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

Student Hearing Office  
1150 5<sup>th</sup> Street, S.E.  
Washington, DC 20003

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[Parent], on behalf of,  
[Student],<sup>1</sup>

Petitioner,

v

District of Columbia Public Schools (DPCS),

Respondent.

Date Issued: August 20, 2010

Hearing Officer: Jim Mortenson

Case No:

Hearing Date: August 11, 12, & 13, 2010

Rooms: 1 (Day 1), 5a (Day 2), & 5b (Day 3)

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**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

This matter came before Independent Hearing Officer (IHO) Jim Mortenson over three days beginning at 1:00 p.m. on August 11, 2010, in hearing room 1, and continuing on August 12, 2010, in hearing room 5a, and concluding on August 13, 2010, in hearing room 5b. The due date for the Hearing Officer's Determination (HOD) is August 21, 2010, pursuant to 34 C.F.R. § 300.515. This HOD is issued on August 20, 2010.

The hearing in this matter was conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and D.C. Mun. Regs. tit. 5, Chap. 30. The hearing was closed to the public.

Present on the first day of hearing were:

Megan Blamble, Esq., Petitioner's Counsel

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<sup>1</sup> Personal identification information is provided in Appendix A.

Daniel McCall, Esq., Respondent's Counsel

Petitioner, Student's Guardian

An observer from the Petitioner's Counsel's office was also present. Only the two attorneys were present during the next two days, but for witnesses testifying.

Six witnesses testified at the hearing for the Petitioner:

Petitioner (P), Student's Guardian

Guardian Ad Litem Investigator

Social Worker

Education Consultant (Admitted as expert in special education programming and placement because: The witness is a qualified expert in special education and programming; her knowledge will assist the IHO in understanding the Student's educational profile, needs, and the appropriateness of his IEP; and her testimony is relevant and reliable because of the forgoing and because she has sufficient firsthand observation of the Student. There is concern the witness did not observe the Student in his classroom environment and only discussed the Student with the Petitioner and others who were not his school service providers or teachers. This concern will impact the weight given the witness's testimony regarding the Student's educational performance.)

IEP Coordinator,

Dr. Meredith Branson (M.B.), Psychologist, (Admitted as expert in psychology because: The witness is a qualified expert in psychology; her knowledge will assist the IHO in understanding the assessment she conducted of the Student; and her testimony is relevant and reliable because of the forgoing and because she has sufficient firsthand observation of the Student in that she was the person who conducted the assessment, over two six hour sessions, upon which her report was written. The witness did not conduct an observation of the Student in the classroom or discuss the Student's performance with his teachers or service providers.)

Three witnesses testified at the hearing for the Respondent:

Special Education Teacher, DCPS

Dorcus Lawrence (D.L.), Special Education Coordinator, DCPS

School Psychologist. DCPS (The Respondent moved for this witness to be admitted as an expert and this motion was denied because: although the

witness is a qualified expert in school psychology, and her testimony could assist the IHO in understanding the review of the assessments she conducted, she neither conducted an assessment of the Student nor had ever met the Student. Thus, she lacked the firsthand knowledge or other facts to support nothing more than a review of the work of others.)

The complaint in this matter was filed on June 9, 2010. A response to the complaint was filed on June 21, 2010. A prehearing conference was held on July 7, 2010, and the first appointed Independent Hearing Officer (IHO) recused himself as a result of scheduling conflicts between the Respondent's Counsel and himself. The undersigned IHO was appointed on July 8, 2010. A second prehearing conference was held on July 21, 2010, and a prehearing order was issued on that date.

The Petitioner is seeking as relief: 1) Revisions to the Student's IEP including: the statement of the Student's present levels of academic achievement and functional performance to address his executive functioning needs; annual goals; and special education and related services and supplementary aids and services, including services on a "full-time" basis and one on one tutoring from a person trained to work with children with ADHD and learning disabilities. 2)

Placement at

12 documents were disclosed and offered jointly by the Petitioner and Respondent. (J 1 – J

12). The following joint exhibits were admitted into evidence:

