

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

Student Hearing Office  
810 First Street NE, STE 2  
Washington, DC 20002

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

Date Issued: December 2, 2011

Hearing Officer: Jim Mortenson

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

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OSSE  
STUDENT HEARING OFFICE  
2011 DEC -2 PM 1:25

**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed by the Petitioner on September 19, 2011.

A resolution meeting was convened on September 29, 2011, and did not result in any agreements or the start of the 45 day hearing timeline. A response to the complaint was untimely filed on October 5, 2011. A prehearing conference was held on October 6, 2011 and a prehearing order was issued on that date.

The first day of the due process hearing was convened and held on November 7, 2011, in room 2003 at 810 First Street NE, Washington, D.C. At the start of the hearing the Petitioner withdrew the second of two issues identified for hearing and the related requested relief. The

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<sup>1</sup> Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

second day of the due process hearing was held on November 22, 2011, in room 2004. Between the two hearing dates the Respondent submitted a “supplemental” disclosure on November 9, 2011. The Petitioner moved to strike the revised disclosure on the same date. The Respondent filed an opposition to the motion on November 14, 2011. The motion was denied in a written order on November 16, 2011.

The Petitioner requested to file written closing arguments. The parties were given until November 23, 2011 to file written closing arguments. Only the Petitioner filed a closing argument, on November 23, 2011.

The due date for this HOD is December 3, 2011. This HOD is issued on December 2, 2011.

## **II. JURISDICTION**

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5, Chap. 30.

## **III. ISSUE, RELIEF SOUGHT, and DETERMINATION**

The issue to be determined by the Independent Hearing Officer (IHO) is:

Whether the Respondent denied the Student a free appropriate public education (FAPE) when it offered or provided the Student an initial individualized education program (IEP) that was not reasonably calculated to provide educational benefit because it lacked “full-time” special education services in a therapeutic environment?

The substantive requested relief at the time of hearing is:

- Compensatory education in the form of tutoring in reading, math, and writing; and
- “Full-time” special education for the 2011-2012 school year (at the non-public Children’s Guild school).

The Respondent provided the Student an initial IEP that was reasonably calculated to provide educational benefit in the academic area of reading and functional skills. The Respondent failed to provide the Student an initial IEP that was reasonably calculated to provide educational benefit in the areas of mathematics and writing.

#### IV. EVIDENCE

Eight witnesses testified at the hearing, six for the Petitioner and two for the Respondent. The Petitioner's witnesses were:

- 1) Guardian Ad Litem
- 2) Petitioner (P)
- 3) Natasha Nelson, Clinical Psychologist (Expert in clinical psychology) (N.N.)
- 4) Chithalina Khanchalern, Educational Advocate (C.K.)
- 5) Director of Admissions,
- 6) Bryan Daniel, Educational Advocate (B.D)

The Respondent's witnesses were:

- 1) Special Education Coordinator
- 2) Regular Education Teacher

33 exhibits were admitted into evidence of 48 disclosures from the Petitioner. The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 7	Undated	Analysis of Existing Data
P 8	June 9, 2010	Prior Written Notice - Evaluation
P 9	February 14, 2011	Prior Written Notice - Evaluation
P 10	February 4, 2011	MDT/IEP Meeting Notes
P 11	February 4, 2011	Advocate's Notes
P 12	April 14, 2011	Advocate's Notes
P 13	April 15, 2011	MDT/IEP Meeting Notes

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 14	April 29, 2011	Advocate's Notes
P 15	June 17, 2011	MDT/IEP Meeting Notes
P 16	June 17, 2011	Advocate's Notes
P 17	March 30, 2011	Confidential Psychological Evaluation
P 18	February 25, 2011	Classroom Observation
P 19	June 16, 2011	Observation [notes]
P 20	July 11, 2011	Observation @ Ketcham ES
P 21	October 3, 2011	[M.C. notes of observations]
P 22	October 27, 2011	[B.D. notes of observation]
P 23	June 22, 2010	1 <sup>st</sup> Grade Report Card SY 2009/2010
P 24	December 2 & 9, 2010	[Two Student work samples]
P 25	June 20, 2011	2 <sup>nd</sup> Grade Report Card SY 2010
P 26	December 3, 2010	Office Discipline Referral Form
	January 24, 2011	Office Discipline Referral Form
	January 31, 2011	Office Discipline Referral Form
	February 15, 2011	Office Discipline Referral Form
	February 17, 2011	Office Discipline Referral Form
	February 23, 2011	Office Discipline Referral Form
	April 13, 2011	Office Discipline Referral Form
P 27	October 27, 2010-	
	January 6, 2011	[21 daily behavior charts]
P 29	January 7, 2011	[Behavior Contract]
	January 7, 2011-	
	March 23, 2011	[35 daily behavior charts]
P 30	June 1, 2011	mClass Literacy Progress Report
P 31	June 9, 2011	[Five Student work samples]
P 32	June 10, 2011	IEP Progress Report – Annual Goals
P 33	June 2, 2011	Service Tracker
	June 20, 2011	Service Tracker
P 34	Undated	[14 word lists]
	Undated	[Graph] Words I Already Know!
P 36	February 15, 2011	Letter from Khanchalern to Batson
P 39	May 10, 2011	Letter from Khanchalern to Batson
P 40	July 8, 2011	Compensatory Education Plan
P 41	August 31, 2011	Email chain ending from Batson to Daniel
P 42	October 7, 2011	Email chain ending from Daniel to Batson
P 48	Undated	Resume of Natasha Nelson, Psy.D.

