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

----------x
STUDENT,[1]

Petitioner,

- against -

District of Columbia Public Schools,

Respondent.
----------x

HEARING OFFICER DETERMINATION

SHO Case No.

Deusdedi Merced, Hearing Officer

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioner's Notice of Due Process Complaint, filed on or about March 2, 2010 (hereinafter, "Complaint"). HO 1.[2] I was appointed shortly thereafter. HO 2. Respondent's Response to the Complaint was filed on or about March 12, 2010. HO 4. A resolution meeting was held on March 18, 2010. The parties, however, were not able to reach an agreement. See HO 7. A pre-hearing conference in the matter was scheduled for, and held on, March 25, 2010. HO 7. The Pre-Hearing Conference Summary and Order was issued on March 25, 2010. HO 7.

A hearing was held on April 12, 2010.[3] It was a closed hearing, and Petitioner student was represented by Douglas Tyrka, Esq. Respondent was represented by Daniel

---

[1] Personal identification information is provided in Appendix A, attached herein.
[2] 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.
[3] Petitioners presented the testimony of M. Ed., Independent Special Education Advocate; Admissions Director, Bettye Bellamy, Ed.D., Program Director, and, MA, Special Education Coordinator, Respondent presented the testimony of MPA, LEA/Placement Monitor, District of

McCall, Esq. Petitioners entered into evidence exhibits 1 to 11; Respondent entered into evidence exhibits 1 to 2.

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"),[4] 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

Petitioner student is years old and attending (hereinafter, a non-public school approved by the District of Columbia Public Schools for the provision of special education services. Petitioner student has attended since January 2009.

On April 1, 2009, Respondent convened an Individualized Education Program (hereinafter, "IEP") Team meeting and recommended that Petitioner student be provided with 20 hours of specialized instruction, as well as related services and a dedicated aide. Petitioner student sought placement in but Respondent denied this request, determining that it can service Petitioner student in a District of Columbia public chool. This appeal ensued.

ISSUES

The issues presented for determination are as follow:

Columbia Public Schools. Witness testimony will be referred to as "Testimony of" followed by the name of the witness.

[4] 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.

a. Whether Respondent failed to comply with the terms and conditions of a February 25, 2009 Hearing Officer Determination.

b. Whether Petitioner student's April 1, 2009 IEP complies with the Individuals with Disabilities Education Improvement Act's (hereinafter, "IDEIA"), 20 U.S.C. § 1400 et seq., procedural requirements and is "reasonably calculated to enable the student to receive educational benefits." Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 207 (1982).

c. Whether can implement the April 1, 2009 IEP.

Petitioner seeks funding and placement in a non-public school approved by the District of Columbia for the provision of special education services; transportation services to and from home and school; an IEP Team meeting to review all current evaluations and revise the student's IEP, as appropriate; and, compensatory education services.

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. Petitioner student is years old. See HO 1-1; Stipulation of the Parties[5].

2. Petitioner student attends a non-public school approved by the District of Columbia for the provision of special education services. Stipulation of the Parties.

3. Petitioner student started attending on January 6, 2009. P 8-1; See Testimony of

[5] The parties submitted Joint Stipulations of Fact on the day of the hearing. See HO 8.

4. Petitioner student has cerebral palsy, but can ambulate with the use of crutches. Testimony of

5. Petitioner student's mother is deceased. Testimony of The mother passed away approximately one year ago. Id.

6. On July 1, 2008, Petitioner student filed a due process complaint (hereinafter, "2008 Complaint"), resulting in an August 4, 2008 Hearing Officer Determination (hereinafter, "2008 HOD"). P 1-6. Specifically, in the 2008 Complaint, Petitioner student challenged her March 5, 2008 IEP. Id.

7. The 2008 HOD hearing officer determined that the March 5, 2008 IEP was "inadequate" and ordered Respondent to convene an IEP Team meeting on or before August 29, 2008 to review Petitioner student's evaluations and assessments and discuss placement alternatives. P 1-7.

8. The 2008 HOD hearing officer further determined that

the student's school placement resulting from the March 5, 2008 IEP, was inappropriate. Id.

