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

| | | |
|---|---|---|
| **STUDENT,**<br>**By and through PARENT,**[1]<br><br>*Petitioner,*<br>**v.**<br><br>**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,**<br><br>*Respondent.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Case No.**<br><br>**Bruce Ryan, Hearing Officer**<br><br>**Issued: July 2, 2011** |

2011 JUL -5 AM 9:51 STUDENT HEARING OFFICE

# HEARING OFFICER DETERMINATION

## I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed April 8, 2011, on behalf of a nine-year old student (the "Student") who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. The Student resides in the District of Columbia and currently attends his neighborhood DCPS elementary school (the "School"). Petitioner is the Student's mother.

Petitioner alleges that DCPS denied the Student a free appropriate public education ("FAPE") by: (a) failing to identify the Student in conformity with child-find requirements; (b) failing to evaluate the Student timely following his parent's request for initial evaluations; and (c) failing to develop an appropriate individualized education program ("IEP") for the Student in both April 2010 and March 2011.

DCPS filed its Response on April 29, 2011, which asserts that the Student has not been denied a FAPE. DCPS asserts that it received the parent's consent to evaluate in January 2010,

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

thereafter conducted evaluations of the Student, and ultimately convened an MDT/IEP team meeting in March 2011. DCPS further asserts that the Student's IEP is appropriate and that he is receiving educational benefit.

A resolution meeting was also held on May 10, 2011, which did not resolve the Complaint, and the statutory 30-day resolution period ended as of May 8, 2011. A Prehearing Conference ("PHC") was then held on May 13, 2011; the parties filed five-day disclosures on June 14, 2011; and the Due Process Hearing was held on June 21, 2011.[2] Petitioner elected for the hearing to be closed.

At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

**Petitioner's Exhibits:** P-1 through P-21.

**Respondent's Exhibits:** R-1 through R-4; R-6 through R-16. (There was no Exhibit marked "R-5.")

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

**Petitioner's Witnesses**: (1) Parent-Petitioner; (2) the Student's Educational Advocate ("EA"); (3) Family Friend; and (4) Tutor.

**Respondent's Witness**: Special Education Coordinator ("SEC").

[2] After initial scheduling at the PHC, the parties determined that a hearing in this case would likely take more than one full day, and that June 21 and 22 were the first dates that both parties and all witnesses were available. The parties further agreed that the 45-day HOD timeline should be extended to July 2, 2011, in order to allow the parties to submit written closing statements, and for the IHO to have adequate time to consider those statements and the record evidence and to prepare the HOD. The Hearing Officer found that good cause existed for the agreed continuance and granted Petitioner's unopposed motion.

## II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *SOP*. The statutory HOD deadline is July 2, 2011.

## III. ISSUES AND REQUESTED RELIEF

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

> **(1) Child Find.** — Did DCPS deny the Student a FAPE by failing to identify, locate, and evaluate the Student as a child with a disability in conformity with the child-find requirements of the IDEA? [3]
>
> **(2) Timeliness of Initial Evaluation.** — Did DCPS deny the Student a FAPE by failing to complete the initial IDEA evaluation process in a timely manner, *i.e.*, within 120 days from the date that the Student was referred for an evaluation or assessment, pursuant to D.C. Code § 38-2561.02 (a)? Petitioner alleges that she made a written request for evaluation on or about 08/25/2009, and that an IEP should have been in place by approximately 12/25/2009.
>
> **(3) Inappropriate IEP.** — Did DCPS deny the Student a FAPE by failing to provide an appropriate IEP in April 2010 and/or March 2011, in that the IEP did not provide an appropriate amount and level of specialized instruction? Petitioner alleges that the Student "required a full-time IEP so that he could get support in all of his classes, not just math and reading." *P2-13* (Complaint, p. 13).
>
> **(4) Procedural – April 2010 IEP Team.** — Did DCPS fail to hold an appropriately constituted IEP team meeting when it developed the initial IEP for the Student, because the team failed to include an Occupational Therapist and a Psychologist?

Petitioner requests (*inter alia*) that the Hearing Officer: (a) find in Petitioner's favor on the above issues; (b) order DCPS to hold an IEP team meeting to increase the Student's IEP to full-time (26.5 hours or more), and make an appropriate placement determination based on such IEP; and (c) order DCPS to fund the parent's compensatory education plan. Petitioner's counsel confirmed at the PHC that compensatory education was not being sought for any period prior to April 2009.

