District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
State Enforcement and Investigation Division
Student Hearing Office
Van Ness Elementary School
1150 5th St., S.E., Washington, D.C. 20003
Phone: (202) 698-3819 Facsimile: (202) 698-3825

2009 FEB 10 AM 10:26

In Re the Matter of :	
Student, [1]	
Petitioner,	
	Date of Complaint: **November 24, 2008**
	Dates of Hearings: **January 14, 2009 and January 23, 2009**
The District of Columbia Public Schools	
825 North Capitol Street, N.W.	**Student Case Number:**
Washington, D.C. 20002	
(DCPS" or "District")	
Respondent.	

HEARING OFFICERS' DECISION *(Amended)*

Hearing Officer:	Attorney Ramona M. Justice
Counsel for Parent:	Attorney Miguel Hull Law Offices of James Brown and Associates, PLLC 1220 L Street, Suite 700 Washington, D.C. 20005
Counsel for DCPS:	Linda M. Smalls, Assistant Attorney General Linda Smalls, Assistant Attorney General Office of the Attorney General 825 North Capitol St., N.E., 9th Floor Washington, D.C. 20002

1 Personally identifiable information is provided in the "Index" which is located on the last page of this Order and must be removed prior to public distribution. Please note that this HOD is amended only to correct Issue 2, on page 19 of the decision, to accurately reflect appropriate *placement*, instead of appropriate *IEP*.

INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004 (IDEIA), (Public Law 108-446)
DISTRICT OF COLUMBIA PUBLIC SCHOOLS
IMPARTIAL DUE PROCESS HEARING

I. INTRODUCTION

The student is years of age, and attends located in the District of Columbia. The student is a resident of the District of Columbia, and identified as disabled and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)". The student's disability classification is Specific Learning Disability (SLD).

On November 24, 2008, Petitioner, through counsel, filed a due process complaint with the D.C. Public Schools, hereinafter referred to as "DCPS", Student Hearing Office, alleging the DCPS denied the student a free appropriate public education ("FAPE"); by failing to: (1) complete reevaluations and convene a meeting to review the evaluations, in a timely manner; (2) provide the student an appropriate IEP; and (3) provide the student an appropriate placement. Petitioner requests that the court also determine whether the student is entitled to compensatory education services.

The due process hearing convened on January 14, 2009, at 9:00 a.m., and reconvened on January 23, 2009, at 1:00 p.m., at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

II. JURISDICTION

This proceeding was invoked in accordance with the rights established pursuant to "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")", Public Law 108-446 and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; the D.C. Appropriations Act, Section 145, effective October 21, 1998; and Title 38 of the District of Columbia Municipal Regulations ("DCMR"), Chapter 30, Subtitle VII, Chapter 25.

III. DUE PROCESS RIGHTS

Petitioners' Counsel waived a formal reading of the parent's due process rights.

IV. ISSUES

The following issues are identified in the ***November 24, 2008*** due process complaint:

(1) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to complete reevaluations and convene a meeting to review the evaluations, in a timely manner?

(2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate IEP?

(3) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement?

(4) Whether the student is entitled to compensatory education services?

V. RELIEF REQUESTED

(1) That DCPS be ordered, or agree, to:

a. provide funding and transportation for the student to attend one of the following:

i.
ii.
iii.
iv. Some other appropriate public or non-public school.

b. provide parent funding to obtain an independent Clinical Psychological Assessment, and any other assessments warranted to determine Frank's cognitive levels, to rule out Dyslexia and ADHD.

c. convene an MDT meeting within 10 business days to review and revise the student's IEP, to include a higher level of services in the special education/pull-out setting, and determine appropriate placement with placement to be made within 5 days if for a public school, or 30 days if for a non-pubic school;

d. convene another MDT meeting within 10 days of receiving the last of the independent evaluations to be conducted to review and revise the IEP and determine appropriate placement with placement to be made within 5 days if for a public school, or 30 days if for a non-public school;

e. award reasonable compensatory education as relief for having an inappropriate IEP and placement for the period since the beginning of the current school year;

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* *Note: At the due process hearing, Petitioner withdrew Issue 1 of the due process complaint.*

f. that DCPS provide any other relief deemed appropriate and relating to the violations committed here; and

g. pay parent's reasonable attorney's fees and costs.

(2) All meetings shall be scheduled through counsel for the parent, Miguel . Hull, Esq., in writing, via facsimile, at 202-742-2097 or 202-742-2098.

VI. DISCLOSURES

The Hearing Officer inquired whether disclosures were made by the parties; and whether there were any objections. Receiving no objections, the following disclosures were admitted into the record as evidence.

VII. DOCUMENTS SUBMITTED BY STUDENT

Petitioner's Exhibits 01 through Petitioner's Exhibits 25; and a witness list dated January 7, 2009.

VIII. DOCUMENTS SUBMITTED INTO EVIDENCE BY DCPS

Respondent's witness list dated January 7, 2009.

IX. PROCEDURAL POSTURE

On November 24, 2008, Petitioner, through counsel, filed a due process complaint with the D.C. Public Schools, hereinafter referred to as "DCPS", Student Hearing Office, alleging the DCPS denied the student a free appropriate public education ("FAPE"); by failing to: (1) complete reevaluations and convene a meeting to review the evaluations, in a timely manner; (2) provide the student an appropriate IEP; and (3) provide the student an appropriate placement.

On December 5, 2008, DCPS filed "District of Columbia Public School's Response to Parent's Administrative Due Process Complaint Notice". On December 8, 2008, the Hearing Officer issued a "Notice of Pre-hearing Conference" scheduling the pre-hearing conference for December 29, 2008 at 9:00 a.m.. On December 11, 2008, a second "Notice of Pre-hearing Conference" was issued rescheduling the pre-hearing conference for December 17, 2008, at 3:00 p.m.. The parties failed to appear for the pr-hearing conference as scheduled, and on December 18, 2008, the Hearing Officer issued a "Pre-hearing Conference Order".

The hearing convened on January 14, 2009, at 9:00 a.m.; and reconvened on January 23, 2009, at 1:00 p.m., to complete presentation of evidence and witnesses; and conclude the hearing.

with understanding and completing assignments.

The student's Summer School Teacher recommended the student continue to the 9th grade, and participate in more level reading.

4. The student's September 26, 2007 "Report to Parents on Student Progress" includes no grades, however, indicates that the student exhibits poor behavior, does not participate; has excessive absences, and poor test scores; and excellent behavior, needs more study.

5. On October 29, 2007, an Educational Evaluation was completed finding that the student's ability to apply academic skills is within the average range of others at his grade level; and his academic skills are low. The evaluator also determined that when compared to others at his grade level, the student's performance is average in mathematics and math calculation skills, and low average in broad reading.

The results of the Woodcock-Johnson III Tests of Achievement reveal that based on a actual grade of 9.2, the student has a grade equivalent of 4.9 in broad reading, 8.2 in broad math, 7.6 in math calculation skills, 5.3 in academic skills, 8.7 in academic applications, 5.3 in letter-word identification, 3.6 in reading fluency, 9.7 in calculation, 5.4 in math fluency, 3.1 in spelling, 7.7 in passage comprehension, 9.4 in applied problems, and 8.9 in writing samples.