9. On or about January 13, 2009, Petitioner student filed a second Notice of Due process Complaint (hereinafter, "2009 Compliant") alleging, *inter alia*, that Respondent denied her a free and appropriate public education (hereinafter, "FAPE") for the 2008 – 2009 school year. See P 1-4 – 1-5. The 2009 Complaint resulted in a February 25, 2009 Hearing Officer Determination (hereinafter, "2009 HOD").[6] See, generally, P 1.

10. Specifically, Petitioner student alleged that the Respondent failed to comply with the 2008 HOD in a timely manner, resulting in Petitioner student's

[6] The undersigned authored the 2009 HOD. See P 1-24.

continued placement in which had been determined inappropriate. See P 1-11.

11. At issue in the 2009 Complaint was also Petitioner student's January 29, 2009 IEP (hereinafter, "January 2009 IEP"), which resulted from Respondent's belated compliance with the 2008 HOD. P 1-13.

12. The January 2009 IEP was deemed inappropriate by Respondent's admission that it "had not offered [the student] any placement or provided an appropriate placement for [the student] for the 2008 – 2009 school year." P 1-13; Stipulation of the Parties.

13. The undersigned further noted that –

> despite Respondent's admission, the appropriateness of the January 29, 2009 IEP is questionable given, for example, that it fails to (i) recommend a one-on-one aide to the student; (ii) provide a meaningful description of the student's present levels of educational performance for a student who is in the ninth grade and functioning in the 2.0 to 4.1 grade equivalency; and, (iii) provide any information relating to the student's socio-emotional functioning, intellectual abilities, and communication skills.

P 1-14 (citations omitted).

14. Respondent was ordered to convene an IEP Team meeting –

> with the parent's participation to consider all current evaluations, assessments, and any other pertinent information, determine the student's continued eligibility for special education and related services, and recommend an appropriate program of special education and related services for the student in an appropriate school environment.

P 1-24; Stipulation of the Parties.

15. Respondent did not convene an IEP Team meeting within the specified timeline ordered in the 2009 HOD. Stipulation of the Parties.

16. An IEP Team meeting was held on April 1, 2009, resulting in the student's January 2009 IEP being revised (hereinafter, "April 2009 IEP"). See P 3; Stipulation of the Parties.

17. participated in the April 2009 IEP meeting. See P 3-12; Testimony of

18. Other than listing a dedicated aide, counseling services, and additional testing accommodations on the April 2009 IEP, the April 2009 IEP is identical to the January 2009 IEP. Compare P 12 with P 13.

19. The April 2009 IEP identifies Petitioner student as having multiple disabilities (P 3-1) but fails to identify what are the concomitant impairments (see id.).

20. Petitioner student is both learning disabled and other health impaired. Testimony of

21. The April 2009 IEP recommends 20 hours per week of specialized instruction hours. P 3-1.

22. The April 2009 IEP Team further determined that general education "cannot meet [Petitioner student's] needs" because it would "impact[] school success." P 3-9.

23. Petitioner student, however, is recommended for placement in a "combination" setting. P 3-9. A "combination" setting would provide the student with both special education and general education classes. Testimony of

24. The April 2009 IEP, however, does not define the actual setting(s) in which the 20 hours of specialized instruction would be provided to Petitioner student.

See P 3-1, P 3-9. Nor does the April 2009 IEP identify in what subjects Petitioner student would be placed in general education. Id.

25. Curricular modifications, accommodations and/or supplemental aides and services cannot be used to place the student in regular education. P 3-9.

26. Petitioner student requires a "self-contained program[,] which can service the needs of a student requiring full-time placement with specialized instruction." P 4-1; Testimony of

27. The April 2009 IEP recommends counseling services (P 3-1) but fails to include any counseling annual goals (see P 3-3 – 3-8; Testimony of

28. The April 2009 IEP assigns a dedicated aide (P 3-1) to Petitioner student on a daily basis but fails to identify the aide's function (see, generally, P 3).

29. The April 2009 IEP fails to include a meaningful description of the Petitioner student's present levels of educational performance. P 3-2.

