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

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

Petitioners,

- against -

District of Columbia Public Schools,

Respondent.
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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 May 4, 2010 (hereinafter, "Complaint"). HO 1.[2] I was appointed shortly thereafter. HO 2. Respondent's Response and Amended Response to the Complaint were filed on or about May 17, 2010. HO 4, 5. A resolution meeting was held on May 19, 2010. See P 2. The parties, however, were not able to reach an agreement. P 2-1. A pre-hearing conference in the matter was initially scheduled for May 28, 2010. HO 6, 7. Petitioners' counsel failed to appear and the undersigned rescheduled the matter for June 2, 2010. HO 8-1, n.8. The pre-hearing conference did go forward on said date. See HO 8. The Pre-Hearing Conference Summary and Order was issued on June 2, 2010. HO Id.

[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.

A hearing was held on June 9, 2010.[3] It was a closed hearing, and the Petitioners were represented by Roberta L. Gambale, Esq. Respondent was represented by Tanya J. Chor, Esq. Petitioners entered into evidence exhibits 1 to 43; Respondent entered into evidence exhibits 1 to 12.

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, "IDEA"),[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 Handicapped (2003).

BACKGROUND

The student is -years-old and in the grade at School. By initial Individualized Education Program (hereinafter, "IEP") dated February 8, 2008, the student was found eligible for special education services and recommended for 15 hours of specialized instruction hours per week outside general education and 1.5 hours per week of psychological services outside general education. The parent disagreed with the recommendation believing that the student required a full-time special education

[3] Petitioners presented the testimony of the parent; grandparent; Janelle Knott, Educational Advocate, James E. Brown & Associates, PLLC; Carolyn Miskel, Educational Advocate, James E. Brown & Associates, PLLC; Sharon Lennon, Ed.D., CEO and Founder, Newlen Educational Services; Bhavin Dave, M.D., Department of Psychiatry and Behavioral Sciences, Children's National Medical Center; and Special Education Teacher, School, formerly at School. Respondent presented the testimony of Special Education Coordinator, School; General Education Teacher, School; Katie Ryzhikov, Occupational Therapist, Educational Based Services; and, Special Education Teacher, School. 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. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. See Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) ("This chapter may be cited as the 'Individuals with Disabilities Education Act.'").

program because of the student's learning needs and Attention Deficit Hyperactivity Disorder.

In February 2009, the IEP Team met and, for the most part, continued the same services that had been recommended in the February 2008 IEP. The parent continued to express concerns with the program recommendation. In March 2010, the IEP Team met and proposed reducing the student's outside general education hours to 10 hours per week but agreed to provide the student with 7.5 hours of specialized instruction in the general education classroom. The parent again disagreed with the recommendation believing that the student continued to need a full-time special education program. This appeal ensued.

ISSUES

The issues and requested relief being presented for determination are as follows:

a. Whether the student requires placement in a full-time special education school in order to receive a free and appropriate public education (hereinafter, "FAPE").[5]

b. Whether the student is entitled to compensatory education services for Respondent's failure to provide the student with "sufficient instructional services" by a reading specialist for the 2009 – 2010 school year and for its failure to provide occupational therapy to the student.

Petitioners are seeking revision of the March 1, 2010 IEP to reflect a full-time special education program and compensatory education services in the form of independent tutoring and related services.

[5] Inherent in the analysis is whether the IEP dated March 1, 2010 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).

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 will be -years-old next month. See HO 1-2.

2. The student attended and at the Charter School (P 25-2), and grade at the Academy (P 25-2), and grades at the School (P 8-1, P 5-1). See also Testimony of Parent.

3. In February and March 2007, the student participated in an independent Comprehensive Psycho-educational Evaluation (hereinafter, "March 2007 Comprehensive Evaluation"). See P 23. Concerns with attentional issues and learning difficulties led to the referral for evaluation. P 23-1. The student was a grader in the Academy. P 23-9.

4. Behavioral observations revealed "significant attentional difficulties." P 23-2.

5. Intellectual functioning was assessed in the High Average range. P 23-2, 23-6. Verbal learning skills clustered in the Superior range, non-verbal skills were in the Average range, working memory skills were in the lower end of the Average range, and processing speed was in the Average range. Id.

6. The examiner opined that the discrepancy between the verbal and non-verbal skills "is suggestive of the learning difficulties that are affecting [the student's] school performance." P 23-2.

7. Evenly developed receptive and expressive skills were noted. P 23-2.

8. Significant difficulty with attention and concentration impacts the student's short-term memory, resulting in the student having trouble "registering information" and then recalling it. P 23-3, 23-4.

9. The examiner diagnosed the student with an Attention Deficit Hyperactivity Disorder (hereinafter, "ADHD"), as well as a learning disability in reading. P 23-4, 23-7, 23-8, 23-10.

10. Academic skills were assessed in the Average range. P 23-7 – 23-9.

11. Instruction in "multisensory settings," whenever possible, was recommended. P 23-11.

12. On April 19, 2007, the parent participated in a meeting between herself, the liaison for the Private and Religious Office, and the Assessment Coordinator. See P 13. The purpose of the meeting was to discuss concerns the parent had with the student's progress and to develop a Student Evaluation Plan (hereinafter, "SEP"). P 13-1.

