates difficulty maintaining focus and requires significant support from his teacher to complete tasks. He has great difficulty with transitioning, working through frustration, maintaining attention, and independent task completion.

Id.

71. The student's attention during the examination did not "appear to negatively impact his performance." P 25-3. He remained alert and focused throughout the testing. Id.

72. He demonstrated excellent pragmatic skills. Id. However, "significant oral language deficits were immediately apparent." Id.

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<sup>11</sup> advised the parent that, although the student's file included Respondent's November 2008 Speech and Language Progress Assessment, see P 24, "only one assessment tool was used, which was inadequate to determine his needs." P 19-1.

73. The student has a “weak phonological (sound) system.” P 25-4. He “mis-sequenced sounds and syllables, in addition to omitting syllables, sounds, and words, with the resultant speech sounding jumbled or slurred.” P 25-3 – 25-4.

74. The student’s auditory processing skills range from below average to average. See P 25-4 – 25-5. His ability to manipulate phonemes in words and hold sounds in memory and blend them to form a word were below average. P 25-5. His weak phonological skills affect his ability to develop fluent reading and spelling ability. Id.

75. The student demonstrates weakness in working memory ability. Id. His weakness in auditory memory affects his ability to remember and follow oral directions. Id. When the amount of information he is asked to repeat is increased, he demonstrates the most difficulty with memory. Id.

76. His expressive vocabulary and word retrieval efficiency are in the borderline range (i.e., 13<sup>th</sup> percentile). P 25-6.

77. The student’s ability to think flexibly and define words accurately are well below average (i.e., first percentile). P 25-7. His ability to construct a sentence about a picture using targeted words is also well below average (i.e., second percentile). Id.

78. His ability to comprehend a story that was both read and shown to him in print and infer meaning from the passage is at the borderline average/below average (i.e., 16<sup>th</sup> percentile) range, despite the student being presented with multiple-choice answers. P 25-8.

79. The student's ability to decode nonsense words is below average (i.e., 14<sup>th</sup> percentile). P 25-9. The student demonstrates "significantly weak" word attack skills, id., and his word attack skills decline as the passages increase in difficulty, P 25-10.

80. The student's reading is "slow and labored." P 25-10.

81. The student's ability to spell single words is at the fourth percentile. Id.

82. His written language ability is also poor. See P 25-11. When asked to write a short story, the student wrote the following story:

Joe and Jill got to walk to the dog but the dog get of the lesh and afont of the Student Drivercrach to the Frie higen and she call the police and gave her a tkite. The othe cars got out of the cars held at th gril and some cars Driver Bop at the the end.

P 25-11.

83. The student's profile is consistent with a diagnosis of Mixed Receptive-Expressive Language Disorder, Disorder of Written Expression, and Reading Disorder. P 25-13.

84. The student's oral and written language deficits play an "enormous role in his academic struggles." P 25-13. The student is at risk for continued academic difficulties, and requires "intense remediation and a high level of support for him to succeed academically." Id.

85. The examiner opined that the student's language weaknesses would be served in a full-time program with other students with similar needs, "where his linguistic, academic, and social needs can be programmed for and addressed across the curriculum." Id.

86. The student requires speech and language services. P 25-14.

87. On March 30, 2009, the student underwent a neuro-psychological evaluation by See P 26.

88. The assessment was authorized and paid for by Respondent. See P 22, 23; Stipulation of the Parties.

89. The examiner reviewed a number of documents pertaining to the student and also had an opportunity to speak with the parent. P 26-1 – 26-3.

90. General cognitive ability was determined to be in the Low Average range of intellectual functioning (i.e., Full Scale IQ of 82), but the student demonstrated some disparity within the four subtests that comprise the Wechsler Intelligence Scale for Children – Fourth Edition. P 26-4 – P26-5. These results are consistent with the testing completed in September 2007. P 26-5; See P 16.

91. The student’s attention waned with time and as tasks grew in complexity. P 26-6 – 26-7; Testimony of

92. The student has difficulty controlling his impulses as tasks grow in complexity. Id.

93. The student’s phonological processing is “severely impaired,” resulting in his having difficulty comprehending language of increasing length and complexity. P 26-7; Testimony of

94. The student’s ability to access routine information is not automatic for him. Id.

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<sup>12</sup> Dr. Missar is a clinical psychologist in private practice since October 1993. P 29-2. Prior to private practice, he worked for a number of agencies. See P 29-2 – 29-3. Dr. Missar has extensive research and teaching experience. See P 29-3 – 29-6. He has also published and presented on numerous issues related to his area of expertise. P 29-6 – 29-8. Dr. Missar has a B.S. in Psychology/Psychobiology from the University of Scranton, an M.A. in Clinical Psychology from The Catholic University of America, and a Ph.D. in Clinical Psychology from The Catholic University of America. P 29-1. Dr. Missar completed a Postdoctoral Fellowship at the National Institute of Mental Health, Bethesda, MA. Id. He is a licensed psychologist in the District of Columbia. Id.

95. The student demonstrates a “pronounced visual-spatial processing deficit,” and he –

does not view the world as most others do, and tends to perceive individual pieces more so than ‘wholes,’ which can often lead to his ‘missing the forest for the trees.’