Six exhibits were admitted into evidence of eight disclosures from the Respondent. The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	March 28, 2011	Functional Behavior Assessment
R 2	March 28, 2011	Behavior Intervention Plan

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 3	April 14, 2011	Evaluation Summary Report
R 4	June 10, 2011	IEP Progress Report – Annual Goals
R 6	July 8, 2011	Compensatory Education Plan
R 8	April 29, 2011	IEP

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. To the extent the findings of fact do not reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are not credited or are not material. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

#### **V. FINDINGS OF FACT**

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

1. Student is a 3<sup>rd</sup> grader at \_\_\_\_\_<sup>2</sup> She was determined eligible for special education and related services in April, 2011, under the definition of emotional disturbance.<sup>3</sup>
2. The Student's identification as a child with a disability was delayed because the Respondent refused to conduct an initial assessment until February 2011.<sup>4</sup>
3. The Student has low-average cognitive functioning.<sup>5</sup> She has been diagnosed with: learning disorder, NOS; oppositional defiant disorder; and attention deficit hyperactivity disorder, combined type.<sup>6</sup> When the Student was determined eligible in April 2011 she was in the second grade and her academic performance was at a kindergarten level in reading and math

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<sup>2</sup> Testimony (T) of M.C., T of P.

<sup>3</sup> R 8.

<sup>4</sup> T of P, P 8, P 9.

<sup>5</sup> P 17, T of N.N.

<sup>6</sup> P 17.

and at a first grade level in writing.<sup>7</sup> Her disabilities affect her ability to read, write, and perform in mathematics.<sup>8</sup> The Student's disabilities affect her ability to follow directions, work cooperatively with peers, maintain self-control, and her attention span is limited.<sup>9</sup> These functional problems affect her ability to be successfully engaged in class and attend to academic tasks.<sup>10</sup>

4. The Student's initial IEP was created in April 2011 and has not yet been revised.<sup>11</sup> The IEP includes annual academic goals in the areas of math, reading, and writing, and functional goals in the area of emotional, social, and behavioral development.<sup>12</sup> There are four math goals, the first and fourth of which are approximately based on second grade math standards and the second and third of which are approximately based on third grade math standards.<sup>13</sup> There are four reading goals, all of which are approximately based on second grade reading standards.<sup>14</sup> There are three writing goals, the first two approximately based on second grade standards and the third approximately based on a third grade standard.<sup>15</sup>
5. The IEP includes the following three functional goals:<sup>16</sup>

- 1) [The Student] will maintain or regain behavioral control by utilizing relaxation techniques or coping skills (i.e. take deep breaths, talk about the situation, ask for help, count to ten slowly, walk away, role-play activities, positive self-talk, planned ignoring, structured time out) in 4 out of 5 trials.

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<sup>7</sup> P 17, T of N.N.

<sup>8</sup> R 8.

<sup>9</sup> R 8.

<sup>10</sup> R 8, T of M.C., T of C.K., T of B.D., T of J.M.

<sup>11</sup> R 8. (No evidence of a revision was provided and so the presumption is that this has not occurred, leading to the finding of fact.)

<sup>12</sup> R 8.

<sup>13</sup> R 8. (Administrative notice is taken of the District of Columbia Education Standards. The math goals in the IEP align approximately with the following math standards (in order of the goals): 2.NSO-C.13, 3.M.3, 3.NSO-C.13, and 2.NSO-N.1 through N.4).