30. The April 2009 IEP fails to include any information relating to the student's socio-emotional functioning, intellectual strengths, and communication skills (id.; Testimony of despite identified concerns (see, e.g., P 3-13, P 7-3; Testimony of

31. Petitioner student is testing in the intellectually deficient range for general intellectual functioning. P 7-3. Specifically, test results suggest that she is functioning at the 1st percentile. Id.

32. However, Petitioner student functions in the "average range." See P 7-3; Testimony of

33. Although Petitioner student presented with truancy issues while attending (P 3-13, P 3-14), the April 2009 IEP Team did not address the issue in the student's IEP (see, generally, P 3).

34. Although Petitioner student demonstrated lack of motivation (P 3-14), the April 2009 IEP does not address how Petitioner student's lack of motivation impacts her educational performance, nor does the IEP address this area of need (see, generally, P 3).

35. The April 2009 IEP annual goals, which are identical to the January 2009 IEP, were not reviewed during the April 2009 IEP Team meeting despite an attempt by Petitioner student's Educational Advocate to discuss same. Testimony of See P 3-13 – 3-14.

36. The April 2009 IEP includes a Transition Services Plan but does not include appropriate measurable postsecondary goals related to training, education, employment, and independent living skills. P 3-10 – 3-12; Testimony of

37. Petitioner student cannot calculate money or tell time. Testimony of The student is not independent despite her age. Id.

38. recommended during the April 2009 IEP Team meeting that the student undergo a full clinical evaluation "to address any underlying social emotional issues that may be present but not have been identified" (P 3-14), but one has not been completed despite Respondent's agreement that it should be done. P 3-15; Testimony of

39. Respondent agreed during the April 2009 IEP Team to complete a physical therapy evaluation. P 3-14, P 3-15. The evaluation was recently completed but has not been reviewed by an IEP Team. See Testimony of

40. By Prior to Action Notice dated April 7, 2010, Petitioner student's school placement was changed from to P 4-1.

41. was not discussed during the April 2009 IEP Team meeting, and the "impression" of the IEP Team participants was that Petitioner student would be returned to Testimony of

42. Petitioner student never enrolled at Stipulation of the Parties.

43. Regardless of whether the student had not unilaterally enrolled in would not have been an option for Petitioner student despite the Prior to Action Notice to the contrary. Testimony of

44. No particular District of Columbia Public School can presently service Petitioner student because of her mobility issues. Id.

45. Petitioner student was unilaterally enrolled at in January 2009. Stipulation of the Parties.

46. is approved to service children with learning disabilities, emotional disturbances, and mental retardation. Testimony of

47. Petitioner student is enrolled in all special education classes at Testimony of

48. Petitioner student receives at all the related services identified in the April 2009 IEP, as well as a dedicated aide.

49. Petitioner student has made progress since enrolling at Compare P 6 with P 8; Compare P 7-1 with P 9; Testimony of

50. Through February 22, 2010, Petitioner student has maintained a 3.67 grade point average and has been absent a total of four times. P 9-1. When at she received mostly D's and F's during the 2007 – 2008 school year. P 7-1.

51. Petitioner student's attendance has also improved dramatically during the 2009 – 2010 school year, with only four absences as of February 22, 2010. P 9-1; Testimony of

52. Petitioner student had missed considerably more school days between January 2009 and June 2009 because of her mother's illness and death. Testimony of

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), Rowley, 458 U.S. at 179-81.

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. Failure to Comply with February 2009 HOD

The February 2009 HOD required Respondent to convene an IEP Team meeting within 10 school days from February 25, 2009. P 1-23 – 1-24. While the IEP Team meeting did not occur within the required timeline, it did go forward shortly thereafter on April 1, 2009. See P 3. Respondent's failure to conduct a timely IEP Team meeting is *de minimis*; Petitioner student has not presented any evidence that would suggest that the brief delay substantively denied her a FAPE. A procedural violation alone does not establish a failure to provide a FAPE. Lesesne v. Dist. of Columbia, 447 F.3d 828 (D.C. Cir. 2006).