P 26-8; Testimony of

96. The student’s ability to plan, set goals, demonstrate mental flexibility, and initiate tasks (i.e., executive functions) is also compromised. P 26-9 – P 26-10.

97. In all, the results of the neuro-psychological tests suggest the presence of four distinct areas of difficulty, when combined, “strongly affect much of his cognitive functioning.” P 26-11 – P 26-12. First, the student –

displays attentional impairments that affect his ability to focus, to sustain his attention, to encode information in memory, and to continuously execute. He also has a tendency to respond impulsively in the midst of his inattentiveness. This inattention...occurs to all type of presented material, be it written, oral, verbal, or visual, although it is most pronounced with verbal materials.

The second significant problem that [the student] displays is [sic] continuing, albeit milder, impairment in receptive and expressive language skills.... Thus in the classroom, [the student] may have difficulty keeping up with the rest of the class because he needs more time to retrieve information.

The third significant problem that [the student] displays is a relative weakness in visual-motor integration. [The student] has difficulty integrating the visual information presented to him. As a result, he has difficulty viewing his environment in the way that most people do. Testing suggests that he tends to perceive individual pieces at a time and often misses or doesn’t see the larger picture. Such a deficit has implications for his behavior in a number of areas. For instance, this may affect his academic performance as it is likely to lead to difficulty with reading (particularly comprehension), writing, and especially mathematics.

The fourth area of impairment concerns [the student’s] executive brain functions. His ability to plan and organize, to shift his focus (and then maintain it) on various stimuli in his environment, and his reasoning ability are all poor. His impulsivity is also strongly related to this type of impairment.

P 26-11.

98. The student presents with a diagnostic profile of AD/HD, Dysthymic Disorder, Reading Disorder, and Disorder of Written Expression. P 26-12.

99. The student requires a full-time, psycho-educational day school placement that has a focus on AD/HD and learning issues, and can provide a low student to teacher ratio. P 26-12.

100. The independent Neuro-psychological Evaluation completed by \_\_\_\_\_ and the independent Comprehensive Speech and Language Assessment completed by \_\_\_\_\_ were provided by Petitioners' counsel to Respondent on April 27, 2009. Stipulation of the Parties.

101. Weekly Progress Reports are provided to the parent by the student's teacher. See P 9; Testimony of Parent, Lubkeman.

102. The Weekly Progress Reports document the student's progress in the areas of book reports, vocabulary, reading, writing, math, science, and social studies. Id. Each discrete area lists the skill set the student worked on during the week or the work that was required to be turned in by the student, and the teacher assesses the student's competency or whether he turned the work in using a smiley face for "Got it!" and a sad face for "Missing in action...." Id.

103. The Weekly Progress Reports also document the student's Weekly Assessments. Id. Mastery in the assessments is defined "as 80% or better on any assigned or test that receives a grade." Id.

104. The parent is also provided feedback on the student's behavior and study/work habits. Id. The parent is asked to sign each Weekly Progress Report and can comment. Id.

105. The student consistently failed to turn in his book reports assignments and/or vocabulary.<sup>13</sup> See P 9-1, 9-3, 9-5, 9-7, 9-10, 9-12, 9-14, 9-16, 9-18, 9-20, 9-22, 9-24, 9-26, 9-30, 9-32, 9-34, 9-36, 9-38, 9-40, 9-42, 9-44, 9-46.

106. His mastery on assignments and/or tests has consistently fell under 80%. See P 9-1, 9-3, 9-5, 9-7, 9-10, 9-12, 9-14, 9-16, 9-18, 9-20, 9-22, 9-24, 9-30, 9-32, 9-34, 9-36, 9-46.

107. His behavior and study/work habits have consistently been described as needing improvement because he is easily distracted and does not complete work and needing "much" assistance. See P 9-2, 9-4, 9-6, 9-8, 9-11, 9-13, 9-15, 9-17, 9-19, 9-21, 9-23, 9-25, 9-27, 9-29, 9-31, 9-33, 9-35, 9-37, 9-39, 9-41, 9-43, 9-45, 9-47.

108. On November 17, 2008, while the student was in the \_\_\_\_\_ grade, he was administered the STAR Math test. R 4-1. He scored at a 2.8 grade equivalent (i.e., 12<sup>th</sup> percentile). Id. The student was administered the same test on May 5, 2009. R 4-2. He scored at a 3.3 grade equivalent (14<sup>th</sup> percentile). Id.

109. A Progress Report dated November 3, 2008 reveals that the student was progressing in meeting his October 2008 annual goals. P 15. However, the parent was never provided with a copy of the Progress Report. Testimony of Parent. The record evidence does not include any subsequent Progress Reports. See Exhibits generally.

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<sup>13</sup> The student's \_\_\_\_\_ Grade Report Card reveals that, in the first advisory period, he completed four out of 16 book reports; in the second advisory period, he completed two out of 16 book reports; and, in the third advisory period, he completed one out of 16 book reports. R 5-2.

110. The student's fourth grade report card reveals that, in Reading / English Language Arts, Social Studies, and Music, he "does not show basic working knowledge of skills/concepts; seldom produces work of satisfactory quality." R 5-1 – 5-2. In Mathematics, Science, Art, Spanish and Physical Education, the student "shows a basic working knowledge of skills/concepts; produces satisfactory work; usually applies skills/concepts correctly. Id.

