DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE

RECEIVED

STUDENT,[1]	)	
	)	
Petitioner,	)	
v.	)	**Case No.**
	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS; and	)	**Bruce Ryan, Hearing Officer**
	)	
	)	**Issued: November 1, 2010**
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION,	)	
	)	
Respondents.		

HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND AND RECORD

This is a due process complaint proceeding brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations. The Complaint was filed July 27, 2010, against Respondents District of Columbia Public School ("DCPS") and the Office of the State Superintendent of Education ("OSSE"). It concerns a year old student (the "Student") who is presently detained at the District of Columbia Central He has been determined to be eligible for special education and related services as a child with a disability under the IDEA. Because the Student is over the age of 18, he brings this Complaint in his own name as the Petitioner.

As discussed and clarified in the September 15, 2010 Prehearing Order ("PHO"), the Complaint contains three "Counts" alleging that Respondents have denied Petitioner a free appropriate public education ("FAPE"), as follows:

[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

Count I — alleges that DCPS denied Petitioner a FAPE by failing to implement his July 21, 2008 Individualized Education Program ("IEP") during the time he was detained at the D.C. Jail and at St. Elizabeth's Hospital, beginning on or about August 8, 2008, when DCPS allegedly did not provide any specialized instruction and related services;

Count II — alleges that DCPS denied Petitioner a FAPE because the July 21, 2008 IEP was inappropriate, for the specific reasons stated at page 5 of the Complaint (as described further in Part II below); and

Count III — alleges that DCPS and OSSE "jointly and severally" denied Petitioner a FAPE while he was in the legal custody of the Federal Bureau of Prisons ("BOP"), beginning on or about May 15, 2009, by failing (1) to implement his 07/21/08 IEP when they did not provide any specialized instruction and related services during the time he was detained by BOP, (2) to review or update the 07/21/08 IEP, and (3) to perform a triennial re-evaluation as required by the IDEA.[2]

DCPS filed a Response to the Complaint on or about August 9, 2010, which asserted (*inter alia*) that DCPS had not denied Petitioner a FAPE as alleged in the Complaint. OSSE filed its Response on or about August 18, 2010, which asserted that it had no liability to Petitioner pursuant to the IDEA.

A resolution meeting was held on or about August 23, 2010, at which DCPS stated that it would authorize independent comprehensive psychological and speech/language evaluations of Petitioner. The resolution process ultimately was not successful, and the statutory 30-day resolution period ended August 26, 2010.

Prehearing Conferences ("PHCs") were then held on August 31 and September 7, 2010, at which the parties discussed and clarified the issues and requested relief. Following discussion

---

[2] *Due Process Complaint Notice,* filed July 27, 2010, Attachment, pp. 4-6. The PHO indicated that Count III also purported to assert the same claims against the BOP, but that it did not appear that the BOP had been served or had otherwise appeared in this case. *See Prehearing Order* (Sept. 15, 2010), p. 2 n. 1. The PHO further indicated that it does not appear that the Hearing Officer would have jurisdiction over the BOP in this due process complaint proceeding since the BOP is not a public agency under the IDEA. *See* 34 C.F.R. 300.2; *HOD*, 107 LRP 69543 (D.C. 2005). Neither Petitioner nor Respondents have requested the Hearing Officer to reconsider these determinations.

at the initial PHC, it was agreed and directed that DCPS would file an Amended Response, and DCPS did so on or about September 1, 2010.

DCPS' Amended Response asserted that: (1) DCPS made specialized instruction and related services available to Petitioner while he was in the during the 2008-09 School Year, but on "most days, the student declined to participate or was in lock-down and unable to participate"; (2) Petitioner 07/21/08 IEP was calculated to provide him educational benefits, and was reviewed and updated in May 2009; and (3) "DCPS cannot provide the student services while he is in federal prison." *DCPS' Amended Response* (Sept. 1, 2010), pp. 1-2. DCPS further asserted that now that Petitioner is "temporarily at the again, DCPS has authorized independent comprehensive psychological and speech evaluations" and will convene an MDT/IEP Team meeting when the evaluations are completed. *Id.,* p. 2. DCPS stated at the PHCs that it does not assert a statute of limitations defense with respect to any actions taken on 07/21/2008.

On September 10, 2010, following discussion at the PHCs, OSSE filed a motion to dismiss Count III of the Complaint as against the OSSE, on the ground that it failed to state a valid claim under the IDEA as a matter of law. The Hearing Officer denied this motion by Memorandum Opinion and Order issued September 22, 2010. The Hearing Officer concluded that Petitioner had met at least the minimal standards needed to withstand dismissal at the pleading stage and that he therefore would be permitted to proceed on his claims against OSSE in Count III, as clarified and discussed in the Memorandum Opinion & Order and the PHO.

In an effort to streamline the facts and issues for hearing, the parties agreed to consult and discuss possible stipulations in advance of the five-day disclosure date. *PHO,* ¶ 6. Petitioner's counsel served a copy of proposed stipulations on respondents on September 15, and respondents replied to the proposals by September 20, 2010. OSSE did not agree to any stipulations, and the only stipulations agreed to by DCPS were as follows: (a) that Petitioner's IEP team met in July 2008 to develop an IEP; and (b) that at the July 2008 meeting, the Director of reported Petitioner's progress as a result of attending instructional reading sessions. *See DCPS' Response to Petitioner's Proposed Stipulations* (Sept. 20, 2010). These were entered as stipulations at hearing. *See Transcript of Proceedings,* Day 1 - Sept. 29, 2010, pp. 38-39 ("*Tr.1: 38-39*").

On September 22, 2010, all parties filed five-day disclosures pursuant to the PHO. Also on that same date, DCPS filed a Partial Motion to Dismiss the Complaint, arguing for the first time that Count III of the Complaint should be dismissed because DCPS asserts it is not responsible for providing FAPE to students in federal correctional institutions. This motion was discussed on the record at the beginning of the due process hearing, and the legal issue was taken under advisement for subsequent determination in the HOD based on the record as a whole. *See Tr. 1:32-37.* The Hearing Officer indicated, among other things, that he believed "it's possible that record evidence about how this has been dealt with in the District of Columbia may be relevant to resolving the legal issue." *Tr. 1:37.*

The Due Process Hearing was held at the in three (3) sessions, on September 29 and 30 and October 4, 2010. During the hearing, the following Documentary Exhibits were admitted into evidence without prior written objection:

<u>Petitioner's Exhibits</u>: ·1 through -24. [3]

<u>DCPS' Exhibits</u>: DCPS-1 through DCPS-12.

<u>OSSE's Exhibits</u>: None.

In addition, the following Witnesses testified on behalf of each party:

<u>Petitioner's Witnesses</u>: (1) Jacqueline Hirsch, Case Manager; (2) Rona Fields, Ph.D, Clinical Psychologist; (3) former Guardian; (4) Ashley Boyland, former Law Student Advocate; (5) KyleeAnn Stevens, M.D., Forensic Psychiatrist; (6) former Administrator, Private School; (7) Student-Petitioner; and (8) Heather McCabe, Deputy Director for Revenue Operations, D.C. Child & Family Services Agency.

<u>DCPS' Witnesses</u>: (1) Christina Wells, Program Manager; and (2) Soncyree Lee, Director/Special Education Coordinator, DCPS Incarcerated Youth Program.

<u>OSSE's Witnesses</u>: (1) Melanie Byrd, OSSE Director of Quality Assurance and Monitoring; and (2) Tameira Lewis, OSSE Assistant Superintendent of Special Education.

