

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

Student Hearing Office  
810 First Street, N.E.  
Washington, DC 20002

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[STUDENT],<sup>1</sup>  
through the Parent/Guardian,\*

Petitioner,

v

DCPS,

Respondent.

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Date Issued: 12/21/11

Hearing Officer: Seymour DuBow

DSSSE  
STUDENT HEARING OFFICE  
2011 DEC 21 AM 10:15

**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

A due process complaint and Motion for an Expedited Hearing was filed by counsel for petitioner on October 26, 2011. (P-35) On November 2, 2011 counsel for respondent filed her opposition to the Motion for an Expedited Hearing. On November 3, 2011 a conference call was held on the Motion for an Expedited Hearing and on that date an Order was issued denying the Motion. Counsel for respondent DCPS filed her response to the complaint on November 7, 2011. (R-1) On November 9, 2011 a resolution meeting was held and the parties failed to reach an agreement. (P-36) On November 17, 2011 a prehearing conference was held and a prehearing Order was issued on November 18, 2011. (P-37)

The due process hearing convened at 9 a.m. on December 7, 2011 in the  
Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Petitioner was

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

represented by Joy Purcell of the Children's Law Center and respondent DCPS was represented by Linda Smalls. The hearing reconvened at 9 a.m. on December 8, 2011 in Room 2007 of the Student Hearing Office. The hearing was closed. At the beginning of the hearing, counsel for the parties agreed to a Stipulation of Facts that is stated below. Respondent's documents R-1-R-29 were admitted into evidence without objection. Petitioner's documents P-1, P-3-5, P7-21, P-31, P-33-38 were admitted into evidence without objection. Counsel for respondent objected to P-2, P-6, P-22-30, P32, P-39 -P-41. These documents were provisionally admitted into evidence pending presentation during the hearing and review by the hearing officer. P-6 was not admitted into evidence based on sustaining the objection on relevance grounds. The first page of P-39 was admitted into evidence and the objection withdrawn because it was written by the witness Ms. Savage, but the following five pages of P-39 were written by someone else and not admitted into evidence. This hearing officer admits into evidence all other documents objected to by respondent's counsel and will determine what weight to give them. All witnesses were sworn under oath prior to testifying. Counsel for petitioner called as witnesses: the petitioner, Amanda Eggers, investigator at Children's Law Center, Richard Weinfeld, qualified as expert witness in special education programming, who all testified in person and of School who testified by telephone. Counsel for respondent called the following witnesses from School: Paige Bennett, teacher, Dr. Marquita Elmore, school psychologist and qualified as expert witness on school psychology, and Cynthia Sheppard, special education coordinator who all testified by telephone. Counsel for the parties submitted written closing arguments.

## JURISDICTION

The hearing was convened on December 7<sup>th</sup> and 8<sup>th</sup>, 2011 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004 (hereinafter referred to as IDEA), Title 34 of the Code of Federal Regulations, Part 300 (2006) and Title V-E of the District of Columbia Municipal Regulations.*

## BACKGROUND

The student is a \_\_\_\_\_ year old male who has been found eligible for special education services as a student with Other Health Impairment (OHI). The student transferred from Alexandria City Public Schools (ACPS) to \_\_\_\_\_ School in the District of Columbia in November, 2010. ACPS had developed an IEP for the student on October 15, 2010. Counsel for the petitioner filed this due process complaint alleging that DCPS did not act in accordance with *IDEA's* regulation at *Section 300.323 (f)* relating to the IEPs of students who transfer from another state and did not provide an appropriate IEP and appropriate placement at \_\_\_\_\_ for the 2010-2011 School Year and the 2011-2012 School Year. Counsel for petitioner argues that because of the student's serious emotional and behavioral issues as well as his academic deficits, he needs a full-time therapeutic day special education school placement at The \_\_\_\_\_ School. Counsel for respondent denies the above allegations and stated that DCPS adopted the ACPS IEP and implemented the IEP at \_\_\_\_\_

## ISSUES AND RELIEF SOUGHT

The issues to be determined are as follows:

1. Did DCPS fail to timely evaluate the student in all areas related to his suspected disability after transferring from \_\_\_\_\_ Campus in Alexandria, Virginia to \_\_\_\_\_ School in the District of Columbia in accordance with *IDEA's Regulation at Section 300.323 (f)(1)*?

2. Did DCPS fail to appropriately review and revise the student's IEP after he transferred from \_\_\_\_\_ Campus in Alexandria, Virginia to \_\_\_\_\_ School in the District of Columbia in accordance with *IDEA's Regulation at Section 300.323 (f) (2)* ?

3. Did DCPS fail to timely provide the student with an appropriate IEP for the 2010-2011 School Year in the following alleged particulars: because the IEP has an inappropriate disability classification that led to a failure to identify and appropriately address the student's multiple disabilities, the IEP lacks annual mathematics goals to address the student's deficits in mathematics, the IEP lacks annual reading goals to address the student's deficits in fluency and comprehension, the IEP lacks appropriate social-emotional goals to address the student's social-emotional deficits, the IEP lacks a Behavior Intervention Plan, the IEP only provides for 30 minutes a week of behavioral support services when the student needs 60 minutes a week of behavioral support services and the IEP only provides for seven hours of specialized instruction a week when the student needs a full-time IEP with special education services provided for all hours of instructional time during the school day ?