13. The parent reported that the student writes backwards, at times, and has difficulty reading. P 13-1. The parent further reported that, despite the student's medication, the student has difficulty with organization, lacks self-control, and has difficulty with completing tasks and activities. Id.

14. The student's last report card, however, as of the day of the meeting and according to the parent, was "outstanding." Id.

15. The parent agreed to sign the SEP and further agreed to review the March 2007 Comprehensive Evaluation and to the conduct of an observation. P 13-1, 13-3.

16. A Classroom Observation of the student was completed on April 19, 2007. See P 26. The student was observed to be fidgety and having difficulty with transitions. P 26-4.

17. On November 8, 2007, the student participated in a Psychological Evaluation (hereinafter, "November 2007 Psychological Evaluation"). See P 24. The purpose of the evaluation was to determine the student's "current level of functioning in the classroom," as it was reported that she has "difficulty with organization, lacks self-control, and has difficulty completing tasks and activities." P 24-1.

18. The student was in the second grade attending the Academy.[6] P 24-1.

19. The Academy reported that the student has difficulties with auditory processing, pragmatic language and social pragmatics. P 24-1. However, the student was determined to be functioning within the average range in reading, written/oral language and spelling. Id. The student was functioning below average in listening comprehension. Id. Services of a reading specialist and counselor were provided to the student by the Academy. Id.

20. A November 5, 2007 observation by the examiner revealed that the student had a difficult time following teacher directives, had a tendency to work ahead of where the teacher was with the rest of the class, required "a lot of re-direction," was "very fidgety," and displayed difficulties with transitions. P 24-2.

21. The classroom teacher reported to the examiner that the observed behaviors were "pretty typical" for the student. Id.

[6] The examiner incorrectly identifies the student's grade as first. See 24-1. Other assessments and the initial IEP suggest that the student was, in fact, in the second grade at the time of the November 2007 Psychological Evaluation. See P 25, P 10.

22. Behavioral observations during the testing revealed that it was "very difficult" for the student to "maintain focus on any one task." P 24-3. "While generally [the student] was not cooperative with the process, it appeared to be more symptomatic of ADHD than a deliberate attempt to be defiant." P 24-4.

23. Intellectual functioning was not reassessed given the March 2007 Comprehensive Evaluation. See 24-4.

24. Overall academic ability fell in the Average range using The Young Children's Achievement Test. P 23-4 – 24-5. The student's "performance varied across subtests" due to her "fluctuating attention and concentration and to some degree her inability to self-regulate to the extent required for each task." P 24-5.

25. The student's overall academic skills measured in the High Average range (84th percentile) with some variation between individual subtests using the Woodcock-Johnson III Test of Achievement. P 24-5 – 24-6

26. The examiner opined that the "available data do [sic] not support a disability classification." P 24-7.

27. A Social Work Evaluation was completed on December 11, 2007 (hereinafter, "December 2007 Social Work Evaluation"). See P 25.

28. On January 23, 2008, a multi-disciplinary team (hereinafter, "MDT") meeting was held. See P 11, P 12. The purpose of the MDT meeting was to determine the student's eligibility for special education and related services. See P 11-1.

29. The parent, the student's classroom teacher, and reading resource teacher reported that the student presented with attentional issues, avoidance behavior, and

difficulty retaining information. P 11-1, 11-3, P 12-1 – 12-4. The student functions better on a one-on-one basis. P 11-3, P 12-3.

30. The MDT reviewed a Speech and Language Evaluation completed by Leslie Charles on January 2, 2008. P 11-4, P 12-7. The student's expressive and receptive vocabulary skills fell in the above average to superior range. P 11-5. Language skills were in the average range and pragmatic skills were in the above average range. Id. Speech and language services were not warranted. Id.

31. The March 2007 Comprehensive Evaluation, the November 2007 Psychological Evaluation, and the December 2007 Social Work Evaluation were also reviewed. P 11-5 – 11-8, P 12-8 – 12-10.

32. Based on the information gleaned from the parent, personnel at the Academy, and the testing results, the MDT found the student eligible as a student with an Other Health Impairment. P 11-8, P 12-10, P 33. An IEP Team meeting was scheduled for February 2008. P 11-8.

33. An IEP Team meeting was held on February 8, 2008 (hereinafter, "February 2008 IEP"). See P 10.

34. The student was a second grader attending the Academy. P 10-1.

35. The student was classified Other Health Impaired and recommended for 15 hours per week of specialized instruction outside general education and 1.5 hours per week of psychological services outside general education. P 10-1, P 9-1.

36. The parent agreed to the implementation of the February 2008 IEP but disagreed with the number of specialized instruction hours recommended per week for

the student, believing that the student required placement in a full-time special education setting. P 10-1, P 9-5.

37. The Principal of the School, however, disagreed with the parent, reasoning that "15 hours of specialized instruction would be enough for [the student] to gain access to the general education curriculum." P 9-2.

38. Prior Notice was issued (by undated document) identifying the school setting as the School. P 10-17. The student remained in the School for the remainder of the 2007 – 2008 school year. P 9-5.

39. In January 2009, the student started to work with a psychiatrist, Dr. Bhavin Dave. P 42-1[7]; Testimony of Dave. Dr. Dave worked to treat the student's ADHD symptoms with medication and has continued to work with the student through the present day, meeting with the student once per month for 30 to 45 minutes per visit.[8] Testimony of Dave.