---

[3] Petitioner's initial disclosures included 20 exhibits ·1 through -20). Two additional exhibits 21 and ·22), which were curriculum vitae of expert witnesses, were included in five-day disclosure addenda. Finally, two more exhibits ·22 and MJ-23), which were the preliminary and final evaluation reports prepared by Dr. Rona Fields, were introduced and admitted at hearing. -22 and 23 were not available as of the 09/22/2010 disclosure date.

This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP").*[4]

II. ISSUES AND REQUESTED RELIEF

A discussion at the PHCs of the issues and requested relief raised by Petitioner resulted in the following issues being presented for determination at hearing:

(1) **Failure to Implement 07/21/2008 IEP at (*vs. DCPS*)** — Did DCPS deny Petitioner a FAPE by failing to implement his July 21, 2008 IEP while he was detained at the beginning on or about August 8, 2008 through to the present? - Specifically, Petitioner claims that DCPS did not provide any of the specialized instruction and related services (including speech-language and counseling) required by the IEP during this time period.

(2) **Appropriateness of 07/21/2008 IEP (*vs. DCPS*)** — Did DCPS deny Petitioner a FAPE by failing to develop an appropriate IEP on or about July 21, 2008, for the reasons stated at page 5 of the Complaint? - Specifically, Petitioner claims that the 07/21/08 IEP does not: (a) include a statement about how his disability affects his involvement and progress in general education; (b) provide an adequate statement of measureable annual goals; (c) provide a description of how he is to achieve such goals; (d) provide an explanation as to why he would not participate with non-disabled children in the class; and (e) provide a statement about the transfer of his rights at the age of majority.

(3) **Failure to Implement 07/21/2008 IEP in BOP Custody (*vs. DCPS & OSSE*)** — Did DCPS and/or OSSE deny Petitioner a FAPE by failing to implement his July 21, 2008 IEP when it did not provide any specialized instruction and related services while he was in the legal custody of the beginning on or about May 19, 2009 through to the present?

(4) **Failure to Review/Revise 07/21/2008 IEP (*vs. DCPS & OSSE*)** — Did DCPS and/or OSSE deny Petitioner a FAPE by failing to review and revise, as appropriate, the July 21, 2008 IEP periodically but not less than annually, pursuant to the IDEA and 34 C.F.R. §300.324(b)?

(5) **Failure to Perform Triennial Re-Evaluation (*vs. DCPS & OSSE*)** — Did DCPS and/or OSSE deny Petitioner a FAPE by failing to ensure that a re-evaluation was conducted at least once every three years, pursuant to the IDEA and 34 C.F.R. §300.303?

---

[4] An agreed continuance of the 45-day HOD timeline was granted to November 1 to allow the parties to review hearing transcripts and submit written closing briefs and a reply. *See Interim Order on Continuance Motion* (Oct. 10, 2010).

As relief for the alleged denials of FAPE, Petitioner seeks compensatory education that will put him in the position that he would have been had DCPS and/or OSSE provided him with a FAPE as required by the IDEA. Specifically, the Complaint requested that the Hearing Officer order Respondents to provide and pay for: (a) one-on-one, individualized tutoring in all areas of special education for as long as necessary for Petitioner to obtain a high-school diploma; (b) a private case manager selected by Petitioner to implement, monitor, and periodically update an individualized program of study; (c) all books and other materials necessary for implementing the program; and (d) private providers (selected by the case manager) in proximity to the facility at which Petitioner is incarcerated who can implement the program. *See Complaint,* p. 6*; PHO,* p. 4. In addition, Petitioner requests that the Hearing Officer "order respondents to work together to move [Petitioner] immediately to a secure facility with an appropriate therapeutic environment in which he can receive appropriate special education and related services." *Id.* Finally, Petitioner requests that such compensatory education award continue to be received beyond Petitioner's period of eligibility under the IDEA as a remedy for past denials of FAPE incurred during the period of eligibility. These requests for relief have been modified somewhat in Petitioner's Closing Brief.

III. FINDINGS OF FACT

1. Petitioner is a ·year old resident of the District of Columbia[5] who is currently at the and enrolled in the The is the school/educational program at the that is operated by DCPS.
2. Petitioner is four feet, 11 inches tall, and he weighs approximately 130 pounds. *See Petitioner Testimony.* According to evaluation reports, he was a premature baby with a low birth weight and probably sustained developmental and neurological damage from *in utero*

[5] As noted in the September 22, 2010 *Memorandum Opinion & Order*, OSSE argued for the first time in its reply brief in support of its motion to dismiss that Petitioner is not a resident of the District of Columbia for purposes of the IDEA. However, Petitioner alleges and there is no dispute that prior to his incarceration, he resided in D.C., his last educational placement was through DCPS, and he was identified and received services pursuant to an IEP developed by DCPS. Under these circumstances, the Hearing Officer finds that his D.C. residency has been adequately established. *Cf. Hester v. District of Columbia,* 505 F.3d 1283 (D.C. Cir. 2007) (DCPS student did not lose residency status due to incarceration in another State for purposes of agreement enabling DCPS to provide special education services under the IDEA).

exposure to toxic substances. *See* *-24.* He also endured significant trauma during childhood, including witnessing the murder of his aunt and two cousins when he was years old and the deaths of his mother and sister when he was about for which he did not receive appropriate counseling or therapeutic intervention. *Id.; see also Psychologist Testimony.*

3. Petitioner's full-scale IQ has previously been calculated to be between 56 and 76. *10.* Current testing reveals a full-scale IQ of between 56 and 72, depending on the subtests included. *-24.* Petitioner's reading comprehension is at the 3rd grade level and his math skills are at the 4th grade level. *Id.*

4. Petitioner has been determined to be eligible for special education and related services under the IDEA, as a child with multiple disabilities including Emotional Disturbance ("ED") and Specific Learning Disability ("SLD"). *See* *-1;* *-2; DCPS-3.*

5. In June 2003, an Impartial Hearing Officer found that DCPS had denied Petitioner a FAPE and ordered DCPS to place and fund Petitioner in a full-time private special education school ("Private School"). The HOD also ordered completion of evaluations and ordered the IEP team to discuss compensatory education for Petitioner. *-9.*

6. In July 2003, an IEP was developed for Petitioner providing for a program of full-time special education and related services. *-7.* Petitioner attended the Private School pursuant to DCPS placement for the next several years, beginning with the 2003-04 School Year. He was enrolled and attended the Private School sporadically until 2008. *Private School Admin. Testimony, Tr. 2:100; DCPS 7.* His attendance record impacted his academic progress. *See DCPS-7.* [6]

7. In May 2008, Petitioner identified private providers who could implement a plan of compensatory education for him – specifically, and thereafter began to act as a "case manager" for the delivery of educational services being provided to Petitioner, including behavioral supports and daily reading instruction at *See* *Testimony.*

[6] While Petitioner's Closing Brief (*e.g.*, pp. 5, 18) discusses various alleged deficiencies in his educational program and resulting harms suffered by Petitioner between 2003 and 2008, no actions prior to July 21, 2008 form the basis of Petitioner's Complaint in this case.