4. Did DCPS fail to provide an appropriate placement for the student for the 2010-2011 School Year at \_\_\_\_\_ School because \_\_\_\_\_ offers a class size that is too large for the student and does not offer the therapeutic supports he needs?

5. Did DCPS fail to provide an appropriate IEP for the 2011-2012 School Year in offering the same IEP as the previous school year that is inappropriate in the following alleged particulars: because the IEP has an inappropriate disability classification that led to a failure to identify and appropriately address the student's multiple disabilities, the IEP lacks annual mathematics goals to address the student's deficits in mathematics, the IEP lacks annual reading goals to address the student's deficits in fluency and comprehension, the IEP lacks appropriate social-emotional goals to address the student's social-emotional deficits, the IEP lacks a Behavior Intervention Plan, the IEP only provides for 30 minutes a week of behavioral support services when the student needs 60 minutes a week of behavioral support services and the IEP only provides for seven hours of specialized instruction a week when the student needs a full-time IEP with special education services provided for all hours of instructional time during the school day?

6. Did DCPS fail to provide an appropriate placement for the 2011-2012 School Year at \_\_\_\_\_ School because \_\_\_\_\_ offers a class size that is too large for the student and does not offer the therapeutic supports he needs?

The relief requested is placement of the student at the non-public special education program at The \_\_\_\_\_ School including transportation services and compensatory education from October 2010 in the form of independent afterschool tutoring and music therapy

## FINDINGS OF FACT

At the beginning of the hearing, Counsel for the parties agreed to the following

### Stipulation of Facts:

1. The Student is in special education and enrolled at \_\_\_\_\_ School for the 2011-2012 School Year. The Student transferred to \_\_\_\_\_ from Alexandria City Public Schools (“ACPS”) in November 2010 with an Individualized Education Plan (IEP) developed by ACPS on October 15, 2010.
2. The Student’s ACPS IEP was developed on October 15, 2010 with a disability classification of Other Health Impairment. The IEP contains 1 to 2 goals in each of the following areas: attention/on-task behaviors, redirection, behavior system, behavior plan, work habits, reading comprehension, vocabulary, and literature. The IEP indicates placement options of public day school and home based program. The IEP indicates the Student would be provided with home based instruction until the parent met with Pupil Services as a result of a physical altercation he had with another student. It further indicates the Student would participate in the special education setting for Science, Mathematics, Language Arts, Social Studies, Science and Mathematics. The IEP also indicates the Student was administered the Wechsler Adult Scale of Intelligence (WASI) with results indicating his overall intellectual functioning was measured in the low average range (FSIQ=88). His verbal abilities fall in the low average range (VIQ=87), and his nonverbal abilities fall in the average range (PIQ=93). The Student was administered the Woodcock Johnson Test of Achievement-Third Edition (WJ-III) to measure is current achievement levels in the areas of reading, mathematics, and written language. The test indicated that his basic

reading, math calculation, reasoning, spelling and written expression skills fell in the average range and commensurate with his measured abilities. He demonstrated weakness in reading comprehension (SS:79) and reading fluency (SS:78).

3. On November 29, 2010 DCPS developed an IEP for the Student with a primary disability of Other Health Impairment. The IEP prescribed 3.5 hours per week of specialized instruction in general education, 3.5 hours per week of specialized instruction outside of general education, and 30 minutes per week of behavioral support services. The IEP contained goals in the areas of reading, social/emotional, and transition. The IEP also had classroom and statewide assessment accommodations, no transportation services, and no extended school year services. The parent Petitioner signed the IEP on November 29, 2010.
4. DCPS revised the student's IEP on November 21, 2011.
5. The current November 21, 2011 IEP contains a disability classification of multiple disabilities. The IEP prescribes 12 hours per week of specialized instruction in general education, 6 hours per week of specialized instruction outside of general education, and 120 minutes per month of behavioral support services outside of general education. The IEP also contains goals in the area of mathematics, reading, written expression, social/emotional, and transition goals. The IEP has classroom and statewide assessment accommodations, no transportation services, and no extended school year services.
6. The Student has received the following evaluations: a psycho educational evaluation performed by ACPS dated February 5, 2009, a social history update performed by ACPS dated February 18, 2009, a diagnostic/assessment report performed by First

Home Care dated December 1, 2010, a psychological evaluation performed by DCPS dated September 29, 2011, an educational evaluation performed by DCPS dated September 21, 2011, and a functional behavior assessment performed by DCPS dated October 12, 2011.

7. DCPS created a behavior intervention plan on December 1, 2011.

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issues 1, 2, 3 & 5 are as follows:

I.