6. On November 6, 2007, the MDT convened to review the student's Educational Evaluation. The MDT developed an IEP for the student recommending 5.0 hours of specialized instruction per week; and that the student expend 15% of his time receiving specialized instruction. The student's "present levels of performance" reflect a 7.7 grade equivalency in reading comprehension, 5.3 grade equivalency in basic reading, and 8.9 grade equivalency in written expression. The student's November 6, 2007 IEP identifies one (1) goal, which is in reading.

X. PRELIMINARY MATTERS

As a preliminary matter, Petitioner withdrew Issue 1 of the due process complaint.

XI. STATEMENT OF THE CASE

1. The student is years of age, and attends located in the District of Columbia. provides inclusion services for special education students, attending the school.

2. The student is a resident of the District of Columbia, and identified as disabled and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)". The student's disability classification is Specific Learning Disability (SLD).

3. A "Summer School Report Card Summary" dated August 7, 2007, indicates that the student performed well in reading class; when focused the student "catches on quick"; was one of the few pupils who seemed to fully understand subjects and predicates; was fairly consistent

The MDT meeting notes include results of the Woodcock-Johnson III assessment; and indicate that the student is late and has excessive absences in most of his classes. The student's educational setting is identified as general education classroom/inclusion setting at Accommodations/modifications include: extended time, calculator, and computer.

The MDT issued a "Prior to Action Notice", recommending the student's placement in a combination general education/resource room setting; at

7. The student's June 13, 2008 "Report to Parents on Student Progress" indicate that the student failed 5 out of 11 classes; progressed in Army Junior ROTC1 and Health & Physical Education; and received a passing grade in music, algebra 1, and developmental reading.

8. On July 10, 2008, a "Consent for Evaluation-Initial or Reevaluation" was signed. The parties dispute whether the consent form was signed by parent.

9. On July 23, 2008, Petitioner, through counsel, forwarded a letter to the Principal, requesting comprehensive reevaluation of the student for special education and related services, including, but not limited to: 1) psycho-educational evaluation, 2) social history, 3) response to intervention assessment, and 4) a formal classroom observation. Petitioner's counsel also submitted a written request for a copy of the student's educational records.

10. On August 6, 2008, Petitioner's counsel forwarded a written request to the Principal, requesting reevaluation of the student.

11. A September 24, 2008 "Report to Parents on Student Progress" reflect grades of "C" in Geometry Part A, "D" in World History, and "C+" in English I.

12. On October 9, 2008, the MDT convened to review/revise the student's IEP, which was due to expire on November 7, 2008. The MDT developed an IEP for the student recommending 5 hours per week of specialized instruction, in the general education setting, and Speech/Language Pathology as a related service, however, the frequency and amount of services is not identified. Courses of study include: Math, English, Science, and History.

Two (2) goals are identified in the student's IEP, namely, reading; and emotional, social, and behavioral development. The IEP fail to include the student's present levels of performance, needs, and impact on the student, in the area of Emotional, Social, and Behavioral Development; and the percentage of time the student will spend with non-disabled peers.

The IEP provides that the student will participate in the DC-CAS with the following accommodations: repetition of directions, calculators; and in general with the following accommodations: small group work, extra time for completion of tasks, repetition of directions, and calculators. The student's IEP also includes "District of Columbia Post-Secondary Transition Plan".

13. On October 9, 2008, DCPS completed a Comprehensive Psychological Evaluation Report. The evaluation results revealed average cognitive ability and failed to reveal any clinically significant psychopathology, emotional, or behavioral problems in the educational environment. The evaluator opined that the student also exhibits some behaviors consistent with those of students who are diagnosed with Attention Deficit Hyperactivity Disorder. The evaluator represents that the student exhibits a Learning Disability and does not exhibit the conditions necessary to meet criteria for special education eligibility under the category of Emotional Disturbance.

The evaluator recommended accommodations and modifications to address the student's attention issues. The students October 9, 2008 IEP fail to include the recommended accommodations and modifications to address the student's attention issues.

14. On January 31, 2007, Petitioner's counsel filed a due process complaint on behalf of the student, alleging that DCPS denied the student a free appropriate public education, by failing to provide the student an appropriate Individualized Education Program (IEP); in violation of "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")".

XII. WITNESSES

Witnesses for Petitioner

Education Advocate
Parent
Student
Admissions Director,

PETITIONER'S WITNESS TESTIMONY

Education Advocate

The Education Advocate testified that in an inclusion classroom setting at the Special Education Teacher visits the student's general education class, and provides 5.0 hours of specialized instruction per week. The Advocate also testified that the student's class is approximately 20 or more students, and a student with ADHD is unable to benefit in such a large class because of the distractibility associated with the disability. The Advocate recommends a full-time special education program because of the student's ADHD and distractibility.

The Advocate also testified that the student requires significant support in reading, and that that student could benefit from full-time special education services, or pull-out services in an inclusion setting, however, pull-out services are unavailable at The Advocate also testified that DCPS denied parent's request for additional services, representing that the student is progressing academically.

The Advocate testified that the student requires assistance in reading and a higher level of services in reading and math; reading is the basis for everything and the student is unable to benefit at in an inclusion program because of his ADHD. The Advocate also testified that the student can benefit from a program geared towards reading, and extended school year services and tutoring may compensate the student for the time he should have received support services in reading. The Advocate testified that according to parent and the student, the student failed to receive support with his reading at

Parent

Parent testified that the student attended Prep School of D.C. during the Summer of 2008, where he reviewed all subjects completed during the 2007/08 school year; which was necessary for the student to graduate. Parent also testified that the student fail to receive the services he requires in the inclusion setting at ; he requires one on one instruction in an academic setting with other special education students.

Parent also testified that the student's attention span and inability to focus is a concern; and because of his deficits he becomes frustrated. Parent also testified that the student fail to receive adequate accommodations during testing at and that she attended the parent/teacher conferences in October and November, 2008, and advised the student's teachers that the student requires a full level of services because of his inability to read, which is fundamental in all areas.

Parent testified that the student is unable to comprehend simple spelling, reading, and lacks the ability to comprehend or read his homework; and as a result, spends more time than his younger siblings, with no disability, and a lower grade levels, even with assistance from his family.

Student

The student testified that his classes include: geometry, world history, English, Reading 180, Art, and Spanish. The student's class size is approximately 15-20 students, and the student testified that he refuses to read aloud because he is embarrassed regarding his inability to read.

The student testified that DCPS fail to provide group teaching in math and English; there are two (2) teachers, and all students receive the same instruction in the large group of students. The student testified that for math tests, he is able to comprehend the math problems with no assistance.

The student testified that he is unable to perform better than the other students; and is unable to take necessary notes in class, as other students, because of his learning disability. The student concluded that he would benefit from placement in a small class because he would be in a class with other students with learning disabilities, and he wouldn't be afraid to speak.

Admissions Director,

The Director testified that primarily serves students with learning disabilities; and although the student's IEP is less than full-time the school can meet the student's needs and provide educational benefit. The Director testified that the school can provide the student counseling, speech services, and reading services.

The Director testified that the class size is 10 with a teacher and teacher's assistant; the school models DCPS' curriculum and offers additional resources; and the student would be with peers functioning on his level. The Director also testified that the student would receive credits towards his High School diploma; the school offers a Transition program, prepares students for college, independent living skills; and offers students a full-time reading specialist, pull-out and one on one instruction, reading program, and the student can receive educational benefit.