40. By IEP dated February 18, 2009 (hereinafter, "February 2009 IEP), the student's classification and program recommendation continued to be the same as in the February 2008 IEP. Compare P 8-1, 8-5 with P 10-1.

41. A reading specialist complemented the student's program, with additional individual and small group (4 – 5 students) reading instruction five days per week. P 8-1; Testimony of Cassidy.

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[7] Petitioners' Exhibit 42 is a written letter from Dr. Dave addressed to, "To Whom It May Concern." See P 42. It is unsigned and not on Dr. Dave's letterhead. Id. Introduction of the letter into the record was withheld by the undersigned until Petitioners offered Dr. Dave's testimony. Dr. Dave did, in fact, testify at the hearing and the credible evidence offered by Dr. Dave is that he authored the letter and can provide the parent with a signed copy of the letter on his letterhead. Id. Petitioners' Exhibit 42 was admitted without objection.

[8] The student's medication has not changed "partly because she is already on high dosages." Testimony of Dave.

42. Work with the reading specialist was not intended to be a special education service but rather a service available to all students, whether eligible for special education or not, who needed assistance with reading. Testimony of

43. The 15 hours of specialized instruction outside general education was provided in small groups that did not exceed five students. Testimony of (

44. The student's 3rd Grade Report Card reveals that the student's overall progress by the fourth advisory period in Reading/English Language Arts, Math, and Social Studies were at a Basic[9] level and in Art, Music, and Health & Physical Education were at a Proficient[10] level. P 32-1 – 32-2.

45. Comments by the student's classroom teacher suggest the student demonstrated progress throughout the school year and that she does well in small group instruction. See P 32-3 – 32-4. Executive functioning weaknesses were also noted, including failure to turn in homework due to disorganization. P 32-3, 32-5; Testimony of

46. In the DIBELS, a test that measures reading fluency and rates performance according to the colors Red (the lowest level of achievement), Yellow, and Green (the highest level of achievement), the student's achievement, which was assessed in the Red range at the start of the school year, reached the cusp between the Yellow and Green range towards the end of the school year. Testimony of

[9] The term Basic is defined as follows, "Student shows a basic working knowledge of skills/concepts; produces satisfactory work; usually applies skills/concepts correctly." P 32-1.
[10] The term Proficient is defined as follows, " Student produces work that meets the standard; frequently produces work of high quality; applies skills/concepts correctly." Id.

47. Further progress in reading was demonstrated through the use of the Read Naturally Program where the student started on a .8 reader at the start of the school year and concluded the school year on a 2.5 reader. Id.

48. By narrative dated June 19, 2009 submitted by the student's third grade classroom teacher to the Special Education Coordinator and Principal at the School, the classroom teacher made the following observations related to the student's academic progress:

> [The student] has made progress as a result of small group instruction. Her reading fluency is better, but not where she should be at the end of 3rd grade because of her attention problems. She has the ability, but not the attention to succeed. She struggles to attend and cannot work independently. She needs constant and frequent redirection and prompting in order to stay on task. Furthermore, [the student] is consistently out of focus even with her ADHD meds.

P 31-1.

49. Poor working memory, an inability to work in a large class size, and difficulties with making friends were further noted by the classroom teacher. Id.

50. Given these identified weaknesses, the classroom teacher opined that the student "needs a different academic setting OR at the least – a speech and language evaluation, O/T evaluation and more hours with a knowledgeable special education teacher trained in ADHD." Id.

51. Tutoring was provided to the student during the Summer 2009 at The Lab School of Washington. See P 22. The student worked on, inter alia, reading, math, and writing skills. See id.

52. In reading, the student focused on reading fluency. P 22-1. The student "demonstrated progress in her reading more fluidly," but continued to "have difficulty

with reading too quickly and would seem frustrated if she were told to slow down." Id. The student would also forget "which direction you read." Id.

53. In math, the student worked on number sense and writing, telling, and elapsed time. Id. The student "developed a firmer grasp on numbers and their relationships." Id. The student was "extremely comfortable with telling time and was becoming stronger with writing time." Id. Continued practice in these areas was recommended. Id.

54. In writing, the student worked on punctuation and writing in cursive. Id. The student demonstrated "much success in being able to identify punctuation errors in works that she herself did not write." P 22-2. She needed help, however, in using correct punctuation in her own writing. Id. The student had "wonderful ideas and translating that onto paper was not a challenge for her." Id. The student "demonstrated progress writing most of the lower case letters in cursive." Id.

55. The parties reached a Settlement Agreement on December 15, 2009 (hereinafter, "Settlement Agreement") resulting from a Notice of Due Process Complaint dated December 3, 2009.[11] See P 3.

56. The parties agreed that the parent was authorized to obtain an independent occupational therapy evaluation and a speech and language assessment at the expense of Respondent. P 3-2. The parties further agreed to hold an IEP Team meeting upon Respondent's receipt of the last independent evaluation to "review the evaluations, review and revise the IEP, discuss and determine location of services, and discuss and determine compensatory education (if warranted)." Id. Finally, the parties agreed to

[11] Neither party entered the Notice of Due Process Complaint dated December 3, 2009 into the record.