8. In July 2008, DCPS representatives met with Petitioner's legal counsel to discuss a proposed compensatory education plan using the services being provided by and DCPS agreed to pay for the intensive reading program at although this agreement was not reduced to writing. *See DCPS-10; Testimony*. DCPS also indicated that it was open to authorizing case-management services, provided her role and scope of work were more clearly defined. *DCPS-10.* The parties also proposed to reconvene a meeting of Petitioner's IEP team to discuss and finalize his formal written program. *Id.*

9. On July 21, 2008, DCPS convened an IEP team meeting to discuss Petitioner's educational program and performance. *-2.* The meeting included Petitioner's counsel, Petitioner's advocate, Petitioner's case manager, and Petitioner's guardian. *See -1.* The team discussed that Petitioner had attended daily one-on-one instructional reading sessions at from May 28 to June 30, 2008, and had "made demonstrable progress" during that time. *-2-p.1. See also -12* progress reports May 28-June 27, 2008). The team also discussed whether a residential placement would be appropriate for Petitioner, but decided that the best approach would be to combine his current placement at Private School with continued instruction at while "remaining cautious not to overwhelm" Petitioner. *-2-pp.1-2.* Accordingly:

> "The team ***agreed to put*** ***intensive reading program on Page 4 of [Petitioner's] IEP under Supplementary Aids and Services.*** The team further agreed that [Petitioner] should participate in ***until November 7, 2008***, and that the team should reconvene to examine [Petitioner's] progress at that point. [Petitioner] will ***start with two hours a day and work up to four hours a day from now until Nov 7, 2008*** " *MJ-2-p.2* (emphasis added).

10. The July 21, 2008 IEP team also discussed Petitioner's need for one-on-one behavioral support and agreed that it should be listed on Page 4 of the IEP and then re-evaluated in six weeks. *-2-p.2.* In addition, the team agreed that certain positive behavioral reinforcements were necessary and should be included in his behavior intervention plan ("BIP"). *Id.*

11. The IEP document dated July 21, 2008 provides for the following "Special Education and Related Services" in Part IV of the document: nine (9) hours per week of specialized instruction by a Special Education Instructor; two (2) hours per week of speech/language

therapy by a Speech Therapist; and four (4) hours per week of counseling by a Clinical Social Worker. *-1-p.1.* All of the services were to be provided outside of the regular (general) education setting. *Id.* The IEP states that "due to the severity of [Petitioner's] disability, his goals cannot be met in the general education setting." *-1-p.14.*

12. Consistent with the program structure developed at the July 21, 2008 team meeting, the 07/21/2008 IEP document also provides under "Supplementary Aids and Services" in Part X for the following: (a) intensive reading" for four (4) hours per day; (b) "one-on-one" support of a "Behavioral Specialist/Psych Tech" for seven (7) hours per day; and (c) "Active Case manager" for six (6) hours per week. *-1-p.14.* The IEP specified the beginning date of these supplementary aids and services as 07/21/2008. *Id.* [7]

13. The 07/21/2008 IEP team agreed to reconvene for further discussions on September 9, 2008. *See 2-p.3.*

14. On August 8, 2008, before the IEP team had an opportunity to reconvene, Petitioner was arrested and detained at the Petitioner remained in the custody of the D.C. between the date of his arrest and May 15, 2009, the date of his sentencing. Except for a brief period at he was detained at the and was enrolled in the during this entire period. *See Complaint,* p. 3; *Petitioner Testimony.* The is operated by DCPS.

15. Between November 7 and December 10, 2008, Petitioner was hospitalized at for a court-ordered competency examination in connection with the pending criminal charges. *See -13; Testimony.* He was found to be competent and was then returned to the *Testimony, Tr. 2:82-86.* Petitioner did not receive any specialized instruction or related services while at *Id., Tr. 2:82.*

16. In the fall of 2008, DCPS convened several follow-up IEP team meetings, including on September 24 (while Petitioner was in the and on November 12 and 25, 2008

[7] Together with the services listed in Part IV, the Supplementary Aids and Services listed in Part X of the 07/21/2008 IEP would appear to extend well beyond a normal full-time weekly program of special education and related services. However, this supplementary program appears to have been developed by the IEP team as a temporary measure, in part to compensate for prior denials of FAPE and in part because the team "agreed that they must go beyond [normal interventions] and be extraordinary and different to address [Petitioner's] needs." *2-p.3.*

(while he was at *See DCPS-7* (11/25/2008 IEP meeting notes). Another meeting was convened in December 2008 after Petitioner was returned to the *Testimony, Tr. 1:130.* The purpose of the multiple meetings was to continue to discuss Petitioner's IEP, compensatory education, and placement should he be released from incarceration, as well as to adjust and/or implement his services as appropriate in light of his incarceration. *See Testimony; Testimony, Tr. 2:69.* No new agreements or changes to the IEP were adopted at these meetings.

17. At the November 25, 2008 IEP team meeting at the team completed its review of the behavioral plan and considered other positive intervention strategies. Petitioner's attorney and case manager asserted that his experience over the summer with demonstrated that he required one-on-one reading instruction in a specialized reading program, as well as support of a behavioral specialist in order to stay on task. *DCPS-7.* They also asserted that Petitioner had not received all services required by his IEP during the times he was detained in the adult criminal system since August 2008. *Id.,* p. 2. The Director of then "assured the team that if [Petitioner] was returned back to the jail, following his stay at that he would immediately receive services." *Id.* She also "assured the team that she would physically go get [Petitioner] at least for the first few sessions." *Id.*

18. Petitioner was returned to the from in December 2008. Following his return, brought him some math packets while he was in lock-down, and he was called for classes. *See Petitioner Testimony, Tr. 2:131-35.*

19. Thereafter, Petitioner attended the school at the only a handful of times. Petitioner estimates that he attended school four or five times between December 2008 and when he transferred to the Petersburg facility in May 2009. After returning from Petersburg in May 2010, Petitioner attended classes only twice more. He believed the school work was not helping him. *See Petitioner Testimony, Tr. 2:135-41; Testimony, Tr. 3:54.* [8]

---

[8] Petitioner testified that he felt he was "wasting my time on my unit and my rec time playing ball, talking with my daughter." *Petitioner Testimony, Tr. 2: 135.* testified that Petitioner generally told the teacher that "I don't feel like doing this" and "don't feel like being here." *Testimony, Tr. 3:56.*

20. Petitioner and his representatives generally were aware that educational services were available at the and knew that Petitioner was being called for class but was not attending despite being encouraged to do so. *See Advocate Testimony, Tr. 2:42, 62; Testimony, Tr. 3:54; Petitioner Testimony, Tr. 2: 141.* When Petitioner did go to class, the teacher helped him, but not as much as Petitioner wanted. *Petitioner Testimony, Tr. 2:138-39.*

21. The evidence shows that DCPS (through the provides educational services, including special education, to adult inmates in the who choose to participate. *Testimony, Tr. 3:41.* The program currently serves 15 special education students, who are called from their units to go to class. *Id., Tr. 3:26, 3:45.* The program operates Monday through Friday from approximately 8:45 AM though 3:15 PM, with an "after-school" program until 5:30 PM Monday through Thursday. *Id., Tr. 3:50.* It has one special education teacher and also uses a computer program called Pearson's Novanet. *Tr. 3:36-37.* Social worker/counseling and speech-language therapy services are available one day per week. *Testimony, Tr. 3:51.* The does not employ additional behavioral specialists. *Id., Tr. 3:71-72.*

22. The adult special education students in the are generally performing between the 3rd and 11th grade levels in reading and math. *Testimony, Tr. 3:48.* The students who are further behind receive more intense direct instruction from the special education teacher, as well as participate in "Read 180" (a research-based reading intervention program) and get extra help from a reading specialist who is available twice a week. *Testimony, Tr. 3:49.* The does not provide services specifically, but does provide one-on-one intensive reading programs. *Id., Tr. 3:72-73.*