J 1	-	(May 26, 2010)	-	Partial draft individualized education program (IEP)
J 2	-	May 21, 2010	-	Independent Psychological Evaluation Checklist
J 3	-	January 8, 2010	-	(Behavior Intervention Plan, BIP)
J 4	-	December 18, 2009	-	Multidisciplinary Team 30 Day Review Meeting Notes
J 5	-	November 18, 2009	-	IEP
J 6	-	November 18, 2009	-	IEP Meeting Notes
J 7	-	October 22, 2008	-	IEP
J 8	-	January 8, 2009	-	Service Tracker
		March 10, 2009	-	Service Tracker
		April 5, 2009	-	Service Tracker

		June 1, 2009	-	Service Tracker
		October 29, 2009	-	Service Tracker
		November 17, 2009	-	Service Tracker
		December 15, 2009	-	Service Tracker
		January 15, 2010	-	Service Tracker
		February 16, 2010	-	Service Tracker
J 9	-	April 26, 2010	-	Comprehensive Neuropsychological Evaluation
J 10	-	September 29, 2008	-	Psychoeducational and Psychological Evaluation
J 11	-	June 18, 2010	-	Report to Parents on Student Progress
J 12	-	December 22, 2009	-	Student Timetable (BV)

23 documents were disclosed and offered into evidence by the Petitioner (P 1 – P 23). Of these, P 1- P 17, P 21, P 23 and P 24 were admitted into evidence.<sup>2</sup> The Petitioner's exhibits are as follows:

P 1	-	June 12, 2009	-	Sign In Sheet (Meeting Notes)
P 2	-	December 12, 2008	-	IEP
P 3	-	December 12, 2008	-	Multidisciplinary Team (MDT) Meeting Notes
P 4	-	October 22, 2008	-	Building Level Multidisciplinary Meeting (BLMDT) Meeting Notes
P 5	-	October 20, 2008	-	Review of Independent Assessment
P 6	-	June 3, 2009	-	Service Tracker
		June 4, 2009	-	Service Tracker
		November 9, 2009	-	Service Tracker
		February 2, 2010	-	Service Tracker
		March 1, 2010	-	Service Tracker
		April 22, 2010	-	Service Tracker
P 7	-	October 22, 2008	-	Service Tracker
		December 4, 2008	-	Service Tracker
		June 25, 2009	-	Service Tracker
		November 3, 2009	-	Service Tracker
		September 28, 2009	-	Service Tracker
		October 13, 2009	-	Service Tracker
		December 7, 2009	-	Service Tracker
		December 18, 2009	-	Service Tracker
		February 12, 2010	-	Service Tracker
		March 11, 2010	-	Service Tracker
		April 9, 2010	-	Service Tracker

<sup>2</sup> P 24 was not disclosed as it was received after the disclosure due date. The IHO requested it and there were no objections to its addition to the exhibits.

P 8	-	March 1, 2010	-	Student Timetable
P 9	-	January 22, 2010	-	Report to Parents on Student Progress
P 10	-	December 4, 2009	-	Report to Parents on Student Progress
P 11	-	October 30, 2009	-	Report to Parents on Student Progress
P 12	-	September 25, 2009	-	Report to Parents on Student Progress
P 13	-	August 26, 2009	-	Student Timetable
P 14	-	June 15, 2009	-	Report to Parents on Student Progress
P 15	-	December 2, 2008	-	Report to Parents on Student Progress
P 16	-	undated	-	(Discipline Notice)
P 17	-	undated	-	Department of Special Education Approved Nonpublic Day Schools
P 21	-	October 29, 2008	-	Letter from Blamble to Lawrence
P 23	-	undated	-	Partial Curricula Vitae Meredith Branson
P 24	-	August 5, 2010	-	(Student's 2010 DC-CAS Scores)

14 documents were disclosed and offered by the Respondent. (R 1 – R 14) All 14 were admitted into the record. Respondent's exhibits are:

R 1	-	undated	-	Due Process Complaint Disposition (unsigned)
R 2	-	June 22, 2010	-	Multidisciplinary Team (MDT) Resolution Meeting Meeting Notes
R 3	-	May 26, 2010	-	(Draft) IEP
R 4	-	May 26, 2010	-	IEP notes
R 5	-	May 26, 2010	-	IEP Team Member Excusal Form
R 6	-	March 26, 2010	-	Report to Parents on Student Progress
R 7	-	June 16, 2010	-	Attendance Summary
R 8	-	May 26, 2010	-	Receipt
R 9	-	November 18, 2009	-	Receipt
R 10	-	November 19, 2009	-	(Release of Information)
R 11	-	May 13, 2010	-	Letter from Blamble to
R 12	-	April 12, 2010	-	Letter from Blamble to (with attached completed BRIEF)
R 13	-	July 21, 2010	-	Letter from Brown to [Petitioner]
R 14	-	undated	-	Curricula Vitae