RESPONDENT'S WITNESSES TESTIMONY

Witnesses for Respondent

General Education World History/Geography Teacher,
Special Educator/Teacher

General Education World History/Geography Teacher

The General Education Teacher testified that during the first semester of the 2008-09 school years, the student was enrolled in her World History class, of approximately 26 enrolled students although only 21 attended class. The teacher also testified that of the 21 students in the class, 3 were special education students

The teacher testified that the student performed well in the class, receiving grades of "B" and "C", however struggled with tests a little; although he was familiar with the information. The teacher also testified that the student is behind grade levels in reading; and although it is a 10^{th} grade class, because the students reading levels vary, they are separated into groups depending on their levels of reading.

The teacher testified that the student is easily distracted and required continuous refocusing; however, refocused and performed well. The teacher opined that the student was capable of performing in a general education setting with accommodations; and the student can receive a high school diploma and attend college, if he receives accommodations.

The teacher testified that the student completed essay assignments, which required answering questions; however, the student is not graded on grammar or his reading ability, but content. The teacher also testified that the student's use a 10^{th} grade text book, and the student's reading level places him at the bottom of all of the students in his class; whereas, half of the students are on the 9^{th} or 10^{th} grade reading level.

The teacher testified that she implemented the accommodations in the student's IEP, however failed to implement the goals and objectives; and she often read tests to the student, upon request because of difficulty in reading the tests independently. The teacher testifies that if the student can hear something, then he can see it. The teacher indicates that the student is easily distracted, yet easily redirected.

The teacher testified that the student is required to read in English and World History, however the student is excused from reading because of his inability to read. The teacher also testified that the student doesn't receive small group teaching in math and English; is unable to take necessary notes in class as other students, or perform better than the other students.

The teacher testified that accommodations are necessary for the student to function in the 10th grade; and in reading he performs at the lowest of all the students in the class. The teacher also testified that the student completed the Reading/180 program, placing at the 2nd grade level in reading.

Special Education Teacher,

The teacher testified that the student is in the Reading/180 class which is a 10th grade English class, which began in October, 2008. The teacher also testified that class consists of approximately 15 students; and eight receive special education services.

The teacher testified that last semester the student repeated the 9th grade because he failed English, and the Reading/180 class is intended to improve the student's reading level. The teacher testified that the student reads on lower level, however not the lowest. The teacher stated that the student performed well last semester, receiving a "B" in the class; and that the student has more difficulty with reading than writing. The teacher also stated that another teacher is in the student's class, and he can work with standards in reading comprehension and decoding.

The teacher also testified that the student performs well in the class, however, at times the is distracted with friends, however, is easily redirected. The teacher testified that the student is capable of performing in a general education setting, with accommodations in reading, extra time, reading aloud, and the student will be able to master the grade level standards, receive high school diploma, and attend college.

The teacher also testified that the students use computer programs and books on tape, student performs well with inclusion, was scheduled for pull-out however was above grade level for pull-out services, therefore, failed to receive the pull-out services.

The teacher testified that the student is more distracted with smaller groups of 5 or less, and performs better with 15 students, although he would benefit from a small class. The teacher testified that she was unable to provide the student the one on one attention he requires during mid November, 2008, because of staffing constraints. The teacher testified that according to the student's IEP he performs on the 4th grade level, however, has improved.

The teacher concluded that this year the student struggles with decoding, word attack, and comprehension; and is capable of reading on a 3rd and 4th grade level; and the 5 hours per week of specialized instruction the student receives in English is working for the student.

The teacher testified that the student is in a 10th grade general education class and held accountable for the work performed by non-disabled 10th grade students; however, merely receives accommodations and modifications to ensure that he can master the information. The teacher testified that there is a need to increase accommodations and modifications in high school, and when as the student's advance in age. The teacher concluded that the student could benefit from specialized instruction services in all classes, because of weaknesses in reading and writing.

XIII. DISCUSSION AND CONCLUSIONS OF LAW

ISSUE 1

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to develop an appropriate Individualized Education Program (IEP) for the student?

Petitioner represents that the IEP that DCPS developed for the student on October 9, 2008, does not provide sufficient specialized instruction in the special education setting; and fail to appropriately classify the student based on his ADHD diagnosis. Petitioner also represents that the IEP is not uniquely tailored to meet the student's needs; the student is a learning disabled student who is functioning at least 4-5 years below his grade level.

Petitioner argues that the student was previously diagnosed with ADHD and requires placement in a highly structured setting; and has been misclassified. Petitioner also argues that a student with ADHD is eligible for special education under the Other Health Impaired (OHI) classification if the condition negatively impacts the student's academic progress.

Petitioner concludes that the student spends the majority of his time in a general education 10th grade class, however, is unable to read a 10th grade text book; and that his IEP fail to accommodate the student's learning disability in reading.

Petitioner also concludes that the student requires placement in a class where he receives the support; and requires inclusion of specialized instruction in every class where there is a requirement for reading and writing. Petitioner represents that there are 26 hours in a school week, and the student receives 5 hours of specialized instruction; and he is struggling academically.

DCPS represents that the student's IEP is appropriate, and the student was not denied a FAPE. DCPS also represents that a Comprehensive Psychological Evaluation was completed and fail to support provision of additional services for the student, and the 5.0 hours of specialized instruction the student receives addresses the student's needs; he is making progress; and making academic progress.

DCPS argues that IDEA requires that the LEA provide students a basic floor of opportunity, which is available to the student; and reflected in his IEP and current placement. DCPS argues that the student being several grade levels behind is inherent in his disability, and additional services are not warranted.

DCPS concludes that Petitioner has the burden of proof, and failed to satisfy its burden because it failed to present evidence that the student requires more than 5 hours of instruction.

DCPS concludes that the student receives services necessary to make educational benefit and is provided a basic floor of opportunity in all classes. DCPS also concludes that the Comprehensive Psychological Evaluation must be reviewed to assess the student's needs.

DISPOSITION

Appropriate Individualized Education Program (IEP)

The FAPE requirement under IDEA, addresses substantive and procedural violations, which may result in denial of a FAPE. When there is a challenge regarding the appropriateness of a program or placement offered to a disabled child by a school district under the IDEA, a reviewing court must undertake a two-fold inquiry: (1) procedural compliance (Procedural FAPE); and (2) conferral of some educational benefit (Substantive FAPE).

Procedural FAPE (Compliance with Procedural Requirements of IDEA)

The ***procedural*** prong of the FAPE analysis, and the ***first*** prong of ***Rowley***, assesses whether DCPS complied with the procedural requirements of the IDEA, including the creation of an IEP that conforms to the requirements of the Act. *See, The Board of Education of the Hendrick Hudson Sch. Dist. v. Rowley*, 459 U.S. 176 (1982), and *Doe, 915 F.2d at 658*.

Procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute a denial of a FAPE under the IDEA. *See, Babb v. Knox County Sch. Sys., 965 F.2d 104, 109 (6th Cir. 1992); W.G., 960 F.2d at 1484.* However, a procedural violation of the IDEA, is not a per se denial of a FAPE. The courts have held that even if we find that DCPS failed to comply with the procedural requirements of IDEA, such a finding does not necessarily mean that the Petitioners are entitled to relief; nor does it end our analysis. Rather, we must inquire as to whether the procedural violations result in a denial of FAPE, causing substantive harm to the student, or his parents.

Procedurally, the Hearing Officer finds that DCPS: 1) failed to review and revise the student's IEP periodically; and consistent with IDEA, §300.324; and 2) reevaluate the student at least once every three (3) years.