23. On or about May 8, 2009, DCPS convened a team meeting to review and update Petitioner's 07/21/2008 IEP. The meeting was attended by Petitioner, Director a Special Education Teacher, and Social Worker. *See DCPS-3.* DCPS also invited Petitioner's attorney and guardian to the meeting. *See DCPS-5* (Letters of Invitation dated 04/20/2009 & 05/04/2009); *Testimony, Tr. 3:57.* At the meeting, the IEP goals were revised as developed by the special education teacher, and services were updated. Petitioner then signed the revised IEP. *DCPS-3; Testimony, Tr. 3:58-64.*

24. The May 8, 2009 IEP continues the same nine (9) hours of specialized instruction and four (4) hours per week of behavioral support services (counseling) outside general education, as had been provided in the 07/21/2008 IEP; and it reduces the speech-language pathology services from two hours to one hour per week. *DCPS-3,* p. 6. The 05/08/2009 IEP no longer provides for the additional "supplementary aids and services" (including one-on-one reading instruction) that had been provided in the 07/21/2008 IEP. The document also states that compensatory education was discussed at the 05/08/2009 IEP meeting and "will be settled with the Office of Special Education." *Id.,* p. 8.

25. On or about May 15, 2009, Petitioner was sentenced to 23 years in a federal correctional facility for convictions in two separate criminal matters. *See Complaint,* p. 3. He has appealed the conviction in one matter and the sentences in both matters. *Id.* At some point after his May 15, 2009 sentencing, Petitioner was transferred to a facility. *Id.,* pp. 3-4.

26. Between May 2009 and May 2010, Petitioner was in the physical custody of the BOP in Petersburg, Virginia. *Petitioner Testimony, Tr. 2:126.*

27. Christina Wells, a Program Manager in the Office of Special Education for DCPS, contacted the federal prison in Petersburg where Petitioner was incarcerated when Petitioner's representatives requested a meeting. *Testimony, Tr. 3:23.* The Education Director at the Petersburg facility informed that DCPS would not have any role in Petitioner's education while he was there and, in fact, she could not even share information about his education with *Tr. 3:23*; *DCPS-8.* DCPS was informed that any communications regarding Petitioner's specific education services should come from his attorney and be directed to Ms. Morris, the Education Director at the facility. *Id.* DCPS forwarded this information to Petitioner's representatives on at least two occasions between August 2009 and March 2010. *See Testimony, Tr. 3:24-25*; *DCPS 8* (08/25/2009 email correspondence from *DCPS 2* (03/16/2010 letter from Dr. Richard Nyankori, Deputy Chancellor of Special Education).

28. In March 2010, while Petitioner was at the Petersburg federal prison, his counsel wrote to the OSSE to report that Petitioner had not received services from DCPS subsequent to his August 8, 2008 arrest and incarceration. *-18.* Petitioner asserted that the OSSE was now

responsible for providing a FAPE to Petitioner, and he requested that OSSE implement his most recent IEP and conduct a triennial evaluation. *Id.*

29. OSSE stipulated that it did not implement an IEP for Petitioner or provide special education services to him while he was in the custody of *OSSE's Closing Brief,* p. 4, ¶ 36. A representative of OSSE testified that OSSE does not monitor students in custody because it only monitors students in D.C. LEAs, and that DCPS does not have responsibility for or authority over students in facilities. *Testimony, Tr. 3:227, 229.* OSSE's position is based, in part, on guidance from the Department of Education. *Testimony, Tr. 3:240.* OSSE's Assistant Superintendent of Special Education testified that neither OSSE nor DCPS receives IDEA funds for students in custody. *Testimony, Tr. 3:277.*

30. In May, 2010, the returned Petitioner to the where he is currently incarcerated pending additional legal proceedings. *See Complaint,* p. 4; *Petitioner Testimony.* He will return to the physical custody of when the current legal proceedings (unrelated to this complaint) are concluded.

31. DCPS is now in the process of further evaluating Petitioner, by authorizing independent comprehensive psychological and speech evaluations. When the evaluations are completed, DCPS intends to schedule another IEP team meeting to review the evaluations and move forward with any further IEP review and revisions determined to be appropriate. *See Testimony, Tr. 3:57-58; DCPS' Amended Response* (Sept. 1, 2010), pp. 1-2.

32. On September 21 and 22, 2010, around the date five-day disclosures were due in this case, Petitioner was evaluated by an independent clinical psychologist (Rona M. Fields, Ph.D). Dr. Fields completed psycho-educational testing, a clinical evaluation, psycho-neurological studies, and extensive cognitive analysis. *See 24; Fields Testimony.* Overall, the evaluator concluded that Petitioner "has the ability to learn albeit at a slower rate than his age peers" and "can achieve approximately sixty percent of the expected curriculum for the grade year." *24, p. 7.* She also recommended a complete neurological examination, a "one-on-one educational tutorial program adapted to his special needs," and "one-on-one therapy to treat his PTSD and Clinical Depression." *Id.* This information has not yet been presented to Petitioner's IEP team and was not considered in developing either his 07/21/2008 or 05/08/2009 IEPs.

IV. DISCUSSION AND CONCLUSIONS OF LAW

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-E3030.3. The normal standard is preponderance of the evidence. *See, e.g., Holdzclaw* v. *District of Columbia,* 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415 (i) (2) (C) (iii).

A. Claims vs. DCPS Only (Counts I and II)

1. Failure to Provide Services at the

As noted above, Petitioner claims that DCPS denied Petitioner a FAPE by failing to implement his July 21, 2008 IEP during the time he was detained at the and at when it alleges that DCPS did not provide required specialized instruction and related services. The Hearing Officer concludes that Petitioner has met his burden of proof on this issue, in part.

DCPS has an obligation to make FAPE available to students with disabilities through the age of 22. 20 U.S.C. § 1412(a)(1); 34 C.F.R. 300.101. Moreover, the IDEA specifically provides that this FAPE obligation extends to students who are incarcerated in adult correctional facilities, at least where such students had been identified and received services prior to their incarceration. *See* 34 C.F.R. §300.102 (a) (2).

(a) Supplementary aids and services – e.g., LMB intensive reading

DCPS concedes that it "did not offer Petitioner the supplemental services on his July 21, 2008 IEP while he was incarcerated in the *DCPS' Closing Argument,* p. 5. As noted above, such services included: (a) intensive reading for four hours per day; (b) one-on-one support of a Behavioral Specialist and/or "Psych Tech" for seven hours per day; and

(c) the services of an "active case manager" for six hours per week. *-1-p.14.* Thus, in this respect, there is no dispute that DCPS failed to implement the IEP as written.[9]

The evidence indicates that, as of the July 2008 meeting, the IEP team had decided to provide these supplementary services until November 7, 2008, and then would reconvene to examine progress. This means that Petitioner missed approximately three months of such services while he was in the beginning August 8, 2008. Based on the frequency of services determined by the July 21, 2008 IEP team, the missed one-on-one intensive reading services alone would total between 130 and 260 hours (10 to 20 hours per week for approximately 13 weeks).