"discuss ESY services for Summer 2009; if ESY services are determined to be warranted; DCPS will reimburse parent cost of ESY services." Id.

57. The Settlement Agreement also includes the following language –

> This Settlement Agreement is in full satisfaction and settlement of all the claims contained in the pending Complaint, including those claims under IDEA and §504 the Parent now asserts or could have asserted within the statute of limitations as of the date of the signed Settlement Agreement.
>
> Parent is unaware of any other issues that DCPS could immediately address for the benefit of the child including, but not limited to [sic] compensatory education.

P 3-2.

58. On January 4, 2010, the parent authorized the School to provide the student with additional services by a math specialist. P 39-1.

59. On January 18, 2010, the student participated in an independent Speech and Language Evaluation (hereinafter, "January 2010 Speech-Language Evaluation"). See P 21. The student was in the fourth grade at the School. P 21-1.

60. Intelligibility and phonological development were judged to be adequate for classroom communication. P 21-2. Expressive and receptive vocabulary was assessed to be in the Above Average to Average range. P 21-3, P 18-1. Overall language skills fell in the Average range. P 21-3 – 21-5.

61. Weaknesses in the student's ability to follow multi-step directions fell Below Average within the severe range. P 21-4, 21-6.

62. The student did not warrant speech and language therapy. P 21-6, P 18-2.

63. An independent Occupational Therapy Evaluation of the student was completed on February 1, 2010 (hereinafter, "February 2010 Occupational Therapy Evaluation"). See P 20.

64. Concerns with the February 2010 Occupational Therapy Evaluation (see P 19, P 7-2) resulted in Respondent completing its own evaluation (see P 16; Testimony of Knott, Ryzhikov). The independent examiner took exception to Respondent's concerns with the February 2010 Occupational Therapy Evaluation. See P 34.

65. An Occupational Therapy Evaluation was completed on the student on March 2, 2010 (hereinafter, "March 2010 Occupational Therapy").

66. The student presented with –

> decreased ocular motor control resulting in difficulty copying from far point and poor scanning skills. Weak intrinsic hand muscles cause poor in-hand manipulation skills and decreased handwriting skills. Poor proprioceptive awareness also negatively impacts on [the student's] ability to complete fine and gross motor activities.

P 16-4.

67. Occupational therapy services were indicated and the examiner recommended 30 minutes per week to address the student's weaknesses. P 16-4; Testimony of Ryzhikov. The independent examiner had also recommended 30 minutes per week. P 20-4.

68. An IEP Team meeting was held on March 1, 2010 (hereinafter, "March 2010 IEP"). See R 6, P 5, P 7. The student was in the fourth grade at the Eaton Elementary School. R 6-1.

69. The purpose of the meeting was to review the latest evaluations and revise the student's IEP per the Settlement Agreement. P 7-1; Testimony of Knott. The IEP Team also discussed the student's progress. See P 7; Testimony of Knott.

70. The student's fourth grade teacher reported that the student's basic skills were "weak" and that the student was functioning below grade level (i.e., the fourth

grade). P 7-1; Testimony of Knott. The student "shows distraction," and has difficulty in math and putting ideas on paper. P 7-1.

71. The student's special education teacher reviewed the results of a Woodcock-Johnson III Test of Achievement completed on or about February 25, 2010. See P 7-2, R 3-2, R 12. The student's decoding skills were assessed in the 4.8 grade equivalency and her comprehension fell at a 4.0 grade equivalency.[12] P 7-2, R 3-2, R 12-1. The special education teacher reported that the student's skills are impacted by attention. Id.

72. In math, the student's basic math skills were at a 3.8 grade equivalency and her applied problems fell at a 2.8 grade equivalency. P 7-3, R 3-2, R 12-1.

73. Concerns with spelling, organizing written thoughts, and handwriting were noted. Id., R 3-3.

74. Annual goals in Mathematics, Reading, Written Expression, and Emotional, Social, and Behavioral Development were included in the IEP. R 6-2 – 6-5.

75. Given the results of the Woodcock-Johnson III Test of Achievement and the student's identified needs, the special education teacher proposed reducing the student's out of general education specialized instruction hours to aid the student to transition back to the general education classroom. P 7-3; Testimony of Baker. Specifically, the IEP Team proposed 15 hours per week of specialized instruction, 10 hours outside general education and five hours in inclusion. Id. The parent objected. Testimony of Parent.

[12] At the time of the testing, the student was in the fourth grade, sixth month (i.e., 4.6). R 12-1.

76. The IEP Team agreed to provide 10 hours of specialized instruction hours outside general education and further agreed to provide an additional 7.5 hours of specialized instruction in an inclusion setting. R 6-6.

77. Behavioral support services were reduced to 60 minutes per week from 90 minutes per week. Compare P 8-5 with R 6-6.

78. Classroom accommodations, as well as Statewide Assessment Accommodations, were included in the IEP. R 6-8.

79. ESY services were discussed and the IEP Team agreed that the student had been eligible for services during the Summer 2009 (P 7-4) and further agreed that the student would be eligible for services during the Summer 2010 (P 7-4, R 6-9). No specific recommendation for ESY services, however, is included in the IEP. See P 5-7, P 14-1.