111. The student is provided with modifications and accommodations throughout the day, including more time, fewer problems, having worked read to him. Testimony of                    The student's listed progress in the discreet subject areas reflect his performance with the modifications and accommodations being in place. Id.

112. The student follows directions and participates in class discussions with frequent prompting. R 5-2. The student rarely completes class work on time or uses time wisely. Id.

113. Comments written by the student's general education teacher after each advisory period suggests that the student started off the school year reading on grade level (see R 2-1, 10/31/08 advisory comment) but that, as of March 20, 2009, he was reading below grade level. See R 2-1 – 2-2.

114. The student was administered the Discovery Education Assessment at the beginning of the school year, in November 2008, January 2009, and March 2009. R 14. The results of the March 2009 were not available at the hearing, and none of the results were shared with the parent. Testimony of

115. The Discovery Education Assessment is not a standardized test. Id.;  
Testimony of                    P 38-2.

116. Between the beginning of the school year and the January 2009 administration of the assessment, the student demonstrated growth in the number of correct answers: beginning of school year, 17% correct; November 2008, 32% correct; and, January 2009, 61% correct. R 14-1. The student, however, was provided testing accommodations in November 2008 and January 2009. Testimony of

P 38-2.

117. The general education teacher did not know what would be considered passing in the Discovery Education Assessment. Testimony of

118. On February 17, 2009, the student's educational advocate observed him in a reading group of five students and then in his general education class. P 38-3. It appeared to the educational advocate that the student does better in a small group setting.

Id.

119. On March 9, 2009, the student was accepted to the Intermediate Program, and recommended that he start during the Extended School Year Program, which provides a five-week summer session. P 28-1; P 27-1.

120. The is accredited by Middle States Association of Colleges and Schools and is approved for the provision of special education and related services in the District of Columbia. P 27-3.

121. The student was observed by his educational advocate on May 11, 2009 while working with his special education teacher in a group of two. P 38-5. The student required constant refocusing. P 38-5 – 38-6; Testimony of

122. The student has not received all of the special education services recommended in the January 2009 IEP. P 38-6; Testimony of

123. In June 2009, the student's general education teacher estimates that the student is functioning at approximately 3.5 grade level in reading and math. Testimony of

124. The student will be promoted to the grade but only because the general education teacher is not permitted to retain the student because he is a special education student. Id. The general education teacher would retain the student if it were her decision to make. Id.

125. The student would be "lost" when in the grade because the work is "harder." Id. The reading and the science and social studies concepts, which rely heavily on a student's ability to read, would be more "complex." Id. Math would also be more "complex." Id.

126. The student is still learning to read rather than reading to learn. Id. The student does demonstrate some ability to be able to read to learn but, regardless, he is not reading at a fourth grade level. Id.

127. The student has not mastered the grade curriculum. Id.

128. It would not be the "best idea" to promote the student to the grade, as he would be "harmed." Id.

#### **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:

*1. Appropriateness of October 30, 2008 and January 26, 2009 IEPs*

The central purpose of the IDEIA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformity with a written IEP (i.e., FAPE). 20 U.S.C. §§ 1400 (d)(1)(A), 1401 (9)(D); 1414 (d); 34 C.F.R. §§ 300.17 (d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005), Rowley, 458 U.S. at 179-81.

A FAPE is offered to a child with a disability when the local educational agency (hereinafter, "LEA") complies with the IDEIA procedural requirements and the child's IEP is reasonably calculated to enable the student to receive educational benefits. Rowley, 458 U.S. at 206-07. However, not all procedural errors render an IEP inadequate. A procedural violation alone without a showing that the child's education was substantively affected, does not establish a failure to provide a FAPE. See Lesesne v. Dist. of Columbia, 447 F.3d 828 (D.C. Cir. 2006); Pabo v. Dist. of Columbia, 573 F. Supp. 2d 41 (D.D.C. 2008); see also Blackman v. Dist. of Columbia, 277 F. Supp. 2d 71, 79 (D.D.C. 2003) (Noting that a procedural violation of the IDEIA "can itself constitute the denial of a free appropriate [public] education."). A hearing officer may find a child did not receive FAPE only if the procedural inadequacies:

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational benefit.

34 C.F.R. § 300.513 (a)(2).

Accordingly, the IDEIA directs that the undersigned Hearing Officer render a decision on whether the student received a FAPE on substantive grounds. 20 U.S.C. §

1415 (f)(3)(E)(i). FAPE is offered to the child “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Rowley, 458 U.S. at 203. IDEIA does not specify the specific level of educational benefits that must be provided through the child’s IEP, nor is the LEA required to maximize the child’s potential. Id. at 189, 199.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320 (a)(1)), establishes annual goals related to those needs (34 C.F.R. § 300.320 (a)(2)), and provides for the use of appropriate special education and related services (34 C.F.R. § 300.320 (a)(4)). The program must also be provided in the least restrictive environment. 20 U.S.C. § 1412 (a)(5); 34 C.F.R. §§ 300.114 (a)(2), 300.116 (a)(2).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief. See Shaffer v. Weast, 546 U.S. 49, 51 (2005) (finding it improper to assume that every IEP is invalid until the LEA demonstrates otherwise).