Petitioner has not shown that DCPS was obligated to continue such services beyond November 7, 2008 (which also happens to be the same date he was moved to While the IEP team discussed this subject at follow-up meetings in November 2008, *see DCPS-7,* there is no indication that the team decided to extend such aids and services past that date in any of Petitioner's new settings. Petitioner's move from the Private School setting to the and his experience in the likely would have affected the team's analysis of these types of instructional and behavioral supports moving forward.[10]

To establish a denial of FAPE based on a failure to implement an IEP, the aspects of an IEP not followed need to be "substantial or significant," and "more than a *de minimus* failure"; in other words, the deviation from the IEP's stated requirements needs to be "material." [11] Here, the July 21, 2008 discussion shows the importance attached by the IEP team to Petitioner's receiving these supplementary services, at least for another few months. DCPS nevertheless argues that the failure to provide these supplementary services did not cause educational harm, in

---

[9] *See, e.g., N.S. v. District of Columbia,* No. 09-621 (D.D.C. May 4, 2010), slip op. at 25 (hearing officer may consider evidence about services prescribed by the IEP or adequately discussed at the IEP meeting).

[10] "Supplementary aids and services" are defined as "aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate ...." 34 C.F.R. 300.42.

[11] *Catalan* v. *District of Columbia,* 478 F. Supp. 2d 73 (D.D.C. 2007), *quoting Houston Indep. Sch. Dist. v. Bobby R.,* 200 F.3d 341,349 (5th Cir. 2000). *See also* 34 C.F.R. §300.513 (a) (2) (hearing officer may find denial of FAPE where procedural inadequacy caused deprivation of educational benefit).

part because Petitioner did not take part in the services that were made available to him. *DCPS' Closing Argument,* p. 6. However, there is no evidence suggesting that Petitioner failed to participate in intensive one-on-one reading instruction on a regular basis when it was offered (*i.e.,* prior to July 21, 2008). The argument also ignores the fact that one of the supplementary services that DCPS had agreed to provide Petitioner was one-on-one support of a behavioral specialist to assist in making sure he was able to avail himself of this reading instruction.

The Hearing Officer therefore concludes that, under the circumstances, this deviation was material; it caused a substantial deprivation of educational benefit; and it constituted a denial of FAPE. Moreover, to the extent that the Part X Supplementary Aids & Services reflected an agreed compensatory education plan for prior program deficiencies, the failure to respond effectively to this agreed compensatory education constitutes a substantive, not procedural, harm. *See D.W. v. District of Columbia,* No. 07-1241 (D.D.C. June 23, 2008), slip op. at 10. [12]

(b) Basic program of specialized instruction and related services

The parties disagreed on the facts regarding DCPS' implementation of the specialized instruction and related services contained in Part IV of the July 21, 2008 IEP. Petitioner claims that such services were not provided. DCPS asserts that it did make these services available to Petitioner at the but that he largely chose not to participate. *DCPS' Closing Argument,* pp. 5-6.

The evidence shows that, after Petitioner returned to the in December 2008, these services were offered and Petitioner did not reasonably avail himself of such services *See Findings,* ¶¶ 19-21. Thus, the Hearing Officer cannot say that any resulting educational harm was caused by DCPS. *See, e.g., Garcia v. Board of Education of Albuquerque Public Schools,* 520 F.3d 1116 (10th Cir. 2008) (denying compensatory education where student's poor attendance and attitude prevented her from receiving educational benefit, regardless of the

[12] Since the parties' 07/21/2008 agreement and IEP were developed before Petitioner was arrested and detained at the the IDEA provides that it could have been subject to modification by the IEP team if the State "demonstrated a bona fide security interest or compelling penological interest that cannot otherwise be accommodated." 34 C.F.R. 300.324 (d) (2). However, DCPS has not argued that this provision ever came into play in this case, and the IEP team took no action to modify the IEP prior to May 2009.

school's actions); *Hinson v. Merritt Educ. Center,* 579 F. Supp. 2d 89 (D.D.C. 2008) (HO's conclusion that student was not "availing himself of educational benefit" found reasonable given absences from school for substantial periods of time); *Austin Independent School Dist. v. Robert M.*, 468 F. Supp. 2d 635, 640 (W.D. Tex. 2001) ("Schools are not required to force or motivate students to take advantage of the education they offer.").

As for the period prior to December 2008, the evidence does not establish that DCPS offered any specialized instruction or related services to Petitioner at the The testimony on both sides primarily concerned the period after Petitioner returned to the from in December 2008. *See, e.g., Testimony; Petitioner Testimony, Tr. 130-35.* DCPS produced no evidence (documentary or testimonial) with respect to any efforts to provide services prior to December 2008. Moreover, given DCPS' failure to provide the agreed supplementary aids and services during that period (which were designed in part to support Petitioner's participation behaviorally), DCPS cannot be heard to complain that Petitioner did not avail himself of services, assuming *arguendo* that they were offered.

Finally, during the approximately one-month period that Petitioner was hospitalized at the testimony showed that Petitioner was not reasonably available for special education services while he was undergoing a court-ordered competency examination. *See Stevens Testimony; ...*

Thus, the Hearing Officer concludes that the period of FAPE denial for the basic program of specialized instruction and related services should be limited to ***August 8 through November 7, 2008,*** the same period as the denial of FAPE for the supplementary services.

2. Appropriateness of July 21, 2008 IEP

Petitioner also claims that DCPS denied Petitioner a FAPE because the July 21, 2008 IEP was inappropriate, for the reasons cited in the Complaint and the Statement of Issues above. The Hearing Officer concludes that Petitioner has not met his burden of proof on this issue.

To be sufficient to provide FAPE under the IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Anderson* v. *District of Columbia,* 109 LRP 18615 (D.D.C. 2009), slip op. at 6,

quoting Board of Education v. *Rowley,* 458 U.S. 176,200,207 (1982).[13] Whether an IEP is appropriate is generally a question of fact for hearing. *See, e.g., S.H.* v. *State-Operated School Dist. of Newark,* 336 F. 3d 260, 271 (3d Cir. 2003). Judicial and hearing officer review of IEPs is "meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was 'reasonably calculated to enable the child to receive educational benefits.'" *Schaffer* v. *Weast,* 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley,* 458 U.S. at 207); *see also Fuhrmann* v. *East Hanover Bd. of Educ.,* 993 F.2d 1031, 1040 (3d Cir. 1993) (whether an IEP is appropriate "can only be determined as of the time it is offered for the student, and not at some later date").

In this case, the Complaint alleged that the July 21, 2008 IEP was inappropriate because it lacked (i) a statement about how Petitioner's disability impacts his participation in general education, (ii) adequate measurable annual goals, (iii) a description of how he will achieve those goals, (iv) an explanation as to why he would not participate with non-disabled peers, and (v) a statement about the transfer of rights at the age of majority. However, Petitioner did not present any evidence related to these alleged deficiencies. To the contrary, testified that the July 21, 2008 IEP was appropriate for Petitioner: "So I do think this will – this document [July 21, 2008 IEP] will create amazing growth for Marcel." *Testimony, Tr. 1:104.* "If he were to get this [July 2008 IEP] he would make progress." *Id., Tr. 1:135.*

Moreover, the July 21, 2008 IEP was developed at a team meeting that included Petitioner's counsel, Petitioner's advocate, Petitioner's case manager, and Petitioner's guardian. *See* *·1.* Petitioner's attorney also signed in agreement with the IEP on behalf of Petitioner's guardian; Petitioner's witnesses testified that the IEP would enable the student to make progress; and Petitioner did not make any argument in his Closing as to how the July 21, 2008 IEP had been demonstrated to be inappropriate.

Finally, given Petitioner's lack of attendance at the school, "it is difficult to say how the Hearing Officer could have determined that the services in the IEP were not working when

[13] *See also Kerkam v. McKenzie,* 862 F. 2d 884 (D.C. Cir. 1988); *J G. v. Abington School,* 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 ("while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit. ").

the student had not yet taken advantage of those services." *Hinson v. Merritt Educ. Center,* 579 F. Supp. 2d 89 (D.D.C. 2008), slip op. at 17.