## II. ISSUES<sup>3</sup>

1. Whether the Respondent failed to ensure that the Student's individualized education program (IEP) was accessible to each regular education teacher, special education

<sup>3</sup> A fourth issue concerning the provision of speech and language services was resolved and withdrawn by the start of the hearing.



Student was in regular education classes when his IEP required special education in segregated classes.<sup>6</sup> Neither the speech and language pathologist nor the occupational therapist had seen the Student's IEP as of the October 22, 2008, IEP team meeting.<sup>7</sup>

3. At the start of the 2008-2009 school year, the Student was performing below the basic level academically and was experiencing behavioral problems, including fighting and other poor conduct.<sup>8</sup> The Student was diagnosed with Attention Deficit Hyperactivity Disorder – Combined Type (ADHD), Disruptive Behavior Disorder NOS, Mood Disorder NOS, Mixed Receptive-Expressive Language Disorder, and Learning Disorder NOS.<sup>9</sup> His cognitive functioning is in the borderline range.<sup>10</sup> His adaptive skills, at the start of the 2008-2009 school year, were in the extremely low range.<sup>11</sup> At the start of the 2008-2009 school year, when the Student was about 12.5 years of age, his academic achievement functioning, according to the Woodcock-Johnson III (WJ-III) Tests of Achievement, broad scores, were: Broad Reading, 77 (Low); Broad Math, 48 (Very Low); and Broad Written Language, 58 (Very Low).<sup>12</sup> The Student has difficulty with organization and remembering to bring things to and from class.<sup>13</sup> He often engages in horseplay between classes and fails to arrive on time.<sup>14</sup>
4. The Student requires, and has required since at least the start of the 2008-2009 school year, an academic setting that offers a high level of structure, a small student to teacher

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<sup>6</sup> T of P. (No evidence was presented to refute the testimony of P on this point and the revision of the IEP in question was not offered.)

<sup>7</sup> T of (No evidence was presented to refute the testimony of ] on this point.)

<sup>8</sup> J 10.

<sup>9</sup> J 10. (This report referenced several other assessment reports that sometimes contained conflicting diagnoses. Only the more relevant and final diagnoses of the evaluation cited are listed here.)

<sup>10</sup> J 10. (Specifically, WISC-IV scores.)

<sup>11</sup> J 10. (Adaptive skills are those which people need to meet "daily demands and expectations of his or her environment.")

<sup>12</sup> J 10. (These scores had an age-equivalency of approximately 9 years for reading, and 7.5 years for math and written language.)

<sup>13</sup> T of P, T of

<sup>14</sup> T of P, T of T of

ratio, firm boundaries, clear and consistent expectations, consequences for inappropriate behavior and on-site therapies including individual, group, and family counseling as needed.<sup>15</sup> Instruction in a small group setting that targets both foundational skills and higher order concepts is necessary, as well as specific instruction in study skills strategies and techniques to assist him in improving his anger control, coping, frustration tolerance, and interpersonal, social and decision-making skills.<sup>16</sup> He also requires close monitoring of his learning and conduct.<sup>17</sup> He requires positive behavior interventions to reinforce good behavior.<sup>18</sup> He requires speech and language therapy.<sup>19</sup>

5. The IEP proposed October 22, 2008, failed to accurately state the Student's present levels of academic achievement and functional performance.<sup>20</sup> General statements were included which were not specific as to how the Student's disability affects his involvement and progress in the general curriculum.<sup>21</sup> These statements led to goals that were too vague to be measurable or meaningful.<sup>22</sup> There were goals written for: math, reading, writing, communication/speech and language, emotional/social/behavioral development, and motor skills/physical development. The special education and related

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<sup>15</sup> J 9, J 10. (These assessment reports were both conducted independently from the Respondent and were conducted in September 2008 and April 2010, respectively. The findings and recommendations were very consistent with each other. The Respondent did not conduct its own assessments and its reviews of these two assessment reports did not find fault with either of them (J 2 & P 5).)