The first two issues presented for consideration are whether the October 30, 2008 and January 26, 2009 IEPs are reasonably calculated to enable the student to receive educational benefits. See Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982). I find that the IEPs are wholly inadequate to meet the educational and socio-emotional needs of the student.

With respect to the October 30, 2009 IEP, the IEP includes general statements of the student’s present levels of academic achievement and functional performance. See 10-2. Information regarding the student’s present levels of academic achievement was readily available to Respondent, see P 16, P 17, P 18, but the information included in the

student's IEP does not encompass the breath of information that was available and would have been germane to understanding the student's educational profile.<sup>14</sup>

For example, in May 2005, when the student was in the \_\_\_\_\_, seventh month of that school year, he was administered the Maryland State Standardized Test. P 16-2. The student was reading at 1.2 grade equivalent, his Language Arts was at a .5 grade equivalent, and his math skills were assessed at a 1.8 grade equivalent. P 16-2. The student was below grade level in all areas tested. An Educational Assessment completed by Respondent on or about October 9, 2008, revealed that the student's academic achievement in broad reading was at the 13<sup>th</sup> percentile; the student's academic achievement in broad math was at the 33<sup>rd</sup> percentile; and, the student's academic achievement in broad written language was at the 17<sup>th</sup> percentile. P 17-2. The student, who was \_\_\_\_\_ years old at the time of the testing, scored one to five years below age expectancy in the 15 subtests administered, with the exception of one subtest where he scored at age expectancy. See P 17-4. None of the information that could be gleaned from the assessments were included in the student's present levels of education performance. See P 10-2. Rather, the IEP Team included scant information of the student's abilities, skills, and needs. Id.

The failure to include appropriate information under the present levels of educational performance resulted in the IEP Team developing one general and non-measurable annual goal for mathematics, one general and non-measurable annual goal for reading, and one general and non-measurable annual goal for written expression for the student. P 10-2. Although each of the annual goals require "one year's growth" in

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<sup>14</sup> In fact, the Special Education Coordinator who participated in the October 2008 IEP Team meeting determined that the "previous evaluation" submitted from the student's previous school was recent and valid and a reevaluation was "not warranted." P 10-6.

reading, math, and written expression, the IEP does not include any baseline data to measure against in one year's time when the annual goals are reviewed to determine whether the student met his annual goals. See id.

To be measurable, annual goals should describe the skill, behavior or knowledge the student will demonstrate and the extent to which it will be demonstrated. Annual goals should also include evaluative criteria that measure how well (e.g., frequency, duration and/or accuracy) and over what period of time the student must perform a behavior in order to consider it met (e.g., number of days, number of weeks, occasions). Although the three goals include reference to 80% accuracy and one year's growth, the inclusion of these criteria is vague given the wording of the annual goals. See P 10-2.

The IEP does not include a description of the student's socio-emotional functioning. Id. This omission is critical given the student's history of inattentiveness and difficulty with following directions. See P 16. Connors' Teacher Rating Scales – Revised: Long administered to the student's classroom teacher revealed that the student "would have significant concerns in both the passive and active areas of attention." Id. A classroom observation of the student on November 22, 2007 in a small group reading class, with one teacher and eight students, was significant for the examiner's observation that the student was on task "66% of the time compared to an average classmate who was on task 85% of the time." P 16-2. The student was sitting right next to the teacher. Id. The student also demonstrated difficulty following directions, spacing his words during written work, and focusing his attention to task. Id. He was usually the last to complete assignments. Id. The classroom reading teacher shared with the examiner that the student has to sit next to her "in order to hold his attention to task. Id.

In reviewing the Confidential Psychological Report completed in Prince George's County Public Schools, a District of Columbia psychologist determined, in October 2008 and prior to the IEP Team meeting, that the student presented with "a syndrome of social problems and AD/HD." P 18-3. The student's general education teacher, who participated in the IEP Team meeting in October 2008, testified that the IEP Team discussed the student's inattention and that she had observed his inattention as early as September 2008. Testimony of see R 1-1 – 1-10. Yet, the IEP is silent on the student's inability to maintain attention in the classroom, even when in a small group. Nor does the IEP include any annual goals to address this deficit area. See P 10-2.

Nor does the IEP include any discussion of, or address, the student's organizational deficits. See P 10. As of the October 30, 2008 IEP Team meeting, the student had failed to turn in nine of the 12 book reports that had been assigned. See R 1-1 – 1-10. The student's general education teacher testified that she felt that the student did not have trouble with the assignment itself, but that he failed to turn them in because of his organization deficits. Testimony of

I further find that, as early as October 2008, the recommendation that the student be provided with five hours per week of specialized instruction was wholly inadequate to address his academic deficits and socio-emotional functioning. The student's intellectual functioning was determined to be in the Low Average range. P 16-2. However, the results of the Woodcock-Johnson III Tests of Achievement administered by Respondent administered in October 2008 support the premise that the student had significant academic delays, scoring one to five years below age expectancy. See P 17-4. These scores were consistent with the low scores the student had obtained in September 2007

when he was administered the Woodcock-Johnson Psych-educational Battery – Third Edition by Prince George’s County Public Schools. Compare P 16 with P 17. Further, the student presented with “borderline Working Memory, and low average verbal abilities.” P 18-3. Finally, his attention difficulties further compromised his already low academic achievement.