80. The parent agreed with the contents of the IEP and acknowledged having the opportunity to be involved in its development. R 6-1. The parent agreed to the IEP mistakenly believing that the IEP Team had agreed to reduce the 15 hours of specialized instruction hours outside general education to 12.5 hours, not 10. Testimony of Parent, Knott; See P 7-3.

81. A revised IEP was issued a few days later on March 4, 2010 (hereinafter, "Revised March 2010 IEP"). See R 7.

82. Occupational therapy (i.e., 30 minutes per week) was added to the Revised March 2010 IEP after the March 2010 Occupational Therapy Evaluation was completed.[13] R 7-4; See P 35. Annual goals in this area were also added. R 7-3.

[13] The parties agreed to the provision of 11 hours of occupational therapy services as compensatory education services for missed services during the 2009 – 2010 school year. Stipulation of the Parties.

83. The parent did not agree to the "contents" of the Revised March 2010 IEP but agreed to the implementation of services. R 7-1. Notably, the Revised March 2010 IEP removed the Statewide Assessment Accommodations and, more significantly, eliminated the student's Reading, Written Expression, and Emotional, Social, and Behavioral Development annual goals. Compare R 7-6 with R 6-8.

84. On April 9, 2010, the parent, through counsel, requested additional information pertaining to the ESY services for Summer 2010. P 14-1. Respondent did not respond to petitioners' letter. P 4-4; Testimony of Parent, Miskel. However, on May 19, 2010, Petitioners were provided with the name and number of an individual who the parents should direct their questions to pertaining to ESY services. Id.

85. The student's overall performance in the DC – BAS throughout the current school year reveals Below Basic to Basic proficiency in both Reading/Language Arts and Math, with exception in the initial testing when the student was Proficient in three of the eight skills tested. See P 29; Testimony of Cassidy.

86. The DC – BAS measures whether specific objectives of the fourth grade curriculum were met. Testimony of Baker.

87. The student's IEP Progress Report for the Period 1 (i.e. August 26, 2009 through October 30, 2009) reveals that she was progressing in all Reading, Mathematics, Written Expression, and Emotional, Social, and Behavioral Development annual goals that had been introduced. See P 28-1 – 28-6. For Period 2 (i.e., November 2, 2009 through January 26, 2010), the student continued to progress in all annual goals, including in the annual goals that had not been introduced during Period 1 but were introduced during Period 2. See P 28-7 – 28-11.

88. The student is also progressing towards mastery of her annual goals in occupational therapy and counseling. See R 9, R 10.

89. As of the third advisory period, the student's 4th Grade Report Card reveals that she is Meeting the Standard (i.e., Proficient) in Reading/English Language Arts, Mathematics, Science, Art, Music, and Health & Physical Education. P 27-3 – 27-4. The student is at a Basic level in Social Studies. P 27-4.

90. The student's overall performance appears to be an improvement to her performance in third grade. Compare P 27 with P 32.

91. A resolution meeting was held on May 19, 2010 where the parties discussed the student's progress in addition to the Complaint. See P 4; Testimony of Miskel.

92. The teachers reported that the student is progressing but continues to struggle with attention. See P 4-1 – 4-9.

93. The parties further agreed to complete a Functional Behavioral Assessment (hereinafter, "FBA") of the student and the parent provided consent to evaluate. Testimony of Miskel. The FBA is in progress. Testimony of Baker.

94. By letter dated June 2, 2010, the student's psychiatrist recommended that the student be provided with various accommodations because "medication alone is not sufficient in managing her [ADHD] symptoms." P 42-1. The student continues to have "breakthrough symptoms" of distractibility, an inability to wait turns, fidgetiness, and impulsivity. Testimony of Dave.

95. Specifically, Dr. Dave recommends placement of the student in a classroom with low student to teacher ratio, frequent breaks, extended time on tasks that

require sustained attention, preferential seating, a behavior plan, and individualized assistance in reading. P 42-1; Testimony of Dave.

96. In class, the student's performance varies depending on the day, topic, and subject. Testimony of Ballou. If the student is not interested in the topic, the classroom teacher cannot get her to engage. Id.

97. The student is "highly distractible" and, on a scale of 1 to 5, 5 being the highest level of distractibility, the teacher would place the student at level 4. Id.

98. The student requires redirection every 5 to 10 minutes and her ADHD impacts her "greatly." Testimony of Ryzhikov, Baker.

99. Socially, the student is "accepted" but has no after-school play dates. Testimony of Ballou, Parent. The student has more difficulty with boys than girls. 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:

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. Appropriateness of the March 2010 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). 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 lack of progress. See S.S. ex rel. Shank v. Howard Road Academy, 585 F.Supp.2d 56, 66 (D.D.C. 2008).

In reducing the student's 15 hours per week of specialized instruction outside general education to 10 hours per week outside general education, the IEP Team felt, with the exception of the parent and her advocate, that less time in the outside of general education placement would facilitate the student's reentry to the general education classroom. Testimony of Baker. However, recognizing that the student required continuing support within the general education classroom, the IEP Team also provided

the services of the special education teacher in the general education classroom for 7.5 hours per week. R 6-6; Testimony of Baker.