## IV. FINDINGS OF FACT

1. The Student is a nearly year old child who has been determined to be eligible for special education and related services under the IDEA as a child with a disability. His primary disability is Specific Learning Disability ("SLD"). *P-9; P-10; Parent Test.*
2. During the 2008-09, 2009-10, and 2010-11 school years, the Student has attended DCPS elementary schools. He began attending his current DCPS elementary school (the "School") in 2010-11, and has just completed the fourth grade. *P-1; Parent Test.*
3. On or about January 16, 2009, due to academic and behavioral concerns in second grade, the Student's teacher referred him to the Student Support Team ("SST") at the School "for further intervention & possible testing." *P3-9; see Parent Test.* However, no SST meetings were held regarding the Student and no academic supports were put in place for him during the remainder of the 2008-09 school year.
4. During Spring 2009, the Student continued to struggle academically, earning mostly "1s" on his 2008-09 SY Report Card. *P3-7.* Teacher comments at the end of the school year (06/15/2009) reported that the Student "continues to struggle with Reading, Writing, and Math problem solving skills." *P3-9.* The teacher noted that he had been "referred to the Student Support Team (SST)," and that there needed to be "follow-through to assure [Student] gets the services he needs in order to improve Reading & Writing skills." *Id.*
5. On or about August 25, 2009, having heard nothing from the SST, Petitioner sent a letter to the School's principal formally requesting that the Student be evaluated for special education services. The letter was in follow up to an in-person conversation between the parent and principal the previous day. *See P20-1; Parent Test.* In addition, other letters were written to the principal on or about that same date by a family friend and by the Student's adult sister. *P17-6; P 20-3.*
6. Two more months passed, with no apparent actions being taken by DCPS in response to Petitioner's request. On or about October 26, 2009, an SST meeting was finally held, and the SST decided that the Student should be evaluated. *P19-1.* "Difficulty in all academic areas was noted in the Student Support Team." *P19-2.* The Student's teacher

---

[3] Petitioner's counsel confirmed at the PHC that while the Complaint refers to the existence of a disability "as far back as January of 2009," Petitioner was not alleging any child-find violation prior to April 8, 2009. *See Prehearing Order,* at 2 n. 1.

informed the SST that the Student was "functioning far below grade level." *Id.* The SST recommended that the Student receive psychological and educational evaluations, as well as a speech/language evaluation (if warranted). *Id.* However, notwithstanding this information and recommendation, the Student was still not evaluated at this time.

7. On or about January 21, 2010, the SST met again. The meeting was "convened as a student evaluation plan," as if the October 2009 meeting never took place. *P18-1.* Once again, the SST cited "his areas of concern [as] reading, math, written expression, [and] motor skills" and decided that he should receive psychological, educational, and OT evaluations. *Id.* DCPS obtained written consent for the evaluations. *R-1.*
8. Also on 01/21/2010, DCPS completed an Analysis of Existing Data, which incorrectly stated that the School had received a "referral for an initial evaluation" of the Student on 01/19/2010. *P17-1.* Under Academics, the Analysis stated: "Based on his DIBELS score, he needs Intensive Support in reading." *P17-2.* It noted that the Student could read only three (3) words per minute, while the grade-level goal was 77 words per minute. *Id.* The Analysis also stated that "student's written expression skill is very low," and that he "lacks third grade skills in mathematics (i.e., fractions, multiplications, etc." *P17-1, P17-2.*
9. The next day, January 22, 2010, an Educational Evaluation of the Student was conducted, consisting of the Woodcock-Johnson III Tests of Achievement. *R-2.* The testing found that his "overall mathematics ability is limited" and that his "sight reading and spelling are negligible." *Id.* His scores in Passage Comprehension, Spelling, and Letter-Word Identification were all at the Kindergarten to 1st grade level. *R-2, p. 2.*
10. On or about January 29, 2010, a Confidential Psychological Evaluation of the Student was conducted by a DCPS school psychologist. Inexplicably, however, the written report took another two months to complete. *See R-3* (03/30/2010 report). The results of the evaluation indicated that the Student met the criteria for educational disability as a student with a Specific Learning Disability ("SLD"). *Id., p. 5.* The evaluator noted that the Student's performance on the DC-BAS was Below Basic on both reading and math areas assessed, and found that he "displays some cognitive and academic difficulties that are impacting his ability to learn." *Id.* The evaluator recommended that, particularly in

math, the Student "would benefit from instruction that is structured and step-by-step and rules are clearly stated." *Id., p. 6.*