<sup>16</sup> J 9, J 10.

<sup>17</sup> J 9, J 10.

<sup>18</sup> J 9, J 10.

<sup>19</sup> J 10, R 2, R 3. (There is no dispute the Student requires speech and language therapy.)

<sup>20</sup> J 7, T of

<sup>21</sup> J 7, T of (For example, the stated level of academic achievement in reading was: "Student can read simple words. Student requires special education resource in the area of reading. Student's disability hinders his ability to perform reading tasks at his expected grade level." All of the statements concerning academic achievement and functional performance were similar.)

<sup>22</sup> J 7, T of S.I, T of (For example, the goal for reading stated "[Student] will improve his English language arts skills through the use of language development, informational and literary text by mastery of his shorterterm [sic] objectives." This goal fails to address a specific skill based on the State content standards, but rather is a general statement applicable to any child, disabled or not, entering school for the year. Furthermore, this goal, as well as the communication goal, references objectives which are not stated in the IEP. All of the goals in this revision of the IEP are similarly written.)

services and supplementary aids and services were not appropriate to meet the Student's needs as they do not reflect the recommendations in the most recent evaluation and no other evidence of the Student's needs or education and services to meet them was provided.<sup>23</sup> The special education to be provided was 11 hours per week of unspecified specialized instruction outside of the general education setting.<sup>24</sup> The related services included 60 minutes per week of each of the following, outside of the general education setting: occupational therapy and speech-language pathology.<sup>25</sup> The supplementary aids and services included: extended time on subtests, preferential seating, and simplification of oral directions.<sup>26</sup> The Student's academic achievement was to be assessed using the DC-CAS with accommodations.<sup>27</sup>

6. The IEP was revised on December 12, 2008.<sup>28</sup> The statements of present levels of academic achievement and functional performance were improved with the addition of assessment scores in various areas, but, with the exception of emotional/social/behavioral development, continued to fail to specifically and accurately describe how the Student's disability affected his involvement and progress in the general curriculum.<sup>29</sup> The goals were not revised.<sup>30</sup> The services were changed to add 10 hours per week of unspecified

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<sup>23</sup> J 7, T of (No prior written notice was provided which showed the explanation for the proposals or the data upon which they were based. While the IEP team must make the decision as to what the IEP requires, this determination must be data based, not arbitrary. See, 34 C.F.R. § 300.503(b)(3). Furthermore, the Respondent argues that the Petitioner agreed to the IEP. Whether the Petitioner agreed to any particular IEP is irrelevant as it is the Respondent's duty to meet the requirements of the law.)

<sup>24</sup> J 7. (Specific instructional methods are not required unless the IEP team determines they are necessary to provide a FAPE. See, 71 Fed. Reg. 46665 (August 14, 2006). Here, the uncontroverted assessment report recommended specific instructional methodologies, but these were not specified in the IEP and there was no other report or documentation of alternatives for the team to choose or consider.)

<sup>25</sup> J 7.

<sup>26</sup> J 7.

<sup>27</sup> J 7, P 2, J 5. (This determination was never changed in the IEP.)

<sup>28</sup> P 2.

<sup>29</sup> P 2. T of

<sup>30</sup> J 7, P 2. (It would not normally be expected that goals are revised after less than two months, but in this case the goals were originally not specific or measurable and remained so.)

specialized instruction and one hour per week of unspecified behavioral support services.<sup>31</sup> The special education and other services remained unsupported by any data to show they were reasonably expected to meet the needs of the Student.<sup>32</sup>

7. The IEP was again revised on November 19, 2009, during the Student's grade year.<sup>33</sup>

With the exception of communication/speech and language goals (one vague goal changed to five specific goals) the statements of present levels of academic achievement and functional performance and the goals did not change.<sup>34</sup> Special education was changed to be provided in the general education setting.<sup>35</sup> The related services were all reduced to 30 minutes per week.<sup>36</sup>

8. The Student's progress in school was positive, despite the IEP and lack of progress toward goals, but there is a gap between his academic achievement and that expected of a student for his grade level.<sup>37</sup> The Student scored "Basic" on the 2010 DC-CAS, meaning he showed some academic knowledge and skills for his grade level, but is in need of academic assistance.<sup>38</sup> From December 2008 through the end of the 2009-2010 school year, the Student did not fail any classes, and earned largely Ds, Cs, and Bs.<sup>39</sup> He constantly had reports of poor behavior in some classes, not completing assignments, and

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<sup>31</sup> J 7, P 2. (A specific behavioral support plan was not put in place until January, 2010.)

