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

----------x

STUDENT, a minor, by and through her Parent(s),[1]

Petitioners,

- against -

District of Columbia Public Schools,

Respondent.

----------x

HEARING OFFICER DETERMINATION

SHO Case No.

Deusdedi Merced, Hearing Officer

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioners Notice of Due Process Complaint, filed on or about April 19, 2010 (hereinafter, "Complaint"). HO 1.[2] I was appointed shortly thereafter. HO 2. Respondent's Response to the Complaint was filed on or about April 29, 2010. HO 5. A resolution meeting was held on May 4, 2010. HO 4, 6. The parties, however, were not able to reach an agreement. HO 6. A pre-hearing conference in the matter was scheduled for, and held on, May 11, 2010. HO 7, 8. The Pre-Hearing Conference Summary and Order was issued on May 11, 2010. HO 9.

A hearing was held on Monday, May 24, 2010, and continued on Tuesday, June 1, 2010.[3] It was a closed hearing, and the Petitioners were represented by Carol Liu, Esq.

---

[1] Personal identification information is provided in Appendix A, attached herein.
[2] 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.
[3] Petitioners presented the testimony of the parent; Dr. Kara Covington, Children's National Medical Center Pediatric Mobile Clinic; and, Director of Admissions, School. Respondent presented the testimony of Special Education Teacher,

Respondent was represented by Linda Smalls, Esq. Petitioners entered into evidence exhibits 1 to 29; Respondent entered into evidence exhibits 1 to 30.

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"),[4] 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-E, Chapter 30, Education of the Handicapped (2003).

BACKGROUND

The student is years old and attending a grade class in the School. Initial special education and related services were recommended in August and October 2009. Specifically, the student's August and October 2009 Individualized Education Programs (hereinafter, "IEP") recommend 10 hours per week of specialized instruction outside general education, 60 minutes per week of occupational therapy outside general education, 60 minutes per week of speech and language services outside general education, and 30 minutes per week of behavioral support services outside general education. The parent is of the opinion that the student requires placement in a full-time special education school. This appeal ensued.

School; General Education Teacher, School; Special Education Coordinator, School; and School Psychologist. Witness testimony will be referred to as "Testimony of" followed by the name of the witness.

[4] In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. 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:

a. Whether Respondent failed to locate, identify and evaluate the student who was residing in the District of Columbia and attending a private school during the 2008 – 2009 school year.

b. Whether the student's August 7, 2009 IEP complies with the IDEA's 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).

c. Whether the student's October 20, 2009 IEP complies with the IDEA procedural requirements and is "reasonably calculated to enable the student to receive educational benefits." Rowley, 458 U.S. 176, 207.

d. Whether Respondent appropriately implemented the student's August 7, 2009 and October 20, 2009 IEPs during the 2009 – 2010 school year.

Petitioners seek placement of the student in a full-time special education program that specializes in serving children with Specific Learning Disabilities, as well as transportation to such program. Petitioners further pray for compensatory education services for the denial of individualized instruction outside of the general education setting and occupational therapy services not provided during the 2009 – 2010 school year, as well as for Respondent's failure to child find during 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 the School. HO 1-1, P 4-1; Testimony of Parent.

2. The student completed kindergarten at the School, grade at the School, and grades at the School, and grade at the School. P 8-2, P 9-2, P 17, P 18, P 19.

3. Overall performance while attending second grade at the School was "Good" to "Excellent." See P 17. She demonstrated some decline in third grade, also at the School, where Effort and Study Skills and Mathematics required "Improvement," and Composition, Social Studies, and Science dropped to "Satisfactory." P 17-1; See Testimony of Parent.

4. Title I services were provided to the student on a pullout basis throughout the second and third grades. Testimony of Parent.

5. Concern with the student's performance in mathematics, the parent contacted Respondent in December 2007 about the possibility of the student receiving tutoring services on an after-school basis. Id. The parent spoke to Paul Quander. Id.

6. Mr. Quander told the parent that Respondent might be able to help the student if the parent enrolled the student in her neighborhood school, the Elementary School. Id. The parent was also told that the tutoring services were no longer available after-school but would be available on Saturdays. Id.

7. The parent elected to keep the student at the School. Id.

8. On April 7, 2008, the student was administered the Terranova CAT achievement test (hereinafter, "April 2008 Terranova"). P 13-1. The student was completing the third grade and attending the School. Id.

9. The student performed in the average range in four of the 14 subtests; the ten other scores were in the below-average range. Id.

10. The student's April 2008 Terranova scores demonstrate a decrease in performance when the scores are compared to the previous administration of the test in March 2007. See P 13-2. In March 2007, the student performed in the average range in eight of the 14 subtests, high average in one of the 14 subtests, and below average in five of the 14 subtests. Id.

11. Dr. Kara Covington completed a Comprehensive Psycho-educational Evaluation of the student in August 2008 (hereinafter, "August 2008 Psycho-educational Evaluation"). See P 8; Testimony of Parent. The student was a rising grader at the School. P 8-1.

12. Concerns with retaining information, acquiring reading skills, and having been in danger of being retained in the third grade resulted in the referral to Dr. Covington. Id.

13. Behavioral observations of the student revealed that the student was "easily distracted" and that she "displayed some anxious behaviors throughout the testing sessions." P 8-2.

14. Intellectual functioning assessed through the Test of Nonverbal Intelligence – Third Edition revealed low end of Average (27th percentile) nonverbal reasoning skills. P 8-3, 8-11; Testimony of Covington.

15. In the area of phonological processing skills, the student demonstrated Average skills when blending sounds to make words but Below Average skills when manipulating sounds within words. P 8-3, 8-6 – 8-7, 8-11.

16. The student's visual perception skills were Below Average (21st percentile) while her visual-motor integration and motor coordination skills fell in the Low range (5th and 8th percentile, respectively). P 8-3 – 8-4, 8-7, 8-12; Testimony of Covington.

17. Academic skills in reading, math, and written language varied. See 8-4 – 8-5, 8-7; Testimony of Covington.

18. In reading, the student's sight word identification skills were in the Average range (66th percentile) and her word attack skills were High Average (76th percentile); sight word and phonemic decoding efficiency measured in the Average range (45th and 74th percentile, respectively); reading fluency at the sentence level fell to the Low Average range (23rd percentile); literal reading comprehension skills placed in the Low Average range (19th percentile) while her inferential reading comprehension skills fell in the Average range (25th percentile). P 8-4, 8-7, 8-12, 8-13.

19. In math, the student's ability to solve paper-and-pencil computational problems were in the Low Average range (18th percentile); she scored in the Very Low range (1st percentile) in math fluency; and her ability to solve word problems that were

orally presented and accompanied by visual and written input fell in the Low range (7th percentile). P 8-4 – 8-5, 8-7, 8-13.