1. On October 15, 2010 Alexandria City Public Schools in Alexandria, Virginia developed an IEP for the student. The student's mother participated in the IEP meeting. (P-19 at p.3) The IEP included results of recent evaluations stating that Wechsler Adult Scale of Intelligence test results indicate the student's overall intellectual functioning is in the low average range (FSIQ=88) His verbal abilities fell in the low average range (VIQ=87) and his nonverbal abilities were in the average range (PIQ=93). The Woodcock-Johnson Test of Achievement-Third Edition (WJ-III) test results indicated that the student's basic reading, math calculation and reasoning, spelling, and written expression skills fell in the average range and are commensurate with his measured abilities, but he demonstrated weakness in reading comprehension (SS: 79) and reading fluency (SS: 78). The IEP does not cite specific current evaluations it relied on for the above scores and comments on academic strengths and weaknesses, but the scores and academic comments are from the February 2009 ACPS Psycho educational

evaluation. (P-4). The Factors for IEP Team Consideration states on the student's current educational performance that he "does well on tasks when he is focused, very fidgety, restless and distracted, presently his academic record for math and social studies is good, science is fair, and Language Arts is poor. " (P-19 at p.6) The student's challenges were a high level of energy and distractibility. (P-19 at p.6) The student's disability classification on the IEP is Other Health Impaired. (P-19 at p. 10)The annual goals included one on reading comprehension and four others on attention/on task behaviors, redirection, behavior system and work habits. (P-19 at p.10-14) The IEP called for 90 minutes a day of specialized instruction in reading in a special education classroom, 45 minutes a day of specialized instruction in writing in a special education classroom and 45 minutes a day of specialized instruction in math in a special education classroom for a total of 15 hours a week of specialized instruction in a special education classroom. The IEP also provided for 30 hours a month of specialized instruction in reading in the general education classroom, 15 hours a month of specialized instruction in writing in the general education setting and 15 hours a month of specialized instruction in math in the general education setting for a total of 15 hours a week of specialized instruction in a general education class. The total number of hours of specialized instruction in and out of the general education setting was 30 hours a week. (P-19 at p.17)

2. Alexandria City Public Schools conducted a psycho educational evaluation on the student on five different dates in January and February 2009 when he was in the grade at School. The evaluation report

provides the test scores and academic comments on strengths and weaknesses that were cited in the ACPS IEP. (P-4 at p. 6, Stipulation of Facts #2) The report also stated the student receives instruction in a self-contained setting for all academics and also receives reading enrichment services. The student's social-emotional functioning was assessed through the teacher and parent versions of the Behavior Assessment System for Children (BASC-2), student interview and observation. The student's three teachers reported that "he almost always has trouble staying seated, has poor self control, has a short attention span, and is easily distracted. [Student] frequently argues when denied own way, defies teachers, breaks the rules, and gets into trouble...[Student] is often reported to act strangely, sometimes says things that make no sense, and appears out of touch with reality." (P-4 at p.5) The evaluator concluded: "Behavior rating scales indicate clinically significant concerns in the areas of hyperactivity and attention both at home and at school, which is consistent with his diagnosis of ADHD. Based on these results, it appears that inattention and hyperactivity continue to impact [student]'s classroom performance and learning. Furthermore, at-risk to clinically significant concerns were noted for aggression, conduct problems, atypicality, and several adaptive areas." (P-4 at p.6) ACPS also conducted a social history-update on February 18, 2009. The school update section states:"In sixth grade he received instruction in a co-taught environment and it was not a positive experience....[Student]attended summer school where he received instruction in the self-contained setting. His experience was a success which gave way for his acceptance of self-contained setting for seventh grade." (P-5 at p.2)

3. In November 2010, the petitioner enrolled the student at School in the District of Columbia. (Testimony of Petitioner) The special education coordinator at SHS sent a Transfer IEP Letter (R-11) and Transfer Student Intake Checklist (R-12) dated November 15, 2010 to the parent.
4. On November 29, 2010 an IEP meeting was held at with the petitioner, the student, the special education coordinator, a special education teacher, and a social worker. (R-13) The IEP team had the Alexandria IEP of October 15, 2010. (Testimony of special education coordinator and Petitioner) A DCPS IEP was developed that provided for 3.5 hours per week of specialized instruction outside of general education and 3.5 hours per week of specialized instruction in general education and 30 minutes per week of behavioral support services. (R-13-4) The IEP contained a goal for reading and a goal for emotional, social, and behavioral development. (R-13-2 & 3) There was no math goal included and no Behavior Intervention Plan. The Petitioner signed he agreed with the contents of the IEP. (R-13, Testimony of Petitioner)
5. On May 4, 2011 an MDT meeting convened with both parents, the special education coordinator, special education teacher, the math teacher, social worker and JROTC teacher. (R-16) The special education teacher indicated in the MDT Notes that the student is late to English class and does not return homework and has excessive absences in the learning lab. The JROTC teacher stated he is late to class and is never prepared. The Algebra teacher indicated he has the ability to do the work, but never comes to tutoring. (R-16-2)

6. On May 27, 2011 an MDT meeting was held with the special education coordinator, special education teacher, assistant principal, attendance counselor and the petitioner. (R-15) The meeting discussed that the student was walking the hall without a pass and then leaving school without permission. The petitioner stated the student was being taunted by other students and the dean of students agreed to permit the student to leave school fifteen minutes before dismissal time. (R-15-2)
7. On June 1, 2011 a meeting was held with the parents, the special education coordinator, two assistant principals, and the attendance counselor. The meeting discussed the parents' concerns about the student being taunted by rival gang members. The meeting recommendations were for the student to attend workshops provided by school social workers on bullying and police and community resources, for the student to seek help from the special education coordinator and assistant principals and avoid gang members. (R-14-3)
8. The student's transcript for the 2010-2011 School Year showed the following grades: U.S. History-C, Physical Education-B, English-(1-B) C-, English (1-A)-C, Algebra (1-A)-F, Biology-D, Algebra (1-B)-F, Biology-D, Army JROTC-F, Learning Lab-C. (R-21)
9. On September 2, 2011 an MDT meeting convened with the special education coordinator, social worker, petitioner, petitioner's attorney, Richard Weinfeld, educational consultant, Amanda Eggers, an investigator with the Children's Law Center, the student's case manager, and the school psychologist Dr. Elmore. (R-9) DCPS was given by the petitioner the psychological evaluation done by