Largely, I am in agreement with the IEP Team that the student's educational needs do not warrant placement of the student in a full-time special education program without mainstreaming opportunities. However, I demur with the IEP Team's decision to reduce the outside general education hours for the student given that her distractibility, impulsivity, and inability to self-regulate has not improved whatever throughout the years since the initial February 2008 IEP recommending 15 hours of specialized instruction hours outside general education and despite medication and other interventions. See Testimony of Dave; P 42.

Concerns with attentional issues and learning difficulties led to the referral for evaluation in February 2007 resulting in the March 2007 Comprehensive Evaluation. P 23-1. Even in the one-on-one testing situation the student was observed to have "significant attentional difficulties." P 23-2. Similarly, behavioral observations during the November 2007 Psychological Evaluation revealed that it was "very difficult" for the student to "maintain focus on any one task." P 24-3. "While generally [the student] was not cooperative with the process, it appeared to be more symptomatic of ADHD than a deliberate attempt to be defiant." P 24-4. Said significant difficulty with attention and concentration impacted the student's short-term memory, resulting in the student having trouble "registering information" and then recalling it. P 23-3, 23-4.

In a classroom observation completed on April 19, 2007 the student was observed to be fidgety and having difficulties with transitions. P 26-4. A second classroom observation completed on November 5, 2007 revealed that the student had a difficult time

following teacher directives, had a tendency to work ahead of where the teacher was with the rest of the class, required "a lot of re-direction," was "very fidgety," and displayed difficulties with transitions. P 24-2. Said behavior was "pretty typical" for the student. Id.

In January 2008, the parent, the student's classroom teacher, and reading resource teacher reported that the student presented with attentional issues, avoidance behavior, and difficulty retaining information. P 11-1, 11-3, P 12-1 – 12-4. The consensus was that the student functions better on a one-on-one basis. P 11-3, P 12-3.

In June 2009, the student's general education teacher made the following observations related to the student's academic progress:

> [The student] has made progress as a result of small group instruction. Her reading fluency is better, but not where she should be at the end of 3rd grade because of her attention problems. She has the ability, but not the attention to succeed. She struggles to attend and cannot work independently. She needs constant and frequent redirection and prompting in order to stay on task. Furthermore, [the student] is consistently out of focus even with her ADHD meds.

P 31-1. Poor working memory, an inability to work in a large class size, and difficulties with making friends were further noted by the classroom teacher. Id. Given these identified weaknesses, the general education teacher opined that the student "needs a different academic setting" or "more hours with a knowledgeable special education teacher trained in ADHD." Id.

By letter dated June 2, 2010, the student's psychiatrist recommended that the student be provided with various accommodations because "medication alone is not sufficient in managing her [ADHD] symptoms." P 42-1. The student continues to have "breakthrough symptoms" of distractibility, an inability to wait turns, fidgetiness, and impulsivity. Testimony of Dave. In class, for example, the student's performance varies

depending on the day, topic, and subject. Testimony of Ballou. If the student is not interested in the topic, the classroom teacher cannot get her to engage. Id. The student is "highly distractible" and, on a scale of 1 to 5, 5 being the highest level of distractibility, the teacher would place the student at level 4. Id.

In all, between February 2007 and June 2010, it is clear beyond doubt that the student's educational performance is impacted by her distractibility, impulsivity, and inability to self-regulate despite the interventions of medication, one-on-one instruction, and small group instruction. There have been no appreciable gains in what might be the student's primary hindrance. To this day, the student requires redirection every 5 to 10 minutes as her ADHD impacts her "greatly." Testimony of Ryzhikov, Baker. However, and despite the student's long-standing and unyielding significant attentional difficulties, the IEP Team reduced the student's outside general education hours with the hope of "transitioning" her back to the general education classroom without the benefit of a behavior plan in place.

Notably, the March 4, 2010 IEP does note include any Emotional, Social, and Behavioral Development annual goals. See R 7. However, the record evidence suggests that the annual goals included in the March 1, 2010 IEP were intended to be carried over to the March 4, 2010 IEP. See R 10-1 – 10-4.

In arguing that the student's March 2010 IEPs were not reasonably calculated to confer educational benefit to the student and that the student requires placement in a full-time special education school, Petitioners rely heavily on what Petitioners perceive to be a lack of progress by the student throughout the 2009 – 2010 school year. Testimony of Parent, Knott, Miskel. A student's failure to increase test scores is not dispositive in

determining whether the student made progress. See Jaccari, 2010 WL 625332 at 13. 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).

Inconsistent progress is evident in the record but wholesale lack of progress is not. See, e.g., R 12, P 27, P 28, and P 29. What is clear, however, is that the apparent gains in reading and math resulted from small group instruction outside general education and not from the student's participation in these subject areas while in the general education classroom. I note that the special education teacher pulls the student out in the morning while the other non-disabled students are working on math and Reading/English Language Arts. Testimony of Ballou.