11. On or about February 26, 2010, an Occupational Therapy ("OT") Evaluation of the Student was conducted. *R-4.* The Student "demonstrated difficulty in areas of visual motor integration, visual perception, and fine motor and handwriting skills." *Id., p. 5.* As a result, the evaluator concluded that OT intervention in the school setting was warranted to address these deficits. *Id.*
12. On or about April 13, 2010, DCPS convened a meeting of the Student's MDT/IEP Team to review the evaluations and determine eligibility. *R-6.* The team determined that the Student was eligible as a child with a disability under the IDEA, specifically SLD. *R-7.*
13. On or about April 29, 2010, the team reconvened to develop the Student's initial IEP. *See R-8.* The 04/29/2010 IEP provided for (a) 15 hours of specialized instruction (Reading, Math, and Written Expression) in an Out of General Education setting; and (b) 60 minutes per week of occupational therapy services, also in an Out of General Education setting. *P10-16; R-10, p.16.* In determining that pull-out services were needed for the Student, the IEP team noted that "Student requires explicit specialized instruction in the designated areas of weakness in order to access the general education curriculum." *Id., p. 17.* And in determining that an overall combination setting was appropriate, the Team explained that "student can be educated satisfactorily in a regular classroom part of the day and in a special education classroom with supplementary aids and services part of the day." *Id.*
14. IEP progress reports dated 11/05/2010 and 02/02/2011 showed the Student progressing or mastering most of his math, reading, and written expression IEP goals. *See R-11; R-12.* However, the Student continued to struggle academically in some areas of the general curriculum, as reflected on his 2010-11 report card grades and teacher comments. *See R-15; R-16.*
15. On or about March 11, 2011, DCPS convened another meeting of the Student's MDT/IEP Team to conduct an annual IEP review. *P-8.* At this meeting, the parent and the advocate expressed concerns over the Student's academic and behavioral progress under the 04/29/2010 IEP. *P-7; P8-1.* The Student's teacher reported that he was "making steady progress in the area[s] of reading and math" according to recent

classroom testing. *P8-2.* His DIBELS reading comprehension scores had improved from Level C to Level E between the Beginning of Year (BOY) and Middle of Year (MOY) testing. *See P4-3; P9-6.* However, the parent and advocate felt that while he was "steadily improving in the special ed setting," he was sometimes "lost and confused" when he returned to the general education setting. *P7-2; see also Parent Test.; EA Test.* DCPS disagreed and felt that full-time special education was too restrictive for the Student at this time. *Id.* Ultimately, the Team decided to carry forward the same services in the 03/11/2011 IEP. *See P9-17; R-14, p. 17.*

## V. DISCUSSION AND CONCLUSIONS OF LAW

### A. Burden of Proof

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). This burden applies to any challenged action and/or inaction, including failures to evaluate and failures to develop an appropriate IEP. 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 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); 20 U.S.C. §1415(i)(2)(C)(iii).

### B. Issues/Alleged Denials of FAPE

As noted above, Petitioner claims that DCPS denied the Student a FAPE by: (1) failing to identify the Student in conformity with child-find requirements; (2) failing to evaluate the Student timely following his parent's request for initial evaluations; and (3) failing to develop an appropriate IEP for the Student in both April 2010 and March 2011. Petitioner also asserts (4) a procedural violation by DCPS in convening an IEP team meeting on 04/29/2010 without an Occupational Therapist and a Psychologist in attendance.

The IDEA requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

> [S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the

individualized education program (IEP)..." 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

For the reasons discussed below, the Hearing Officer concludes that Petitioner has met her burden of proof on Issues 1 and 2, but has failed to meet her burden of proof on Issues 3 and 4.

