

**DISTRICT OF COLUMBIA OFFICE OF THE STATE SUPERINTENDENT  
STATE ENFORCEMENT AND INVESTIGATION DIVISION**

-----x  
a minor, by and  
through his Parent(s),

Petitioners,

- against -

District of Columbia Public Schools,

Respondent.  
-----x

**HEARING OFFICER  
DETERMINATION**

SHO Case No.

Deusdedi Merced, Hearing Officer

Student I.D. Num.:

Attending School:

Home School:

School

Elementary School

**INTRODUCTION**

This matter comes before the undersigned Hearing Officer on Petitioners Notice of Due Process Complaint (hereinafter, "Complaint"), filed on or about January 29, 2009. HO 1.<sup>1</sup> I was appointed shortly thereafter and a pre-hearing conference in the matter was scheduled for, and held on, February 13, 2009. HO 2, 3 and 5. A Response to the Complaint was filed on or about February 13, 2009. HO 4. The Pre-Hearing Conference Summary and Order was issued on February 15, 2009. HO 5.

A hearing was held on March 3, 2009, and continued on March 23, 2009.<sup>2</sup> It was a closed hearing, and the Petitioners were represented by Christopher West, Esq.

---

<sup>1</sup> The Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioners Exhibits will be referred to as "P" followed by the exhibit number; and, Respondent Exhibits will be referred to as "R" followed by the exhibit number.

<sup>2</sup> Petitioners presented the testimony of the parent, Carolyn Miskel, Educational Advocate, James E. Brown & Associates, PLLC, and Senior Director, School. Respondent presented the testimony of Barbara Bailey, Special Education Supervisor, District of Columbia Public Schools. Witness testimony will be referred to as "Testimony of" followed by the name of the witness.

Respondent was represented by Laura George, Esq. during the March 3, 2009 hearing and by Nia M. Fripp, Esq. during the March 23, 2009 hearing. Petitioners entered into evidence exhibits 1 to 25; Respondent entered into evidence exhibits 1 to 19.

### **JURISDICTION**

The due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter, "IDEIA"),<sup>3</sup> 20 U.S.C. § 1400 *et seq.*, its implementing regulations, 34 C.F.R. § 300 *et seq.*, and the District of Columbia Municipal Regulations, Title 5, Chapter 30, Education of Handicapped (2003).

### **BACKGROUND**

The student is      years old, and in the      grade. See HO 1, P 9-1. He is classified as Emotionally Disturbed and recommended for 27.5 hours per week of specialized instruction and related services. P 9-4. The student's classification and the January 7, 2009 Individualized Education Program (hereinafter, "IEP") are not in dispute. Stipulation of the Parties.

On August 25, 2008, the student was enrolled in the Educational Campus. Testimony of Parent. A triennial evaluation of the student was agreed upon on August 15, 2008. P 15-1, P 16-1. On January 7, 2009, the IEP Team recommended placement of the student in the ED Cluster Program at Educational Campus. P 9-5. The parent disagreed with the recommended placement. P 10-3; Testimony of Parent. On March 20, 2009, an IEP Team met and proposed placement of the student in the ED Cluster Program at      School. R

---

<sup>3</sup> In 2004, Congress reauthorized the Individuals with Disabilities Education Act (hereinafter, "IDEA") as the IDEIA. See Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005.

19-2. The parent disagreed with the recommended placement. R 19-4; Testimony of Parent, Miskel.

Petitioners filed this appeal on or about January 29, 2009 seeking placement of the student in, and funding of, the \_\_\_\_\_ School of Prince George's County.

### ISSUES

The issues presented to the undersigned for determination are as follows:

- a. Whether the student's placement in the ED Cluster Program at \_\_\_\_\_ Educational Campus is appropriate to meet the student's educational and socio-emotional needs as prescribed by his January 7, 2009 IEP.
- b. Whether the student's placement in the ED Cluster Program at \_\_\_\_\_ School is appropriate to meet the student's educational and socio-emotional needs as prescribed by his January 7, 2009 IEP.
- c. Whether the student was denied a free and appropriate public education (hereinafter, "FAPE") when Respondent failed to implement the student's August 14, 2008 IEP during a two week period when he was suspended from \_\_\_\_\_ Educational Campus on or about November 10, 2008 and placed at \_\_\_\_\_ for a 45 day suspension.