The February 2009 HOD, however, also required Respondent to review Petitioner student's January 2009 IEP and "recommend an appropriate program of special education and related services for the student in an appropriate school environment." P 1-23. Petitioner student has convincingly established, for example, that (i) Special Education Coordinator Tamara Clemmons refused to review Petitioner student's January 2009 IEP annual goals during the April 2009 IEP Team meeting; (ii) Respondent failed to address "other pertinent information" relating to Petitioner student despite numerous concerns being raised by Petitioner student's providers; and, (iii) despite two previous HODs

finding that was an inappropriate school environment for the student (see P 1-7, P 1-12 – 1-13), no other school placement other than was discussed during the April 2009 IEP Team meeting. Testimony of

Respondent failed to comply with the terms and conditions set forth in the February 2009 HOD, resulting in an inappropriate IEP. For the reasons stated herein and below, I find that Petitioner student was denied a FAPE.

2. Appropriateness of April 2009 IEP

The April 2009 IEP is identical to the January 2009 IEP, with few exceptions. The April 2009 IEP lists a dedicated aide, counseling services, and additional testing accommodations. Compare P 12 with P 13. However, although the parties agree that the student requires an aide, counseling services, and testing accommodations, the April 2009 IEP is procedurally and substantively inappropriate and thereby denies Petitioner student a FAPE.

a. Present Levels of Academic Achievement and Functional Performance

Petitioner student was deemed eligible for special education and related services by reasons of having been identified as having multiple disabilities that adversely affects her educational performance. See P 3-1. The April 2009 IEP, however, does not identify the Petitioner student's concomitant impairments whatever. See, generally, P 3. An IEP must include a statement of how the student's disability affects the child's involvement and progress in the general education curriculum. 34 C.F.R. § 300.320(a)(1)(i). In the absence of identifying the specific impairments that cause "such severe educational needs that they cannot be accommodated in special education programs solely for one of the

impairments," (34 C.F.R. § 300.8(c)(7)), any statement relating to how the student's disability would impact her educational performance in the general educational curriculum is meaningless absent any qualitative information being provided relating to the impairments.

For example, in the Academic Areas section, the April 2009 IEP simply specifies that the student has deficits in math, reading fluency, spelling and phonemic awareness which impact her access to the general education curriculum. P 3-2. This statement, however, can be applicable to any student, even a non-disabled one. Nowhere in the April 2009 IEP is the reader informed that the student has "a disorder in one or more of the basic psychological processes involved in understanding or in using language...that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations." 34 C.F.R. §300.8(c)(10). I further note that the April 2009 IEP also fails to identify that the student has cerebral palsy.

The statements of present levels of academic achievement and functional performance contained in the April 2009 IEP are limited and lack any substantive information to allow the reader to understand Petitioner student's present functional levels. In reading, for example, Petitioner student's strength lies in her "desire to learn and read." P 3-2. No additional information is provided. See id. In math, the April 2009 IEP specifies that the student "can compute basic math" without elaboration. P 3-2. However, despite her "basic" math skills, Petitioner student is expected to apply her reasoning skills to interpret and calculate multi-step algebraic and geometric math problems. P 3-3.

Reliance in the educational testing scores referenced in the April 2009 IEP to achieve a better understanding of Petitioner student's present levels of academic achievement is of little value. See P 3-2. The represented scores suggest that Petitioner student, a ninth grader at the time of the April 2009 IEP, was five to seven years behind grade level in reading, math, and written expression. Id. However, the reported scores were obtained in May 2008, almost one year earlier than the April 2009 IEP Team meeting date. The April 2009 IEP does not include any teacher estimates of where Petitioner student was functioning at the time of the April 2009 IEP Team meeting. Moreover, although the April 2009 IEP identifies that Petitioner student would be expected to demonstrate "improved oral reading skills for fourth grade level materials," (P 3-5), the reported scores suggest that Petitioner student might have achieved the annual goal already, further questioning the utility of the reported scores. See P 3-2.