Further, although the results of the Woodcock-Johnson III Test of Achievement completed on or about February 25, 2010 suggests near grade level performance in reading when reviewing the grade equivalencies (see P 7-2, R 3-2, R 12), a comparison of the standard scores in this test with the standard scores the student obtained in the administration of the Woodcock-Johnson III Test of Achievement in November 2007 reveals that the student's progress continues to be labored.[14] Compare R 12-1 with P 24-6. In decoding, as measured by the Letter-Word Identification subtest, the student's November 2007 standard score was 114 (83rd percentile) and her February 2010 standard score was 102 (55th percentile); in reading comprehension, as measured by the Passage Comprehension subtest, the student's November 2007 standard score was 94 (35th

[14] The more recent scores continue to fall within the average range. R 12-1.

percentile) and her February 2010 standard score was 97 (42nd percentile); and, in basic computation, as measured by the Calculation subtest, the student's November 2007 standard score was 95 (37th percentile) and her February 2010 standard score was 93 (33rd percentile). Id. Said standard scores, albeit in the average range, depict a student who has simply maintained average performance, without much growth, in reading and math, and presumably because of the specialized instruction provided outside the general education environment. See Testimony of Cassidy. I note that the student's intellectual functioning is in the High Average range, with verbal skills in the Superior range. P 23-2, 23-6.

In contrast, a review of the DC – BAS suggests that the student continued to struggle with the fourth grade curriculum throughout the current school year. See P 29. The student's overall performance in the DC – BAS was within the Below Basic to Basic proficiency in both Reading/Language Arts and Math. Id. The student, however, had tested in the Proficient range at the start of the school year in three of the eight skills tested but her performance declined in subsequent testing, suggesting that she regressed in the skill areas tested. Id.; Testimony of Cassidy.

A reduction of the number of outside general education specialized instruction hours – albeit well intended – cannot be sustained given the student's learning needs and inconsistent educational performance as quantified by the February 2010 Woodcock-Johnson III Test of Achievement, DC – BAS, and teacher progress reports. This said, however, neither can I agree that the student's overall educational profile warrants placement in a significantly more restrictive program. The student has demonstrated an ability to maintain average performance, as measured by the Woodcock-Johnson III Test

of Achievement, in a less restrictive environment. Rowley simply requires a "basic floor of opportunity."

Kerry Cassidy, the student's special education teacher during the 2008 – 2009 school year credibly testified that more than 15 hours outside the general education environment would be too much given that the student would also be pulled out for related services and specials.[15] See Testimony of Cassidy. Her recommendation based on her understanding of the student's educational profile and needs, as well from the information gleaned from the documents in the record, that the student continue to be provided with 15 hours of specialized instruction hours outside general education in tandem with 30 to 45 minutes per day of push-in services by a special education teacher in the general education classroom to assist with keeping the student on task and to negotiate transitions and social-interactions, maintains the student in the least restrictive environment and provides a "basic floor of opportunity." I, therefore, agree with said recommendation and adopt it as specified in the Order below. I further find that the March 1, 2010 and March 4, 2010 IEPs were not reasonably calculated to confer educational benefit to the student for the reasons stated herein.

2. ESY Services

Pursuant to 34 C.F.R. § 300.106(a), an LEA must ensure that ESY services are available as necessary to provide FAPE to the student. ESY services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with 34

[15] In weighing the testimony of Ms. Cassidy against the student's current teachers, I am mindful that Ms. Cassidy did not work with the student during this school year and that she is no longer a teacher in the Eaton Elementary School. Ms. Cassidy, however, offered her opinion based on her knowledge of the student and after having reviewed all of the disclosures (almost 300 pages). See Testimony of Cassidy. Her testimony was candid, forthright, and consistent and demonstrated and understanding of the documents received into the record.

C.F.R. §§ 300.320 through 300.324, that the services are necessary for the provision of FAPE to the student. 34 C.F.R. § 300.106(a)(2). ESY services cannot be limited to particular categories of disability, or duration of those services. 34 C.F.R. § 300.106(a)(3)(i) and (ii). Pursuant to 34 C.F.R. § 300.106(a), the term ESY services means special education and related services that are provided to a child with a disability beyond the normal school year of the LEA in accordance with the child's IEP and at no cost to the parents of the child.

IDEA does not establish a standard for determining a student's needs for ESY services. See Letter to Myers, 213 IDELR 255 (OSEP 1989). States have the discretion to establish policies and procedures, within established judicial, statutory and regulatory guidelines, for providing ESY services. As a rule, if the student will experience any loss or regression in skills during a school break, ESY services should be made available to the student. See Lawyer v. Chesterfield County Sch. Bd., 19 IDELR 904, (E.D. Va. 1993). Failure to meet IEP goals does not necessarily entitle the student to ESY services. Letter to Kleczka, 30 IDELR 270 (OSEP 1998). ESY services are not meant nor required to maximize a student's educational benefit. Cordrey v. Euckert, 17 IDELR 104 (6th Cir. 1990), cert. denied, 112 S.Ct. 1391 (1991).

In the instant matter, the parties agree that the student requires ESY services. See R 6-9, R 7-7, P 7-4. However, the March 2010 IEPs do not include the special education and related services to be provided to the student during the Summer 2010 or the ESY goals to be worked on during the Summer 2010. Id. Attempts by Petitioners to secure additional information (see P 14-1, P 4-4) resulted in Respondent simply providing Petitioners with the name and number of an individual who the parents should direct their

questions to pertaining to ESY services. P 4-4. It is an IEP Team, however, who is responsible for determining the ESY services and goals. See 34 C.F.R. § 300.106(b)(1)(ii).