First, according to IDEA, 34 C.F.R. §300.324, each public agency must ensure that, subject to paragraphs (b) (2) and (b) (3) of this section, the IEP Team—

(i) Reviews the child's IEP ***periodically***, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(ii) Revises the IEP, as appropriate, to address—

(A) Any lack of expected progress toward the annual goals, and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under §300.303;

(C) Information about the child provided to, or by, the parents, as described under §300.305(a)(2);

(D) The child's anticipated needs; or

(E) Other matters.

The record reflects that on October 9, 2008, DCPS completed a "Comprehensive Psychological Evaluation Report". Evaluation test results reveal that the student exhibits some behaviors consistent with those of students who are diagnosed with Attention Deficit Hyperactivity Disorder, and a Learning Disability.

The evaluator recommended the multidisciplinary development team (MDT) review the report with other currently relevant data to determine whether the student meets Special Education criteria for Specific Learning Disability or any other disabilities, and requires Special Education services. The evaluator concluded that regardless of the MDT's determination, accommodations and modifications to address attention issues will be needed.

The student's October 9, 2008 IEP includes classroom accommodations which include: DC-CAS: repetition of directions, and calculators; and general accommodations which include: small group work, extra time for completion of tasks, repetition of directions, and calculators.

The October 9, 2008 MDT meeting notes fail to reflect that the team reviewed the October 9, 2008, Comprehensive Psychological Evaluation Report, its findings and recommendations. There is also no indication that since completion of the October 9, 2008 evaluation, the MDT convened to review the evaluation. As a result, the student's October 9, 2008 IEP was developed without the benefit of the findings and recommendations of the evaluation; fail to address the student's ADHD diagnosis; and recommendations for accommodations/modifications to address attention issues.

In addition, the IEP fail to include specialized instruction, in each of the student's classes, to address his learning disability; accommodations/modifications to address the student's ADHD; or a sufficient level of services to address the student's learning disability and ADHD. As a result, the student may have an IEP that is not specifically tailored to address his special education needs.

The Hearing Officer finds that DCPS failed to comply with IDEA, 34 C.F.R. §300.324, by failing to review the student's IEP periodically to address: 1) any lack of expected progress toward the annual; 2) goals, and in the general education curriculum, if appropriate; 3) the results of the October 9, 2008 Comprehensive Psychological Evaluation; 4) information about the child provided to, or by, the parents; 5) the child's anticipated needs; or 6) other matters.

Second, IDEA, 34 C.F.R. §300.303 (b)(2) provides that a reevaluation conducted under paragraph (a) of this section must occur at least once every three (3) years, unless the parent and the public agency agree that a reevaluation is unnecessary.

The record reflects that a Psycho-educational Evaluation report was completed on August 23, 2005, therefore, DCPS was required to reevaluate the student by August 23, 2008. The record reflects that a Social Work Evaluation report was completed on July 6, 2005, therefore, DCPS was required to reevaluate the student by July 6, 2008. The record reflects that a Speech and Language Evaluation report was completed on July 5, 2005, therefore, DCPS was required to reevaluate the student by July 5, 2008. The record reflects that the Clinical Psychological Evaluation report was completed on October 4, 2005, therefore, DCPS was required to reevaluate the student by October 4, 2008.

There is no evidence that parent and the public agency agreed that reevaluations were unnecessary. In fact, the record reflects that on July 23, 2008, and August 6, 2008, parent requested comprehensive reevaluation of the student, and evaluation to determine if the student presents with dyslexia. Therefore, DCPS was required to reevaluate the student pursuant to parent's request; and at least once every three (3) years; and failed to reevaluate the student in a timely manner.

On October 9, 2008 DCPS completed a Comprehensive Psychological Evaluation, however, failed to reevaluate the student consistent with parent's request and as required by IDEA. The Hearing Officer finds that DCPS failed to comply with the procedural requirements of IDEA, in developing, reviewing, and revising the student's IEP.

The Hearing Officer concludes that DCPS failed to reevaluate the student pursuant to parent's request, or triennially, in violation of IDEA, 34 C.F.R. §300.303(a)(2) and §300.303(b)(2). As a result, the student's October 9, 2008 IEP was developed, without the benefit of recent comprehensive evaluations.

Free and Appropriate Public Education (FAPE)

In regard to procedural violations, the 2004 amendments to IDEA, at Section 615(f)(ii) limits the jurisdiction of administrative hearing officers to make findings that a child did not receive FAPE due to ***procedural violations***, if the inadequacies:

(1) impedes the child's right to a FAPE; or

(2) significantly impede the parent's opportunity to participate in the decision making process;

(3) deprives the student educational benefit.

It is the Hearing Officer's decision that Petitioner satisfied its burden by presenting evidence sufficient for a finding that the procedural inadequacies in this matter: (1) impede the child's right to FAPE; (2) significantly impedes the parent's opportunity for "meaningful" participation in all decisions regarding the student's educational program; and (3) deprives the student educational benefit; causing substantive harm to the student and his parent, representing denial of a FAPE.

Substantive FAPE (Conferral of Educational Benefit)

Having concluded under the first prong of *Rowley*, that DCPS failed to comply with the procedural requirements of IDEA, in developing, reviewing, and revising the student's IEP, the Hearing Officer proceeds to the ***second*** prong of *Rowley*, which requires a determination of whether the individualized education program ("IEP"), offered by the LEA, is reasonably calculated to enable the child to receive "some educational benefit".

The ***substantive*** prong of the FAPE analysis, and the ***second*** prong of Rowley, assesses whether the individualized education program ("IEP"), offered by the LEA, is reasonably calculated to enable the child to receive some educational benefit.

In alleging substantive violations of IDEA, a party challenges the ***substantive*** content of the educational services the disabled student is entitled to receive under the IDEA; and courts have held that substantive harm can also occur when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process.

According to *The Board of Education of the Hendrick Hudson Sch. Dist. v. Rowley*, 459 U.S. 176 (1982), and *Doe, 915 F.2d at 658*; an IEP need not maximize the potential of a disabled student, it must provide "meaningful" access to education, and confer "some educational benefit" upon the child for whom it is designed. However, in its interpretation of *Rowley*, the District Court held that an appropriate IEP must result in more than de minimis benefits to satisfy *Rowley's* "some educational benefit" standard.

For the benefit to be sufficiently meaningful, the IDEA was enacted to assure that all children with disabilities have available to them a (FAPE), which emphasizes special education and related services designed to meet their unique needs, supported by such services, as are necessary to permit the child to benefit from the instruction. The court also held that a plan for a disabled student will satisfy the IDEA only if it is "likely to produce progress, not regression or trivial educational advancement."

In order for FAPE to be offered, the school district must show it complied with the statutory elements of an IEP, and the goals and objectives in the IEP are reasonable, realistic and attainable. The special education and related services must be reasonably calculated to enable the child to receive more than de minimis educational benefit, and must be likely to produce progression, not regression.

First, the student's October 9, 2008 IEP recommends the student receive 5.0 hours per week of specialized instruction, in a general education inclusion setting, and Speech/Language services, beginning October 9, 2008. However, the IEP fail to indicate the frequency and amount of speech and language services the student will receive. The IEP merely indicates "min per day".