### FINDINGS OF FACT

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

1. The student is \_\_\_\_\_ years old. See HO 1, P 9-1. He is in the \_\_\_\_\_ grade. P 9-1.

2. In the 2006 – 2007 school year, the student was enrolled in the ED Cluster Program at Educational Campus. P 18, P 23-2; Testimony of Parent.

3. The student was unilaterally enrolled in a general education boarding school in Indiana during the 2007 – 2008 school year. R 16; Testimony of Parent.

4. The student was not in receipt of any special education and related services while enrolled in the boarding school. The student passed all his classes. Id.

5. A multi-disciplinary team (hereinafter, “MDT”) meeting was held on August 15, 2008. R 16. The parent was present at the meeting. Id.

6. The purpose of the meeting was to hold an annual review of the student’s IEP, which had expired in the 2006 – 2007 school year and had not been renewed because of the student’s enrollment in the boarding school in Indiana during the 2007 – 2008 school year. See R 16.

7. The parent agreed that the student would do well in a general education setting at Educational Campus. R 16-1; P 13-1.

8. The IEP Team recommended that the student be classified Emotionally Disturbed and provided with 15 hours of specialized instruction and one hour of psychological services per week. P 13-1.

9. The student started at Educational Campus on August 25, 2008. Testimony of Parent.

10. The educational testing relied on by the IEP Team during the August 15, 2008 IEP meeting was outdated. P 13-2. The testing was dated January 8, 2004. Id. The IEP Team agreed to conduct a reevaluation of the student, such assessments to

include a psychological evaluation, an educational evaluation, and a social history assessment. P 15-1.

11. The parent signed consent to reevaluate the student on August 15, 2008. P 16-1.

12. The student's behavior has deteriorated since he returned to Educational Campus. Initially, the student was trying to do his work but, by the fourth week of school, he "reverted to inappropriate behavior." P 10-1, P 12-1, P 23-2.

13. Increasingly, he has had on-going difficulties with his peers, resulting in his leaving the classroom and school in order to avoid his peers. P 10-2, P 12-1 – 12-2, P 23-2; Testimony of Parent.

14. The parent received numerous calls from the Assistant Principal relating to the student's in-school behaviors. The parent has met with the Assistant Principal at least six times to discuss the student's problematic behaviors. Testimony of Parent.

15. The student has been suspended numerous times. P 12-2; Testimony of Parent. He was suspended on September 16, 2008, October 21, 2008, November 10, 2008, and February 25, 2009. Testimony of Parent; P 21.

16. The November 10, 2008 suspension was for 45 days. The student was sent to \_\_\_\_\_ but did not start in the program until November 19, 2008 because \_\_\_\_\_ Educational Campus had not sent to \_\_\_\_\_ "paperwork." The student returned to \_\_\_\_\_ Educational Campus on or about February 3, 2009. Testimony of Parent.

17. A Psychological Re-Evaluation was conducted on the student on September 4, 2008. P 22.

18. The student's overall intellectual functioning is in the Low Average range, demonstrating strength in completing verbal tasks (Average range) and a relative weakness in completing non-verbal tasks (Low Average range). P 22-3 – 22-4.

19. A behavior inventory completed by the parent –

does not indicate any significant behavior issues. This is in agreement with his teacher..., who also did not note any significant behavior problems but did state that his social skills are a potential problem.

P 23-4.<sup>4</sup>

20. The psychologist recommended a more restrictive program for the student, with an increase in specialized instruction hours. P 23-5

21. On September 24, 2008 and September 25, 2008, the student participated in an educational evaluation. P 19, P 25. A classroom observation of the student was also conducted as part of the educational evaluation. P 25-3.

22. The classroom observation revealed that the student is able to complete his work “with minimal assistance,” but does require reminders to stay on task. Id.

23. With the exception of reading fluency, the student's reading abilities are in the average range. P 25-3; See 19-1.

24. With the exception of math fluency, the student's math abilities are in the average range. P 25-3 – 24-4; See 19-1.

25. In Spelling and Writing fluency subtests, the student scored in the average range. However, his writing sample was in the low average range. P 25-4; See 19-1.