**1. Child Find**

Under its "child find" mandate, DCPS has an affirmative duty to "identify, locate, and evaluate" a potentially disabled child. 20 U.S.C. §1412(a) (3) (A); 34 C.F.R. §§300.111(a); DCMR 5-E3002.1(d); *see IDEA Public Charter School v. McKinley*, 570 F. Supp. 2d 28 (D.D.C. 2008). As part of both an initial evaluation and any re-evaluation, DCPS must (*inter alia*) ensure that the child "is assessed in all areas related to the suspected disability," and that the evaluation is "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. §300.304 (c) (4), (6); *Harris v. DC,* 561 F. Supp. 2d 63, 67-68 (D.D.C. 2008). Parents also have a right to request particular assessments to determine whether their child has a disability and the child's educational needs. *See, e.g.,* 34 C.F.R. 300.305 (d); ***Herbin v. District of Columbia,*** 362 F. Supp. 254 (D.D.C. 2005).

In this case, the facts indicate that DCPS should reasonably have suspected the Student as having a disability as early as January 2009, when his second grade teacher reported significant academic and behavioral concerns and referred him to the SST "for further intervention & possible testing." *P3-9.* Despite the red flags, essentially nothing happened for the next year. No meetings were held, no evaluations were conducted, and no further information was collected. It appears that DCPS just forgot about the Student. At hearing, DCPS offered no real evidence to explain its delay or rebut the evidence presented by Petitioner. Accordingly, Petitioner has met her burden of proof on Issue 1.

**2. Timeliness of Initial Evaluation**

District of Columbia law requires that DCPS "shall assess or evaluate a student, who may have a disability and who may require special education services, ***within 120 days from the date that the student was referred*** for an evaluation or assessment." D.C. Code §38-2561.02 (a)

(emphasis added). As this statute has been construed by the courts, DCPS "must conduct a full and individual initial evaluation" within the required time frame of 120 days from the date of referral. *IDEA Public Charter School v. McKinley*, 570 F. Supp. 2d 28 (D.D.C. 2008); ***see also*** 34 C.F.R. §300.301(a); DCMR §5-3005.2. This means that DCPS must complete and review the initial evaluation in all areas of suspected disability, determine eligibility, develop an IEP if the Student is found eligible, and determine an appropriate placement, all within 120 days. ***See*** *Hawkins v. D.C.,* 539 F. Supp. 2d 108 (D.D.C. 2008)*; D.C. v. Abramson,* 493 F. Supp. 2d 80, 85 (D.D.C. 2007); DCMR §§ 5-3002, 5-3013.

In this case, it is clear that a "referral" within the meaning of the statute occurred ***no later than*** August 25, 2009, when Petitioner requested in writing that DCPS evaluate the Student for IDEA eligibility. This appears to be the position taken by Petitioner. *See Closing Statement,* pp. 2-3. Accordingly, Hearing Officer concludes that the mandatory 120-day timeline specified in D.C. Code §38-2561.02 (a) expired no later than ***December 25, 2009.*** [4] DCPS did not determine eligibility and develop an IEP for the Student until April 29, 2010, which was at least four months late. Accordingly, the Hearing Officer concludes that DCPS violated its obligations under IDEA and D.C. Code § 38-2561.02 (a) by not determining eligibility and developing an IEP by 12/25/2009.

Courts have held that a delay in completing required evaluations is not a "mere procedural inadequacy"; rather, "such inaction jeopardizes the whole of Congress' objectives in enacting the IDEA." *Harris v. DC,* 561 F. Supp. 2d 63, 68-69 (D.D.C. 2008). [5] As in ***Harris***, the "intransigence of DCPS as exhibited in its failure to respond quickly to [parent's] simple request has certainly compromised the effectiveness of the IDEA as applied to [the Student]." 561 F. Supp. 2d at 69. Alternatively, the Hearing Officer concludes on the basis of the record evidence presented by Petitioners that by delaying the eligibility and IEP dates by at least four months,

---

[4] Although Petitioner does not appear to argue this point, it is possible that a referral may have occurred as early as January 2009, when the Student's teacher requested SST consideration of further intervention and testing. *See* discussion under Issue 1 above. In that event, the 120-day timeline may have expired as early as May 16, 2009.