20. The student met the criteria for Mathematics Disorder. P 8-7.

21. With written language, the student demonstrated Average ability (60th percentile) in spelling; writing fluency fell to the Low range (2nd percentile) when she was asked to generate brief, simple sentences quickly using three target words to describe a picture; and, in the Writing Samples test, the student performed in the Average range (32nd percentile). P 8-5, 8-7, 8-13.

22. Projective testing revealed the presence of "significant anxiety and self-doubt." P 8-6. The examiner opined that school "has become a source of anxiety" for the student. P 8-6, 8-14.

23. The student had not appeared to develop "the social and coping skills to handle fairly normative life stressors." Id.

24. Testing also revealed that the student "appeared" to meet the criteria for Attention Deficit / Hyperactivity Disorder, Predominately Inattentive Type but further exploration by a child psychiatrist or pediatrician was warranted for a more definitive finding. P 8-5, 8-7, 8-14; See Testimony of Lucas.

25. In addition, the examiner recommended individual therapy to address the self-esteem issues and to improve social and coping skills, as well as a comprehensive occupational therapy evaluation. P 8-8.

26. With respect to school placement, the examiner opined that the student would "benefit from a small, supportive, and structured classroom with a small student-

teacher ratio that is designed to meet the needs of students with a Specific Learning Disability." P 8-8; Testimony of Covington.

27. Dr. Covington did not speak with the student's classroom teacher or observed the student in a classroom. Testimony of Covington.

28. The parent was not granted an opportunity to speak directly with Dr. Covington regarding the results of the evaluation despite attempts by the parent to speak with Dr. Covington. Testimony of Parent. However, the parent did speak with the social worker at Children's National Medical Center, where Dr. Covington works, and was advised to explore Respondent's schools. Id.

29. Evaluation in hand, the parent enrolled the student in the School for the start of the 2008 – 2009 school year and provided school personnel with a copy of the evaluation. Testimony of Parent. The student was a rising fourth grader. Id.

30. Upon enrolling the student in the School, school personnel discussed with the parent whether the student had an IEP and the parent understood that an IEP was associated with special education services. Id.

31. The student was placed in a class size of 30 students and the parent expressed concern to the classroom teacher with the number of students in the fourth grade class. Id.

32. Concerned with the student's class size at the School, the parent removed the student from the school at the end of September 2008 and enrolled the student at the School, where class sizes ranged from eight to nine students. Id.

33. The student was once again provided with Title I services while at the School. Id.

34. In an October 2008 meeting with the student's classroom teacher and the principal of the School, the parent presented the August 2008 Psycho-educational Evaluation. P 2-1; Testimony of Parent.

35. The principal discussed referring the student to the C.A.R.E. Center for evaluation but after reviewing the August 2008 Psycho-educational Evaluation, the principal agreed to provide the student with accommodations and the parties agreed to discuss the student's progress in January 2009. Testimony of Parent.

36. Child find activities for parentally placed private-religious school students take place at the C.A.R.E. Center, which is affiliated with the District of Columbia Public Schools Private – Religious Office (hereinafter, "DCPS – PRO"). See R 28-4.

37. A referral was not made to the DCPS – PRO by the principal or the parent. P 2-1, See Testimony of Parent.

38. Despite the interventions and accommodations, the student did not do well in several subject areas and did not meet the grade-level requirements in math. Id.

39. In January 2009, the principal did not follow-up with the parent and the parent did not follow-up with the principal. Testimony of Parent.

40. Although the parent continued to have concerns about the student's progress in January 2009, the parent elected to keep the student at the School because she did not want to pull the student out during the school year. Id.

41. On May 6, 2009, the student participated in the Group Mathematics Assessment and Diagnostic Evaluation (hereinafter, "May 2009 G-MADE"). P 14-2. The student was completing the grade at the School. Id.

42. The student demonstrated approximately a year's growth when comparing the May 2009 G-MADE scores to an October 23, 2008 administration of the G-MADE but her overall performance continued to be below average. Compare P 14-1 with P 14-2.

43. The student made the honor roll in the School. Testimony of Parent.

44. In June 2009, the parent met with her attorney-of-record in this matter, Carol Liu. Id. The parent, however, had initially talked to Ms. Liu in January or February 2009. Id.

45. On or about June 11, 2009, the parent made a referral to the DCPS – PRO. See P 1, 2; Testimony of Parent. The referral was received on June 12, 2009, and consent to evaluate was provided on July 22, 2009. R 4-1, R 6-1.

46. The student was enrolled in the District of Columbia Public Schools on or about June 25, 2009. See R 3.

47. Concerns with the student's ability to complete the grade math curriculum, as well as the student's struggle to make progress in other areas, warranted the referral by the parent. See P 1-1.

48. The student's classroom teacher during the 2008 – 2009 school year also expressed concern with the student's progress and recommended an "alternative educational placement." P 1-1, 1-3, 1-6, P 21.

49. Specifically, the student's classroom teacher noted that the student –

> frequently answered oral questions about directions and assignments with answers that did not make sense. This was done one on one. There was a difference between wrong answers and confused answers. [The student] needed long periods of time to complete assignments that she knew how to do. Once started she continued until finished, most often with passing grades. Sometimes, [the student] would get distracted or just look off in space. Other times, [the student] was focused until she finished.
>
> ...
>
> [The student] did not complete fourth grade mathematics.
>
> ...
>
> [The student's] parents are loving and supportive of her. However, this year, [the student's] absenteeism prevented the progress she could have made.... That being said, [the student] worked so slowly, that it was difficult for her to make up assignments.
>
> ...
>
> [The student] does try and can do the work assigned to her. However she was not able to keep up the pace of the fourth grade. Though I permitted all students to work at their own pace for assignments, in comparison, [the student] was extremely slow, but many times, especially in vocabulary, she had the best accuracy in work.
>
> [The student] needs a classroom environment whereby she can work at her own pace, bus she is not self-disciplined or self-motivated enough to work without constant guidance and structured support.
>
> ...
>
> While I will recommend [the student] to the grade for 2009 – 2010, I do so with caution.

P 21-1 – 21-2.

50. The student's attendance became an issue during grade, resulting in significant absences and tardiness because of frequent complaints of illness. P 9-2; Testimony of Parent. The student missed between 37 to 45 days of school and was tardy 30 – 90 minutes 60 times. P 1-3, P 19-1.

51. Overall, the student completed the school year with seven A's, two B's, one C, and one D. P 19-1. English and math were her worse subjects and the teacher noted that the student was not working at grade level in math. Id.

52. However, the student's Title I Progress Reports for Math suggest that the student made "dramatic" progress in math when comparing the G-MADE scores. P 20-3.

53. The student was promoted to the grade for the 2009 – 2010 school year. P 19-1.

54. Dr. Kara Covington completed a second Comprehensive Psycho-educational Evaluation of the student in June and July 2009 (hereinafter, "June/July 2009 Psycho-educational Evaluation"). See P 9; Testimony of Parent, Covington.