---

<sup>4</sup> The parent completed the Behavior Assessment System for Children – 2 sometime in November 2008 after the Psychological Re-Evaluation had been completed of the student. See P 6, P 23 and R 15.

26. The evaluator recommended annual goals for reading fluency, math fluency, and written language. An individual behavior plan was not recommended for the student. P 25-4.

27. A Functional Behavior Assessment (hereinafter, "FBA") was completed on the student. There appear to have been two classroom observations of the student in order to complete the FBA. R 6.

28. The evaluator determined that the student "appears to participate in distracting and disruptive behaviors in order to avoid classwork and to vent his frustration against peers and/or adults." R 6-5.

29. On October 9, 2008, Petitioners' counsel wrote to the Special Education Coordinator (hereinafter, "SEC") at Educational Campus inquiring of the status of the re-evaluations, and requesting copies of same. P 7-1.

30. In response, by letter dated October 9, 2009, the SEC informed Petitioners' counsel that the educational assessment of the student had been completed, and that the psycho-educational evaluation would be completed, and available to the parent, by October 14, 2008. R 14-2.

31. However, the SEC further informed Petitioners' counsel that the social history assessment had not been completed as the parent had not made herself available for the interview. Four unsuccessful attempts had been made to secure the parent's participation in the interview. Id.

32. On October 21, 2008, a Letter of Invitation was provided to Petitioners' counsel proposing three dates for the parent to choose from in order to hold an IEP Team

meeting. R 13-2. The proposed dates were October 29, 2008, October 30, 2008 and November 5, 2008. Id.

33. Petitioners' counsel was also informed that the SEC had again made several unsuccessful attempts to secure the parent's participation in the social history interview. R 13-1.

34. On October 27, 2008, Petitioners' counsel was informed that the parent failed to show up for an agreed upon meeting on October 23, 2008 with the social worker for the purpose of completing the social history assessment. R 12-1.

35. Petitioners' counsel was also provided with a Letter of Invitation to hold the IEP Team meeting, as the parent had not responded to the October 21, 2008 Letter of Invitation. R 12-2. The October 27, 2008 Letter of Invitation proposed three new dates for the IEP Team meeting: November 5, 2008, November 12, 2008, and November 13, 2008. Id.

36. On October 29, 2008, Petitioners' counsel wrote to the SEC and acknowledged receipt of the Psychological Re-evaluation dated September 4, 2008 and Educational Evaluation dated September 24, 2008. However, Petitioners' counsel requested an independent psychological evaluation of the student, as it was felt that "the psychological evaluation does not address the student's current levels of social/emotional functioning...." P 6-1

37. On November 3, 2008, in response to Petitioners' counsel's October 29, 2008 letter, the SEC wrote to Petitioner's counsel and explained that the parent had not returned the behavior inventories that had been sent to her by the testing psychologist, nor had the parent submitted for an interview with the social worker. R 15.

38. On November 5, 2008, the parent participated in a social history assessment. P 24.

39. The school social worker who interviewed the parent recommended counseling services in school to support the student's social emotional development, and address his inappropriate, school behaviors. P 24-5.

40. On November 13, 2008, the Addendum to the Psychological Re-Evaluation was completed, which included an assessment of the student's socio-emotional / behavioral skills. P 23.

41. On November 14, 2008, the SEC provided to Petitioners' counsel a copy of the Addendum to the Psychological Re-Evaluation dated November 13, 2008 and a copy of the Social History assessment dated November 5, 2008. R 17.

42. A Letter of Invitation to hold the IEP Team meeting was also provided to the Petitioners' counsel on November 14, 2008. The SEC proposed three new dates for the IEP Team meeting: November 19, 2008, November 20, 2008, and December 3, 2008. R 17-2.

43. The parent did not respond to the Letter of Invitation dated November 14, 2008 and, on December 2, 2008, another Letter of Invitation was provided to Petitioners' counsel proposing three new dates to hold an IEP Team meeting. The proposed dates were December 10, 2008, December 11, 2008, and December 17, 2008. R 8-1.