Neither does the April 2009 IEP include any information pertaining to the student's present level of intellectual functioning. See P 3-2. Petitioner student is testing in the intellectually deficient range for general intellectual functioning, suggestive of mild mental retardation. P 7-3, P 3-13. The overall score, however, "should be viewed cautiously, as it appears to be an underestimation of her cognitive potential due to her orthopedic impairment." P 7-3. The student is "believed" to be functioning in the "average range." P 7-3; Testimony of

Further, although the April 2009 IEP Team identified concerns in Petitioner student's socio-emotional functioning (e.g., truancy, lack of motivation, depression resulting from the parent's health issues), the April 2009 IEP does not include any statement on how these concerns impact Petitioner student's involvement and progress in

the general education curriculum, nor does the April 2009 IEP address these needs. See P 3. And, although the IEP lists counseling services to be provided by a social worker, the April 2009 IEP fails to include any annual goals. See P 3-3 – 3-8.

I note that recommended during the April 2009 IEP Team meeting that the student undergo a full clinical evaluation "to address any underlying social emotional issues that may be present but not have been identified" (P 3-14), but one has not been completed to date despite Respondent's agreement that it should be done. P 3-15; Testimony of

In summary, the April 2009 IEP fails to include a meaningful statement of Petitioner student's present levels of academic achievement and functional performance as required by 34 C.F.R. § 300.320(a)(1). Nor does the April 2009 include a meaningful statement of how Petitioner student's disability affects her involvement and progress in the general education curriculum as required by 34 C.F.R. § 300.320(a)(1)(i).

b. Placement

Consistent with 34 C.F.R. § 300.320(a)(4), the April 2009 IEP must include a clear statement of the special education services to be provided to Petitioner student. The April 2009 IEP, however, fails to identify with any level of precision the special education services that were to be provided to Petitioner student.

The April 2009 IEP Team determined that general education cannot meet Petitioner student's needs because it would impact school success. P 3-9. The Team further determined that curricular modifications, accommodations and/or supplemental aides and services could not be used to place the student in regular education. Id. Nonetheless, and despite the Team determining that Petitioner student would not benefit

from a general education placement, the April 2009 IEP recommends that Petitioner student be placed in a "combination" setting. Id. A "combination" setting would place Petitioner student in general education classes. Testimony of

I further note that, even if Petitioner student can benefit from general education classes, the April 2009 IEP fails to identify the specific classes in which the student would have been placed in general education. See P 3-1, P 3-9.

And although the April 2009 IEP recommends 20 hours per week of specialized instruction hours to be provided in reading, mathematics, and written expression (P 3-1, P 3-9), the IEP does not define the actual setting(s) in which the 20 hours would be provided to Petitioner student (see P 3-1, P 3-9). The IEP does not specify whether Petitioner student is to be provided with the 20 hours in a self-contained classroom, resource room, or some other setting. Id. Nor does the IEP elucidate whether the 20 hours are to be provided in a small group, one-on-one, or a class setting. Id.

In all, the April 2009 IEP fails to include a precise statement of the special education services Petitioner student would have been provided with to enable her to advance appropriately toward attaining the annual goals and to be involved in and make progress in the general education curriculum. 34 C.F.R. § 300.320(a)(4)(i) and (ii).

The record evidence supports a finding that Petitioner student requires placement in a full-time special education program. P 4-1; Testimony of Any suggestion to the contrary is based on conjecture. See Testimony of

In May 2008, Petitioner student's overall reading ability was assessed to be within the low range (percentile rank range of 3 to 6). P 6-1. Although she was years, 9 months of age at the time of testing, she was functioning at a years, 3 months age

equivalence. P 6-1, P 6-3. In math, Petitioner student was functioning within the very low range (percentile rank of <1), or an 8 years, 4 months age equivalence. Id. Writing skills were equally compromised. Id. In comparison, in November 2009, when 18 years, 3 months of age, Petitioner student demonstrated slight improvement in reading, math, and writing, but overall functioning continued to be significantly compromised.

c. Carnegie Units

Petitioner student's April 2009 IEP as drafted would not permit her to obtain a District of Columbia High School Diploma (hereinafter, "D.C. Diploma") despite the IEP Team determining that Petitioner student is a candidate for a D.C. Diploma. P 3-12.