[5] *See also IDEA Public Charter School, supra* (failure to perform child-find duty and comply with DC's 120-day timeline constitutes substantive denial of FAPE)*; Hawkins v. District of Columbia,* 539 F. Supp. 2d 108 (D.D.C. 2008)*(*same); *District of Columbia v. Abramson,* 493 F. Supp. 2d 80 (D.D.C. 2007) (noting that DCPS is obligated to "*offer FAPE* by evaluating the student, convening an eligibility meeting, determining eligibility, developing an IEP if the student is eligible, and determining and offering an appropriate placement") (emphasis added).

this procedural violation has (i) impeded the Student's right to a FAPE, (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, and/or (iii) caused a deprivation of educational benefit. 34 C.F.R. §300.513(a). Accordingly, Petitioner has met her burden of proof on Issue 2.

### 3. Failure to Provide an Appropriate IEP

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia,* 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe,* 484 U.S. 305, 311-12 (1988)). An IEP is a comprehensive written plan that must include, among other things: (1) "a statement of the child's present levels of academic achievement and functional performance, including ... how the child's disability affects the child's improvement and progress in the general education curriculum"; (2) "a statement of measurable annual goals, including academic and functional goals, designed to ... 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 meet each of the child's other education needs that result from the child's disability"; (3) "a description of how the child's progress toward meeting the annual goals...will be measured"; (4) "a statement of the special education and related services and supplementary aids and services ...and a statement of the program modifications or supports for school personnel that will be provided for the child"; and (5) an explanation of the extent, if any, to which the child will not participate with non-disabled children in any regular classes. 20 U.S.C. 1414(d)(1)(A)(i). *See also* 34 C.F.R. 300.320; DCMR 5-E3009.1.

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).[6] Judicial and hearing officer review of IEPs is "meant to be largely prospective and to focus on a child's needs

[6] *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. ").

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.'" [7]

The issue of whether an IEP is appropriate is 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). "Ultimately, the question ...is whether or not [the] defects in the ...IEP are so significant that [DCPS] failed to offer [the Student] a FAPE." *N.S. v. District of Columbia,* 709 F. Supp. 2d 57 (D.D.C. 2010), slip op. at 20.

In this case, Petitioner has failed to prove by a preponderance of the evidence that either the 04/29/2010 or 03/10/2011 IEPs were not reasonably calculated to confer educational benefits on the Student, based on the information available to the IEP team at the time the IEPs were developed. Moreover, while DCPS must periodically update and revise an IEP "in response to new information regarding the child's performance, behavior, and disabilities," *Maynard v. District of Columbia,* 54 IDELR 158 (D.D.C. 2010), *slip op. at* p. 6.; *see* 34 C.F.R. 300.324, the evidence is insufficient to establish that major changes were mandated as of March 2011. The IEP team appears to have acted reasonably in deciding to continue the program of intensive, pull-out instruction for the majority of the school day (15 hours per week) for at least another year, given the progress being made.

Indeed, DCPS is not only permitted, but is statutorily required, to educate the Student in the least restrictive environment. IDEA expressly requires DCPS to ensure that, to the "maximum extent appropriate," the Student is educated with children who are nondisabled." 34 C.F.R. 300.114 (a) (2). Here, the 03/10/2011 IEP Team found the following benefits for the Student in continuing to attend a regular education class for at least a portion of his schedule: "student's ability to adequately access , and socialize with his peers; receive special subject instruction with the non-disabled students; and participate in all academic instruction, assessment, and learning experience (however modified through specialized instruction) in all scholastic domains of mathematics, language arts, social studies, science, art, physical education, and library science." *P9-18.* Petitioner has not provided a sufficient justification to overrule

[7] *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").

these team judgments. Accordingly, the hearing Officer concludes that Petitioner has not sustained her burden of proof on Issue 3.

**4. Procedural – April 2010 IEP Team**

The Complaint also includes a procedural claim that DCPS failed to hold a properly constituted IEP team meeting in April 2010, when it developed the initial IEP for the Student, because the team failed to include an Occupational Therapist and a Psychologist on the team. However, the Hearing Officer notes that Petitioner may have abandoned this claim as she did not argue the issue at all in her written Closing Statement.