Accordingly, the Hearing Officer concludes that at the time it was created, the July 21, 2008 IEP was "reasonably calculated to enable the child to receive educational benefits." Thus, DCPS did not deny Petitioner a FAPE by adopting an inappropriate IEP.

B. Claims vs. DCPS and OSSE (Count III)

Petitioner next claims that DCPS and OSSE "jointly and severally" have denied Petitioner a FAPE while he has been in the custody of the BOP, beginning on or about May 15, 2009. Petitioner claims they did so by (1) failing to implement his 07/21/08 IEP when they did not provide any specialized instruction and related services during the time he was detained by BOP, (2) failing to review or update the 07/21/08 IEP, and (3) failing to perform a triennial re-evaluation as required by the IDEA.[14]

1. Failure to Provide Services While in BOP Custody

Petitioner claims that DCPS and/or OSSE failed to implement his July 21, 2008 IEP when they did not provide any specialized instruction and related services while he was in the legal (and physical) custody of the from May 2009 to May 2010. For the reasons discussed below, the Hearing Officer concludes that the IEP was not implemented during this period, but that Petitioner has not met his burden of proving a denial of FAPE on this ground.

The question of DCPS and/or OSSE responsibility for providing a FAPE to D.C. resident students with an existing IEP who are incarcerated in facilities controlled by was previously addressed, but not fully resolved, in connection with motions to dismiss in this case. OSSE argues that the National Capital Revitalization and Self-Government Act of 1997 establishes that neither OSSE nor DCPS has such obligations because responsibility for the education of convicted was transferred from the to the DCPS argues that the IDEA itself, as interpreted by the U.S. Department of Education ("DOE"),

[14] Petitioner also attempts to assert a new claim for the first time in his Closing Brief (pp. 21-22) that DCPS denied a FAPE by failing to transfer educational records to pursuant to 34 C.F.R. 300.323. Apart from not having been asserted in the Complaint and specified in the PHO, the problem with this argument is that BOP is not a "public agency" as defined in the IDEA. *See* 34 C.F.R. 300.2.

imposes no obligation on States (or LEAs) to provide special education and related services to individuals in federal facilities. Petitioner disputes both propositions.

As discussed in the 09/22/2010 *Memorandum Opinion and Order*, the Hearing Officer is not persuaded that, as a matter of law, the D.C. Revitalization Act eliminates all responsibilities of DCPS and/or OSSE to provide any special education and related services under the IDEA to students incarcerated in federal correctional facilities. The statutory provision relied on by OSSE merely addresses the general areas of responsibilities that shifted from the to the It never mentions the IDEA or the issue of providing special education and related services to disabled students. Given the IDEA's specific recognition of LEA/SEA duties to incarcerated students, [15] it does not seem reasonable to infer that Congress intended to eliminate those duties, *sub silentio,* in separate legislation addressing the transfer of agency responsibilities that did not even encompass special education.

The IDEA's only apparent reference to ***federal*** prisoners, specifically, is in the provision referencing the transfer of parental rights at majority, which is phrased to include the "transfer to children who are incarcerated in an adult or juvenile ***Federal***, State, or local correctional facility." 20 U.S.C. 1415 (m) (1) (D). This provision is inconclusive, however.

The only other authorities cited by either party are DOE regulatory interpretations arising in somewhat different contexts. In 2005, in proposing the current transfer of rights regulation at 34 C.F.R. 300.520, the DOE explained its omission of correctional institutions by remarking, without elaboration, that "States do not have an obligation to provide special education and related services under [IDEA] to individuals in federal facilities." 70 *Fed. Reg.* 35782, 35810 (June 21, 2005). Similarly, in a 2003 OSEP letter involving the housing of federal inmates in Vermont's state correctional system, the DOE stated that "[i]ndividuals in the federal correctional system fall under the jurisdiction of the within the Department of Justice" and that "IDEA makes no specific provision for funding educational services for individuals with disabilities through the " *Letter to Yudien,* 39 IDELR 270

[15] The IDEA states that FAPE applies to children in adult correctional facilities who are identified and receive services under an IEP prior to incarceration. *See* 34 C.F.R. §300.102. It also imposes on SEAs the responsibility for ensuring that FAPE requirements are met for "students with disabilities who are ***convicted as adults under State law and incarcerated in adult prisons***." 34 C.F.R. §300.149 (d). *See also* 34 C.F.R. §300.324 (d) (modifications of IEP or placement for incarcerated students).

(OSEP Aug. 13, 2003). These interpretations are entitled to substantial weight, although (other than in broad dicta) they do not appear to address the precise situation at issue here.

A ruling that FAPE obligations did not apply to any federal prisoners would have potentially far greater impact in the District of Columbia than in other jurisdictions. In all other "States" covered by the IDEA, disabled students "who are convicted as adults under State law and incarcerated in adult prisons" are generally sent to State or local correctional facilities, which are themselves subject to IDEA requirements. In the District, however, all persons convicted of felonies under D.C. law are sent to federal prison under the custody of the Thus, many more otherwise eligible residents could be excluded from IDEA coverage under this interpretation. The Hearing Officer is reluctant to so rule in the absence of express congressional language or controlling court decisions in this jurisdiction, and where the referenced DOE regulatory interpretations appear to have at most only a general application to this situation.

Even assuming *arguendo* that the IDEA does require DCPS and/or OSSE to provide services (where feasible) to DCPS students held in federal custody, Petitioner has not shown that either agency denied him a FAPE as alleged from May 2009 to May 2010. Respondents correctly point out that when Petitioner was in the custody of the the was legally "responsible for [his] custody, care, subsistence, ***education***, treatment and training." D.C. Code § 24-101 (b). As a practical matter, this meant that the BOP's cooperation and assistance was needed in order for Respondents to deliver any special education services to Petitioner at the – in the same way that a parent or legal guardian must cooperate for a student to receive services in other settings. Moreover, unlike the case of students incarcerated in adult state prisons such as the the SEA in this case (OSSE) could not simply assign to another "public agency in the State" (such as a state or local correctional facility) the responsibility for ensuring that IDEA requirements were met for such students. *Cf.* 34 C.F.R. 300.149 (d); 34 C.F.R. 300.2 (b) (1) (iv).

Here, the evidence shows that DCPS did take affirmative steps to contact the BOP in an effort to see if services could be delivered to Petitioner at the Petersburg federal prison. However, the inquiries were rebuffed, and the made clear that it would not coordinate or cooperate in delivering any DCPS services. *See Findings,* ¶¶ 27-28. The Hearing Officer has no

jurisdiction over the and thus is unable to grant Petitioner any injunctive relief directed against the in this matter.

In *Hester v. District of Columbia,* 505 F.3d 1283 (D.C. Cir. 2007), the Court of Appeals for the D.C. Circuit held that DCPS did not violate an agreement to provide FAPE to a DCPS student incarcerated in Maryland where Maryland prison officials "assumed responsibility for Hester's education and did not allow D.C.'s designated education providers into the prison." Thus, "Maryland officials made it impracticable for [DCPS] to provide special education services in the prison." *Id.* While this decision arises in a somewhat different situation and turns on contract impracticability issues, it is instructive nonetheless. As in *Hester*, even assuming that Petitioner's IEP was not fully implemented as required during his custody, any DCPS or OSSE failures in this regard do not appear to have caused Petitioner's inability to obtain special education services while in Rather, BOP officials indicated that DCPS providers would not be allowed to deliver services within the federal correctional system, and there is no evidence that OSSE would have been any more successful in this particular case. [16]

The Hearing Officer therefore concludes that there has been no denial of FAPE in this regard. However, in view of the failure to fully implement the IEP, the Hearing Officer will exercise his equitable discretion to include certain appropriate measures in the Order designed to ensure that the OSSE is taking all reasonable steps within its control to supervise and ensure that the requirements of the IDEA are carried out in these situations.