Alexandria Public Schools in February 2009 (P-4) and the First Home Care Diagnostic Assessment Report (P-3). DCPS agreed with the consent of the parent to complete comprehensive psychological and academic evaluations, a FBA and BIP and reconvene the MDT on October 3, 2011. (R-9-3)

10. On September 29, 2011 DCPS psychologist Dr. Elmore completed her written psychological evaluation. (R-24, P-1) The student was      years and 5 months old and in the      grade when the evaluation was conducted. On the Wechsler Intelligence Scale for Children (WISC-IV), the student had a full scale IQ score of 78. The results of the evaluation were that the student's verbal reasoning and problem solving were in the Below Average range and his nonverbal reasoning skills are in the low average range and are an area of strength relative to his other skills. When combined with his significant achievement deficits in reading comprehension, "the data appear to be characteristic of a Specific Learning Disability." (P-1 at p.19, R-24 at p.19) The student had standard scores of 83 in Broad Reading and Broad Written Language with a grade equivalent of 5.8. (P-1 at 11, R-24 at 11) Dr. Elmore also found he meets the disability criteria for Other Health Impairment because of his short attention span, high distractibility, requires frequent redirection and is disruptive. Dr. Elmore found he is experiencing significant difficulties with reality testing. "He appears to be experiencing occasional auditory hallucinations and perceptual distortions which impair his judgment and ability to perceive and interpret the intentions of others. As a result, he appears to respond in inappropriate ways by laughing or speaking loudly at inappropriate times, becoming verbally aggressive or threatening in

response to innocuous interactions, and by fleeing from environments which he suddenly perceives as threatening. His emotional and behavioral issues present significant concerns such that he would appear to meet the Special Education eligibility criteria as a student with Emotional Disturbance.” (P-1 at p.19, R-24 at p. 19) Dr. Elmore’s report indicated that the student attempted suicide by setting himself on fire prior to enrolling at (P-1 at 1, See also P-32 INOVA Alexandria Hospital Discharge Instructions of October 21, 2010) Dr. Elmore recommended that “Given his emotional and behavioral issues as well as significant distractibility, [student] appears to require a specialized therapeutic learning environment in order to minimize distractions and limit the potential for becoming over stimulated by typical classroom disruptions. Although his behavior has varied from few difficulties to significant difficulties in his present classroom settings, the seriousness of his mental health concerns dictates at this time, [student] appears to require a therapeutic environment in which he is provided with full time special education services in his core academic subjects. His class sizes should be small (no more than 15 students) to limit distractions and to provide maximum teacher support, structure, supervision, and therapeutic feedback. [Student] may not require specialized instruction in elective classes such as Art, Physical Education, or Music. He should be afforded the opportunity to continue to interact with nondisabled peers to the greatest extent possible including during electives, transitions and lunchtime. However, his adjustment during elective classes, transitions, and lunchtime should be monitored carefully to ensure that he does not require additional support or a more restrictive

environment during these portions of the school day as well.” (R-24-20, P-1-20)

Dr. Elmore recommended teachers who are specially trained in special education and who understand social/emotional needs. (Testimony of Dr. Elmore)

11. An educational evaluation was done by DCPS on September 21, 2011. The student was administered the Woodcock-Johnson III Tests of Achievement. He scored in the average range in Broad Math. In written expression, his overall ability to express himself in writing is limited. His Broad Reading scores were in the low average range and his fluency with reading tasks is negligible. When compared to others at his grade level the student’s performance was average in mathematics, and low average in broad reading, math calculations skills, written language and written expression. (R-25)
12. On October 3, 2011 the MDT reconvened. The MDT reviewed Dr. Elmore’s psychological evaluation. The MDT agreed to provide the student with specialized instruction in his core courses, but does not require specialized instruction in elective classes. The MDT agreed to reconvene on October 18, 2011 to review the FBA and BIP. (R-8-4)
13. On November 21, 2011 an MDT convened with the parents and their representatives. The MDT developed a new IEP. (R-2) (See above Stipulation of Facts #5)

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer’s Findings of Fact on issues 4 and 6- that DCPS failed to provide an appropriate placement at S.H.S. for the 2010-2011 and 2011-2012 School Years are as follows:

II.

1. The student enrolled at School in November 2010. (Testimony of Petitioner, Special Education Coordinator)
2. Since attending the student has been enrolled in general education classes except for one period a day when he goes to a Learning Lab. (R-21) Most general

education classes have approximately 25 students. (Testimony of special education coordinator) The Geometry class for this school year is a large class of 35 students that is co-taught with one special education teacher. (P-1 at p.7, R-24 at p.7, Testimony of Dr. Elmore and special education coordinator)The Learning Lab is an 80 minute block period where students who are all behind grade level are taught reading intervention, math and writing skills. The Learning Lab is currently taught by a teacher who is not certified in special education, but is working for her master's degree in special education at George Mason University. (Testimony of