44. The parties agreed to convene an IEP Team meeting on December 11, 2008. R 9-2.

45. The parent canceled the IEP Team meeting scheduled for December 11, 2008 on December 10, 2008. R 10-1. The SEC issued a Letter of Invitation on

December 11, 2008 proposing three new dates for the IEP Team meeting. R 10-2. The three dates were December 17, 2008, December 18, 2008, and January 7, 2009. Id.

46. On January 2, 2009, because of the parent's apparent failure to respond to the December 11, 2008 Letter of Invitation, the SEC informed Petitioners' counsel that the IEP Team meeting would go forward on January 7, 2009 regardless of whether the parent and Petitioners' counsel were available to attend. R 11.

47. On January 7, 2009, an IEP Team meeting was held. The parent was in attendance. P 9-1.

48. The IEP Team continued the student's classification of Emotional Disturbance. P 9-1. The student's classification is not in dispute. Stipulation of the Parties.

49. The IEP Team increased the student's specialized instruction hours to a total of 26.5 hours per week, and also recommended one hour per week of behavioral support services. P 9-4.

50. A behavior intervention plan (hereinafter, "BIP") is not part of the student's IEP. See P 9.

51. The January 7, 2009 IEP is not in dispute. Stipulation of the Parties.

52. The student was recommended for the ED Cluster Program at Educational Campus, which is a more restrictive program than what had been recommended for the student during the August 15, 2008 IEP Team meeting. P 9-5; P 10-3; P 11-1

53. The parent disagreed with the recommended placement. P 10-3; Testimony of Parent.

54. The student was accepted to the School of Prince George's County for the 2008 – 2009 school year on January 21, 2009. P 8-1.

55. On January 22, 2009, the parent, through counsel, informed the Deputy Chancellor that the parent intended to remove the student from the District of Columbia Public Schools (hereinafter, "DCPS") and unilaterally place him at the School of Prince George's County, at DCPS' expense. P 4-1.

56. The parent explained in her letter to the Deputy Chancellor that she was rejecting the proposed placement of the Educational Campus, as the program could not implement the student's January 7, 2009 IEP and there were "safety issues" should the student returned to the Educational Campus. Id.

57. An identical, second letter was sent to the Deputy Chancellor on January 29, 2009. P 3-1.

58. On February 27, 2009, the parent met with the Principal of the Educational Campus for a pre-suspension meeting; the student was being suspended for assaulting a teacher. The parent also met with the SEC and the SEC proposed placing the student in the ED Cluster Program at School. However, the parent was not provided with much information regarding the program at School. Testimony of Parent.

59. The parent visited School the first week in March, 2009 and met with SEC for School. She did not have an opportunity to meet with the ED Cluster Program classroom teacher.

60. On March 20, 2009, an MDT meeting was held to discuss the student's progress and need for an alternate placement. Testimony of Parent, Bailey; R 19.

61. At the outset of the meeting, the parent proposed that the student be placed in a residential, school placement. Testimony of Parent; R 19-1, R 19-3.

62. The student's special education teacher reported to the MDT that the student's behaviors were "changing," and expressed concern about his truancy from school. See R 19-1.

63. The MDT considered placement of the student at the \_\_\_\_\_ School of Prince George's County and in the ED Cluster Program at \_\_\_\_\_ School, a DCPS program. Testimony of Parent, Miskel; See R 19.

64. The ED Cluster Program at \_\_\_\_\_ Middle School would provide the student with a small class size of eight students with one teacher and one full-time aide. A full-time social worker and part-time psychologist are assigned to the program. R 19-2, R 19-5; Testimony of Bailey.

65. The student is also able to participate in extra-curricular sports with typically developing peers. Tutoring is provided to students, and there is a mentoring program. R 19-2, R 19-5.

66. Should the student go into crisis, the student will be allowed to de-escalate in the social worker's room. R 19-5.

67. It was determined that the student's January 7, 2009 IEP did not require revision. A Prior Notice Letter was issued on the same date placing the student in the ED Cluster Program at \_\_\_\_\_ School. R 19-2

68. The parent declined the ED Cluster Program at \_\_\_\_\_ School as she "sees \_\_\_\_\_ as another \_\_\_\_\_." R 19-4; Testimony of Parent, Miskel.