2. Failure to Review/Revise the July 21, 2008 IEP

Petitioner next claims that DCPS and/or OSSE denied Petitioner a FAPE by failing to review and revise, as appropriate, the July 21, 2008 IEP periodically but not less than annually, as required by the IDEA. *See* 20 U.S.C. 1414(d)(4); 34 C.F.R. §300.324(b). The Complaint alleges that the IEP was not reviewed and revised while Petitioner was in BOP custody.

---

[16] Nor has Petitioner demonstrated in this case how any "regional or State program or service delivery system" could be designed to meet the needs of students such as Petitioner, 34 C.F.R. 300.227 (a) (1) (iv), who may be located in various federal prisons outside the District of Columbia and whose education is controlled by the assuming *arguendo* that OSSE were required to deliver direct services. This may be a broader policy issue to be addressed to the OSSE via rulemaking petition or otherwise. The Hearing Officer also notes that Petitioner has not filed a State-level complaint with OSSE.

The Hearing Officer concludes that Petitioner failed to meet his burden to prove that he was denied FAPE and is entitled to relief on this issue. Even assuming that DCPS and/or OSSE would have had an obligation to revise the IEP while Petitioner was in custody, the evidence shows that DCPS did revise the IEP on May 8, 2009, while Petitioner was still at the *See DCPS-3.*

Neither the appropriateness of the May 8, 2009 IEP nor its alleged procedural inadequacy was raised in the present due process complaint. Thus, while Petitioner now seeks to argue such points (*e.g., Pet's Closing Brief, pp. 9-10, 18-20)*, they are not at issue in this proceeding. *See* 34 C.F.R. 300.511 (d). There also is no ripe issue concerning DCPS' review of Dr. Fields' evaluation, which has not yet been presented to and considered by the IEP team, or any obligation to review and update the May 2009 IEP. Petitioner may, of course, still present these issues in a future due process complaint. *See* 34 C.F.R. 300.513(c).

3. Failure to Perform a Triennial Re-Evaluation

Petitioner also claims that DCPS and/or OSSE denied the Student a FAPE by failing to ensure that a re-evaluation was conducted at least once every three years, pursuant to the IDEA and 34 C.F.R. §300.303.

A reevaluation must be done at least every three years unless the IEP team determines that additional information is not needed. 20 U.S.C. § 1414 (a) (2) (B); 34 C.F.R. §300.303. In this case, a neuropsychological evaluation of Petitioner was completed by Kellie M. McCants, Ph.D. at Mental Health Resources, LLC in January 2006. *DCPS-11.* No further evaluations of Petitioner appear to have been conducted between January 2006 and September 2010.

Assuming *arguendo* that a triennial evaluation would next have been due in January 2009, Petitioner was then in the custody of the DCPS would not have had access to Petitioner and been able to assess him at that time. On the other hand, if the January 2006 evaluation was not part of a triennial review (*see Pet's Response to Closing Briefs,* Part VIII), then DCPS may have failed to conduct such a review during the earlier period of confinement in the (*i.e.,* August 2008 – May 2009). However, that was not what Count III alleged; it was expressly limited to the period of custody after May 2009. *See Complaint,* p. 5; *PHO.*

To the extent the Complaint can be read to allege that DCPS failed to conduct a triennial evaluation since being returned to the in May 2010, it did not request any specific relief

with respect to that violation, other than compensatory education. No new evaluations were requested as relief in the Complaint or at the PHCs. Nevertheless, on August 24, 2010, DCPS authorized Petitioner to obtain an independent comprehensive psychological evaluation and an independent speech and language evaluation. *DCPS-13.* Petitioner has now obtained a comprehensive psychological evaluation, performed by Rona M. Fields, Ph.D., on September 21 and 22, 2010. *·24.* This evaluation should now be presented to and considered by the IEP team. Pending such review, no other relief has been shown to be warranted at this time.[17]

Accordingly, the Hearing Officer concludes that Petitioner has failed to meet his burden of proving that he was denied FAPE and is entitled to relief beyond the authorized independent evaluations based on a failure to perform triennial re-evaluations.

C. Requested Relief

Having found a denial of FAPE as discussed above, the IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.,* 20 U.S.C. §1415 (i) (2) (C) (iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, I5-16 (1993); *Reid v. District o/Columbia,* 401 F.3d 516, 521-23 (D.C. Cir. 2005). Based on the record developed at hearing, the Hearing Officer has exercised his discretion to order the relief set forth in the accompanying Order. The relief includes compensatory education and other appropriate equitable relief.

1. Compensatory Education

Compensatory education is an equitable remedy available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA. Under the theory of 'compensatory education,' courts and hearing officers may award 'educational services...to be provided

[17] Petitioner's Closing Brief proposes that the Hearing Officer award additional independent evaluations – specifically, a neurological evaluation, a vision evaluation, a functional behavior assessment, and an occupational therapy evaluation. *Petitioner's Closing* at 28. However, because these proposed evaluations were not mentioned in the Complaint or at the PHCs, Respondents had no opportunity to respond to this request – to either agree to provide the evaluations or dispute their necessity. This relief is therefore denied, without prejudice to Petitioner's making such requests to DCPS and/or OSSE directly and then, if dissatisfied with their responses, pursuing an additional due process complaint on such issues. *See* 34 C.F.R. 300.513 (c).

prospectively to compensate for a past deficient program.'" *Reid v. District of Columbia*, 401 F. 3d at 521 (quotations omitted). "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." 401 F.3d at 524. *See also Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student'").

In this case, Petitioner demonstrated that DCPS' failure to provide Petitioner with all required services under his July 21, 2008 IEP ***from August 8 to November 7, 2008***, has resulted in harm to Petitioner, and DCPS did not rebut this showing at hearing. Based on careful consideration of all the testimony and evidence adduced in this case, the Hearing Officer concludes that a compensatory education plan containing the elements described below would be an appropriate equitable remedy under the circumstances. The plan meets the *Reid* standard because it has been shown to be (a) reasonably calculated to provide the educational benefits that likely would have accrued from special education services that DCPS should have supplied in the first place during the relevant time period, and (b) reasonably tailored to the unique needs and deficits of Petitioner.