In all, the student’s educational profile suggested that he required significantly more than what was ultimately recommended during the October 30, 2008 IEP Team meeting.

The January 26, 2009 IEP fails no better. In fact, with the exception of a few distinctions, the January 26, 2009 IEP is a carbon copy of the October 30, 2008 IEP despite the passage of time. The student’s classification continued to be Specific Learning Disability, P 11-1, but he was recommended for 10 hours per week of specialized instruction outside the general education classroom, P 11-3; Stipulation of the Parties. This was an increase of five hours. Compare P 10-3 with P 11-3.

The IEP, however, includes general statements of the student’s present levels of academic achievement and functional performance, and the statements are identical to the statements in the October 30, 2008 IEP. Compare P 11-2 with P 10-2. Not all of strengths and weaknesses identified in the Teacher Evaluation of Student Strengths and Needs for the \_\_\_\_\_, which had been completed by the general education teacher prior to the IEP Team meeting, were included in the student’s IEP. Compare P 35 with P 11-2. Nor does the IEP include all of the teaching techniques that have proven helpful to the student, as identified by the general education teacher in the

Teacher Evaluation of Student Strengths and Needs for the

Compare P 35-2 with P 11.

The IEP Team drafted one annual goal for mathematics, one annual goal for reading, and one annual goal for written expression for the student. P 11-2. With the exception of the math annual goal, the reading and written expression annual goals are identical to the reading and written expression annual goals in the October 30, 2008 IEP. Compare P 11-2 with P 10-2. The IEP does not include any baseline data and/or information for each of the annual goals. See P 11-2. The IEP does, however, include math standard scores for an educational assessment administered to the student on October 15, 2008 and standard scores for a speech and language assessment administered on December 8, 2008. P 11-10. However, like the October 30, 2008 IEP, each of the annual goals requires the student to “demonstrate one year’s growth” in each skill. P 11-2. Further, the IEP does not include a description of how the student’s progress toward meeting the annual goals will be measured. See P 11.

Again, the IEP does not include a description of the student’s socio-emotional functioning. Id. The information was available at the time. See P 35-2.

In all, the January 26, 2009 IEP is inadequate for the same reasons that the October 30, 2008 IEP was deemed insufficient.

I further find that the increase of specialized instruction hours from five to a mere 10 continued to demonstrate Respondent’s inability to appreciate the student’s educational needs despite the wealth of information suggesting that the student required a significantly more restrictive program than what had been recommended. The student’s general education teacher concurred with this assessment, albeit short of saying that the

student should be completely removed from the general education environment, when she testified that the student's recommended specialized instruction hours are "low."<sup>15</sup>

Testimony of

The record evidence reveals that between September 2008 and the January 26, 2009 IEP Team meeting, the student was administered 45 classroom assessments and/or quizzes, requiring that he demonstrate 80% mastery. See R 1-1 – 1-28. The student, however, failed to meet the 80% mastery threshold 36 times during this period. See id. Of the 33 book reports assigned to the student during this period, only six were turned in by the student. Id. Neither did the student's difficulties with attention substantively improved. Id.; P 35-2. Moreover, the student commanded 50 to 70 percent of the general education teacher's time either in a one-on-one situation or in a small group of not more than one to two additional students. Testimony of

Accordingly, for the reasons stated above, I find that Petitioners have met their burden of demonstrating that the October 30, 2008 and January 26, 2009 IEPs denied the student FAPE.

## *2. Failure to Provide Services Mandated in the IEPs*

Petitioners aver that the student was not provided with all of the recommended specialized instruction hours after the October 30, 2008 or the January 26, 2009 IEP Team meetings. Testimony of Parent, Respondent also agrees that the student might not have received all of the hours that had been recommended. Testimony

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<sup>15</sup> There is no question in the undersigned's mind that the student's general education teacher made every effort to help the student try to be successful in the general education environment. While the undersigned disagrees with the teacher's assessment that the student should not be removed from the general education environment, the undersigned's opinion is not a condemnation of the teacher's efforts. The undersigned commends the classroom teacher and the student's most recent special education teacher in their untiring push to help the student.



#### *4. The Student's Educational Needs*

The record evidence supports that the student requires a more restrictive placement than what has been recommended. The record evidence further supports that the student's significant deficits and learning disabilities have not been appropriately identified and addressed throughout the 2008 – 2009 school year.