In order to earn a D.C. Diploma, Petitioner student must earn Carnegie units. Testimony of The April 2009 IEP, however, specifically rejects placement of Petitioner student in out of general education because she would not earn Carnegie units. P 3-9. Carnegie units are not available to students enrolled in special education classes in the District of Columbia Public Schools. See id.; Testimony of Yet, the April 2009 IEP recommends placement of Petitioner student in special education classes for the majority of her school week.[7] P 3-1. Further, the Prior to Action Notice identifies Petitioner student as needing a self-contained program in a full-time placement. P 4-1.

The April 2009 IEP does not provide for an alternate means for Petitioner student to earn a D.C. Diploma.

d. Adaptive Physical Education

[7] A full-time special education placement in the District of Columbia Public Schools would comprise of 27.5 hours per week. Testimony of Petitioner student was recommended for 22 hours per week of special education and services. P 3-1.

Petitioner student must have access to programs designed to develop physical and motor fitness, fundamental motor skills and skills in aquatics, dance, and individual and group games and sports. 34 C.F.R. § 39(b)(2). Adaptive physical education is a program of physical education intended to meet the unique needs of each student. See 34 C.F.R. § 39(b)(3).

In this regard, Petitioner student is recommended to receive 30 minutes per week of adaptive physical education given her cerebral palsy. P 3-1. However, the April 2009 IEP, does not identify to what extent the student will participate in physical education other than stating the amount of time and how often she would participate. Nor does the April 2009 IEP include a statement of measurable annual goals in this area. Given her orthopedic impairment, it was incumbent upon the IEP Team to draft goals designed to meet Petitioner student's needs that result from her disability to enable her to be involved in and make progress in physical education. See 34 C.F.R. § 300.320(a)(2).

e. Transition Services Plan

In developing each child's IEP, the IEP Team must consider the academic, developmental, and functional needs of the child. 34 C.F.R. § 300.324 (a)(1)(iii). Moreover, the IEP must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and independent living; and the transition services needed to assist the child in reaching those goals. 34 C.F.R. § 300.320 (b)(1) and (b)(2).

Transition services is defined as –

> a coordinated set of activities for a child with a disability that—
>
> (1) Is designed to be within a results oriented process, that is focused on improving the academic and functional achievement of the child with a

> disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
>
> (2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes—
>
> (i) Instruction;
>
> (ii) Related services;
>
> (iii) Community experiences;
>
> (iv) The development of employment and other post-school adult living objectives; and
>
> (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.
>
> (b) Transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

34 C.F.R. § 300.43 (a)(1), (a)(2), and (b).

The April 2009 IEP includes a Transition Services Plan for Petitioner Student. P 3-10 – P 3-12. The Transition Services Plan, however, is wholly inadequate and fails to include appreciable specificity to enable the student to reach her postsecondary goals. For example, to enable Petitioner student to live independently post-school, the transition activities listed to assist her in reaching this goal are to "complete assignments on time" and "utilize support at school and community level." P 3-12. Given Petitioner student's inability to calculate money or tell time (Testimony of the Transition Services Plan has little correlation to Petitioner student's desires and actual functioning.

f. <u>Location of Services</u>

With respect to the 2009 – 2010 school year, would not have been able to service Petitioner student. Testimony of Post the issuance of the Prior to Action Notice dated April 7, 2009, informed LEA Placement Specialist that the school would not be an option for Petitioner student. Id. In addition, there are no District of Columbia Public Schools that can service Petitioner student right now because of the student's mobility issues. Id.

Accordingly, Respondent has failed to identify a school placement for Petitioner student as it relates to the 2009 – 2010 school year.

g. Summary

For the reasons stated herein, I find that the April 2009 IEP denies Petitioner student a free and appropriate public education.

2. Appropriateness of

An LEA is required to reimburse parents for their tuition payment to a private school for the services obtained for the student by his or her parents if the services offered by the LEA were inadequate or inappropriate, the services selected by the parents were appropriate under the Act, and equitable considerations supported the parents' claim. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 (1985). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by an LEA as an available remedy in a proper case. Burlington, 471 U.S. at 370-71. "Reimbursement merely requires [an LEA] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP. Burlington, 471 U.S. at 370-71; see also 20 U.S.C. § 1412 (a)(10)(C)(ii); 34 C.F.R. § 300.148. The mere

fact that the state educational agency or the LEA has not approved the private school placement does not bar the parents from reimbursement. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993).