The student's class schedule for the 2008/09 school year includes nine (9) classes; and his IEP includes two (2) goals, namely, reading; and emotional, social, and behavioral development. The reading goal indicates that the student's present level of educational performance in reading comprehension is 7.7, and his grade equivalent is 5.3. The second goal of emotional, social, and behavioral development, fail to include the student's present level of educational performance, needs, or impact on the student.

In addition, the October 9, 2008 Comprehensive Psychological Evaluation provides that the student has a learning disability in reading; and according to his teacher, the student behavior also suggests a learning disability in writing. However, the student's IEP fail to include a goal, interventions, supports, related services, accommodations/modifications to address the student's writing deficits.

The IEP also fail to include information regarding the manner in which the student's disability affects his involvement and progress in the general education curriculum; 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 the child's other educational needs that result from the child's disability; a description of how the child's progress toward meeting the annual goals will be measured; and the extent, if any, to which the child will not participate with non-disabled children in the regular class.

Second, the IEP team that developed the student's October 9, 2008 IEP failed to include a representative of the public agency who is qualified to provide, or supervise the provision of specially designed instruction to meet the needs of the student; an individual knowledgeable about the availability of resources of the public agency (i.e. Reading Specialist or program, or placement options); or other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate (i.e. Speech and Language Therapist, Reading Specialist).

The Hearing Officer finds that the DCPS failed to develop the student's IEP consistent with the requirements of IDEA, 34 C.F.R. §300.320 (1); by ensuring that the IEP team included individuals consistent with requirements of IDEA, 34 C.F.R. §300.321.

Third, the purpose of the October 9, 2008 IEP team meeting was to review and revise the student's IEP, consistent with 34 C.F.R. §300.324(b). IDEA, 34 C.F.R. §300.324 (a) provides that in developing each child's IEP the IEP Team must consider—

(i) The strengths of the child;
(ii) The ***concerns of the parents*** for enhancing the education of their child;

(iii) The ***results of the initial or most recent evaluation*** of the child; and
(iv) The ***academic, developmental, and functional needs*** of the child.

The Hearing Officer finds that the IEP team failed to consider concerns of parent for enhancing the student's education, specifically, parent's request that the student receive a higher level of services; concerns regarding changes in the student's class schedule and it impact; request for reevaluations to rule out dyslexia, and weaknesses in reading. The team also failed to consider the results of the most recent Comprehensive Psychological Evaluation in developing the student's IEP.

The team failed to consider the student's specific learning disability in reading and weaknesses in writing; his academic, developmental, and functional needs, within the inclusion setting at For instance, the student's 9th grade progress reports during the 2007/08 school years reflect that the student failed 5 out of 10 of his classes, failed his 9th grade English class, because of reading deficits, and attended Summer school, repeating the majority if not all subjects completed during the 2007-08 school year.

Fourth, IDEA, 34 C.F.R. §300.324(2) provides that in the case of a child whose behavior impedes his learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

The Student Progress Update completed by the student's Spanish Teacher indicates that the student attends class however arrives and leaves on his schedule, although at the time of the report, followed the required schedule.

The teacher also indicated that the student exhibits behavior problems, she communicates with the student regarding his behavior and contacts the student's parents to discuss the student's behavior and its impact upon his learning.

The teacher's report indicates that the student exhibits behavior impacting his learning, however, there is no evidence that the IEP team complied with IDEA, 34 C.F.R. §300.324(2), or considered the use of positive behavioral interventions and supports, and other strategies, to address the student's behavior.

Fifth, the student's Spanish Teacher, notes that the student can grasp the concepts when he is ***focused***; wants to learn; and not "clown". The student's teachers indicate that the student ***struggles with maintaining focus***; and report inconsistency in completion of homework, class participation, and ***maintaining focus***.

The Hearing Officer finds that the teacher's comments are consistent with findings and recommendations included in the October 9, 2008 Comprehensive Psychological Evaluation, wherein the evaluator indicated that the student exhibits some behaviors consistent with those of students who are diagnosed with Attention Deficit Hyperactivity Disorder; and that accommodations and modifications are required to address the student's attention issues.

The Hearing Officer also finds that the student's October 9, 2008 IEP fail to address the student's ADHD diagnosis, or include accommodations and modifications to address the student's attention issues. The team also failed to consider the student's ADHD diagnosis in determining the student's placement in a general education inclusion setting.

Sixth, the Hearing Officer finds that the student's IEP recommends 5.0 hours of specialized instruction, per week. The student is diagnosed with a learning disability, in reading, and there are indications of writing deficits; and ADHD. However, the student only receives the 5.0 hour per week of specialized instruction in English, and fails to receive services in the remaining eight classes, although reading and writing are fundamental requirements in all of the student's classes; and he is expected to perform at the same level as the non-disabled 10th grade students.

The Hearing Officer finds that the level of special education services in the student's October 9, 2008 IEP are insufficient to meet the student's academic, developmental, and functional needs.

Seventh, the IEP also includes accommodations during testing; and in general, however, fail to describe the supplemental aids and services, to be provided the student. The accommodations/modifications included in the student's October 9, 2008 IEP includes small group work, extra time for completion of tasks, repetition of directions, and calculators.

Failure to provide the student the services and supports necessary to address his reading and writing deficits, and ADHD, adversely impact his academic performance in school. The level of services, accommodations, and modifications recommended in the student's IEPs are insufficient to address the student's learning disability, writing deficits, and ADHD. The evidence suggests that the student may benefit from receiving specialized instruction, accommodation and modifications in all classes, requiring more than 5.0 hours of specialized instruction per week.

The services included in the student's IEP are not reasonably calculated to enable the student to receive more than de minimis educational benefit, failing to satisfy *Rowley's* "some educational benefit" standard. If the student received any value from the education afforded by DCPS, it was trivial and not sufficient; and he is likely to continue to produce regression, and not progression, academically and behaviorally.

Eighth, the IEP team reviewed and developed the student's IEP; however, failed to revise the student's IEP, as appropriate, to address the student's lack of progress towards achieving the goals in his IEP; reflect the level of services the student required to address his special education and related service needs; and that were necessary to ensure that the student received "meaningful" educational benefit.

Ninth, an inclusion setting may not be conducive for a student with a learning disability, and ADHD; which is evidenced by the student's failing grades during the 2007/08 and 2008/09 school years, failure to complete homework assignments, poor attendance, inattentiveness, inability to grasp concepts, and maintain focus. In addition, the student attended Summer school, repeating the majority if not all subjects completed during the 2007/08 school year; and failed his 9th grade English class because of his reading disability.

The student's placement in a general education inclusion setting during the 2007/08 and 2008/09 school years, has proven to offer de minimis academic benefit because the student failed five out of ten subjects during the 2007/08 school year; during Summer school, repeated the majority, if not all subjects completed during the 2007/08 school year; and failed English because of his reading disability. The student continues to regress academically; remains 4-5 grade levels below his actual grade level; and fail to progress.

Furthermore, the student is capable of more than de minimis results he received at However, the student requires a special education program specifically designed to address his learning disability and ADHD; in a small structured therapeutic environment, where he can receive one on one instruction in all subject areas. The student also requires remedial services in reading.

The Hearing Officer finds that curricular modification, accommodation and/or supplemental aids and services ***cannot*** be used for a LRE setting in ***regular*** education; and the nature of the student's disability necessitates placement in a less integrated setting. Placement of the student at Coolidge SHS fails to satisfy the least restrictive environment requirements of IDEA.