69. The student is slated to begin in the ED Cluster Program at [REDACTED] on March 30, 2009.

### CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The central purpose of the IDEIA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformity with a written IEP (i.e., FAPE). 20 U.S.C. §§ 1400 (d)(1)(A), 1401 (9)(D); 1414 (d); 34 C.F.R. §§ 300.17 (d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005); Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81 (1982).

A FAPE is offered to a child with a disability when the local educational agency (hereinafter, "LEA") complies with the IDEIA procedural requirements and the child's IEP is reasonably calculated to enable the student to receive educational benefits.

Rowley, 458 U.S. at 206-07. However, not all procedural errors render an IEP inadequate. A procedural violation alone without a showing that the child's education was substantively affected, does not establish a failure to provide a FAPE. See Lesesne v. Dist. of Columbia, 447 F.3d 828 (D.C. Cir. 2006); Pabo v. Dist. of Columbia, 573 F. Supp. 2d 41 (D.D.C. 2008); see also Blackman v. Dist. of Columbia, 277 F. Supp. 2d 71, 79 (D.D.C. 2003) (Noting that a procedural violation of the IDEIA "can itself constitute the denial of a free appropriate [public] education."). A hearing officer may find a child did not receive FAPE only if the procedural inadequacies:

- (i) Impeded the child'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 to the parent's child; or

(iii) Caused a deprivation of educational benefit.

34 C.F.R. § 300.513 (a)(2).

Accordingly, the IDEIA directs that the undersigned Hearing Officer render a decision on whether the student received a FAPE on substantive grounds. 20 U.S.C. § 1415 (f)(3)(E)(i). FAPE is offered to the child "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Rowley, 458 U.S. at 203. IDEIA does not specify the specific level of educational benefits that must be provided through the child's IEP, nor is the LEA required to maximize the child's potential. Id. at 189, 199.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320 (a)(1)), establishes annual goals related to those needs (34 C.F.R. § 300.320 (a)(2)), and provides for the use of appropriate special education and related services (34 C.F.R. § 300.320 (a)(4)). The program must also be provided in the least restrictive environment. 20 U.S.C. § 1412 (a)(5); 34 C.F.R. §§ 300.114 (a)(2), 300.116 (a)(2).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief. See Shaffer v. Weast, 546 U.S. 49, 51 (2005) (finding it improper to assume that every IEP is invalid until the LEA demonstrates otherwise).

*1. Appropriateness of the ED Cluster Program at Educational Campus*

Petitioners do not challenge the appropriateness of the January 7, 2009 IEP. Stipulation of the Parties. The student's classification is also not in dispute. Id. Rather, the question presented for consideration by the undersigned is whether the student's

placement in the ED Cluster Program at Educational Campus was appropriate to meet the student's educational and socio-emotional needs as prescribed by his January 7, 2009 IEP. I find that Petitioners have not met their burden of demonstrating that the student's placement in the ED Cluster Program at Educational Campus was inappropriate.

The parent's primary concerns with the ED Cluster Program at Educational Campus centered on the student's continued safety in the school and the school's ability to handle the student's misbehaviors without the school having to call her frequently and asking her to come in to speak to her about the student's behaviors. Testimony of Parent; R 19-1, R 19-4. Specifically, the parent expressed concern about the student's safety in the school because of "bullying" incidents that resulted in the student leaving his classroom and the school in order to avoid confrontations with his peers. Testimony of Parent. Some of the students who had "bullied" the student presumably were also in the ED Cluster Program at Educational Campus. Id. Petitioners, however, failed to provide any credible, substantive evidence to define the extent of the bullying and how it would have affected the student's receipt of FAPE when in the ED Cluster Program at Educational Campus.

To the contrary, the record evidence supports that the incidents leading to the student's class/school avoidance happened, for the most part, outside the classroom. See P 10-1, P 12-2. The student's general education teacher reported during the January 7, 2009 IEP meeting that "[t]hings would happen prior to class and this would result in him not showing up for her class." P 10-1. These incidents were "always something that

[were] initiated prior to [the student] coming to her class that would spill over to her class or after school,” resulting in the student’s suspension from school. Id.