A court or hearing officer, however, is not prevented from ordering a school district to develop and implement at public expense an IEP placing the child in a private school without the parents first having to incur the costs associated with the placement. See Burlington, 471 U.S. at 370. In Burlington, the Court made clear that –

> In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, *it seems clear beyond cavil* that 'appropriate' relief would include *a prospective injunction* directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

Id. (emphasis added).[8]

Turning to the appropriateness of I find that is appropriate and I further find that Petitioner student has derived educational benefit from her placement at

All witnesses agreed that Petitioner student is doing well academically at Testimony of Through February 22, 2010, Petitioner student has maintained a 3.67 grade point average. P 9-1. When at she received mostly D's and F's during the 2007 – 2008 school year and was required to repeat the grade. P 7-1, P 3-14.

The record evidence further supports that Petitioner student's placement in has had a positive impact: she has demonstrated a comfortable relationship with peers;

[8] Burlington is often associated with tuition reimbursement. However, although the question presented to the Burlington Court was whether retroactive reimbursement was an available and appropriate relief that a court could award, the Court's holding is anchored in the Act's granting to the courts broad equitable power, which permits both tuition reimbursement and a "prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school." Burlington, 471 U.S. at 370. The mere fact that the Court's discussion centered on reimbursement is not to the exclusion of the other.

school attendance has dramatically improved (only 4 days missed during the current school year); and she is participating in social functions where in the past she would shy away. Testimony of

is a non-public school approved by the District of Columbia for the provision of special education services. Stipulation of the Parties. has a total of 135 students in grades nine through twelve. Testimony of There are six students to one teacher in each class. Id.

High school students transition between three floors. Id. Petitioner student has access to three elevators, allowing her to transition between the three floors. Id. Should any elevator break down, has an elevator technician on premises. Id. Petitioner student also has access to a dedicated aide, but she has become less dependent on the aide since she started at Id.

Petitioner student is enrolled in six classes with all different teachers. Testimony of Snipes. All six teachers are certified in special education and in the content area in which they teach. Id. Petitioner student's teachers are utilizing the grade curriculum. Id.

Petitioner student is grouped with only learning disabled children in her classes. Testimony of Bellamy.

Petitioner student is an auditory/kinesthetic learner, and requires that assignments be divided into segments and that she be provided with lots of classroom modifications (e.g., number charts, outlines). Testimony of Petitioner student is more withdrawn in class sizes of 5 – 6 students, but does well in a group of two children. Testimony of accommodates the student's learning style by providing one-

on-one instruction, as needed, in the classroom setting and by providing the necessary classroom modifications. Testimony of

The April 2009 IEP annual goals and objectives have been modified and updated to address Petitioner student's educational needs. Testimony of

provides Petitioner student with all the related services listed in the April 2009 IEP. Testimony of All the related service providers are certified in their respective discipline area. Id.

Petitioner student is earning Carnegie units despite being enrolled in special education classes and is expected to receive a D.C. Diploma. Testimony of Accommodations are provided to Petitioner student in order to complete the course work. Id.; Testimony of

For the reasons discussed herein, I find that is an appropriate placement for Petitioner student. I further find that Petitioner student has derived educational benefit from her attendance in the program. Although LEA Placement Specialist is of the opinion that is not an appropriate school for Petitioner student because primarily services children with emotional and behavioral difficulties, readily admitted that has made Petitioner student comfortable and confident. Testimony of further recognizes that Petitioner student is doing well academically in the program. Testimony of Changing Petitioner student's placement now would be detrimental to her overall development, and would compromise the trust she has gained as a result of her placement in Testimony of

[9] Ms. Harrison further conceded that can service students with other disability categories. Testimony of Harrison.

3. Equitable Considerations

I further find that equitable considerations support the student's placement at

Respondent has presented no evidence whatsoever that would suggest that Petitioner student acted unreasonably or did not comply with any demands made of her by Respondent in its attempt to provide a FAPE. On the contrary, the record evidence suggests that, despite Respondent having been ordered to convene an IEP Team meeting to review and revise Petitioner student's January 2009 IEP (see P 1), Respondent engaged in a perfunctory exercise resulting in an inappropriate IEP.