It is the Hearing Officer's decision that Petitioner satisfied its burden of proof by presenting evidence that DCPS failed to comply with the statutory elements of IDEA, in developing, reviewing, and revising the student's IEP. DCPS failed to develop an appropriate IEP for the student during the 2007/08 and 2008/09 school years; in violation of IDEA, representing denial of a FAPE to the student.

ISSUE 2

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate *placement*?

Petitioner represents that is not an appropriate placement for the student, because the school is unable to provide the student the education setting he requires; and a student's placement is to be in the least restrictive environment and in a school capable of meeting the student's special education needs.

Petitioner further represents that "[a]lthough not defined by statute or regulation, "inclusion" is generally recognized by educators to mean the placement of a child with a disability in a regular education class with the child's age-appropriate peers. The child with a disability receives appropriate special education services to support his or her placement in the regular education class, while working towards the achievement of his or her IEP annual goals." Board of Education of the City School District of the City of Rochester, 26 IDELR 823 (SEA NY 1997)

Petitioner argues that the standard for determining the appropriateness of an inclusion setting for a particular student is whether the student can be "educated satisfactorily" in the setting. Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993). "In determining whether a child with disabilities can be educated satisfactorily in a regular class with supplementary aids and services...[several factors should be considered], including: 1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom, 2) the educational benefits available to the child in a regular class, with appropriate supplementary aides and services, as compared to the benefits provided in a special education class, and 3) the possible negative effects of the inclusion of the child on the education of the other students in the class." Id.

Petitioner concludes that the student has a history of ADHD, and is several years below where he should be; and the student requires placement in a structured environment; and that can only offer the student specialized instruction in an inclusion setting, and large open classroom environment; which fail to accommodate the student's learning disability and ADHD, provide access to the general curriculum, or meet the student's educational needs.

Petitioner concludes that it satisfied its burden of proof, and the preponderance of the evidence supports a finding that it is more likely than not, that the level of services; and the student's placement are inappropriate to meet the student's needs.

DCPS represents that can provide the student the services included in his IEP; and has not been denied a FAPE; and the basic floor of opportunity is provided the student in his current placement. DCPS further represents that a full-time placement is not recommended in the student's evaluations, or warranted; and the student is several grade levels behind, which is inherent of his disability.

DCPS argues that IDEA requires that the LEA provide students a basic floor of opportunity, which is available to the student; and reflected in his IEP and current placement.

DCPS concludes that Petitioner has the burden of proof, and failed to satisfy its burden because it failed to present evidence that the student requires an inclusion setting. DCPS also concludes that the student receives accommodations in his general education setting, and the services necessary to make educational benefit and is provided a basic floor of opportunity in all classes.

DISPOSITION

IDEA, 34 C.F.R. §300.116 provides that in determining the educational placement of a 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 ***Least Restrictive Environment (LRE)*** provisions of this subpart, including Sections 300.114 through 300.118.

(b) The child's placement-
(1) is determined at least annually;
(2) is based on the child's IEP;
(3) is as close as possible to the child's home.

First, the record reflects that on ***October 9, 2008***, a Multidisciplinary Development Team (MDT) meeting convened to conduct an annual review of the student's IEP; develop, review and revise the student's Individualized Education Program (IEP), for the 2008/09 school years. ***Participants included***: parent, special education teacher, general education teacher, student, Spanish Teacher, Social Worker, School Psychologist, Special Education Coordinator, and the Education Advocate.

The team failed to include a DCPS representative qualified to provide, or supervise the provision of specially designed instruction to meet the unique needs of the student; and knowledgeable about the availability of resources of the public agency. In addition, the student's teachers serving on the team were unable to provide input regarding the student's academic and functional performance in other classes, within the inclusion setting.

In addition, IDEA 34 C.F.R. §300.116(a)(1); requires that the placement decision is made by a group of individuals qualified to discuss placement options. Although the team determined that the student's placement at Coolidge is appropriate, it failed to include on the team a Placement Specialist or other individual qualified to discuss placement options for the student; in violation of subparagraph §300.116(a)(1).

Finally, the student's IEP recommends the student receive Speech-Language services, however, the team failed to include a Speech and Language Therapist, or other individual qualified to interpret the instructional implications of the results of the Speech and Language Evaluation completed on July 5, 2005.

The Hearing Officer finds that the IEP team failed to comply with IDEA, 34 C.F.R. §300.321(a), which requires that the public agency ensure that the IEP team for each child with a disability include certain qualified individuals.

The Hearing Officer also finds that DCPS failed to ensure that the placement decision was made in accordance with IDEA, 34 C.F.R. §300.116 (a)(1); and §300.321.

Second, IDEA, 34 C.F.R. §300.116, subparagraph (a)(2) requires that the placement decision is made in conformity with the Least Restrictive Environment (LRE) provisions of this subpart, including §300.114 through §300.118.

The LRE requirement reflects the IDEAs' preference that "[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 not disabled", and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *See also, 34 C.F.R. Section 300.114(a)(2); 34 C.F.R. Section 300.116(a)(2); and D.C. Municipal Regulations Title 5, Section 3011*.

IDEAs' preference for "mainstreaming" disabled students is not absolute; Section 1412(a)(5) permits the delivery of educational services to disabled students in less integrated settings as necessitated by the student's disability. *A. B. ex rel. D.B. v. Lawson, 354 F.3rd 315, 330 (4th Cir. 2004)*.

According to the student's October 9, 2008 IEP, a general education inclusion setting, is recommended for the student; and the student receives 5.0 hours of special education services, per week. As represented by Petitioner, the standard for determining the appropriateness of an inclusion setting for a particular student is whether the student can be "educated satisfactorily" in the setting. Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993).

"In determining whether a child with disabilities can be educated satisfactorily in a regular class with supplementary aids and services...[several factors should be considered], including: 1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom, 2) the educational benefits available to the child in a regular class, with appropriate supplementary aides and services, as compared to the benefits provided in a special education class, and 3) the possible negative effects of the inclusion of the child on the education of the other students in the class." Id.

In addressing the ***first*** criteria, the student's disability is learning disabled, in reading and/or writing; and a recent Comprehensive Psychological Evaluation completed by DCPS, diagnoses the student with ADHD. The student receives 5.0 hours of special education services per week to support his placement in the regular education class, in an inclusion setting. The special education teacher visits the student in his regular education class, and the student receives the specialized instruction services, within the class, and in an open classroom among disabled and non-disabled students.

The record reflects that for the 2008/09 school year the student has approximately nine (9) classes, namely: Advisory, Spanish I, Geometry Part A, World History/Geography 2, English I, Art and Design Foundations, Geometry Part B, Chemistry I, and English II.

According to the testimony of the student's Special Education Teacher, the student receives 5.0 hours per week of special education services in his English class, therefore, it may be presumed that the student receives no special education services in the remaining eight (8) classes to address the student's learning disability in reading, or possible writing disability. The student's Special Education Teacher also testified that the student can benefit from special education services in all classes where there is an expectation or requirement for reading and writing.

According to the testimony of the student's World History teacher, the student receives accommodations in his World History/Geography 2 class. However, there is no evidence that the student receives accommodations/modifications in the remaining eight (8) classes, as recommended in the student's IEP. Therefore, absent evidence to the contrary, the Hearing Officer finds that DCPS failed to make reasonable efforts to accommodate the child in the regular education setting.