3. The student has counseling services outside of general education every Monday from 9-9:30 a.m. He has not been attending the counseling sessions on a regular basis. A certified letter was sent to the parent informing him that the student missed three sessions. (R-17)
4. S.H.S. has self contained classrooms for Intellectually Deficient (ID) students, but no longer has self-contained classrooms for Emotionally Disturbed (ED) students. All other specialized instruction is provided in inclusion classes. (Testimony of Dr. Elmore)
5. The student has been accepted at The School, a non-public special education day program for students with Emotional Disturbance, OHI, and Autism. All students have social/emotional issues. All students have full-time IEPs. The School is located in Rockville, Maryland. The School has two high school programs each with 20 students that provides for small and large group therapy every day. There are no individual therapy sessions. The class size is a maximum of ten students with two

teachers with other classes having two to five students with one teacher. All teachers are certified in special education or in the process of being certified in special education K-12. The science teachers are not certified in special education or the content area of biology. The science teachers are in the process of being certified in special education. There are social workers and licensed counselors on staff to provide therapeutic support. A psychiatrist is on staff to prescribe medications and therapeutic support. There is a school-wide behavioral plan based on a token-reward system. A reading specialist is on staff to work with students performing below grade level and there is a lower functioning class. Transition services are provided for experiences in the workforce and opportunities for college. Most students are on a diploma track. Fourteen DCPS students attend both high school programs. Transportation is provided by DCPS bus service. The cost of the program is fifty thousand dollars a year including related services. The tuition has not been raised in eight years. The Frost School is certified by OSSE and the rates are approved by OSSE. The interaction with non-disabled peers is limited to returning to the home school for extra-curricular activities including athletics. Some students transition back to their home school, but there are no tenth graders, which this student would be, transitioning back to their home schools. (Testimony of

6. The student has not attended since October 11, 2011 because of safety concerns related to assaults and threats from rival gang members at and remains at the petitioner's home during the school day. (Testimony of petitioner)
- DCPS has initiated the process of a safety transfer of the Student to another high school in the District. (Closing brief of respondent)

### **CREDIBILITY FINDING**

A hearing officer is responsible for assessing the credibility of witnesses. *See Shore Regional High School Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3<sup>rd</sup> Cir. 2003) This hearing officer observed the demeanor of the petitioner in his lengthy testimony and found his testimony to be credible. This hearing officer also observed the demeanor of Richard Weinfeld, qualified as an expert witness in special education programming and found his detailed and comprehensive answers to questions credible. This hearing officer listened to the detailed and comprehensive testimony of Dr. Marquita Elmore, qualified as an expert witness in school psychology, and based on her thorough psychological evaluation and found her testimony credible.

### **DISCUSSION/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 on issues one and two are as follows:

*IDEA Regulation at 34 C.F.R. Section 300.323 (f)* requires the following on IEPs for children who transfer from another state:

*(f) IEPs for children who transfer from another State.* If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency-(1) Conducts an evaluation pursuant to Sections 300.304 through 300.306 (if determined to be necessary by the new public agency); and (2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in Sections 300.320 through 300.324.

Counsel for petitioner argues that DCPS failed to timely evaluate the student in all areas of suspected disability after transferring from \_\_\_\_\_ Campus in Alexandria, Virginia to \_\_\_\_\_ School in accordance with the above cited regulation. Counsel for respondent counters that the ACPS IEP indicated the student had a psychological evaluation performed in February 2009 and a social history update performed on February 18, 2009 and that the student thus had current evaluations that did not suggest further testing was warranted.

The above quoted section leaves it to the discretion of the new public agency to determine if it is necessary to conduct new evaluations. In this case, The ACPS IEP does reference recent evaluation test scores, but does not specifically cite the above evaluation. (See Findings of Fact I. #1) The psycho-educational evaluation the ACPS IEP relied on was done in February 2009 and provided the data for developing the ACPS October 15, 2010 IEP that DCPS adopted in part on November 29, 2010. There is no evidence in the record that Petitioner challenged the validity of the February 2009 psycho-educational evaluation. Counsel for petitioner has not met her burden of proof that DCPS violated *Section 300.323 (f)(1)*.

The student transferred to Coolidge in November 2010 and DCPS partially adopted the ACPS IEP on November 29, 2010. The *2010 U.S. Department of Education, Office of Special Education and Rehabilitative Services Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations*, 54 IDELR 297, (June 1, 2010) on the question of what is the timeline for a new public agency to adopt an IEP from a previous public agency or to develop and implement a new IEP states: "Neither Part B of the IDEA nor the regulations implementing Part B of the IDEA establish timelines for a new public agency to adopt the child's IEP from the previous public agency or to develop and implement a new IEP."

However, consistent with *34 CFR Section 300.323 (e) and (f)*, the new public agency must take these steps within a reasonable period of time to avoid any undue interruption in the provision of required special education and related services.” DCPS acted within a month to adopt the ACPS IEP. Counsel for petitioner has failed to meet her burden of proof that DCPS did not take steps “within a reasonable period of time” that “Develops, adopts, and implements a new IEP, if appropriate” in compliance with *Section 300.323 (f)(2)*.