The record evidence also supports that the student instigated some of the incidents. In fact, when observed in September, 2008 and October, 2008, as part of a Functional Behavioral Assessment, while in Science class, it was the student who appeared to demonstrate problem behaviors. He was observed inconsistently following teacher directions, distracting others by talking, eating candy, handing out candy to peers, singing, getting up from his seat and running to the back of the classroom to talk with others, and investing little effort in the class assignments. P 20-3. A September 15, 2008 suspension resulted from the student fighting with another student in the cafeteria and the student hitting and pushing the Assistant Principal who had intervened to stop the fight. P 21-1. It was noted in the Suspension Report that the student “refused to calm down for 10-15 minutes and made many attempts to go after the other student.” Id.

Other incidents include the student being observed outside school kicking another student in the stomach and shoving the same student into a fence (P 23-2); the student, on three separate occasions, being non-compliant, aggressive, using profanity, and being disrespectful to a teacher (Id.); the student using profanity towards an educational aide (Id.); and, the student being arrested in school for possession of marijuana (P 24-2).

While the parent avers that the student’s misbehaviors were in response to being bullied, the parent offered no credible evidence to support same, and the undersigned finds such assertion to be incredible given the documentary evidence to support the student’s own complicit behaviors. Nor did the parent provide any credible testimony on

how the events prior to the student's placement in the ED Cluster Program at

Educational Campus would deny the student FAPE once in the program.

The mere fact that the student would be in class with some of the peers that he was having problems with does not make the program inappropriate. I note that the program is for children with emotional disturbances, and the student's primary socio-emotional needs include anger-management deficits, lack of empathy for the feelings of others, and an inability to take responsibility for his own inappropriate behaviors. See P 9-3. These were the very issues that the program would address through the provision of Behavioral Support Services, small class size, and a myriad of accommodations, including praise for effort, preferential seating, small group work, and seating away from distractions. P 9-4.

Nor am I persuaded that the parent reasonably considered the ED Cluster Program at Educational Campus. Although the IEP Team recommended placement in the program on January 7, 2009, the student did not start the program until some time after February 3, 2009, after he had completed his 45 day suspension at Academy. See Testimony of Parent. Upon his return to the Educational Campus, the student was suspended again on or about February 25, 2009 for allegedly assaulting a teacher. Testimony of Parent. The parent's assessment that the student's behavior after the January 7, 2009 IEP meeting was "not good" must be balanced against the fact that the student had been in the program for an insubstantial

period of time, and that any appreciable progress would not materialized instantly given the depth of the student's considerable socio-emotional needs.<sup>5</sup>

2. *Appropriateness of the ED Cluster Program at [redacted] School*

The incident of February 25, 2009 leading to the student's fourth suspension for the school year resulted in the SEC and the parent discussing alternate placements to the [redacted] Educational Campus. See Testimony of Parent. On February 27, 2009, the parent had a preliminary discussion regarding the ED Cluster Program at [redacted] School, which she had an opportunity to visit the first week in March, 2009 and then again on March 20, 2009. Testimony of Parent.

The parent, however, avers that this program, too, is inappropriate to meet the student's socio-emotional needs. Id. Specifically, the parent contends that the ED Cluster Program at [redacted] School would be more of the same as the program at the [redacted] Educational Campus (Id.; R 19-1), but such assertion is entirely based on conjecture and driven, in part, by the parent's myopic view that only the [redacted] School can serve the student's needs. The parent's stance is without merit, and in contradiction to her own testimony.

The parent readily admits that she cannot speak to the ED Cluster Program at [redacted] School because the student has not started in the program. Testimony of Parent. Yet, she "feels it is more on the same line as [redacted] because it would not have anything in place to address the student's outbursts. R 19-1; Testimony of Parent. The parent readily admits that the ED Cluster Program at [redacted] School provides smaller class sizes than the program at the [redacted] School.

---

<sup>5</sup> In his opening statement, Petitioners' counsel alleged that the student had not been placed in the ED Cluster Program at [redacted] Educational Campus upon his returned from [redacted]. However, Petitioners provided no evidence to substantiate same.

Educational Campus, but questions whether the available resources and “manpower” would be sufficient. Testimony of Parent.