The students' World History and Special Education teachers testified that the student is unable to function in a 10th grade regular education inclusion class, without accommodations, and when the accommodations are not present, the student is unable to access the general curriculum, or receive educational benefit.

The student's progress reports and report cards, demonstrate that even with the accommodations received by the student in his World History class, the student continue to struggle academically; and although he appears to benefit from the accommodations, the benefits are no more than de minimis.

The Hearing Officer finds that DCPS failed to make reasonable efforts to accommodate the child in a regular classroom.

In addressing the ***second*** criteria, the student's October 9, 2008 IEP fail to include any appropriate supplementary aides or services for the student, although the student can benefit from the services of a Reading Specialist, Reading Program, Extended School Year services, tutoring, etc..

The Hearing Officer finds that the student failed to receive appropriate supplementary aides or services, therefore, the Hearing Officer is unable to determine whether the educational benefits available to the child in a regular class, with appropriate supplementary aides and services, as compared to the benefits provided in a special education class.

The ***third*** criteria, requires an inquiry into the possible negative effects of the inclusion on the student's education and other students in the class." According to the testimony of the student, he fails to read aloud because he is embarrassed regarding his inability to read, and although he is required to read in his World History and English classes, his teacher doesn't request that he read because of his inability to read. The student's World History Teacher testified that the student requests, and she accommodates the student by reading assignments, lessons, etc., to the student during class.

The student also testified that he is unable to perform as other students; or take necessary notes in class from the teacher's lessons because of his reading and writing deficits. The student concludes that he would benefit from a small group of students with learning disabilities; and if placed in such an environment with his peers, he "would not be afraid to speak".

According to the student's IEP, his disability impacts his learning. Therefore, placement of a student with a learning disability in reading and/or writing, and ADHD in a general education classroom, where he receives 5.0 hours per week, inclusion services in only one of nine classes, while expected to perform at the same level as non-disabled 10th grade students; which is likely to continue to produce regression and not progression.

In addition, receiving specialized instruction in the inclusion classroom, isolates and ostracizes the student, where he is noticeably different than the other students, which presents opportunity for ridicule and harassment from non-disabled students; and negatively impacts the student's self esteem and confidence, furthering hindering his ability to progress academically.

For instance, according to the results of the Reading/180 test, the student reads at the 2nd grade level, however, is expected to perform at the 10th grade level. The student's inability to "keep up" with class instruction, follow assignments, read, write, or participate in the class at the same level as other non-disabled 10th grade students isolates the student, denies the student access to the general curriculum and educational benefit. It also requires the instructor to dedicate more time to the student, than other students; and given the class size negatively impacts all students.

The Hearing Officer finds that the benefits the student would receive if placed in a special education class of his peers, far outweighs the possible negative effects of maintaining the student's placement in an inclusion setting, on the student's education and other students in the class. The student's self esteem, frustration level, desire to succeed, and continued interest in school, is likely to be compromised and/or diminish, should he remain in an inclusion setting. Meanwhile, the student is denied access to the general curriculum; and fails to receive educational benefit because of an insufficient level of services and accommodations; and inappropriate placement.

In addition, the Hearing Officer finds that an increase in specialized instruction, and accommodations/modifications in all the student's classes, at is not practicable because the school is primarily a general education setting; and the student would be further isolated in his environment.

The Hearing Officer concludes that based on the aforementioned, the student with a learning disability in reading and/or writing; and ADHD, cannot be educated satisfactorily in a regular class, even with the use of supplementary aids and services; modifications and accommodations.

Fourth, IDEA also provides that 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. *See, 34 C.F.R.§300.116.*

The Hearing Officer finds that DCPS failed to consider the potential harmful effects on the student, by recommending 5.0 hours of specialized instruction per week, although the student has reading and writing requirements in all classes; and fail to ensure that the student received specialized instruction in all classes where there is a requirement to read and write. The student only receives specialized instruction in his English class.

DCPS also failed to consider the potential harmful effects on the quality of services the student requires, by placing the student in an inclusion environment where he is expected to perform at the same level as other 10th grade students, however, is unable to fully participate because of his learning disability; and the unavailability of specialized instruction services in eight of his nine classes. As a result, the student is denied access to the general curriculum; in the eight classes, where he fails to receive specialized instruction.

In addition, the classes include approximately 15-20 students. The classes are too large and the student's needs are significant, precluding the teacher from providing the student the one on one instruction he requires. As a result, the student is unable to participate and access the general curriculum; and recommend educational benefit.

The Hearing Officer finds that based on the evidence presented, the decision to place the student at was not made in accordance with the ***Least Restrictive Environment (LRE)*** requirements of IDEA. is not the least restrictive environment for the student; and the nature of the student's disability is such that placement in a general education class the majority of each school day, and receipt of specialized instruction in only one of nine classes, denies the student access to the general curriculum, and educational benefit. The student requires a less integrated academic setting, which is necessary for the student to access the general curriculum, and progress academically.

Fifth, IDEA requires that 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.

The Hearing Officer finds that although DCPS convened annually to discuss and determine that the student' placement; it failed to discuss and determine the student's placement annually, as required; and as contemplated by IDEA. Rendering a determination that the student requires placement in a general education inclusion setting, and recommending 5.0 hour per-

week of specialized instruction, and failing to adequately consider the nature of the student's disability, the level of special education services, accommodations, modifications, and support services that are necessary to support the student's disability; and academic, developmental, and function needs within the environment; is not as IDEA intended.

IDEA contemplates that during an annual review of a student's IEP, the IEP team will review the student's IEP, academic progress, progress in his current placement, evaluations, academic history, input from parent and others, and determine whether the recommended level of services are sufficient, and the placement is appropriate to meet the student's academic, developmental, and functional needs. If it is determined that the level of services and placement are insufficient or inappropriate, IDEA expects that the team will revise the student's IEP to ensure that it is reasonably calculated to provide the student "some educational benefit"; the student's needs can be met in the placement, his IEP implemented, and he can receive educational benefit.

IDEA also requires that the student's placement is based on his IEP. The record reflects that the student's October 9, 2008 IEP recommends the student's placement in a general education inclusion setting, however, the student's educational records reflect that the student failed his 9th grade English class, participated in Summer school during the 2007/08 school years, repeating the majority if not all of the classes completed during the 2007/08 school year; and according to his teachers, although the student receives accommodations in his World History class and specialized instruction in English, the student continue to struggle academically.

In addition, an October 9, 2008 Comprehensive Psychological Evaluation diagnoses the student with ADHD. However, the IEP team failed to consider the student's ADHD diagnosis, and other relevant factors, in developing the student's IEP, recommending an appropriate level of specialized instruction services, and determining the student's placement for the 2007/08 and 2008/09 school years.

In addition, although IDEA provides that the student's placement is based, in part, on his IEP, the court determined that the student's October 9, 2008 IEP inappropriate. Therefore, the appropriateness of the student's placement is questionable.

Sixth, If the student received any value from the education afforded by DCPS, even with the use of appropriate accommodations/modifications, supplementary aides and services, it was trivial and not sufficient; and the student is likely to continue to regress, and not progress, academically. This is evidenced by the student's failing grades; and the fact that even with the accommodations in his World History class, and support of his Special Education Teacher in English, in his World History class, his reading level is the lowest in his class; he remains 4-5 grade levels below his grade equivalent; and failed his 9th grade English class because of his deficits.