55. The student had completed the grade at the School at the time of the testing. P 9-2

56. Supplemental testing was requested by the parent due to academic concerns despite the student's receipt of Title I individualized instruction in a small group of eight children in reading and mathematics. P 9-1, P 9-2.

57. Behavioral observations of the student revealed that the student required redirection in order to focus on test activities. P 9-3.

58. Overall intellectual functioning was assessed to be in the Low Average range (12th percentile) with Average verbal comprehension (61st percentile), Low Average working memory skills (13th percentile), and Borderline processing speed (7th percentile) and perceptual reasoning (4th percentile). P 9-3, 9-9, 9-16.

59. In reading, the student demonstrated Average (69th percentile) sight word identification, High Average (87th percentile) phonetic decoding skills in an untimed

format, and Average (52nd and 73rd percentiles) basic reading skills in a timed format. P 9-6, 9-10, 9-17, 9-18. Reading fluency was at the low end of Average (25th percentile) while the student's literal and inferential reading comprehension skills were Low Average (16th percentile). P 9-6 – 9-7, 9-10, 9-17, 9-18.

60. The student made "solid growth" when comparing the June/July 2009 Psycho-educational Evaluation basic reading skills scores with the August 2008 Psycho-educational Evaluation scores. P 9-10. The student, however, did not make "adequate progress" in her reading comprehension skills, yet remained in the Low Average range. Id.; Testimony of Covington.

61. In math, the student's math calculation skills were Low Average (19th percentile) while her math fluency was Very Low (<1st percentile) and math problem-solving skills were Low (2nd percentile). P 9-7, 9-10, 9-18.

62. The student made "solid growth" when comparing the June/July 2009 Psycho-educational Evaluation calculation skills scores with the August 2008 Psycho-educational Evaluation scores. P 9-10. The student, however, "made virtually no progress in acquisition of basic math facts nor [sic] in her ability to solve word problems". Id.; See Testimony of Covington.

63. In writing, the student's spelling and written expression skills measured in the Average range (57th and 28th percentile, respectively) while her writing fluency fell in the Low range (7th percentile). P 9-7, 9-10, 9-17. These scores represent "some progress over last year's but are not at the expected pace." P 9-10; See Testimony of Covington.

64. The student continued to meet the criteria for Mathematics Disorder and met the criteria for Reading Disorder and Disorder of Written Expression. P 9-10. Daily intensive instruction in these skill areas was recommended. Id.

65. The examiner opined that the student "is ill-equipped to meet the more complex academic demands she will confront as she approaches middle school." Id.

66. The examiner recommended an occupational therapy evaluation, as well as a speech and language evaluation. P 9-11.

67. The examiner further continued to recommend placement in "a small, supportive, and structured classroom with a small student-teacher ratio that is designed to meet the needs of students with a Specific Learning Disability." Id.

68. An Occupational Therapy Evaluation of the student was completed on July 27, 2009 (hereinafter, "July 2009 OT Evaluation"). See P 11. The student was a rising grader transitioning to the School. P 11-1.

69. General observations of the student during the testing session revealed that the student's attention fluctuated throughout the battery of tasks presented. P 11-2.

70. The student demonstrated difficulty in the areas of visual closure and spatial relationships (<1st percentile). P 11-3.

> Difficulty with visual perceptual skills may impact upon a student's ability to perform certain academic skills. Reading/language and handwriting development may additionally be affected, as she is required to learn and recall specific words, identify proper sentence structure and copy information from various sources (ex., white board or text books).

Id.

71. Direct and indirect occupational therapy services for 60 minutes per week were recommended. P 11-6.

72. An initial IEP Team meeting was held on August 7, 2009 (hereinafter, "August 2009 IEP"). See P 3. The student was a rising grader. Testimony of Parent.

73. The parent was seeking full-time special education services for the student. Testimony of Parent.

74. The IEP Team relied on the June/July 2009 Psycho-educational Evaluation and the July 2009 OT Evaluation. See P 3-2 – 3-6, 3-15 – 3-19; Testimony of Bridgers, Lucas.

75. The IEP includes annual goals in math, reading, written-expression, socio-emotional development, and occupational therapy. P 3-2 – 3-6. The parent did not object to any of the annual goals during the IEP meeting. Testimony of Bridgers.

76. The student was classified as having a Specific Learning Disability and recommended for 10 hours per week of specialized instruction outside general education, 60 minutes per week of occupational therapy outside general education, and 30 minutes per week of behavioral support services outside general education. P 3-1, 3-7, R 8-2 – 8-3.

77. A Prior Notice Letter was issued on August 7, 2009 recommending placement of the student in her neighborhood school, the School. R 10-1.

78. The parent disagreed with "certain portions of the IEP" but agreed to sign the IEP with the "understanding that she will continue to seek the additional special education services" that she believed the student required. P 24-1. Specifically, the

parent believed the student requires "a separate, full-time special education program." P 24-2.

79. The parent agreed to "monitor" the student's progress throughout the school year. Id.; Testimony of Parent.

80. The August 2009 IEP was signed on August 26, 2009. R 12-1.

81. The student's classification is not in dispute. See HO 1.

82. The parent signed consent to conduct a speech and language evaluation on August 7, 2009. R 11-1.

83. The parent, however, "not feeling" the School yet, enrolled the student in the School, where the August 2009 IEP could be implemented. R 17-1; Testimony of Parent.

84. The student was removed from the School after two weeks of attendance because the parent became concerned with the amount of homework the student was required to do each night. Testimony of Parent.

85. The student was re-enrolled in the School. Id.

86. A Speech and Language Evaluation of the student was completed on September 23, 2009 (hereinafter, "September 2009 Speech-Language Evaluation"). See P 12. The student was in the fifth grade at the School. P 12-1.

87. The student demonstrated difficulty with relational vocabulary, morphological comprehension, and determining multiple meanings of words. P 12-2. The student also demonstrated difficulty combining sentences and some difficulty with picture vocabulary. Id.

88. The student's difficulties with receptive and expressive language resulted in the examiner recommending speech and language therapy one to two hours per week. Id.

89. A second IEP Team meeting was held on October 20, 2009 (hereinafter, "October 2009 IEP"). See P 4; Testimony of Parent.

90. The October 20, 2009 IEP mirrors the August 2009 IEP, with some exceptions; notably the IEP Team added speech and language annual goals resulting from the September 2009 Speech-Language Evaluation. See P 4-4; Testimony of

91. The student was recommended for speech and language services for 60 minutes per week outside general education. P 4-8. Speech services, however, were started prior to the October 2009 IEP meeting. Testimony of Parent.

92. The parent agreed with the "contents of the IEP" and acknowledged being "involved" in its development." P 4-1. The parent provided consent for services to be initiated. Id.