Equity, however, also dictates that Respondent not be obligated to pay for services that Petitioner student did not avail herself of during the period between April 1, 2009 and June 2009 when Petitioner student was caring for her mother. Accordingly, for the period between April 1, 2009 and June 2009, Respondent shall not be required to pay for any period in which Petitioner student did not attend for the full calendar month for at least seventy-five percent (75%) of the regularly scheduled days on the official calendar for the particular calendar month in question.

4. Compensatory Education

The final issue is whether Petitioner student is entitled to compensatory education services for Respondent's prolonged denial of FAPE to the student.

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 (4th 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.

The record evidence supports that the student has been denied a FAPE since the April 2009 IEP Team meeting. However, Petitioner student availed herself of services when she unilaterally enrolled in in January 2009. Having determined that the services provided to Petitioner student were, and continue to be, appropriate, I find that Petitioner student is not entitled to any compensatory education, as mitigated any harm resulting from the inappropriate April 2009 IEP.

ORDER

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

1. Respondent shall pay for Petitioner student's placement at from April 1, 2009 through June 2009, subject to any reduction resulting from Petitioner student's failure to attend for the full calendar month for at least seventy-five percent (75%) of the regularly scheduled days on the official calendar for the

particular calendar month in question. Respondent shall also pay for Petitioner student's incurred transportation costs to and from and Petitioner student's home for the same period, and subject to the same reduction.

2. Respondent shall pay for Petitioner student's placement at for the 2009 – 2010 school year. Respondent shall also pay for Petitioner student's incurred transportation costs to and from and Petitioner student's home for the same period.

3. The April 2009 IEP is hereby amended to reflect placement of Petitioner student in a full-time, out-of-general education non-public day school.

4. The April 7, 2009 Prior to Action Notice is hereby amended to read that Petitioner student's placement is being changed to

5. Respondent shall convene an IEP Team meeting to be held at within 30 calendar days from the date on this Order for the purpose of reviewing, revising and amending Petitioner student's IEP, as appropriate and necessary and in a manner consistent with this HOD.

6. Petitioner student is hereby authorized to obtain, at Respondent's sole expense, a clinical evaluation. Payment for said evaluation shall not exceed the rate set forth in the Chancellor's Directive dated July 18, 2008 relating to independent evaluations. The evaluation, and the report resulting from said evaluation, shall be completed within 45 calendar days from the date on this Order and provided to the OSE Resolution Team in the Office of Special Education via facsimile transmission ((202) 645-8828).

7. Petitioner student is hereby authorized to obtain, at Respondent's sole expense, a Level III Vocational Assessment. Payment for said evaluation shall not

exceed the rate set forth in the Chancellor's Directive dated July 18, 2008 relating to independent evaluations. The evaluation, and the report resulting from said evaluation, shall be completed within 45 calendar days from the date on this Order and provided to the OSE Resolution Team in the Office of Special Education via facsimile transmission ((202) 645-8828).

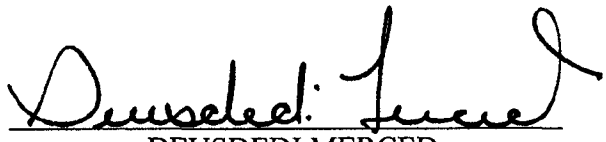
8. Upon receipt of both the clinical evaluation and the vocational assessment, Respondent shall convene an IEP Team meeting within 20 school days to review the evaluation and assessment, as well as any other pertinent information, and revise Petitioner student's IEP, as necessary and appropriate.

9. Petitioner student's request for compensatory education services is denied.

10. Any delay in meeting any of the deadlines in this Order because of an act or acts of Petitioner student and/or her representatives, will extend the deadlines set herein by the number days attributable to Petitioner and/or Petitioner's representatives' actions. Respondent shall document any delays caused by Petitioner student and/or Petitioner's representatives.

IT IS SO ORDERED.

DATED: April 16, 2010



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).