<sup>14</sup> R 8. (The reading goals in the IEP align approximately with the following reading standards (in order of the goals): 2.BR-PA.2, 2 BR-P.11, 2.BR-P.10, 2.IT-E.2).

<sup>15</sup> R 8. (The first writing goal in the IEP align approximately with a combination of different writing standards for second grade. The second and third goals align approximately with standards 2.EL.6 and 3.W-I.1).

<sup>16</sup> R 8. (There are no educational standards associated with functional skills as opposed to academic achievement.)

- 2) [The Student] will display appropriate behavior in the school environment as evidenced by her listening and following directions, completing given assignments, not displaying physical aggression towards adults and staff and not walking out of class/school or destroying school property in 4 of 5 trials.
- 3) Given adult or peer modeling, [Student] will appropriately initiate and sustain social contact with her same age peer by inviting the child to play with her, sharing or asking permission to join in the child's play and not displaying physical aggression in 4 out of 5 opportunities.

The baseline from which the Student's progress toward these goals is to be measured is that she displays defiant and disruptive behaviors 90% of the time and lacks friendships in the school setting.<sup>17</sup>

6. The IEP includes the following special education and related services for the Student:

<u>Service</u>	<u>Setting</u>	<u>Time/Frequency</u>
Reading	General Education	20 hours per month
Writing	General Education	20 hours per month
Math	General Education	8 hours per month
Behavioral Support	General Education	240 minutes (4 hours) per month

7. The Respondent did not provide the Petitioner with prior written notice of its proposed special education services for the Student that includes an explanation why the Respondent proposed these levels of service.<sup>18</sup>
8. At the end of the 2010-2011 school year, the Student made little to no progress on her math goals.<sup>19</sup> She made some progress on only one of four reading goals.<sup>20</sup> The Respondent had not implemented the services to enable the Student to reach the writing goals and she made

<sup>17</sup> R 8.

<sup>18</sup> No evidence was offered by either party and the explanation was not included in the response to the complaint. P 14, meeting notes, and R 8, the IEP, also do not include the explanation for the levels of service.

<sup>19</sup> R 4/P 32.

<sup>20</sup> R 4/P 32.

no progress on any of them.<sup>21</sup> The Student made progress on two of three functional goals.<sup>22</sup>

In fact, her behavior improved dramatically by this time.<sup>23</sup>

9. The Student's medications had been changed sometime during the spring of 2011, as did her living arrangements: moving from home to foster care and then to her Grandmother's in the summer of 2011.<sup>24</sup>
10. At the end of the 2010-2011 school year the Student did not meet academic standards for reading and writing.<sup>25</sup> She approached the academic standards for math.<sup>26</sup> In non-core subjects (science, social studies, art, music, and health/physical education she met academic standards.<sup>27</sup>
11. The Student did not receive extended school year services under her IEP, but she did attend summer school.<sup>28</sup>
12. The Student is now reading and writing at a first grade level.<sup>29</sup> Her math performance is still at a kindergarten level, but almost to first grade.<sup>30</sup> Her behavior remains a problem but is overall improved as there have been no discipline referrals this year.<sup>31</sup>
13. The current progress toward towards the Student's annual IEP goals is unknown.<sup>32</sup>

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<sup>21</sup> R 4/P 32.

<sup>22</sup> R 4/P 32.

<sup>23</sup> P 13, P 15, T of J.M., T of C.K.

<sup>24</sup> T of J.M., T of P, T of C.K.

<sup>25</sup> P 25.

<sup>26</sup> P 25.

<sup>27</sup> P 25.

<sup>28</sup> T of T.B., P 20.

<sup>29</sup> T of T.B.

<sup>30</sup> T of P.

<sup>31</sup> T of T.B., T of P, P 26, P 27, P 29.

<sup>32</sup> While evidence of progress in the general education curriculum was provided through testimony, no current IEP progress reports or testimony was provided.

## VI. 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. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

2. 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.

3. Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA's purpose. *See*: 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA's purpose. *See*: 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. "[A]n IEP that focuses on ensuring that the child is

involved in the general education curriculum will necessarily be aligned with the State's content standards." 71 Fed. Reg. 46662 (2006). The Supreme Court has described the purpose of the IDEA as providing a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982). When a child is mainstreamed:

the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit.

Id. at 203. The Court held:

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.

Id. at 203-204. Thus, the "basic floor of opportunity" provided by the IDEA for this Student, and as described by the Supreme Court, consists of the opportunity for advancement in the grade level content for the grade in which the Student is enrolled.