<sup>32</sup> P 2.

<sup>33</sup> J 5.

<sup>34</sup> P 2, J 5, T of (It is unclear whether this represents solely a failure to make any progress toward goals, sloppy record keeping, or both. Likely, it is a result of the initial statements of present levels of performance (which were no longer "present levels" a year later) and goals being too vague to be meaningful to measure educational and functional progress. One exception would be the motor skills goal of the Student being able to write his name. Clearly, it could be determined whether that goal was accomplished. If, during the course of the year, progress was not being made, it would have been incumbent upon the IEP team to review and revised the IEP to address that, long before the annual IEP review, per 34 C.F.R. § 300.324(b).)

<sup>35</sup> J 5, P 1, T of P, T of (Inexplicably, this change was made for the start of the 2009-2010 school year, but was not reflected in the IEP until November 2009, which was back-dated to reflect it. Also, like the other IEP proposals, there is no evidence prior written notice was provided.)

<sup>36</sup> J 5, P 1.

<sup>37</sup> J 2, J 10, J 11, P 5, P 9, P 10, P 11, P 12, P 14, P 15, P 24, R 6.

<sup>38</sup> P 24. (The next level on the DC-CAS is "proficient" which is the level a student should be, or above.)

<sup>39</sup> P 9, P 10, P 11, P 12, P 14, P 15, R 6, J 11.

requests for conferences with his parent.<sup>40</sup> It was often reported that he participated well in class.<sup>41</sup> The scores on the WJ III in April 2010, a couple of months after he turned 14 years of age, also showed slight, although not significant, improvement with his broad scores as follows: Broad Reading, 82; Broad Math, 48; and Broad Written Language, 68.<sup>42</sup> The Student's scoring on the Read 180 program also showed some gradual growth.<sup>43</sup>

9. Staff attempted to address the Student's behaviors and executive functioning deficits in ways not documented on the IEP.<sup>44</sup>

10. On May 26, 2010, an IEP team meeting was convened.<sup>45</sup> There was no regular education teacher at the start of the IEP team meeting.<sup>46</sup> The Student's Computer teacher was asked to participate and brought some documents to the meeting then participated for some of the meeting by phone but gave no substantive input.<sup>47</sup> A regular education teacher was not excused from the meeting.<sup>48</sup> The IEP meeting was to review the recent neuropsychological evaluation.<sup>49</sup> The Respondent brought a draft IEP to the meeting.<sup>50</sup>

The Petitioner and her representative wanted the Student's "label" changed from specific learning disability to multiple disabilities and wanted the Student in a "full-time" special

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<sup>40</sup> P 9, P 10, P 11, P 12, P 14, P 15, R 6, J 11.

<sup>41</sup> P 9, P 10, P 11, P 12, P 14, P 15, R 6, J 11.

<sup>42</sup> J 9. (The age-equivalency of these scores are, respectively: 10 years three months, seven years nine months, and eight years nine months.)

<sup>43</sup> T of

<sup>44</sup> T of T of T of P.

<sup>45</sup> Stipulated fact.

<sup>46</sup> T of T of

<sup>47</sup> T of R 4.

<sup>48</sup> T of R 5 (This "excusal form" agreement was the only one presented as evidence, and it is not for the regular education teacher.)

<sup>49</sup> T of T of T of P.