This hearing officer finds, however, that DCPS did not comply with *34 CFR Section 300.323 (f)* in not providing “comparable” services. In *Sterling A. v. Washoe County School District*, 2008 U.S. Dist. LEXIS 94222 (D. Nevada, 2008) the Court interpreted the meaning of “comparable” services. The Court looked to the OSEP explanation that stated when a child transfers to a new public agency from another state, “comparable services means services that are ‘similar’ or ‘equivalent’ to those that were described in the child’s IEP from the previous public agency, as determined by the child’s newly-designated IEP Team in the new public agency.” *71 Fed. Reg.* 46540 (Aug. 14, 2006) The Court held: “Similarly, this court finds that ‘comparable’ services within the meaning of *20 U.S.C. Section 1414 (d)(2)(C )(i)(11)* means that, in the interim IEP, WCSD needed to provide services that were ‘similar’ or ‘equivalent’ to those provided for in the California IEP.”

In this case, the Alexandria, Virginia IEP called for 15 hours of specialized instruction outside of general education and 15 hours of specialized instruction in general education per week. (See Findings of Fact I. #1) The November 29, 2010 DCPS IEP only provided for 3.5 hours of specialized instruction outside of general education and 3.5 hours of specialized instruction in general education per week. The disparity of 30 hours of specialized instruction in the Alexandria, Virginia IEP to only 7 hours of specialized instruction in the DCPS IEP- a

difference of 23 less hours of specialized instruction a week- is not “similar” or “equivalent”. DCPS failed to provide “services comparable to those described in the previously held IEP”.

The next inquiry is whether the failure to provide comparable services resulted in a denial of a FAPE. The above cited section of *IDEA* states: “the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child’s IEP from the previous public agency),...” By providing only 7 hours of specialized instruction instead of 30 hours as required in the ACPS IEP, it resulted in the student not making educational progress at \_\_\_\_\_ as evidenced by his poor grades (See Findings of Fact I. #8) and his low test scores on the Woodcock-Johnson III Tests of Achievement in broad reading, math calculation skills, written language and written expression. (See Findings of Fact I. # 11) When the student was administered the W-J III Tests of Achievement by ACPS in February 2009 when he was receiving specialized instruction in all his academics in a self-contained setting, (See Findings of Fact I. #2) the test scores indicated his basic reading, math calculation, reasoning, spelling and written expression skills fell in the average range and were commensurate with his measured abilities. (See Stipulation of Facts #2) The student was adversely affected by not receiving comparable services. Providing comparable services under this section is an essential element of providing a FAPE, and the failure to do so here results in a denial of a FAPE.

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 on issues three and five-that the November 10, 2010 IEP is inappropriate are as follows:

The United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) in determining if a FAPE has been provided held that courts must determine: “First, has the State

complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. *Rowley*, 458 U.S. at 206-07

In *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988) *cert denied*, 488 U.S. 1030 (1989), The Third Circuit held that appropriateness under *Rowley* as applied to a student with severe disabilities means more than trivial educational benefit. The Court held in *Polk* that "...using *Rowley*'s own terminology, we hold that Congress intended to afford children with special needs an education that would confer meaningful benefit." *Polk* at p.184 Other Circuits have endorsed the *Polk* court's interpretation of educational benefit in *Doe v. Smith*, 441 IDELR 544 (6<sup>th</sup> Cir. 1989); *Fort Zumwalt School District v. Clynes*, 26 IDELR 172 (8<sup>th</sup> Cir. 1991); *Roland M. v. Concord School Comm'n, Id.*, and *Hall v. Vance County Board of Education*, 557 IDELR 155 (4<sup>th</sup> Cir. 1985) In *Ridgewood Bd. of Educ. v. N.E.*, 30 IDELR 41,44 (3d Cir. 1999) and *T.R. v. Kingwood Township Board of Education*, 32 IDELR 30 (3d Cir. 2000) the Third Circuit held that an IEP must provide "meaningful benefit." *See also A.I. Iapalucci v. D.C.*, 402 F. Supp. 2d 152 (D.D.C. 2005) ("...the appropriate focus of the court's review should be on whether DCPS is providing A.I. with an IEP that is reasonably calculated to provide meaningful educational benefit." *Id.* at p.167) "Academic success is an important factor in determining whether an IEP is reasonably calculated to provide educational benefits." *Roark ex rel. Roark v. District of Columbia*, 460 F. Supp. 2d 32 at 44 (D. D.C. 2006) (quoting *Berger v. Medina Sch. Dist.*, 348 F. 3d 513 (6<sup>th</sup> Cir. 2003)

Counsel for petitioner's main argument that the November 29, 2010 DCPS IEP is inappropriate is that it does not provide sufficient hours of specialized instruction to meet the

student's needs and that the student needs a full-time IEP with all specialized instruction provided outside of general education. The Alexandria City Public School October 15, 2010 IEP based on their February 2009 psycho educational evaluation and observations of the student determined the student needed 30 hours a week of specialized instruction split equally between general education and special education classes. DCPS, however, in developing the November 2010 IEP only provided for 7 hours of specialized instruction per week split between an inclusion class in math and a special education class. The ACPS IEP and February 2009 Psycho educational evaluation indicated that the student had weaknesses in reading comprehension and reading fluency and not in math. The student was thus receiving 23 hours less a week of specialized instruction with the DCPS IEP. The DCPS November 29, 2010 was not reasonably calculated to provide educational benefits to the student.