The student presents with reading fluency, phonemic awareness, decoding and comprehension difficulties. See P 9-1 – 9-47, P 16-2, P 16-4, P 17-2, P 25-8 – 25-10, P 35-1, R 5-1 – 5-2; Testimony of Parent,

His grammar, sentence formulation, vocabulary development, and language organization are compromised. See P 9-1 – 9-47, P 17-2, P 17-4, P 25-6 – 25-7; Testimony of Parent,

His written language – spelling, sentence formulation and elaboration, capitalization and punctuation, editing, and vocabulary development – is poor. See P 9-1 – 9-47, P 17-2, P 17-4, P 25-11, P 35-2;

Testimony of Parent, He requires significant assistance with self-regulation, attention and focus, organization, study skills, time management, and task initiation and completion. See P 9-1 – 9-47, P 16-2, P 16-4, P 18-3, P 26-6 – 26-7, P 26-9 – 26-10, R 5-1 – 5-2; Testimony of Parent,

The student also demonstrates significant language deficits. See P 15-4, P 25-3 – 25-5, P 26-7

All the assessments considered by the undersigned support the proposition that the student requires intensive remediation and a high level of support for him to succeed academically. The testimony of the student's general education teacher, his current special education teacher, and is consistent in that the student

learns when provided with one-on-one or in small group instruction. See Testimony of

Such testimony is consistent with the observations of the school psychologist from Prince George's County Public Schools who observed the student in September 2007, when in the third grade, and determined that the student was on task "66% of the time compared to an average classmate who was on task 85% of the time" in a group of eight students and one teacher. P 16-2. The fact that the student's current general education teacher expends 50% to 70% of her school day working with the student one-on-one or in a group of one to two additional students is quite telling and further evidence that the student requires placement in a low student to teacher ratio.

The student's need for such low student to teacher ratio is also indicative of his need for significant differential instruction. The record evidence supports that the student has not mastered any of his annual goals. Testimony of Although he is provided with classroom modifications and accommodations, including, extended time, fewer problems, and passages read to him, the student has not met the grade curriculum standards. See R 5; Testimony of In fact, he is only being promoted to the grade because the general education teacher is not permitted to retain the student due to his special education designation. Testimony of He would be "lost" in the grade because he has yet to fully learn to read. Id.

The student requires a full-time psycho-educational day school placement that has a focus on AD/HD and learning issues, and can provide a low student to teacher ratio. P 25-13, P 26-12; Testimony of The student also requires speech and language services (group and individual) and counseling services. P 25-14;

Testimony of Occupational therapy services are to be determined after the student has been evaluated.

*5. Placement at The*

Petitioners seek an order placing the student at the Respondent's expense. I find that the placement is warranted and necessary for the student to obtain FAPE.

Before 1997, IDEIA was silent on the subject of private school reimbursement. However, an LEA was required to reimburse parents for their tuition payment to a private school for the services obtained for the student by his or her parents if the services offered by the LEA were inadequate or inappropriate, the services selected by the parents were appropriate under the Act, and equitable considerations supported the parents' claim. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 (1985). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by an LEA as an available remedy in a proper case. Burlington, 471 U.S. at 370-71. "Reimbursement merely requires [an LEA] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." Burlington, 471 U.S. at 370-71; see also 20 U.S.C. § 1412 (a)(10)(C)(ii); 34 C.F.R. § 300.148. The mere fact that the state educational agency and/or the LEA has not approved the private school placement does not bar the parents from reimbursement. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993).

Prior to 1997, Courts granted private school reimbursement under principles of equity pursuant to 20 U.S.C. § 1415 (i)(2)(C). See Burlington, 471 U.S. at 370 ("[W]e

are confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy...."). 20 U.S.C. § 1415 (i)(2)(C) provides, "In an action brought under this paragraph, the court ... shall grant such relief as the court determines is appropriate."

In 1997, Congress amended the IDEA to include a new section entitled, "Payment for education of children enrolled in private schools without consent of or referral by the public agency." 20 U.S.C. § 1412 (a)(10)(C). Now, with respect to children with disabilities enrolled by their parents in private schools when FAPE is at issue, IDEA provides, in part:

(a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility....

(b) Disagreements about FAPE. Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in §§ 300.504 through 300.520.

(c) Reimbursement for private school placement. If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency*, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

(d) Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied—

(1) If—

(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in § 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

20 U.S.C. § 1412 (a)(10)(C)(ii); 34 C.F.R. § 300.148 (emphasis added).

Given the statutory language, the question arises whether private school reimbursement continues to be an available remedy under the general principles of equity pursuant to 20 U.S.C. § 1415 (i)(2)(C), and consistent with Burlington, for children who have never received special education and related services from a public agency. It appears, given the present case law, that 20 U.S.C. § 1412 (a)(10)(C)(ii) does not create a categorical bar to recovery of private school reimbursement. Bd. of Educ. v. Tom F., 128 S. Ct. 1 (2007) (per curiam); Forest Grove Sch. Dist. v. T.A. (9<sup>th</sup> Cir. 2008), cert. granted, (U.S. Jan. 16, 2009) (No. 08-305); Frank G. v. Bd. of Educ., 459 F.3d 356 (2d Cir. 2006), petition for cert. filed, 75 U.S.L.W. 3248 (U.S. Oct. 23, 2006) (No. 06-580), cert. denied, 128 S. Ct. 436 (2007); see also Letter to Luger, 33 IDELR 126 (OSEP 1999).