93. The parent did not object to any of the annual goals. Testimony of Bridgers.

94. The parent felt "better about [the student's] progress" as of the October 2009 IEP meeting. R 17-2.

95. Although the October 2009 IEP mandates that the student be provided with 10 hours of specialized instruction hours outside general education, the IEP Team discussed with the parent providing the student with only 8.5 hours of specialized instruction outside general education and 1.5 hours of specialized instruction in the

general education classroom. Testimony of Reportedly, the parent agreed to this change to the location of services. Id.

96. As of October 21, 2009, the student had missed 4 hours of occupational therapy due to the absence of the provider. P 5-1, P 6-1 – 6-3; Testimony of Bridgers.

97. As of December 7, 2009, the student was owed 2.5 hours out of the 4 hours that had been missed due to the provider's absence. P 5-1; Testimony of Bridgers.

98. In October 2009, the parent requested supplementary education services (hereinafter, "SES") from Respondent. Testimony of Parent. The student was provided with tutoring in math between January 20, 2010 and mid-May 2010. Id.

99. In December 2009, the parent met with school personnel and obtained an update on the student's progress in occupational and speech and language therapy. Testimony of Parent. Although the parent had heard from the student in early December 2009 that she might not be getting the pullout specialized instruction hours recommended in the October 2009 IEP, the parent did not address this concern during the December 2009 meeting. Id.

100. Between February 4, 2010 and April 29, 2010 there are five recorded instances where the student was not provided with occupational therapy services due to either the provider not being available, the student being absent, or weather. P 6-5 – 6-7.

101. Services are not required to be made up if the student is absent or because of school closures due to inclement weather or legal holidays. Testimony of However, if the provider is absent or the student is on a field trip, the services have to be made up. Id.

102. In all, between October 19, 2009 and April 30, 2010, the student was to be provided with 1500 minutes of occupational therapy services.[5]

103. The student actually received 1440 minutes of services between October 19, 2009 and April 30, 2010, suggesting that the student has only missed one session of occupational therapy services.[6] See R 18.

104. The student has mastered three of the six occupational therapy annual goals and is progressing in one other. Testimony of

105. In February 2010, the parent spoke with the student's special education teacher because the student continued to report that she was not being pulled out for specialized instruction. Testimony of Parent. It was explained to the parent that the student's class was preparing for the District of Columbia Comprehensive Assessment System (hereinafter, "DC – CAS") and that, in order to avoid having the student miss out on the prep, the special education teacher was pushing in the services in the general education class. Id.; Testimony of

106. The parent did not object to this arrangement but did discuss it with her lawyer, Ms. Liu. See Testimony of Parent.

---

[5] The 1500 minutes were calculated by multiplying the number of actual school weeks (i.e., 25 weeks) within the defined period (i.e., 10/19/09 – 4/30/10) with the recommended number of minutes per week (i.e., 60 minutes). The undersigned took judicial notice, with the parties' acquiescence, of Respondent's 2009 – 2010 school year calendar in order to ascertain the number of actual school weeks within the defined period.

[6] The Special Education Coordinator testified that the student received services on October 21, 2009 (90 minutes), October 28, 2009 (150 minutes), November 10, 2009 (60 minutes), November 17, 2009 (60 minutes), December 1, 2009 (60 minutes), December 10, 2009 (90 minutes), December 14, 2009 (75 minutes), January 7, 2010 (75 minutes), January 12, 2010 (75 minutes), January 20, 2010 (60 minutes), January 27, 2010 (60 minutes), February 18, 2010 (60 minutes), March 16, 2010 (90 minutes), March 18, 2010 (90 minutes), April 22, 2010 (75 minutes), and April 29 2010 (60 minutes). See R 18; Testimony of Bridgers. The Special Education Coordinator further testified that, although the Service Tracker sheet documents that the student received services on February 5, 2010 for 60 minutes (R 18-6), the student was, in fact, absent that day but the 60 minutes were made up in the month of February 2010 on a day other than February 18, 2010 when the student was also provided with 60 minutes of services. Testimony of Bridgers.

107. The student did not get all of the specified specialized instruction during the prep period. Testimony of Gardner.

108. The student was "progressing" towards mastery of the annual goals introduced as of the third Report Period. See P 7-1 – 7-4, R 20-1 – 20-5; Testimony of Gardner.

109. The parent avers that she was not provided with all of the student's IEP progress reports, with the exception of one that she happened to find in the student's backpack. Testimony of Parent. The parent, however, did not follow-up with the school on this matter because she does not feel that it is her responsibility to obtain the reports and she cannot remember to ask the school for the reports. Id.

110. Neither has the parent ever expressed any concerns with the annual goals included in the October 2009 IEP. Id.

111. The parent speaks with the student's teachers on a regular basis. Id.

112. Prior Written Notice dated April 21, 2010 informed the parent that a calculator was added to the student's Statewide Assessment Accommodations for use during the DC – CAS. P 4-12 – 4-16.

113. The student was administered the Discovery Education Assessments (otherwise known as the DC – BAS) in both reading and math throughout the 2009 – 2010 school year. See P 15. There were three administrations each of the assessments. See id.

114. In reading, the student demonstrated Basic subject proficiency, having answered 11, 20, and 13 questions correctly out of a possible 35 questions. P 15-1 – 15-3; See Testimony of Covington.

115. In math, the student demonstrated Below Basic to Basic subject proficiency, having answered 11, 11, and 14 questions correctly out of a possible 35 questions. P 15-4 – 15-6; See Testimony of Covington.

116. By Addendum to Psycho-educational Evaluation dated May 11, 2010 (hereinafter, "May 2010 Addendum"), Dr. Covington recommended placement of the student in a classroom that provides full-time specialized instruction due to the student's "minimal progress" throughout the school year as reflected in the DC – BAS, DIBELS, and other tests administered by the school. P 10-1.

117. The student's progress was inconsistent. Testimony of Covington.

118. The student, however, demonstrated considerable progress in the DIBELS. See P 16-1, R 22-1; See Testimony of Covington.

119. In reading comprehension, the student's grade equivalency fell at 2.0 at the beginning of the 2009 – 2010 school year but increased to a grade equivalency of 2.9 within three to four months. Id.

120. Similarly, the student's oral reading fluency increased by one (1) year within the same time period, going from a 2.5 grade equivalency to a 3.5 grade equivalency. Id.

121. Dr. Covington, however, felt that, while the progress is commensurate with the services the student received, the student is not working up to potential and continues to be significantly behind given that she will be a rising sixth grader for the 2010 – 2011 school year. Testimony of Covington.

122. Informal testing (i.e., Houghton Mifflin) by the student's special education teacher suggests that the student is functioning closer to grade level than what the

DIBELS revealed. See Testimony of The student was provided with more time to answer the questions presented during the informal testing than what is provided for in the DIBELS. Id.