4. Federal regulations at 34 C.F.R. § 300.320 lists the required contents of an IEP:

- (a)(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); or
  - (ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;
- (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;
- (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
- (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.

5. “An IEP may not be reasonably calculated to provide benefits if, for example, a child’s social behavior or academic performance has deteriorated under his current educational program, *see Reid v. District of Columbia*, 401 F.3d at 519-20 [401 F.3d 516 (D.C. Cir 2005)]; the nature and effects of the child’s disability have not been adequately monitored, *see Harris v. District of Columbia*, 561 F. Supp. 2d at 68 [561 F. Supp. 2d 63 (D.D.C. 2008)]; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties. *See Gellert v. District of Columbia Public Schools*, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006).” *Suggs v. District of Columbia*, 679 F. Supp. 2d 43, 53 IDELR 321 (D.D.C.2010).

6. 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.

7. The concept of "least restrictive environment" (LRE) is defined in Federal Regulations as:
- (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
  - (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114(a)(2).

8. The Petitioner challenges the level of special education services in the IEP and the educational placement, specifically whether the Student requires a "full-time" level of special education services in a therapeutic environment. With regard to the special education services it must be determined whether the services provided in the IEP: a) enable the Student to advance toward attaining the annual goals in the IEP; b) enable the Student to be involved in and make progress in the general education curriculum; and c) enable the Student to be educated and participate with other children with disabilities and nondisabled children in academic and non-academic activities? *See* 34 C.F.R. § 300.320(a)(4).<sup>33</sup>
9. The Petitioner has shown that the special education serviced in the IEP for math were not reasonably calculated to enable the Student to advance toward the annual math goals in the

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<sup>33</sup> The Petitioner argues, using decisions from other circuits, that the IEP is examined as of the time it was created and that evidence of progress, or lack thereof, subsequent to the IEP's creation is not appropriate. The Petitioner's argument is not persuasive. The IEP is not a static document. *See e.g.* 34 C.F.R. § 300.324 (The IEP is periodically reviewed and revised to address multiple factors, including progress). *See also, Reid v. District of Columbia*, 401 F.3d 516, 519-520 (D.C. Cir. 2005)(An IEP may not be reasonably calculated to provide benefits if a child's social behavior or academic performance has deteriorated under his current educational program.).

IEP or make progress in the general education curriculum for math or writing. There was no explanation for the eight hours per month of math services, as required by 34 C.F.R. § 300.503(b)(2), and little, if any, progress has been shown after half a year. An increase in math services, including pull-out specialized instruction, will be necessary to remedy this denial of FAPE. The services for writing also were not reasonably calculated to provide benefit because little to no academic progress has been demonstrated in this area. Indeed, the Respondent failed to provide writing instruction services as required by the IEP, at least during the 2010-2011 school year, and this has contributed to the lack of progress.

Regardless, the Student remains at roughly the same level of academic performance in writing that she did when the IEP was formulated and there was no explanation for the level of service offered. The Respondent has also failed to monitor the Student's progress toward her IEP goals. For all these reasons, the Student was been denied a FAPE.

10. The Petitioner has not shown that the special education services in the IEP for reading and functional skills (behavior) were not reasonably calculated to enable the Student to advance toward the annual goals for those areas in the IEP and to make progress in the general education curriculum (sans math and writing). In the half-year since the IEP was created, the Student has progressed from a kindergarten level in reading to a first grade level, and her goals are a second grade level by April 2012. Thus, her trajectory is on target for reading improvement with the services provided. The Student's behavior is no longer resulting in her removal from the classroom and it is overall improved from last year, and likely due to reasons beyond just the IEP, including a more stable home environment and medication management. Despite the lack of explanation for the services in reading and functional skills, and the lack of monitoring progress toward the IEP goals, the evidence shows, generally, the

Student has improved in the general education curriculum (thus presumably toward her reading goals since they are based on the curriculum), and so the IEP was reasonably calculated to provide educational benefit with regard to these two areas.