Counsel for petitioner has not met her burden of proof that the DCPS November 29, 2010 IEP was inappropriate for only having the primary disability classification of Other Health Impairment (OHI) and not having the disability classification of Multiple Disabilities. DCPS adopted the ACPS IEP primary disability classification of OHI which was supported by the February 2009 psycho-educational evaluation as the student's primary disability. At the time of November 29, 2010 MDT meeting that was the primary disability information DCPS had. As counsel for respondent cited in her closing written statement: "An IEP is a snapshot, not a retrospective. In striving for appropriateness, an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated." *M.S. v. Fairfax County School Board*, 553 F. 3d 315 (4<sup>th</sup> Cir. 2009) Moreover, the additional classification of Multiple Disabilities would not be necessary if the IEP addressed his other educational needs and provided services for those needs.

Counsel for petitioner has not met her burden of proof that the DCPS November 29, 2010 IEP was inappropriate for not having math goals since the ACPS IEP and February 2009 ACPS psycho educational evaluation indicated that math was an area of strength for the student. (See Stipulation of Facts #2, P-19, P-4)

Counsel for petitioner has also not met her burden of proof that the DCPS November 29, 2010 IEP was inappropriate for not having adequate reading and social emotional goals since DCPS adopted these goals from the ACPS IEP. The petitioner also signed his agreement with the contents of the November 29, 2010 IEP including reading and social emotional goals. (See Findings of Fact I. #4)

Counsel for petitioner has not met her burden of proof that the DCPS 2010 IEP was inappropriate for not having sufficient counseling minutes. The ACPS IEP did not have any provision for counseling services. DCPS in adopting the ACPS IEP added 30 minutes a week of counseling outside of general education. The student failed to attend counseling sessions. (See Findings of Fact II. #3)

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 on issues four and six-that S.H.S. is an inappropriate placement are as follows:

The legal standard for educational placements was stated in the U.S. Department of Education interpretative guidelines that "educational placements under Part B must be individually determined in light of each child's unique abilities and needs, to reasonably promote the child's educational success." *Appendix A to 34 C.F.R. Part 300 Question 1*. Following the development of an IEP, the public school system is required to provide an appropriate educational placement that meets the needs set forth in the IEP and allows for its

implementation. See *Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22, 25 (D.D.C. 2004) (citing *Petties v. District of Columbia*, 238 F. Supp. 2d 114, 116 (D.D.C. 2002) and 34 CFR 300.116

The ACPS IEP provided for 15 hours a week of specialized instruction outside of general education as well 15 hours per week of specialized instruction in general education. The February 2009 ACPS psycho educational evaluation stated the student received instruction in a self-contained setting for all academics and also receives reading enrichment services. The February 18, 2009 ACPS social history update indicated the student did not do well in a co-taught environment in an inclusion class in sixth grade, but was successful in a self-contained setting in seventh grade. [redacted] only has self-contained classrooms for Intellectually Deficient (ID) students and no longer has self-contained classrooms for ED students. This student's intellectual profile is different and higher than ID students who would be placed in a self-contained classroom. (See Stipulation of Facts #2) All specialized instruction is provided in inclusion classes where the average class size is 25 students and the co-taught Geometry class has 35 students. Dr. Elmore recommended teachers who are specially trained in special education and who understand social/emotional needs. (See Findings of Fact I. #10) The Learning Lab course the student takes for specialized instruction is not taught by a certified special education teacher. (See Findings of Fact II. #2) [redacted] is not able to provide an out of general education setting for the student.

The student's transcript at [redacted] for the 2010-2011 School Year showed he got Fs in Algebra 1-B and Army ROTC, Ds in Algebra 1-A, Biology and Health Education and Cs in U.S. History and English. (See Findings of Fact I. #8) The educational evaluation done by DCPS on September 21, 2011 shows the student is low average in broad reading, math calculation skills,

written language and written expression. (See Findings of Fact I. #11) These WJ-III test scores conducted at \_\_\_\_\_ are lower than his WJ-III test scores in 2009 conducted by ACPS where his scores were average in all the above areas and when the student was receiving specialized instruction in all his academics in a self-contained setting. The student has not made academic progress at \_\_\_\_\_

This hearing officer gives great weight to the recommendations of DCPS's expert witness psychologist Dr. Elmore based on her comprehensive psychological evaluation. Dr. Elmore recommended: "Given his emotional and behavioral issues as well as significant distractibility, [student] appears to require a specialized therapeutic learning environment in order to minimize distractions and limit the potential for becoming over stimulated by typical classroom disruptions. Although his behavior has varied from few difficulties to significant difficulties in his present classroom settings, the seriousness of his mental health concerns dictates at this time, [student] appears to require a therapeutic environment in which he is provided with full time special education services in his core academic subjects. His class sizes should be small (no more than 15 students) to limit distractions and to provide maximum teacher support, structure, supervision, and therapeutic feedback." (See Findings of Fact I. #10) The student's present placement at \_\_\_\_\_ based on my Findings of Fact at II. #2 & #4 is not able implement DCPS's own psychologist's recommendations to meet the emotional, behavioral and academic needs of the student. This hearing officer concludes that DCPS failed to provide an appropriate placement for the student at \_\_\_\_\_ and denied a FAPE.