Nonetheless, in the absence of Petitioners providing the undersigned with a proposed ESY services plan whatever for his consideration, the undersigned cannot determine what would be appropriate ESY services for the student. Petitioners request, offered at the conclusion of the hearing after the parties had rested, that the undersigned place the student in The Lab School of Washington summer program, while tempting given Respondent's omission and failure to be responsive, is not possible given that Petitioners' counsel did not demonstrate that said program would provide FAPE to the student.

3. Compensatory Education

The final issue is whether the student is entitled to compensatory education services for Respondent's failure to provide the student with "sufficient instructional services" by a reading specialist for the 2009 – 2010 school year and for its failure to provide occupational therapy 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 (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.

Petitioners contend that the services of a reading specialist, as documented in the February 2009 IEP, were intended to be part of the student's special education program and should have been carried over to the 2009 – 2010 school year. P 8-1; Testimony of Parent. While the record evidence evidences that the student has benefitted from the services of the reading specialist, I remain unconvinced that the February 2009 IEP Team offered the services of a reading specialist for additional individual and small group instruction five days per week to the student as a special education program. Testimony of Cassidy, Braxton. The credible testimony offered at the hearing made clear that the work with the reading specialist was not intended to be a special education service but rather a building-level service available to the student, just as it was made available to other students, including non-disabled peers. Id.

With respect to occupational therapy services dating back to March 2007 when the parent presumably raised the concern with the MDT (see P 13-1), any compensatory education services that might have been due, were waived by the Settlement Agreement reached by the parties in December 2009.

Pursuant to the Settlement Agreement, the parties agreed that the parent was authorized to obtain an independent occupational therapy evaluation. P 3-2. The parties further agreed to hold an IEP Team meeting upon Respondent's receipt of the last independent evaluation to "review the evaluations, review and revise the IEP, discuss and determine location of services, and discuss and determine compensatory education (if warranted)." Id. The parties further agreed to the following language –

> This Settlement Agreement is in full satisfaction and settlement of all the claims contained in the pending Complaint, including those claims under IDEA and §504 the Parent now asserts or could have asserted within the statute of limitations as of the date of the signed Settlement Agreement.
>
> Parent is unaware of any other issues that DCPS could immediately address for the benefit of the child including, but not limited to [sic] compensatory education.

P 3-2. Absent any qualifying language defining the period contemplated for compensatory education services, Petitioners waived all claims to compensatory education services that might have been warranted for any period prior to the Notice of Due Process Complaint dated December 3, 2009 and within IDEA's two-year statute of limitations. Accordingly, Petitioners request for compensatory education services is denied.

Nonetheless, recognizing that Respondent requested an occupational therapy evaluation in June 2009 (see P 31), the parties agreed that the student should be provided with 11 hours of compensatory occupational therapy services (Stipulation of the Parties), and nothing in this decision should be construed to deny the student the compensatory occupational therapy services agreed upon by the parties.

ORDER

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

1. Petitioners' request for a full-time special education program is hereby DENIED.

2. Petitioners' request for compensatory education services is hereby DENIED, but nothing in this decision should be construed to deny the student the compensatory occupational therapy services agreed upon by the parties.

3. The student's March 4, 2010 IEP is hereby amended as follows:

a. The student is to be provided with 15 total hours of specialized instruction hours outside general education by a special education teacher.

b. The student is to be provided with 2.5 total hours of specialized instruction hours in general education by a special education teacher.

c. The annual goals in Reading, Written Expression, and Emotional, Social, and Behavioral Development found in the March 1, 2010 IEP are to be incorporated into the March 4, 2010 IEP.

4. Within 10 calendar days from this Order, Respondent is to present to Petitioners a proposed ESY services plan that includes the ESY special education and related services to be provided to the student during the Summer 2010, as well as identifies the ESY goals to be worked on during the Summer 2010. Should the parties reach an agreement on the ESY services and goals, the plan shall be incorporated into the student's March 4, 2010 IEP.

5. As agreed upon by the parties, the student is to be provided with 11 hours of compensatory occupational therapy services. Within 15 calendar days from this Order, Respondent is to present to Petitioners a proposed compensatory occupational therapy services plan outlining when the services will be provided, whether the services will be provided by Respondent or independently (and at no cost to the parent), and the location of services, if the services are to be provided by Respondent. The 11 hours are to be completed by no later than June 2011.

6. Prior to the conclusion of the current school year, i.e., 2009 – 2010, Respondent shall have completed the FBA that is in progress.

7. Upon completion of the FBA, and prior to the commencement of the 2010 – 2011 school year, Respondent shall convene an IEP Team meeting to review the FBA and discuss whether the student warrants a BIP. Should the student require a BIP, the BIP shall be developed at the ordered IEP Team meeting and incorporated into the March 4, 2010 IEP.

8. At the ordered IEP Team meeting the parties are directed to discuss how the student's teachers will provide the parent with progress updates during the 2010 – 2011 school year. The parties are also free to discuss other matters.

9. Petitioners have prevailed in demonstrating that the March 2010 IEPs denied the student FAPE.

10. The Complaint is DISMISSED with prejudice.

IT IS SO ORDERED.

DATED: June 11, 2010

DEUSDEDI MERCED

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).