Neither is a court or hearing officer prevented from ordering a school district to develop and implement at public expense an IEP placing the child in a private school

without the parents first having to incur the costs associated with the placement. See Burlington, 471 U.S. at 370. In Burlington, the Court made clear that –

In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, *it seems clear beyond cavil* that ‘appropriate’ relief would include *a prospective injunction* directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

Id. (emphasis added).<sup>17</sup>

In consideration of this analysis, and as discussed in paragraph 1 *supra*, I have determined that Petitioners have sustained its burden of establishing that Respondent denied the student a FAPE. A FAPE is defined as the provision of “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Bd. of Educ. v. Rowley, 458 U.S.176 (1982). An appropriate educational program begins with an IEP that accurately reflects the results of the various evaluations that the student has undergone and that identifies the student’s needs based on those evaluations. 34 C.F.R. § 300.320 (a)(1). The IEP must also establish annual goals related to the identified needs, 34 C.F.R. § 300.320 (a)(2), and provides for the use of appropriate special education and related services, 34 C.F.R. § 300.320 (a)(4).

The October 30, 2008 IEP and the January 26, 2009 IEP fall short of what is required.

The inquiry, however, does not stop there, and Petitioners bear the burden of demonstrating that the services selected by the parent, i.e., the

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<sup>17</sup> Burlington is often associated with tuition reimbursement. However, although the question presented to the Burlington Court was whether retroactive reimbursement was an available and appropriate relief that a court could award, the Court’s holding is anchored in the Act’s granting to the courts broad equitable power, which permits both tuition reimbursement and a “prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.” Burlington, 471 U.S. at 370. The mere fact that the Court’s discussion centered on reimbursement is not to the exclusion of the other.

are appropriate under the Act, and that equitable considerations support the parent's claim. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 (1985).

Here, the hearing record does support a finding that the [redacted] is appropriate for the student, and that it is the least restrictive environment (hereinafter, "LRE"). 20 U.S.C. § 1412 (a)(5); 34 C.F.R. §§ 300.114 (a)(2), 300.116 (a)(2).

The [redacted] has a total enrollment of 330 students in grades K – 12.<sup>18</sup> P 27-1. The student-teacher ratio is four or five students to one adult. Id. The school provides a multi-sensory program, which employs the art forms and the Academic Club Methodology, in conjunction with teaching academic skills. Id.; Testimony of [redacted]

The arts (dance, drama, music, graphic design, ceramics, woodworking, and film making) enhance the process of neural maturation necessary for academic success by helping to increase attention, build organizational competencies, and improve language skills, as well as developing a strong sense of self-worth.

Id. The Academic Club Methodology allow students to learn history, literature, science, geography, and archaeology by participating in the Cave, Gods, Knights and Ladies, Renaissance, Museum, and Industrialists clubs. Id.; Testimony of [redacted]

Psychological, occupational therapy, and speech and language therapy services are provided using an integrative model, as well as direct pull out services. Id.

Students are grouped primarily according to age and social maturity. P 27-2. Each homeroom group has 11 or 12 students with one teacher and at least two assistant teachers. Id.; Testimony of [redacted] Each student's academic work is individualized to [redacted]

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<sup>18</sup> The Intermediate Program is ungraded and serves the needs of children aged 10 – 13. P 27-1.

his/her needs, and there is individualized diagnostic teaching of reading, writing, spelling, mathematics and perceptual skills. Id. Other subjects (i.e., geography, history, ecology) are taught but woven into the classroom designed and related to reading and math. Id. Students work individually or in very small groups. Id.

The proposed class for the student for the 2009 – 2010 school year would be taught by a certified special education teacher who has a Master's in Special Education and by two assistant teachers, one who is attending a graduate program in education at American University and the other has completed her Bachelor's of Arts in Education and is trained by the \_\_\_\_\_ as a tutor. Testimony of \_\_\_\_\_ The class has 11 children slated for it and the students are 10 to 11 years old. Id. The students present with learning disabilities, speech and language impairments, and/or AD/HD. Id.

The school employs research based programs throughout the school day, including Phonographic Reading, Great Leaps, Wilson Reading, and Project Read. Id. Research has shown that the programs used by the school have been proven to be effective. Id. A typical day for the student would include fluency work in reading and math; participation in a "club" where he would learn content information in history or in some other content area; intensive remediation in word study / reading comprehension and math; instruction in written language and science; and, participation in physical education and art, drama, wood-working or graphic arts. Id. Speech and language services would be provided on an individual basis and in using an integrative model. Id.

Upon starting at the \_\_\_\_\_ the student will be involved in an "initial period of diagnostic/prescriptive instruction, which will include formal and

information diagnostic testing by his teacher and the school diagnostician.” P 12-1;

Testimony of [redacted] From these assessments, and the assessments completed by [redacted] and Respondent, as well as anecdotal teacher information, the school will develop current levels of functioning, which will then lead to the creation of an IEP for the student. Id.

Petitioners have met their burden of demonstrating that the services selected by the parent are appropriate under the Act. I further find that equitable considerations support the student’s placement at the [redacted]. There is no question that the parent is an involved parent who cares for the well-being of her son. She frequently communicated and met with school personnel, sought the assistance of the student’s teachers, and helped the student at home to the extent she could with his home assignments. See R 1, P 38-1; Testimony of Parent, [redacted]. The record evidence is devoid of any suggestion that equity should bar Petitioners’ requested relief.