123. The student's oral reading fluency went from beginning grade to end of grade during the course of the current school year. Testimony of In reading comprehension and math, the student started at a mid-third grade level and is now at an early fourth grade level. Id.

124. In class, the student is "more confident" with reading comprehension and the strategies needed to succeed in reading. Testimony of In math, the student "volunteers more," and is "proud" to provide correct answers. Id.

125. As of the third Advisory period, the student demonstrated overall Basic[7] progress in Reading/English Language Arts, Mathematics, Science and Social Studies. R 21-1 – 21-2. The student was meeting the standards in Art, Music, and Health & Physical Education. R 21-2.

126. The general education teacher commented that the student is "easily distracted in school but that she "continues to show growth in the basic skills." R 21-3.

127. The teacher estimates that the student will continue to demonstrate overall Basic progress in Reading/English Language Arts, Mathematics, Science and Social Studies at the conclusion of the fourth Advisory period. Testimony of .

128. It is anticipated that the student will be promoted to the grade. Id.

129. As of May 2010, the student had missed 20 days of classes. P 23-1. As of April 2010, the student had been late to school 17 times. R 23-2.

[7] The Reporting Key in the student's 5th Grade Report Card defines Basic as the "student shows basic working knowledge of skills/concepts; produces satisfactory work; usually applies skills/concepts correctly." P 22-1.

130. On or about May 11, 2010, the student was accepted into the School. P 28; See Testimony of Lourie. The parent started to explore the School in April 2010. Testimony of Parent.

131. The School is a co-ed college preparatory school for children with language-based learning disabilities. Testimony of The school has been approved by the Office of the State Superintendent of Education for the provision of special education and related services for children residing in the District of Columbia. Id.

132. Following the filing of the Complaint, the parties participated in a resolution meeting where the student's progress was discussed. See R 2.

133. The student's special education teacher reported that the student had made social progress. R 2-1; Testimony of At first, the student was "very reserved and quiet," but "now is very interactive and engaged in class, often helps other students with work." R 2-1.

134. The parent, however, felt that the student required a full-time placement because the student had not made progress throughout the school year. Id. Respondent disagreed, believing that there is "evidence of progression." R 2-2.

135. A Classroom Observation of the student was conducted on May 17, 2010. See R 29.

136. The student was observed in the general education setting and –

> appeared to be comfortable with her teacher and peers utilizing appropriate strategies to solve questions presented to her. She displayed appropriate self-esteem and did not display any signs of frustration or anxiety. [The student] appeared to be comfortable enough to orally respond to questions in the classroom, request assistance from teacher and peers, which was evident throughout the classroom observation.... When

> presented with new information [sic] [the student] was able to utilize previous skills learned to respond appropriately. [The student appears] to be a student that is benefitting from pull out services as well as push in services.

R 29-3.

137. The parent is asking for placement of the student in special classes for all academic subjects taught by a special education teacher. Testimony of Parent. The parent believes the student can be placed in general education classes for non-academic classes like music, physical education, and art. Id.

138. Dr. Covington concurs that the student can be with typically developing peers (i.e., non special education students) for non-academic classes and recess. Testimony of Covington.

139. The Special Education Coordinator, the student's general education and special education teachers, and the School Psychologist who participated in the August 2009 IEP meeting disagree that the student required more than what was recommended in the IEPs. See Testimony of Gardner, Johnson, Bridgers and Lucas.

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:

The central purpose of the IDEA 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., free and appropriate public education (hereinafter, "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 IDEA 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. IDEA 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).

1. Child Find

The IDEA mandates that an LEA identify, locate, and evaluate all children with disabilities residing in the State, including children who are homeless, migrants, or un-enrolled. See 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(i), (c)(2). This obligation also extends to children who are suspected of having disabilities. 34 C.F.R. § 300.111 (c)(1); Hawkins v. District of Columbia, 539 F. Supp. 2d 108 (D.D.C. 2008); see also District of Columbia v. Abramson, 493 F. Supp. 2d 80 (D.D.C. 2007). Under these provisions, LEAs are required to have in effect policies and procedures ensuring that:

> All children with disabilities residing in the State ... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(i) and (ii).

In this regard, the DCPS – PRO is tasked with Respondent's child find obligations. See R 27. Those seeking evaluations of their children have four points of access to pick up referral packets and an explanation of the procedures. R 27-8. A parent can either pick up a referral packet from the DCPS – PRO itself, the student's private or religious school, one of five cluster schools, or the DCPS – PRO website. Id.

At issue is whether Respondent failed to locate, identify, and evaluate the student, who was residing in the District of Columbia but attending the DuPont Park Adventist School during the 2008 – 2009 school year, when the parent handed to the principal of the DuPont Park Adventist School in October 2008 the August 2008 Psycho-educational Evaluation completed by Dr. Covington. See HO 1-3. I am not persuaded that Respondent failed to comply with its child find obligations.

Concern with the student's performance in mathematics, the parent contacted Respondent in December 2007 about the possibility of the student receiving tutoring services on an after-school basis. Id. The parent spoke to Paul Quander. Id. Mr. Quander told the parent that Respondent might be able to help the student if the parent enrolled the student in her neighborhood school, the School. Id. The parent was also told that the tutoring services were no longer available after-school but would be available on Saturdays. Id. The parent elected to keep the student at the School. Id.

Shortly after the administration of the August 2008 Psycho-educational Evaluation, the parent was advised by the social worker at the Children's National Medical Center, where Dr. Covington works, that she explore Respondent's schools. Id. Evaluation in hand, the parent enrolled the student in the School

for the start of the 2008 – 2009 school year and provided school personnel with a copy of the evaluation. Testimony of Parent. Upon enrolling the student in the School, school personnel discussed with the parent whether the student had an IEP and the parent understood that an IEP was associated with special education services. Id. The parent did not request special education for the student. See Testimony of Parent.

At the School, the student was placed in a class size of 30 students and the parent expressed concern to the classroom teacher with the number of students in the fourth grade class. Testimony of Parent. Concerned with the student's class size, the parent removed the student from the school at the end of September 2008 and enrolled the student at the School, where class sizes ranged from eight to nine students. Id.

In an October 2008 meeting with the student's classroom teacher and the principal of the School, the parent presented the August 2008 Psycho-educational Evaluation. P 2-1; Testimony of Parent. The principal discussed referring the student to the C.A.R.E. Center[8] for evaluation but after reviewing the August 2008 Psycho-educational Evaluation, the principal agreed to provide the student with accommodations and the parties further agreed to discuss the student's progress in January 2009. Testimony of Parent. A referral was not made to the DCPS – PRO by the principal or the parent. P 2-1, See Testimony of Parent.