The ED Cluster Program at \_\_\_\_\_ School would provide the student with placement in a class of eight students with one teacher and one aide. Testimony of Bailey; R 19-2. The program is housed in its own wing in the middle school, allowing for closer supervision of the attending children; the student has a history of walking out of the classroom and wandering the halls. There is a full time social worker and a part-time psychologist assigned to the program. Testimony of Bailey; R 19-2. Should a crisis arise requiring the removal of the student from the classroom, the student would be escorted by the psychologist or the social worker to the social worker’s room to be given the opportunity to decompress and to address the issues that led to his removal from the classroom. Testimony of Parent, Bailey. The students in the program can participate in the extra-curricular activities with typically developing peers, and are provided with tutoring and can participate in a mentoring program. Testimony of Bailey; R 19-2.

In comparison to the \_\_\_\_\_ School, the ED Cluster Program at \_\_\_\_\_ School provides essentially the same program to the student, but in a lesser restrictive environment. The parent, however, maintains that the \_\_\_\_\_ School has time-out rooms where the student would be permitted to decompressed when he is having an outburst, and that this fact alone, presumably, sets the \_\_\_\_\_ School apart from the ED Cluster Program at \_\_\_\_\_ School, which does not have a crisis room. Testimony of Parent; Miskel. Such over reliance on the existence of

a crisis room provides no basis for finding that the ED Cluster Program at

School is inappropriate for the student.

The School employs Behavior Techs, who are trained to help a student deescalate when in crisis. Testimony of Miskel. These are not individuals who are trained psychologists or social workers, but rather are simply educational aides with training in behavior management. Id. When in crisis, a student is brought to the time-out room and allowed to reflect on the problem behavior that resulted in his being brought to the room. Id. The student is then asked to write about the incident, and the Behavior Tech will then facilitate a discussion about the incident based on the student's written submission. Id. While the formality of this "recovery process" is commendable, Petitioners failed to demonstrate that the staff at the ED Cluster Program at

School would not follow a similar process in addressing the student's outbursts. Nor am I persuaded that the existence of dedicated time-out rooms augments the program at the High Roads School in a significantly qualitative manner to justify placement of the student in such a restrictive program. Neither is the existence of Behavioral Techs persuasive; the student's misconduct would be directly addressed by the social worker and/or psychologist in the ED Cluster Program at

School, two individuals whose professional training and credentials can be set apart from an educational aide who has been provided with behavior training.

Accordingly, I find that the ED Cluster Program at School is appropriate to meet the needs of the student as identified in the January 7, 2009. I further find that the ED Cluster Program at School is the least restrictive program.

### *3. Equitable Considerations*

The record evidence supports a finding that the parent's own conduct stymied Respondent's ability to recommend an appropriate program for the student prior to the January 7, 2009 IEP Team meeting. The parent testified that she was "upset" during the February 27, 2009 meeting when the SEC introduced the idea of placing the student in the ED Cluster Program at \_\_\_\_\_ School because she (i.e., the parent) had requested an alternate placement as early as September, 2008. Testimony of Parent. However, it was the parent, when discussing placement options for the student during the August 15, 2008 MDT meeting, who also felt that the student would do well in a general education setting at the \_\_\_\_\_ Educational Campus given his performance in the general education boarding school during the 2007 – 2008 school year. Testimony of Parent; R 16-1; P 13-1.

And, although the student's behavior started to deteriorate soon after the commencement of the school year, it was the parent who made herself unavailable to complete the social history assessment, waiting until November 5, 2008 to sit for the interview despite numerous attempts by Respondent to secure same in late September, 2008. P 24-2. When provided with behavior inventories shortly after the conduct of the Psychological Re-Evaluation on September 4, 2008, the parent failed to complete same, delaying the interpretation of same until November 13, 2008. R 15; P 23.

Moreover, prior to the January 7, 2009 IEP Team meeting, the parent had been presented with 15 different dates for the IEP Team meeting, starting as early as October 29, 2008. However, the parent was non-responsive throughout and, the one time she did

respond, she canceled the IEP Team meeting the day before it was scheduled to go forward. R 10-1.

#### *4. Compensatory Education Services*

The final issue is whether the student is entitled to compensatory education services for Respondent's failure to provide the student with special education and related services during a two week period in November 2008.