DCPS was required to ensure that the Student's IEP Team included individuals who could interpret the instructional implications of evaluation results. 34 C.F.R. 300.321 (a) (5). The evaluations being reviewed at the April 2010 IEP meetings included psychological and OT evaluations. However, the documents show that both a psychologist (in person) and occupational therapist (by phone) participated in the 04/13/2010 meeting where the evaluations were reviewed and IDEA eligibility was determined. *P11-3.* While they may not have been present for the subsequent (04/29/2010) meeting to develop the IEP, the statutory requirement relates primarily to interpretation of evaluations. Moreover, both experts were present at the 03/10/2011 team meeting where the IEP was reviewed and renewed. *P9-1.*

The Hearing Officer concludes that this level of participation satisfied the procedural requirements of the IDEA. Even assuming *arguendo* that it did not, Petitioner has not shown that such procedural violation caused a deprivation of educational benefit, or otherwise resulted in a substantive denial of FAPE, in accordance with 34 C.F.R. 300.513 (a) (2). *See Lesesne v. District of Columbia,* 447 F.3d 828, 834 (D.C. Cir. 2006). Accordingly, the Hearing Officer concludes that Petitioner has failed to meet her burden of proof on this issue.

**C. <u>Requested Relief</u>**

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, 15-16 (1993); *Reid v. District of Columbia,* 401 F.3d 516, 521-24 (D.C. Cir. 2005). Here, the primary relief requested is compensatory education for the period in which DCPS failed to evaluate and determine eligibility (*i.e.*, for approximately one full year prior to April 2010).

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 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'").

Thus, compensatory education awards are equitable in nature. They should be qualitative and they should be flexible. They should be crafted so as to address the educational harm suffered by the Student as a result of the violation of IDEA/denial of FAPE. In this case, Petitioner has met her burden of establishing the harm caused by the absence of any special education services until April 2010, and of proposing a well-articulated compensatory education plan that can remedy the harm.

First, Petitioner presented credible testimony and educational testing data to support a finding that the educational harm suffered by the Student was a direct result of his not having an IEP in place, and thus not receiving individualized targeted instruction, until at least April 2010.

Second, Petitioner has presented a compensatory education plan that is, for the most part, appropriate and well-reasoned. Petitioner proposes 150 hours of academic tutoring and 30 hours of counseling by an independent provider of the parent's choosing. The academic tutoring component is well suited to remedy the specific harm suffered by the Student and is supported by the record evidence. The independent tutoring would reasonably compensate the Student for his missed pull-out specialized instruction in Reading, Math, and Written Expression, and would likely get him to a point he would have been expected to reach had he received such services. The evidence shows that the Student is getting ready to enter the 5th grade, but as of March 2011 was still performing at the 1st grade level in reading and the 2d to 3d grade level in math. *P8-2.*

However, the counseling portion of the compensatory education plan does not appear to be supported by the record evidence, especially where (a) the Student has not demonstrated significant social/emotional concerns, and (b) the IEP developed for the Student does not identify a need for behavioral support services. Thus, this element will not be included in the Order. The Hearing Officer will substitute 30 hours of intensive one-on-one reading instruction to help remedy his significant deficits in this area, as this remains a major concern (*see P4-1*).

## VI. ORDER

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

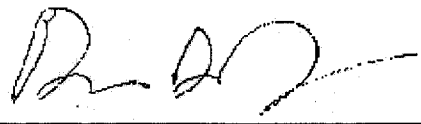
1. Unless the parties agree in writing otherwise, Respondent shall pay for **100 hours of individual academic tutoring services** for the Student in Reading, Math and/or Written Expression, at hourly rates not to exceed the current established market rate in the District of Columbia for such services, beginning within **30 calendar days** of this Order. These services shall be completed by **July 2, 2012.**

2. Unless the parties agree in writing otherwise, Respondent shall also pay for **30 hours of one-on-one intensive reading instruction**, at hourly rates not to exceed the current established market rate in the District of Columbia for such services (*e.g.*, by Linda Mood Bell), beginning within **30 calendar days** of this Order. These services shall be completed by **July 2, 2012**.

3. Petitioner's other requests for relief in her Due Process Complaint filed April 8, 2011, are hereby **DENIED.**

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

***IT IS SO ORDERED.***



Dated: July 2, 2011

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).