<sup>50</sup> T of R 3. (The Petitioner had asserted this document was a proposed IEP, but the document and testimony show there has not been a proposed IEP for the 2010-2011 school year.)

education setting.<sup>51</sup> As a result the meeting ended without discussion of the IEP and the complaint in this matter followed before another meeting could be held.<sup>52</sup>

11. The Student was accepted at \_\_\_\_\_ on June 10 or 11, 2010, for the 2010-2011 school year.<sup>53</sup> It is an appropriate school for him.<sup>54</sup> \_\_\_\_\_ is a non-public segregated school for children with various disabilities including specific learning disabilities and executive functioning problems.<sup>55</sup> The District of Columbia curriculum is used and the Student will be in a small class with ten other children, a head teacher, assistant teacher, and paraprofessionals when needed.<sup>56</sup> The cost of \_\_\_\_\_ is \_\_\_\_\_ per year plus the cost of any related services.<sup>57</sup>

#### IV. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. In reviewing this determination, a court's inquiry will be "twofold. First, has the State complied with the procedures set for in the Act? And second, is the [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Board of Educ. v. Rowley, 458 U.S. 176, 206-207 (1982). Thus, the IHO should also utilize this two part test in analyzing the facts.

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<sup>51</sup> T of P, T of \_\_\_\_\_ T of \_\_\_\_\_ R 4. (An IEP need not include a disability label, *see* 34 C.F.R. § 300.320, and a placement determination is made after the IEP has been developed or revised. *See*, 34 C.F.R. §§ 300.116, 300.320, 300.324. "Full-time," in the context of an IEP, is a term of art in the District of Columbia that refers to an entirely segregated school or program in which special education and related services are delivered to a student with a disability.)

<sup>52</sup> T of D.L., R 4, *See*, Due Process Complaint Notice filed June 9, 2010.

<sup>53</sup> T of \_\_\_\_\_

<sup>54</sup> T of \_\_\_\_\_ J 9, J 10.

<sup>55</sup> T of \_\_\_\_\_

<sup>56</sup> T of \_\_\_\_\_

<sup>57</sup> T of \_\_\_\_\_

2. 34 C.F.R. § 300.323 When IEPs must be in effect.

(a) General. At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320.

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(d) Accessibility of child's IEP to teachers and others.

Each public agency must ensure that —

(1) The child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and

(2) Each teacher and provider described in paragraph (d)(1) of this section is informed of —

(i) His or her specific responsibilities related to implementing the child's IEP; and

(ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

3. The Student's IEP was not in effect at the start of the 2008-2009 school year. It was not implemented until some point following the Petitioner becoming aware that the IEP was not being implemented, but before the October 22, 2008, IEP team meeting. The speech pathologist had not seen the IEP by the time of the October 22, 2008, IEP team meeting, nor had the occupational therapist. Thus, the procedural requirement under 34 C.F.R. § 300.323 was not complied with.

4. 34 C.F.R. § 300.321 IEP Team.

(a) General. The public agency must ensure that the IEP Team for each child with a disability includes —

(1) The parents of the child;

(2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);

(3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;

(4) A representative of the public agency who —

(i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(ii) Is knowledgeable about the general education curriculum; and

(iii) Is knowledgeable about the availability of resources of the public agency.

(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;

- (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (7) Whenever appropriate, the child with a disability.

.....

(e) IEP Team attendance.

(1) A member of the IEP Team described in paragraphs (a)(2) through (a)(5) of this section is not required to attend an IEP Team meeting, in whole or in part, if the parent of a child with a disability and the public agency agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(2) A member of the IEP Team described in paragraph (e)(1) of this section may be excused from attending an IEP Team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if —

(i) The parent, in writing, and the public agency consent to the excusal; and

(ii) The member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

5. The Respondent failed to have the required team members at the October 22, 2008, and May 26, 2010, IEP team meetings. Regular education teachers were not at either team meeting and were not properly excused. The limited participation of the computer class teacher at the May 26, 2010, IEP team meeting does not equate to the expected level of participation as the teacher was not involved in the broader discussion of the Student's functional performance. Thus, the procedural requirement under 34 C.F.R. § 300.321 was not complied with.

6. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

special education and related services that —

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA, including the requirements of this part;

(c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17. The Supreme Court has described the purpose of the IDEA quite clearly:

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a “free appropriate public education,” we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Board of Educ. v. Rowley, 458 U.S. 176, 203-204 (1982). It is within this legal context we must examine the case at hand.