Compensatory education is an equitable remedy available to a hearing officer, exercising his authority to "grant such relief as the court determines appropriate," 20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3), when a child with a disability has previously been denied FAPE. See Burlington Sch. Comm. v. Massachusetts Dept. of Educ., 105 S. Ct. 1996 (1985); Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005); Letter to Kohn, 17 IDELR 522 (OSEP 1991); See also Letter to Riffel, 34 IDELR 292 (OSERS 2000). Compensatory education effectuates a child's ability to receive FAPE by providing the FAPE by which the child was originally entitled to receive. Letter to Kohn, 17 IDELR 522 (OSEP 1991). "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, 401 F.3d 516 (D.C. Cir. 2005) citing G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4<sup>th</sup> Cir. 2003).

An award of compensatory education "must be reasonably calculated to provide the educational benefits that likely would have accrued." Reid, 401 F.3d at 524. "This standard 'carries a qualitative rather than quantitative focus,' and must be applied with '[f]lexibility rather than rigidity.'" Mary McLeod Bethune Day Academy Pub. Charter

Sch. v. Bland, 555 F. Supp. 2d 130 (D.D.C. 2008) (quoting Reid, 401 F.3d at 524). In crafting the remedy, the undersigned Hearing Officer is charged with the responsibility of engaging in “a fact-intensive analysis that includes individualized assessments of the student so that the ultimate award is tailored to the student’s unique needs.” Mary McLeod, 555 F. Supp. 2d 130 (citing Reid, 401 F.3d at 524). For some students, the compensatory education services can be short, and others may require extended programs. Id.

Reid rejects a “cookie-cutter approach,” i.e., an hour of compensatory instruction for each hour that FAPE. Reid, 401 F.3d at 523. However, while there is no obligation, and it might not be appropriate to craft an hour for hour remedy, an “award constructed with the aid of a formula is not *per se* invalid.” Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 532 F. Supp. 2d 121, 124 (D.D.C. 2008). Again, the inquiry is whether the “formula-based award ... represents an individually-tailored approach to meet the student’s unique needs, as opposed to a backwards-looking calculation of educational units denied to a student.” Id.

While there appears to be no disagreement that the student was without services for approximately a two week period in November, 2008 resulting from his suspension from the Educational Campus, compensatory education services are not warranted. Petitioners failed to demonstrate how the student had been harmed by not having special education and related services for the two week period. “[C]ompensatory education is not a contractual remedy, but an equitable remedy, part of the court’s resources in crafting ‘appropriate relief.’” Reid, 401 F.3d 516, citing Parents of Student W. v. Puyallup Sch. Dist., No. 3, 31 F.3d 1489, 1497 (9<sup>th</sup> Cir. 1994). “[T]he essence of

equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.'" Reid, 401 F.3d 516, citing Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

Neither have Petitioners demonstrated that the proposed compensatory education plan, had the undersigned felt inclined to award services, is individually tailored to meet the student's unique needs, and that it is "reasonably calculated to provide the educational benefits that likely would have accrued" to the student had he been provided with some level of services. Reid, 401 F.3d at 524. The student's Educational Advocate proposed 16 hours of tutoring services in math, science, and reading comprehension to bring the student up to "snuff." Yet, educational testing conducted in September, 2008, reveals that the student is functioning in the average range in math and reading comprehension. P 25-3; See P 19-1.

### **ORDER**

Based upon the above Findings of Fact and Conclusions of Law, I find that the ED Cluster Program at Educational Campus was appropriate at the time of the January 7, 2009 IEP Team meeting; that the ED Cluster Program at

School is appropriate to meet the student's educational and socio-emotional needs pursuant to the January 7, 2009 IEP; and, that Petitioners failed to demonstrate harm for Respondent's failure to provide services to the student for a two week period in November, 2008.

Petitioners' request for placement of the student in, and funding of, the School of Prince George's County is DENIED. Petitioners' request for

compensatory education services is DENIED. The Complaint is dismissed with prejudice.

IT IS SO ORDERED.

DATED: March 26, 2009

*Deusdedi: Merced*  
DEUSDEDI MERCED

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision may bring a civil action in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within 90 days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. § 1415(i)(2)(B).