#### *6. Compensatory Educational Services*

The final issue is whether the student is entitled to compensatory education services for Respondent’s prolonged denial of FAPE to the student.

Compensatory education is an equitable remedy available to a hearing officer, exercising his authority to “grant such relief as the court determines appropriate,” 20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3), when a child with a disability has previously been denied FAPE. See Burlington Sch. Comm. v. Massachusetts Dept. of Educ., 105 S. Ct. 1996 (1985); Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005); Letter to Kohn, 17 IDELR 522 (OSEP 1991); See also Letter to Riffel, 34 IDELR 292 (OSERS 2000). Compensatory education effectuates a child’s ability to receive

FAPE by providing the FAPE by which the child was originally entitled to receive. Letter to Kohn, 17 IDELR 522 (OSEP 1991). “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, 401 F.3d 516 (D.C. Cir. 2005) citing G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4<sup>th</sup> Cir. 2003).

An award of compensatory education “must be reasonably calculated to provide the educational benefits that likely would have accrued.” Reid, 401 F.3d at 524. “This standard ‘carries a qualitative rather than quantitative focus,’ and must be applied with ‘[f]lexibility rather than rigidity.’” Mary McLeod Bethune Day Academy Pub. Charter Sch. v. Bland, 555 F. Supp. 2d 130 (D.D.C. 2008) (quoting Reid, 401 F.3d at 524). In crafting the remedy, the undersigned Hearing Officer is charged with the responsibility of engaging in “a fact-intensive analysis that includes individualized assessments of the student so that the ultimate award is tailored to the student’s unique needs.” Mary McLeod, 555 F. Supp. 2d 130 (citing Reid, 401 F.3d at 524). For some students, the compensatory education services can be short, and others may require extended programs. Id.

Reid rejects a “cookie-cutter approach,” i.e., an hour of compensatory instruction for each hour that FAPE. Reid, 401 F.3d at 523. However, while there is no obligation, and it might not be appropriate to craft an hour for hour remedy, an “award constructed with the aid of a formula is not *per se* invalid.” Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 532 F. Supp. 2d 121, 124 (D.D.C. 2008). Again, the inquiry is whether the “formula-based award ... represents an individually-tailored

approach to meet the student's unique needs, as opposed to a backwards-looking calculation of educational units denied to a student." Id.

The record evidence supports that the student has been denied a FAPE since October 30, 2008. In order to remedy this denial of FAPE, Petitioners propose that the student be provided with extended school year (hereinafter, "ESY") services at the beginning June 22, 2009 through July 23, 2009 and with additional funding for two summer school speech-language programs, i.e., Intensive Phonological Awareness and Reading Fluency and The Problem Solvers' Brigade, which run concurrent with the ESY. P 33; Testimony of

I find that that ESY services are necessary given the extent of the student's disabilities and the failure of Respondent to provide a program during the 2008 – 2009 school year that was "reasonably calculated to enable the student to receive educational benefits." See Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982). The student has needed a full-time placement for some time now, and Respondent's incremental, yet insignificant, increase of specialized instruction hours in January 2009 despite overwhelming data and teacher anecdotal information suggesting that the student required substantively more, warrants an award of compensatory education services in the form of ESY services. I further find that the speech-language programs sought by Petitioners are tailored to the student's unique needs, (see P 36; testimony of , and that both programs will compensate the student for the failure of Respondent to address the student's significant receptive and expressive language disorder.

**ORDER**

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

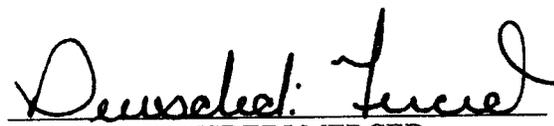
1. Respondent shall place and fund the student in the \_\_\_\_\_ for the 2009 – 2010 school year in its 10 months academic program.
2. Respondent shall provide the student with transportation services to and from his home and the \_\_\_\_\_ to coincide with the student's first day of attendance in the 10 months academic program for the 2009 – 2010 school year.
3. By no later than September 30, 2009, Respondent shall convene an IEP Team meeting at the \_\_\_\_\_ to consider all current evaluations, assessments, and any other pertinent information, discuss and determine the student's special education and related services needs, and revise the student's IEP accordingly, including listing the \_\_\_\_\_ as the student's program and placement. Consideration should also be given by the IEP Team to whether the student's classification should be amended to include other health impaired and speech or language impairment.
4. Petitioners request for compensatory education services is granted. Respondent shall provide funding for ESY services at the \_\_\_\_\_ for the period of June 22, 2009 through July 23, 2009 and shall further provide additional funding for the Intensive Phonological Awareness and Reading Fluency and The Problem Solvers' Brigade program. The speech-language programs are to be provided to the student concurrently with the ESY services during the period of June 22, 2009 through July 23, 2009. Transportation to and from the student's home and the \_\_\_\_\_

shall be provided by Respondent for period of June 22, 2009 through July 23, 2009.

5. Respondent shall arrange to have an occupational therapy evaluation conducted of the student by no later than July 23, 2009. Such evaluation may be completed by the \_\_\_\_\_ should Respondent authorize same.

IT IS SO ORDERED.

DATED: June 10, 2009

  
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**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 90 days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. § 1415(i)(2)(B).