7. “Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability[.]” 34 C.F.R. § 300.39(a)(1). Federal

Regulations at 34 C.F.R. § 300.39(b)(3) defines “specially designed instruction” as:

adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

8. An IEP must include:

- (1) A statement of the child's present levels of academic achievement and functional performance, including —
  - (i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); . . .
  - (2)(i) A statement of measurable annual goals, including academic and functional goals designed to —
    - (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
    - (B) Meet each of the child's other educational needs that result from the child's disability; . . .
  - (3) A description of —
    - (i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
    - (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
  - (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf

of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child —

- (i) To advance appropriately toward attaining the annual goals;
  - (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
  - (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
- (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;
- (6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why —
- (A) The child cannot participate in the regular assessment; and
  - (B) The particular alternate assessment selected is appropriate for the child; and
- (7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.

34 C.F.R. § 300.320(a), *see also*, D.C. Mun. Regs. tit. 5, § 3009.1.

9. Placement determinations are to be made according to the following:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that —

- (a) The placement decision —
  - (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
  - (2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;
- (b) The child's placement —
  - (1) Is determined at least annually;
  - (2) Is based on the child's IEP; and
  - (3) Is as close as possible to the child's home;
- (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
- (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

34 C.F.R. § 300.116.

10. The Student's IEP for the 2008-2009 and 2009-2010 school years failed to include:

accurate statements of the Student's present levels of academic achievement and functional performance; measurable annual academic and functional goals; and appropriate and necessary special education and related services and supplementary aids

and services. In the IEP proposed October 22, 2008 (J 7) the statements of present levels of academic achievement and functional performance lacked meaningful information required under 34 C.F.R. § 300.320(a)(1). When the IEP was revised in December 2008 (P 2) the statements of present levels of academic achievement and functional performance were more complete, but still failed to describe how the Student's disability affected his involvement and progress in the general curriculum. Of the six goals in the IEP (which did not change with the December revision) only one, concerning motor skills development, was specific enough to be measurable ("Student will independently write his first and last name from memory using cursive letters with adequate formation, sizing, casing, and letter-line orientation in 4 out [of] 5 trials.") Unfortunately this goal, was not, nor were most of the others, changed from 2008-2009 to the 2009-2010 school year, either because they were so vague and/or because the Student did not reach the goal. In 2009-2010 four goals were added to the area of communication/speech and language that were also too vague to be measurable in a meaningful way because they lacked a current baseline of performance. The statement of present levels of academic achievement and functional performance did not change in 2009-2010, thus they were not "present levels" of achievement or performance. The special education to be provided to the Student began at 11 hours per week in the October 2008 IEP and was increased to 21 hours per week for the remaining two IEPs. The Student was provided 60 minutes per week of each of the following for the 2008-2009 school year: occupational therapy and speech-language pathology. These related services were reduced to 30 minutes per week for the 2009-2010 school year. Behavioral support services were added in the December 2008 revision to the IEP for 60 minutes per week. This was reduced to 30 minutes per week for

the 2009-2010 school year. Supplemental aids and services for both years included: extended time on subtests; preferential seating; and simplification of oral directions. No written notices (34 C.F.R. § 300.503) were provided explaining why these special education and related services and supplementary aids and services, and the amounts, were proposed in each revision of the IEP, including the evaluation procedures, assessments, records, or reports the Respondent used as a basis for the proposals that ended up in the IEPs. Thus, and because the statements of present levels of academic achievement and functional performance were not sufficient and the goals were, largely, too vague and not measurable, it cannot be determined whether all the necessary special education and related services and supplementary aids and services to enable the Student advance appropriately toward attaining the annual goals, to be involved in and make progress in the general education curriculum, to participate in extracurricular and other nonacademic activities, and to be educated and participate with other children with disabilities and nondisabled children, were provided in the IEP. The Student's marginal progress academically and functionally does not show the IEP has been entirely successful.

11. No revision of the IEP for 2010-2011 IEP has yet been proposed. The draft IEP used for discussion at the May 26, 2010, IEP team meeting never resulted in a proposal as the parties were in a stalemate over the Student's eligibility category. This dispute resulted in the filing of the complaint leading to this hearing and HOD. The IHO cannot rule on a proposal that was never made. However, as specific provisions as possible in revising the IEP will be required as a result of the denial of FAPE.

12. The Petitioner did not show that the procedures for determining placement were not followed. Rather, the difficulties experienced by the Student were the result of a non-compliant IEP, as discussed above, not because of a failure under 34 C.F.R. § 300.116.