Despite the interventions and accommodations, the student did not do well in several subject areas and did not meet the grade-level requirements in math. Id. In January 2009, the principal did not follow-up with the parent and the parent did not

[8] The C.A.R.E. Center is affiliated with the DCPS – PRO. See R 28-4.

follow-up with the principal. Testimony of Parent. Although the parent continued to have concerns about the student's progress in January 2009, the parent elected to keep the student at the School because she did not want to pull the student out during the school year. Id.

In June 2009, the parent met with her attorney-of-record in this matter, Carol Liu. Id. The parent, however, had initially talked to Ms. Liu in January or February 2009. Id. On or about June 11, 2009, the parent made a referral to the DCPS – PRO. See P 1, 2; Testimony of Parent. The referral was received on June 12, 2009, and consent to evaluate was provided on July 22, 2009. R 4-1, R 6-1.

While the record evidence is not entirely clear on what steps personnel at the School took after receiving the August 2008 Psycho-educational Evaluation, the undersigned is not convinced that the parent was as unaware of the available options. The social worker at the Children's National Medical Center referred the parent to Respondent's schools fully understanding that Dr. Covington's report recommended for the student "a small, supportive, and structured classroom with a small student-teacher ratio that is designed to meet the needs of students with a Specific Learning Disability." P 8-8; See Testimony of Parent. Upon enrolling the student at the School, the parent participated in a discussion with school personnel related to special education (i.e., the parent understood that an IEP was associated with special education services) after handing over Dr. Covington's report. Testimony of Parent.

In October 2008, while at the School, the parent again was presented with the opportunity to explore special education when she and the principal

discussed referring the student to the C.A.R.E. Center. Instead of the referral, the parent agreed to the accommodations proposed by the principal and further agreed to explore the student's progress in January 2009. Cognizant that the principal had not approached her in January 2009, the parent elected not to approach the principal to revisit the discussion about available options for the student. The parent preferred to keep the student in the private school rather than pull her out in the middle of the school year.

I note that it is around this time that the parent had an initial conversation with Ms. Liu, the attorney-of-record.

In all, it would appear that the parent was presented with opportunities to explore special education for the student but, for whatever reasons, did not initiate, or cause to be initiated, a referral to the DCPS – PRO.[9] And, even after the August 2009 IEP had been drafted, the parent, "not feeling" the School yet, enrolled the student in the School. R 17-1; Testimony of Parent. The parent removed the student from the School after two weeks of attendance because the parent became concerned with the amount of homework the student was required to do each night. Testimony of Parent. The student was then re-enrolled in the School. Id.

I remain unconvinced that Respondent failed to locate, identify and evaluate the student. However, had Petitioners carried their burden, the remedy for this denial of a FAPE would be compensatory education. Where a school system fails to provide special education or related services to a disabled student, the student is entitled to compensatory education, "i.e., replacement of educational services the child should have received in the

[9] While I am mindful that Respondent has an affirmative obligation to child find, said obligation is not to the exclusion of the parent exercising her right to refer the student for special education and related services.

first place." Reid v. Dist. of Columbia, 401 F.3d 516, 518 (D.C. Cir. 2005). Here, Petitioners failed to present any evidence of the amount of compensatory education the student is due had the undersigned determined the student was denied a FAPE.

2. Appropriateness of the August 2009 and October 2009 IEPs

An IEP is reasonably calculated to confer educational benefits when it is likely to produce progress, and not regression or trivial educational advancement. See Alex R., ex rel. Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. No. 221, 375 F.3d 603 (7th Cir. 2004); Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119 (2d Cir. 1998); Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245 (5th Cir. 1997) cert. denied, 118 S. Ct. 690 (1998); Board of Educ. V. Diamond, 808 F.2d 987 (3d Cir. 1991); Kerkam v. McKenzie, 862 F.2d 884 (D.C. Cir. 1988). "The requisite degree of reasonable, likely progress varies, depending on the student's abilities." Alex R., 375 F.3d at 615. Under Rowley, while only minimal results might be sufficient for the most severely handicapped children, such results would be insufficient in the case of other children whose disabilities are not as pronounced. Id.; Jaccari v. Bd. of Educ. of the City of Chicago, Dist. No. 299, 2010 WL 625332 (N.D. Ill. 2010). However, while IDEA seeks to promote educational progress, it only requires a "basic floor of opportunity" which "consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. Rowley, 458 U.S. at 201. Objective factors (i.e., advancement from grade to grade, passing grades) usually show satisfactory progress. Walczak, 142 F.3d at 130 (citing Rowley, 458 U.S. at 207 n. 28).

An IEP is a snapshot of what was thought to be objectively reasonable when the IEP was developed. Tompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143 (10th Cir. 2008); JG v. Douglas County Sch. Dist., 552 F.3d 786 (9th Cir. 2008); Adams v. Oregon, 195 F.3d 1141 (9th Cir. 1999); Carlisle Area Sch. v. Scott P., 62 F.3d 520 (3d Cir. 1995); Roland M. v. Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990); Shank v. Howard Road Academy, 51 IDELR 151 (D.D.C. 2008). Permitting "excessive hindsight-based judging of IEPs" would "discourage ... [LEAs] from reassessing and updating IEPs out of fear that any addition to the IEP would be seen as a concession of liability for an earlier one." Schaffer v. Weast, 554 F.3d 470, 477 – 478 (4th Cir. 2009). However, "[w]hile an IEP must be examined at the time of its implementation, ... whether a student achieved progress under an IEP can shed light upon whether the [LEA's] efforts were reasonably calculated to confer educational benefit." Jaccari, 2010 WL 625332 at 13 citing James D. v. Bd. of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 826 n.17 (N.D. Ill. 2009) (internal citations omitted).

In arguing that the student's IEPs were not reasonably calculated to confer educational benefit to the student throughout the 2009 – 2010 school year, Petitioners rely heavily on the student's "inconsistent progress" throughout the school year and what Petitioners perceive to be minimal progress in the DC – BAS and DIBELS.[10] P 10-1; See Testimony of Parent, Covington. As explained, however, an IEP is to be examined at the time of its implementation and the undersigned is tasks with asking whether the IEPs were appropriately designed and implemented so as to convey meaningful benefit to the student rather than asking whether the IEPs were adequate in light of the student's

[10] The August 2009 IEP and the October 2009 IEP differ slightly, notably the IEP Team added speech and language annual goals resulting from the September 2009 Speech-Language Evaluation. See P 4-4; Testimony of

presumed lack of progress. See S.S. ex rel. Shank v. Howard Road Academy, 585 F.Supp.2d 56, 66 (D.D.C. 2008). The credible evidence presented at the hearing suggests that the recommended services were "objectively reasonable" to address the student's identified educational needs when the IEPs were developed. Further, the student's failure to increase test scores is not dispositive in determining whether the student made progress. See Jaccari, 2010 WL 625332 at 13. Moreover, contrary to Petitioners' assertions, what is clear from the record is that the student's performance in the DIBELS and other tests, as well as other indicators, suggest that the student has, in fact, made progress since her enrollment at the School at the start of the current school year.