Once a court or hearing officer finds that the public school district has failed to offer a FAPE, the court or hearing officer is authorized to "grant such relief as the court determines is appropriate." *20 U.S.C. Section 1415(i)(2) (C) (iii)*. "Under this provision, equitable

considerations are relevant in fashioning relief, and the Court enjoys broad discretion in so doing.” *Florence County School District Four v. Carter*, 510 U.S. 7 at 16 (1993) Counsel for the petitioner is requesting for relief placement of the student at The \_\_\_\_\_ School in Rockville, Maryland. Such relief can be granted under the Supreme Court decisions in *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359 (1985) and *Carter* if the public school system failed to provide a FAPE and the private placement is appropriate. *See also IDEA 2004* and its *2006 Regulation at 20 U.S.C. 1412 (a)(10)(C)(ii) and 34 CFR 300.148 (c)*. In *Carter*, the Court held: “[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors.” *Id.* In *Branham v. District of Columbia*, 427 F.3d 7, 13 (D.C. Cir. 2005) the Court stated: “Specifically, courts have identified a set of considerations “relevant” to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive environment.” These “relevant factors” have been considered in this case as follows: DCPS’s school psychologist’s comprehensive evaluation points out the nature and severity of the student’s disability and his specialized education needs. (See Findings of Fact I. #10) The \_\_\_\_\_ School is a full-time day special education program for students with Emotional Disturbance and Other Health Impairment that can provide the therapeutic environment with full-time special education services the student needs. The cost of the program of \_\_\_\_\_ a year including related services has not been changed in eight years and DCPS is funding 14 DCPS students at The \_\_\_\_\_ School at OSSE approved rates. The \_\_\_\_\_ School only serves disabled students with social and emotional needs, and there is limited opportunity for them to be with non-disabled students for

extracurricular activities including sports. (See Findings of Fact II. #5) This hearing officer gives great weight to the expert opinion of Richard Weinfeld that School, based on his knowledge of the program and review of all the student's records, can meet the student's needs as identified in Dr. Elmore's comprehensive psychological evaluation. This hearing officer concludes that The School can provide the specialized instruction in a therapeutic environment with small classes that the student needs to receive educational benefits.

In weighing all equitable considerations including that the costs of the private placement are reasonable and there are no unreasonable actions by the petitioner, this hearing officer finds no equitable impingement to placement of the student in a non-public special education school.

Compensatory education is an equitable remedy for the denial of a FAPE. In *Reid v. District of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005), this Circuit set out the standards for an award of compensatory education. "Under the theory of 'compensatory education,' courts and hearing officers may award educational services...to be provided prospectively to compensate for a past deficient program. *Id.* at 522 Designing a compensatory education remedy requires " a fact-specific exercise of discretion by either the district court or a hearing officer." *Id.* at 524 To assist the court or hearing officer's fact specific inquiry, " the parties must have some opportunity to present evidence regarding [the student's]specific education deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526 DCPS may be required to "offer proof that the placement compensated for prior FAPE denials in addition to providing some benefit going forward." *Id.* at 525. "[T]he 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.” *Reid ex rel. Reid v. District of Columbia*, 401 F. 3d 516, 524 (D.C. Cir. 2005)

The parent has the burden of “propos[ing] a well-articulated plan that reflects [the student’s] current education abilities and needs and is supported by the record.” *Phillips v. District of Columbia*, 2010 WL 3563068, at \*6, 55 IDELR 101 (D.D.C. Sept. 13, 2010) In this case, counsel for petitioner presented a compensatory education plan prepared by their expert witness, Richard Weinfeld. (P-34) The plan proposed 100 hours of individual afterschool tutoring and 50 hours of traditional or music therapy. The basis for the calculation was that due to severe academic deficits in reading and written expression, the student requires afterschool tutoring to make up for a lack of academic progress and he requires additional hours of therapy to make up for a lack of social-emotional progress during the past school year. The hearing officer can determine the amount of compensatory education that a student requires if the record provides him with sufficient “insight about the precise types of education services [the student] needs to progress.” *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 130 (D.D.C. 2008) Findings to assist the hearing officer to tailor the compensatory education award to the student’s unique needs should include the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services requested and the student’s current educational abilities. *Branham v. District of Columbia*, 427 F. 3d 7 (D.C. Cir. 2005)

Because DCPS failed to develop an appropriate IEP for the student in not adopting ACPS’s IEP provision for 30 hours per week of specialized instruction and instead only developed an IEP providing for 7 hours a week of specialized instruction, this hearing officer concludes the student is entitled to an award of compensatory education in the form of

specialized instruction in reading and written expression in extended school year services for the summer of 2012.

In determining an award of compensatory education, courts have held that the conduct of the parties' may be considered. *Parents of Student W.*, 31 F. 3d 1489, 1497 (9<sup>th</sup> Cir. 1994); *Reid* at 524. In this case, the student has failed to attend counseling sessions offered by DCPS. (See Findings of Fact II. #3) In light of this failure, this hearing officer will not award compensatory education for counseling services.

### **ORDER**

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

**DCPS shall fund and place the student for the 2011-2012 School Year at The School in Rockville, Maryland including transportation within fifteen school days of issuance of this Hearing Officer's Determination. DCPS shall also issue a Prior Notice of Placement to The School within the above time frame. DCPS shall also provide Extended School Year (ESY) services for the summer of 2012. An MDT meeting shall be convened no later than May 15, 2012 at The School with DCPS participation to develop and finalize an ESY plan for the student on the specialized instruction to be provided in reading, math calculation and written expression to be in place at the beginning of the ESY session.**

**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).

Date: 12/21/11

\_\_\_\_\_  
*Seymour DuBow /s/*  
Hearing Officer