#### **V. ORDER**

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

1. The Petitioner prevails on Issue #1 because the Respondent failed to implement the Student's IEP until two to three weeks into the school year, and neither the speech and language pathologist nor the occupational therapist had been informed of his or her specific responsibility related to implementing the IEP.
2. The Petitioner prevails on Issue #2 because the Respondent failed to ensure the Student's IEP team included not less than one regular education teacher of the Student at the October 22, 2008 and May 10, 2010, IEP team meetings.
3. The Petitioner prevails on Issue #3 because the Respondent failed to provide or propose an IEP reasonably calculated to provide educational benefit to the Student when the revisions to the IEP in 2008 and 2009 failed to include: accurate or complete statements of the Student's present levels of academic achievement and functional performance; a statement of measurable annual goals, including academic and functional goals designed to meet the Student's needs that result from his disability to enable him to be involved in and make progress in the general education curriculum and meet each of his other educational needs that result from his disability; and special education and related services and supplementary aids and services to be provided to the Student, or on behalf of the Student, to enable him to advance appropriately toward attaining the annual goals,

and to be educated and participate with other children with disabilities and nondisabled children.

4. The Student's IEP must be revised in accordance with this order no later than September 10, 2010. The revisions to the IEP, at a minimum, must include:<sup>58</sup>

a. Accurate statements of the Student's present levels of academic achievement and functional performance based on: the summary in the April 26, 2010, Comprehensive Neuropsychological Evaluation; the Student's 2010 DC-CAS scores; and teacher reports, including the most recent report cards, of how his disabilities affect his involvement and progress in the general education curriculum and the school environment.<sup>59</sup>

b. Measurable annual academic and functional goals that are designed to address the Student's skill deficits in mathematics, reading, written language, organization, motor skills, and memory. These goals must address specific skills to be taught or strengthened and include a specific level of accomplishment by a date certain. The academic goals must be designed to reduce and eventually close the academic achievement gap between the Student's current abilities and the expectations of a student in his grade level. The functional goals must be designed to aid the Student in improving the executive functioning skills, specifically organization, memory, and study skills, to a degree reasonable over the course of a year and in conjunction with his academic achievement.

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<sup>58</sup> Generally, an IEP will not be sent back to the IEP team without more specifics. However, in this case the Petitioner did not present clear evidence as to what she thought should be in the IEP that was not there. Rather, the evidence focused on what the IEP lacked, and the remedy sought was placement at a segregated non-public school. While the violations found here are denials of FAPE, the Student's academic performance has not suffered to such a degree that he requires such a placement. Rather, with corrections to the IEP in line with what is ordered here, the Student will reasonably be expected to perform proficiently on grade level within a year or two.

<sup>59</sup> The Student's "disability classification" is not an IEP content requirement and, therefore, is irrelevant to the IEP.

- c. Special education and related services and supplementary aids and services including: a structured instructional program that combines explicit teacher-directed small group instruction as well as problem solving and strategy training, use of pictorial or concrete representations when possible, intensive timed practice with mixed problem sets, and cumulative review of previously mastered skills; classes with a student/adult ratio of ten to one; classroom environment with limited distractions, relative to a non-modified classroom; seating near the source of instruction and away from areas of distractibility such as windows and doors; alternatives to demonstrating knowledge through written tests and assignments when practicable, such as projects, experiments, oral reports, and other hands-on tasks and experiential learning activities; work be give to the Student at or just above his present level of functioning; specific instruction in study skills strategies; copies of instructor notes; double time for lengthy tests (more than 30 minutes); and one to one tutoring outside of the usual school day (extended school year) to address specific deficits in math, reading, and writing.
5. The Student's educational placement must be in accordance with the above. If the Student's present school cannot implement such and IEP, the Respondent is responsible for locating a school that can. All of the Student's other needs not specifically addressed here, such as speech and language, must also be addressed. All other IEP requirements under 34 C.F.R. § 300.320 must be met.
6. The Respondent, when convening the IEP team, must provide the Petitioner with at least three dates and times to meet, not consecutive, and inform the Petitioner of the time the meeting will proceed if she fails to choose one of the proposed times within three days.

Nothing in this order prohibits the parties from agreeing to an alternative meeting time within the timeline established here.

**IT IS SO ORDERED.**

Date: August 20, 2010

A handwritten signature in black ink, consisting of a stylized, cursive 'S' followed by a horizontal line.

Independent Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).