11. The services in the IEP are reasonably calculated to enable the Student to be educated and participate with other children with disabilities and nondisabled children in academic and non-academic activities. The IEP provides all special education and related services to the Student in the general education setting and the student is making progress toward the annual IEP goals in reading and functional skills and in the general education curriculum but for math and writing. Given the lack of progress in math and writing, the Student will require more intensive services, including a more restrictive setting for such services.
12. This hearing officer must grant relief appropriate to ensure the Student is provided a FAPE. See 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). Compensatory education is an equitable remedy that may be provided as relief in disputes under the IDEA. Reid, 401 F.3<sup>rd</sup> 516, \_\_\_, 43 IDELR 32, (p 5, p 6) (D.C. Cir. 2005), citing G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003), and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993). If, in the hearing officer's broad discretion, compensatory education is warranted, the "goal in awarding compensatory education should be 'to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.'" Wilson, at p 9, citing Reid, 401 F.3d at 518, and Carter at 15-16. "Once a student has established a denial of the education guaranteed by the IDEA, the Court or the hearing officer must undertake 'a fact-specific exercise of discretion' designed to identify those services that will compensate the student for that denial." Id., citing Reid, 401 F.3d at 524; see Stanton ex rel. K.T. v. District

of Columbia, 680 F. Supp. 2d 201, 207 (D.D.C. 2010); Phillips ex rel. T.P. v. District of Columbia, 736 F. Supp. 2d 240, 247 (D.D.C. 2010).

13. Petitioner has requested compensatory education in the form of reading, math, and writing tutoring, as well as a placement in a separate, non-public, day school for children with disabilities.<sup>34</sup> Compensatory education in the areas of math and writing are warranted to put the Student in the place she would have been but for the denial of FAPE. Because the Respondent has not adequately monitored the Student's progress toward the IEP goals for math and writing, the award ordered will be flexibly applied and based on the outcome expected by the annual goals in the IEP. The compensatory services will be specialized instruction, not general education tutoring, because the Student is a child with a disability. Additionally, the Student's IEP will be revised to reflect a level of math instruction appropriate to meet the Student's needs, based on the level of service that has shown benefit in reading. Finally, the increased level of math services will require a change in placement to a pull-out setting because the Student remains so far behind her third grade peers. A separate day school for children with disabilities is not warranted, however, as it is not the least restrictive environment for this Student.

#### **VII. DECISION**

The Petitioner prevails because the IEP is not reasonably calculated to provide educational benefit to the Student in the areas of math and writing. The IEP is reasonably calculated to provide educational benefit in the areas of reading and functional skills.

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<sup>34</sup> P 40/R 6, a "Compensatory Education Plan" is not given any weight because it is arbitrary and not based on the facts herein, having been created in July, 2011.

### VIII. ORDER

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

1. The Respondent will provide the Student with compensatory education in the form of specialized instruction in math. This instruction will be provided afterschool for three days per week for up to one hour per session. This instruction will begin the week following the winter break and will continue until the Student has reached her current annual IEP goals in math. This instruction, in addition to the IEP services, is intended to help the Student reach those goals by the end of April 2012. The instruction must be provided by a highly qualified special education teacher with knowledge of the elementary math curriculum.
2. The Respondent will provide the Student with compensatory education in the form of specialized instruction in writing. This instruction will be provided afterschool for one day per week for up to one hour per session. This instruction will begin the week following the winter break and will continue until the Student has reached her current annual IEP goals in writing. This instruction, in addition to the IEP services, is intended to help the Student reach those goals by the end of April 2012. The instruction must be provided by a highly qualified special education teacher with knowledge of the elementary English language arts curriculum.
3. The Student's IEP is revised to include 20 hours per month of specialized instruction in mathematics, outside of the general education setting but within the Student's school. This is the least restrictive environment for the Student and provides the opportunity for her to receive the intensive specialized instruction she needs to be able to be involved in and progress in the general education curriculum with her peers. She is currently not able to participate in the same curriculum as her third grade peers as a result of her math deficits. This amount of time is reasonable because it is based on the amount of time the IEP team

determined necessary for the Student in reading, which has provided the Student with educational benefit, and with the more intensive pull-out services should be sufficient to advance the Student forward to her math goals which are based on second and third grade standards. This increase in service will begin the week the Student returns from winter break.

4. The compensatory education herein will be put into a written plan by the Respondent and a copy of the plan provided to the Petitioner prior to December 21, 2011. The plan will be modified during its implementation, based on the performance of the Student. The performance of the Student will be monitored and reported to the Petitioner every two weeks, in written form.
5. The revision to the IEP will be made by the Respondent and a copy of the revised IEP will be provided to the Petitioner prior to December 21, 2011. Nothing in this order prohibits the parties from agreeing to additional changes to the IEP or to the compensatory award herein, as long as those changes do not deny the Student a FAPE. The IEP team must meet and make revisions if monitoring of the Student's progress shows she is not on track to meet the annual IEP goals by the end of April, 2012, pursuant to 34 C.F.R. § 300.324(b)(1)(ii)(A).

**IT IS SO ORDERED.**

Date: December 2, 2011



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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).