In recommending 10 hours per week of specialized instruction outside general education, 60 minutes per week of occupational therapy outside general education, 60 minutes per week of speech and language services outside general education, and 30 minutes per week of behavioral support services outside general education,[11] the IEP Team considered the student's overall progress while the student was in attendance in the School and the School and the student's low average to average performance in the tests administered by Dr. Covington. Testimony of Bridgers, Lucas. The IEP Team also considered that the student had not been provided with any special education and related services prior to her enrollment in the School and, it surmised that, the recommended services would address her identified educational weaknesses while maximizing her time in the mainstream environment. Id.

[11] The student was also provided with tutoring in math, as a supplementary educational service, between January 20, 2010 and mid-May 2010. Testimony of Parent.

Overall performance while attending second grade at the School was "Good" to "Excellent." See P 17. The student demonstrated some decline in third grade, also at the School, where Effort and Study Skills and Mathematics required "Improvement," and Composition, Social Studies, and Science dropped to "Satisfactory." P 17-1; See Testimony of Parent. In fourth grade, the student continued to excel despite numerous absences (i.e., 37 – 45) and being late to class 60 times. P 19-1. The student completed the fourth grade year with seven A's, two B's, one C, and one D. Id. The student made the honor roll in the School. Testimony of Parent.

Testing completed prior to her enrollment in the School suggests that the student, while demonstrating continued weaknesses in math, she nonetheless made progress despite not being enrolled in any special education program. Specifically, on May 6, 2009, the student participated in the Group Mathematics Assessment and Diagnostic Evaluation (hereinafter, "May 2009 G-MADE"). P 14-2. The student demonstrated approximately a year's growth when comparing the May 2009 G-MADE scores to an October 23, 2008 administration of the G-MADE. Compare P 14-1 with P 14-2. The student's Title I Progress Reports for Math suggest that the student made "dramatic" progress in math when comparing the G-MADE scores. P 20-3.

The August 2008 Psycho-educational Evaluation suggests that the student's academic achievement was, for the most part, commensurate with her intellectual functioning. Intellectual functioning assessed through the Test of Nonverbal Intelligence – Third Edition revealed low end of Average (27th percentile) nonverbal reasoning skills. P 8-3, 8-11; Testimony of Covington. Although academic skills varied (see 8-4 – 8-5, 8-

7; Testimony of Covington), many of her scores fell in the Low Average in Average range in reading, math, and written language.

In reading, the student's sight word identification skills were in the Average range (66th percentile) and her word attack skills were High Average (76th percentile); sight word and phonemic decoding efficiency measured in the Average range (45th and 74th percentile, respectively); reading fluency at the sentence level fell to the Low Average range (23rd percentile); literal reading comprehension skills placed in the Low Average range (19th percentile) while her inferential reading comprehension skills fell in the Average range (25th percentile). P 8-4, 8-7, 8-12, 8-13. In math, the student's ability to solve paper-and-pencil computational problems were in the Low Average range (18th percentile); she scored in the Very Low range (1st percentile) in math fluency; and her ability to solve word problems that were orally presented and accompanied by visual and written input fell in the Low range (7th percentile). P 8-4 – 8-5, 8-7, 8-13. With written language, the student demonstrated Average ability (60th percentile) in spelling; writing fluency fell to the Low range (2nd percentile) when she was asked to generate brief, simple sentences quickly using three target words to describe a picture; and, in the Writing Samples test, the student performed in the Average range (32nd percentile). P 8-5, 8-7, 8-13.

The June/July 2009 Psycho-educational Evaluation suggests "solid growth" when comparing the scores to the August 2008 Psycho-educational Evaluation scores. In reading, the student demonstrated Average (69th percentile) sight word identification, High Average (87th percentile) phonetic decoding skills in an untimed format, and Average (52nd and 73rd percentiles) basic reading skills in a timed format. P 9-6, 9-10, 9-

17, 9-18. Reading fluency was at the low end of Average (25th percentile) while the student's literal and inferential reading comprehension skills were Low Average (16th percentile). P 9-6 – 9-7, 9-10, 9-17, 9-18. In math, the student's math calculation skills were Low Average (19th percentile) while her math fluency was Very Low (<1st percentile) and math problem-solving skills were Low (2nd percentile). P 9-7, 9-10, 9-18. In writing, the student's spelling and written expression skills measured in the Average range (57th and 28th percentile, respectively) while her writing fluency fell in the Low range (7th percentile).[12] P 9-7, 9-10, 9-17.

The student, however, did not make "adequate progress" in her reading comprehension skills, yet remained in the Low Average range. Id.; Testimony of Covington. The student "made virtually no progress in acquisition of basic math facts nor [sic] in her ability to solve word problems". Id.; See Testimony of Covington.

Taking into consideration the student's varied academic skills as measured by Dr. Covington's evaluations, the IEP Team determined that the student required special education services to address her weaknesses in math, reading comprehension, and written expression despite the student's achievement in third and fourth grades, as reflected in her progress reports. See P 3-2 – 3-3, P 4-2 – 4-4. Annual goals in each of these areas were drafted and the parent, who was represented buy counsel, did not object to any of the annual goals during the IEP meetings. Id.; Testimony of

With respect to the student's demonstrated difficulty in the areas of visual closure and spatial relationships (<1st percentile), the IEP Team recommended 60 minutes of

[12] These scores represent "some progress over last year's but are not at the expected pace." P 9-10; See Testimony of Covington.

direct occupational therapy services.[13] P 11-3, P 3-7, P 4-8. The annual goals address the student's indentified weaknesses with visual perceptual skills. Compare P 11-3 with P 3-5 and P 4-6 – 4-7. Again, the parent did not object to any of the occupational therapy annual goals. Testimony of

To address the student's "significant anxiety and self-doubt" (P 8-6), the IEP Team recommended 30 minutes per week of behavioral support services. P 3-7, P 4-8. Annual goals to help the student identify "personal strengths" and learn "coping strategies" were developed. Id. The parent did not object to these annual goals, either. Testimony of Bridgers.

Finally, to address the student's demonstrated difficulty with relational vocabulary, morphological comprehension, determining multiple meanings of words, combining sentences and picture vocabulary (P 12-2), the IEP Team recommended 60 minutes per week of speech-language services and developed annual goals to address each of these weaknesses. P 4-8, P 4-4 – 4-5.