The student's teachers testified that the student can only function in a regular classroom with accommodations, and according to the student's Special Education teacher, because of the nature of his learning disability, he would benefit from specialized instruction in all classes.

In addition, the benefits received by the student in the inclusion setting, are far less and outweighed by the benefits the student would receive in a special education class with his learning disabled peers.

Finally, the student is diagnosed with ADHD, and according to his teachers, is easily distracted, although easily redirected. However, the benefit the student receives in a general education inclusion setting, with approximately 15-20 students, is far less and outweighed by the benefits the student would receive if in a small structured environment, where there are minimum distractions, and he can receive one on one instruction.

Based on the evidence presented, the Hearing Officer finds that the educational benefits available to the child in a regular class, with appropriate supplementary aides and services, as compared to the benefits provided in a special education class, are no more than de minimis, and fail to satisfy *Rowley's* "some educational benefit" standard.

The student requires a less integrated academic setting, with learning disabled peers, accommodations/modifications, supplementary interventions and supports, remedial and related services; and an inclusion setting with non-disabled peers, without a sufficient level of specialized instruction services, related services, accommodations/modifications, interventions and supports, fail to serve the student's needs, or provide educational benefit.

Based on the aforementioned, it is the Hearing Officer's decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS' failed to provide the student an appropriate placement during the 2008/09 school years, in violation of IDEA, 34 C.F.R. §300.116, representing denial of a FAPE; and entitlement to compensatory education services.

Petitioner proposes School as an alternative placement for the student. offers a full-time special education program for students with learning disabilities; and provides a small structured therapeutic environment, with a small student to teacher ratio, offers several reading programs, full-time reading specialist on pull-out and one on one intervals, utilizes DCPS' curriculum, offers a transitional and independent living skills program, can implement the student's IEP, and provide the student educational benefit. The school is also staffed with certified Special Education Teachers, and service providers.

The student evaluations fail to recommend the student's placement in a full-time special education program for learning disabled students, and in fact, fail to recommend any placement for the student. However, the evidence is sufficient to find that the student's placement in a general education inclusion setting, without a sufficient level of specialized instruction, related services, accommodations/modifications, interventions and supports, denies the student access to the general curriculum, and denies the student educational benefit.

In addition, placement of the student in a general education 10th grade class where he is expected to perform at the same level as non-disabled student, although he performs on the level of a disabled student with a learning disability and ADHD, is an unreasonable expectation and fail to benefit the student. The general education 10th grade class at is not considered a class of the student's peers; and the nature of the student's disability necessitates placement in a less integrated setting; and among peers with similar disabilities and levels of academic performance.

The Hearing Officer concludes that The is an appropriate placement for the student, however, the student's placement is an interim placement, providing DCPS the opportunity to provide the student an appropriate IEP and placement.

ISSUE 3

Compensatory Education Services

Whether the student is entitled to compensatory education services?

Petitioner represents that "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 516 (D.C. Cir. 2005).

Petitioner further represents that in *Reid* the Court reasoned that "[a]ccordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments...this flexible approach will produce different results in different cases depending on the child's needs. Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended programs, perhaps even extending hour-for-hour replacement of time spent without FAPE."

Petitioner concludes that "if a parent presents evidence that her child has been denied FAPE, she has met her burden of proving that he is entitled to compensatory education." *Mary McLeod Bethune Day Academy Public Charter School v. Bland, Memorandum Opinion February 20, 2008, Civil Action No. 07-1223 (D.D.C. 2007).*

DCPS represented that compensatory education services are not warranted because there is no denial of a FAPE, the IEP provides the student educational benefit, and therefore, the complaint should be dismissed with prejudice.

The purpose of compensatory education is to help the child make the progress that he/she would have made if an appropriate program had been available. The specific services provided must be tailored to the child's needs. Compensatory education can mean extra instruction or related services (such as therapies) provided during the school year or summer.

A child with disabilities may be able to obtain "compensatory education" – makeup services – if he/she went without an appropriate program for some period of time. In this matter, the Hearing Officer determined that the student failed to receive an appropriate IEP and placement, during the 2008/09 school years; and therefore, was denied the services he was entitled to receive under the IDEA.

Compensatory education might also be available if there was an illegal delay in evaluating the child for special education and if, as a result, the child did not receive needed service. In this matter, the Hearing Officer determined that DCPS failed to comply with the procedural requirements of IDEA, in developing, reviewing, and revising the student's IEP, including reevaluation of the student.

Sometimes special materials or other special services tailored to the child's needs are appropriate. The amount of compensatory services provided should reflect the student's specific learning needs, and should relate to the amount of services the student has missed, and therefore, a day for each day of services missed, may not be appropriate.

Based on the evidence and testimony presented, it is the Hearing Officer's decision that Petitioner satisfied its burden by presenting evidence sufficient for a finding that DCPS failed to provide the student an appropriate IEP and placement, resulting in denial of a FAPE, and entitling the student to compensatory education services.

XIV. ORDER

Based on the aforementioned, it is hereby:

1. **ORDERED**, that no later than February 13, 2009, DCPS shall issue a Prior Notice of Placement, authorizing funding of the student's placement at the with transportation, until such time as DCPS develops an appropriate IEP, and provides an appropriate placement for the student, consistent with the findings in this decision; and it is further

2. **ORDERED**, that DCPS shall convene an MDT meeting within 30 days of the student's enrollment at the to review and revise the student's IEP, to provide for a higher level of special education services to ensure that the student receives specialized instruction services in every class requiring reading and writing, to accommodate his learning disability; support services of a reading specialist; the student's participation in a Reading program; extended school year, and tutoring services, to provide the student additional academic support.

   At the MDT meeting referenced herein, DCPS shall also determine an appropriate permanent placement for the student in a small structured therapeutic setting that accommodates the student's learning disability in reading, and he can receive one on one instruction; and ADHD, where there are minimum distractions; and it is further

3. **ORDERED,** that DCPS shall issue a Notice of Placement being issued within 5 days if the permanent placement is at a public school, or 30 days if the permanent placement is in a non-pubic school; and it is further

4. **ORDERED,** that DCPS shall fund an independent Physical Therapy Evaluation or other assessment, deemed appropriate to address the student's writing deficits; and provide parent funding to obtain an independent Clinical Psychological Assessment, and/or any other assessments warranted to determine the student's cognitive levels, and "rule out" Dyslexia; and it is further

5. **ORDERED,** that in the event of DCPS' failure to comply with the terms of this Order, Petitioner's Counsel will contact the Special Education Coordinator at the High Road School and the DCPS Office of Mediation & Compliance to attempt to obtain compliance prior to filing a complaint, alleging DCPS' failure to comply with this decision and order; and it is further

6. **ORDERED,** that any delay in meeting the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.
DCPS shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives; and it is further

7. **ORDERED,** that DCPS shall send all notices and schedule all meetings through parent's counsel Miguel Hull, Esq., in writing, via facsimile, at 202-742-2097 or 202-742-2098.

8. **ORDERED,** this decision and order are effective immediately

XV. APPEAL PROCESS

This is the **FINAL ADMINISTRATIVE DECISION.** Appeals may be made to a court of competent jurisdiction within ninety (90) days from the date this decision was issued.

Ramona M. Justice /s/ 2/9/09

Attorney Ramona M. Justice
Hearing Officer

Date Filed: _____

cc: Attorney Linda Smalls, Office of the Attorney General
Attorney Miguel Hull: Fax: 202-742-2098