The evidence shows that Petitioner received significant educational benefits from the intensive reading instruction and other services he received during the 2008 summer. For example, testified that he achieved about seven months of reading progress during his approximately one month of instruction. *Testimony.* Dr. Fields also testified that Petitioner would have made progress in math and reading, and would have developed feelings of support and trust with his service providers, had the services continued. *See Fields Testimony.*

The recent comprehensive psychological evaluation also supports the continued effectiveness of one-on-one intensive reading instruction for Petitioner. For example, the evaluator found (*inter alia*) a significant discrepancy between his functioning in Verbal Comprehension and his Perceptual Reasoning Index, which indicates that he is "severely challenged in receptive and expressive speech and language and in communication skills generally." *·24, p. 3.* As a result, Dr. Fields found that Petitioner "has absorbed little of the

language based formal education, nor can he best learn through that modality." *Id.* On the other hand, the evaluator found that his perceptual reasoning and processing speed were "much less impaired" and thus "provides a modality through which [Petitioner] can be taught effectively on a one-on-one basis." *Id.*[18]

The Hearing Officer therefore concludes that additional one-on-one reading instruction (along with associated behavioral and management supports) in the amounts set forth below is reasonably calculated to provide the educational benefits that likely would have accrued from the special education services that DCPS should have supplied in the first place, and is reasonably tailored to the unique needs and deficits of Petitioner. As such, the compensatory education plan addresses the Student's specific deficiencies by enabling him to gain skills and other educational benefits he likely would have obtained had he been supplied with all of his IEP services (both the supplementary aids & services and the basic specialized instruction and related services) as required in the fall of 2008. In contrast, the four years of compensatory education requested by Petitioner, with the goal of achieving functional literacy (*Pet's Closing Brief, pp. 14, 30)*, are not reasonably linked to the amount of progress Petitioner would have made had appropriate services been delivered for the three-month period at issue.

Accordingly, compensatory education shall be awarded to Petitioner as follows:

(a) 40 hours of active case management by (or another qualified provider with comparable qualifications selected by Petitioner's counsel), to include design of curricula and coordination of tutoring and behavioral support services;[19]

(b) 200 hours of intensive, one-on-one reading instruction, through or another qualified program and/or service provider agreed to by Petitioner and DCPS (including

[18] The Hearing Officer notes that the findings of this evaluation are being considered at this point only with respect to the award of compensatory education. As noted above, the IEP team still needs to review this evaluation, along with any other updated assessments, and consider their implications for Petitioner's IEP going forward. Again, neither the appropriateness of Petitioner's May 2009 IEP nor the need for any further revisions is at issue in the current complaint.

[19] The evidence shows that presently serves as a case manager for one or more other disabled DCPS students who are incarcerated at the and, in that capacity, she designs curricula and directs private tutors and other service providers. *Testimony.*

any qualified individual reading instructors employed by the at the together with reasonably necessary books and supplies, to be coordinated by DCPS and Ms. Hirsch; and

(c) 50 hours of individual counseling/behavioral support services, by a clinical social worker or other qualified provider, to be coordinated by DCPS and Ms. Hirsch.

All services shall be completed over the next three to six months, and ***no later than May 1, 2011***. The Hearing Officer stresses that DCPS should act to implement these compensatory education services as soon as possible, while Petitioner remains incarcerated at the given the difficulties already experienced in delivering services while in BOP custody. Otherwise, to the extent necessary and feasible, DCPS and/or OSSE are encouraged to request special arrangements through the and/or the in order to complete the delivery of the compensatory education services within this timeframe.

2. Other Equitable Relief

While OSSE is not the "first-line provider" of direct services, OSSE has responsibility for general supervision under IDEA, including responsibility "for ensuring that the requirements of [IDEA] are carried out." 34 C.F.R. §300.149(a). Thus, OSSE "is ultimately responsible for the provision of a [FAPE] to all of its students and may be liable for the state's failure to assure compliance with IDEA." *Gadsby v. Grasmick,* 109 F.3d 940, 953 (4th Cir. 1997). *See also Ullmo v. Gilmour Academy,* 273 F.3d 671 (6th Cir. 2001); *S.S. v. Howard Road Academy,* 108 LRP 37537 (D.D.C. 2008). As noted above, unless assigned to another public agency in the State, such SEA responsibilities specifically encompass the "responsibility of ensuring that the requirements of Part B of the Act are met with respect to ***students with disabilities who are convicted as adults under State law and incarcerated in adult prisons."*** 34 C.F.R. §300.149(d) (emphasis added). OSSE must also provide special education and related services directly whenever it determines that the LEA "is unable to establish and maintain programs of FAPE that meet the requirements of [Part B]" or that the LEA "has one or more children with disabilities who can best be served by a regional or State program or service delivery system designed to meet the needs of these children." 34 C.F.R. §300.227(a) (ii), (iv).

In light of these statutory obligations and the factual record developed in this case concerning the inability of DCPS to deliver any special education and related services to

Petitioner (and similarly situated students) while in custody, the Hearing Officer has included certain ancillary equitable relief in the order below.

However, the Hearing Officer has not granted other relief requested by Petitioner, including a change in his placement, schedule, and/or environment in which he is incarcerated in order to facilitate the delivery of special education services. The Hearing Officer does not believe DCPS and/or OSSE are required to intervene with correctional officials to attempt to alter the terms of Petitioner's incarceration to ensure that he receives services "in a supportive environment that is quiet, predictable, stable, and secure." (*Pet's Closing Brief*, at 6.) Nor does the Hearing Officer believe he has the legal authority to grant such relief.

V. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby ORDERED:

1. DCPS shall provide **compensatory education services** to Petitioner in the form of: (a) 40 hours of active case management by a Case Manager selected by Petitioner's counsel, to include design of curricula and coordination of tutoring and behavioral support services; (b) 200 hours of one-on-one reading instruction, through (or another qualified program and/or service provider agreed to by Petitioner and DCPS), together with reasonably necessary books and supplies, to be coordinated by DCPS and Petitioner's Case Manager; and (c) 50 hours of individual counseling/behavioral support services, by a clinical social worker or other qualified provider, to be coordinated by DCPS and Petitioner's Case Manager.
2. The compensatory education services specified in Paragraph 1 above shall commence immediately and shall be completed **by May 1, 2011**.
3. DCPS shall reimburse the costs of the comprehensive psychological evaluation conducted in September 2010 by Dr. Rona Fields, in accordance with the standard criteria governing independent educational evaluations authorized by DCPS.
4. Within **30 calendar days** of this Order (*i.e.,* **by December 1, 2010**), or of the last date that DCPS receives the results of the independent evaluations authorized on or about August 24, 2010, DCPS shall convene a meeting of Petitioner's MDT/IEP Team with all necessary members (including Petitioner's counsel and Case Manager and the Director of the at the to (a) review the results of the evaluations, (b) discuss and determine whether any additional evaluations are needed, and (c) review and revise, as appropriate, Petitioner's IEP.

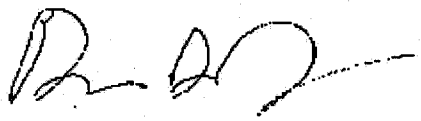
5. Within **60 calendar days** of this Order ((*i.e.,* **by December 31, 2010**), the OSSE shall: (a) communicate in writing with OSSE's State liaison, Director of the Office of Special Education Programs, and/or other appropriate officials of the U.S. Department of Education to request additional guidance regarding OSSE's responsibilities, if any, to ensure delivery of special education and related services to disabled students who are convicted as adults under District of Columbia law and incarcerated in adult federal correctional facilities; and (b) communicate in writing with appropriate officials of the U.S. Department of Justice and regarding the willingness and ability to provide the OSSE with access to such students for purposes of delivering special education and related services in the event the OSSE and/or DCPS is determined to be legally responsible for such services under the IDEA, including pursuant to an appropriate Intergovernmental Agreement.

6. All written communications from DCPS and/or OSSE concerning the above matters shall include copies to Petitioner and to Petitioner's counsel, Joseph B. Tulman, Esq, University of the District of Columbia David A. Clarke School of Law, by facsimile (202-274-5569) or email (jtulman@udc.edu).

7. Petitioner's other requests for relief in his Due Process Complaint, including additional forms of compensatory education and injunctive relief, are **DENIED**.

8. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.



Dated: November 1, 2010

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).