In all, given the information available to the IEP Team in August 2009 and October 2009, the recommended special education and related services were reasonably calculated to confer educational benefit to the student, and Petitioners have not sustained their burden of demonstrating that the student required placement in a full-time special education program. I further note that, although the parent disagreed with "certain portions of the [August 2009] IEP" and agreed to sign the IEP with the "understanding that she will continue to seek the additional special education services" that she believed

[13] Dr. Covington recommended an occupational therapy evaluation, as well as a speech and language evaluation. P 9-11. Respondent readily conducted said evaluations. An Occupational Therapy Evaluation of the student was completed on July 27, 2009. See P 11. A Speech and Language Evaluation of the student was completed on September 23, 2009 soon after the parent signed consent to allow the evaluation to proceed. See R 11-1, R 12.

the student required (P 24-1), the parent agreed with the "contents of the [October 2009] IEP" without exception and acknowledged being "involved" in its development." P 4-1. In fact, the parent felt "better about [the student's] progress" as of the October 2009 IEP meeting. R 17-2.

Moreover, not only were the IEPs reasonably calculated to confer educational benefit to the student at the time of their implementation, the student, in fact, achieved progress under the IEPs. Overreliance on the DC – BAS – the student's performance on the DC – BAS being less than desirable[14] – must be considered in the context of the student's impairments, lack of special education and related services until the current school year, and record of excessive absences and tardiness. The scores on the DC – BAS are not the sole or dispositive indicia of progress.

The student, for example, demonstrated considerable progress in the DIBELS. See P 16-1, R 22-1; See Testimony of Covington. In reading comprehension, the student's grade equivalency fell at 2.0 at the beginning of the 2009 – 2010 school year but increased to a grade equivalency of 2.9 within three to four months. Id. Similarly, the student's oral reading fluency increased by one (1) year within the same time period, going from a 2.5 grade equivalency to a 3.5 grade equivalency. Id.

Informal testing (i.e., Houghton Mifflin) by the student's special education teacher suggests that the student is functioning closer to grade level than what the DIBELS revealed. See Testimony of The student was provided with more time

[14] The student participated in the DC – BAS in both reading and math throughout the 2009 – 2010 school year. See P 15. There were three administrations each of the assessments. See id. In reading, the student demonstrated Basic subject proficiency, having answered 11, 20, and 13 questions correctly out of a possible 35 questions. P 15-1 – 15-3; See Testimony of Covington. In math, the student demonstrated Below Basic to Basic subject proficiency, having answered 11, 11, and 14 questions correctly out of a possible 35 questions. P 15-4 – 15-6; See Testimony of Covington.

to answer the questions presented during the informal testing than what is provided for in the DIBELS. Id. The student's oral reading fluency went from beginning fifth grade to end of fifth grade during the course of the current school year. Testimony of In reading comprehension and math, the student started at a mid-third grade level and is now at an early fourth grade level. Id.

Further, in class, the student is "more confident" with reading comprehension and the strategies needed to succeed in reading. Testimony of Johnson. In math, the student "volunteers more," and is "proud" to provide correct answers. Id.

Social-emotional functioning has improved as well. The student's special education teacher reported that the student had made social progress. R 2-1; Testimony of Gardner, Johnson. At first, the student was "very reserved and quiet," but "now is very interactive and engaged in class, often helps other students with work." R 2-1. A Classroom Observation corroborates the teacher's assessment of the student's progress. See R 29. Specifically, the student was observed in the general education setting and –

> appeared to be comfortable with her teacher and peers utilizing appropriate strategies to solve questions presented to her. She displayed appropriate self-esteem and did not display any signs of frustration or anxiety. [The student] appeared to be comfortable enough to orally respond to questions in the classroom, request assistance from teacher and peers, which was evident throughout the classroom observation.... When presented with new information [sic] [the student] was able to utilize previous skills learned to respond appropriately. [The student appears] to be a student that is benefitting from pull out services as well as push in services.

R 29-3.

The student continues to demonstrate overall Basic progress in Reading/English Language Arts, Mathematics, Science and Social Studies throughout the fourth Advisory period, and it is anticipated that the student will be promoted to the sixth grade.

Testimony of Johnson. While Dr. Covington is of the opinion that the student's progress is commensurate with the services the student received, that the student is not working up to potential, and that student continues to be significantly behind given that she will be a rising sixth grader for the 2010 – 2011 school year (Testimony of Covington), said opinion suggests that there may be a disconnect between Dr. Covington and the parent's expectations of the student and Rowley's requirement for simply providing the student with a "basic floor of opportunity."

For the foregoing reasons, the undersigned is of the opinion that the August 2009 and October 2009 IEPs were reasonably calculated to confer educational benefit on the student. Petitioners failed to demonstrate that the student has been denied a FAPE.[15]

3. Compensatory Education

The final issue is whether the student is entitled to compensatory education services for Respondent's alleged failure to provide the student with occupational therapy and provide the 10 hours per week of pullout specialized instruction as specified in the IEPs.

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.

[15] Having determined that the student has not been denied a FAPE, it is not necessary for the undersigned to review the appropriateness of the Chelsea School. Placement of the student in the Chelsea School might have been warranted if the services offered by the LEA were inadequate or inappropriate, the services selected by the parent were appropriate under the Act, and equitable considerations supported 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).

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 (4th 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]lexibity 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 was denied. 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 did not get all of the specified specialized instruction during the DC – CAS prep period. Testimony of The student received between 35 to 50 hours of the 70 hours that should have been provided during the prep period and said hours were provided in the general education classroom rather than outside the general education classroom. Id. Petitioners, however, failed to demonstrate that the student was harmed by not getting all of the specified hours. In fact, after it was explained to the parent that the student's class was preparing for the DC – CAS and that, in order to avoid having the student miss out on the prep, the special education teacher was pushing in the services in the general education class, the parent did not object to the arrangement. Testimony of Parent. Regardless, even if Petitioners demonstrated harm, Petitioners (yet again) failed to present a compensatory education plan for the undersigned to consider.

With respect to missed occupational therapy services, the argument is without merit. In all, between October 19, 2009 and April 30, 2010, the student was to be provided with 1500 minutes of occupational therapy services. The student actually received 1440 minutes of services between October 19, 2009 and April 30, 2010, suggesting that the student has only missed one session of occupational therapy services. See R 18. The school year has not ended. And, despite missing out on the one session,

the student has mastered three of the six occupational therapy annual goals and is progressing in one other. Testimony of

Accordingly, Petitioners request for compensatory education services is denied.

ORDER

For the reasons stated herein, for reasons that the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief, and for reasons that the parent failed to carry said burden, the Complaint is DISMISSED with prejudice.[16]

IT IS SO ORDERED.

DATED: June 4, 2010

DEUSDEDI MERCED

[16] The undersigned is mindful that both the parent and Dr. Covington have additional reservations with the implementation of the current program when the student enters middle school next school year. See Testimony of Parent, Covington. Specifically, the student is expected to move from class to class in middle school and have more than one teacher for the various academic subjects. Id. Given the parent's continued concerns, and understanding that the current IEP expires in October 2010, the parties should consider and discuss whether the student's annual review should occur prior to the commencement of the 2010 – 2011 school year.

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).