



functional behavior assessment (“FBA”); (2) failing to review and revise his individualized education program (“IEP”) annually; (3) failing to determine an appropriate educational placement; and (4) failing to develop an appropriate IEP by not providing speech/language pathology services.

DCPS filed its Response on February 11, 2011, which responds that DCPS has not denied the Student a FAPE. The Response asserts (*inter alia*) that “DCPS has evaluated this student many times since 2007 with a variety of different assessments, including independent ones obtained by Petitioner directly, as well as having IEP meetings, including invitation to attend them as recent[ly] as December 2010 and January 2011.” (Response, filed Feb. 11, 2011, at 2).

A resolution session was held February 16, 2011, which did not resolve the Complaint. On February 25, a Prehearing Conference (“PHC”) was held, at which the parties discussed and clarified the issues and requested relief. At that time, DCPS stated that it was still in the process of seeking a new non-public placement for the Student and was also developing a settlement offer regarding missed services. However, no written agreement was reached either to settle the pending claims or to end the resolution period early, and the statutory 30-day resolution period therefore ended by operation of law on March 2, 2011.

No motions were thereafter filed by either party, and the case proceeded to hearing. Five-day disclosures were filed as directed on March 3, 2011; and the Due Process Hearing (“DPH”) was held in two sessions on March 10 and 17, 2011. Petitioner elected for the hearing to be closed.

During the DPH, the following Documentary Exhibits were admitted into evidence:

**Petitioner’s Exhibits:** -1 through -4; and -6 through  
-26.<sup>2</sup>

**Respondent’s Exhibits:** DCPS-1 through DCPS-27.<sup>3</sup>

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

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<sup>2</sup> DCPS’ relevancy objection to the admission of Exhibit WJ-5 was sustained, and its relevancy objections to Exhibits -11, -12, and 22 through 24 were overruled, for the reasons stated on the record.

<sup>3</sup> Petitioner’s objections to the admission of DCPS’ Exhibits were overruled for the reasons stated on the record.

**Petitioner's Witnesses:** (1) Parent; (2) Educational Advocate; (3) Executive Director of Private School B; and (4) Program Director of the

**Respondent's Witnesses:** (1) Mr. Gradis White, DCPS Placement Monitor; (2) Mr. Benjamin Persett, DCPS Project Manager; (3) Admissions Director, and (4) Ms. Lauren Davis, DCPS Compliance Case Manager.

## **II. JURISDICTION**

The Due Process Hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*. The HOD deadline is April 16, 2011.

## **III. ISSUES AND REQUESTED RELIEF**

As confirmed at the PHC and in opening statements at the DPH, the following issues were presented for determination at hearing:

- (1) **Triennial Reevaluation** — Did DCPS deny the Student a FAPE by failing to conduct required re-evaluation(s) of the Student pursuant to 34 C.F.R. 300.303? And if so, did any such failure to evaluate result in a denial of FAPE in accordance with 34 C.F.R. 300.513 (a) (2) and/or otherwise constitute a substantive denial of FAPE?
- (2) **Annual IEP Review** — Did DCPS fail to review and revise the Student's IEP annually in violation of 34 C.F.R. 300.324 (b)? And if so, did such failure result in a denial of FAPE in accordance with 34 C.F.R. 300.513 (a) (2) and/or otherwise constitute a substantive denial of FAPE?
- (3) **Failure to Develop an Appropriate IEP** — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (*i.e.*, one that is reasonably calculated to provide meaningful educational benefit) in February 2009, in that the IEP failed to provide speech/language services?
- (4) **Failure to Provide an Appropriate Educational Placement** — Did DCPS deny the Student a FAPE by failing to provide an appropriate educational placement as of March 2010, because Private School B was unable to implement his IEP and was unable to meet his needs.

As relief, Petitioner requests that DCPS be ordered to: (a) fund independent speech/language, psycho-educational, and FBA evaluations; (b) convene an IEP team meeting to review the evaluations and revise the IEP; (c) fund an appropriate educational placement; and (d) provide compensatory education in the form of independent tutoring. *See* -1; -4.

#### IV. FINDINGS OF FACT

1. Petitioner is a -year old student who resides in the District of Columbia. He has been determined to be eligible for special education and related services under the IDEA as a child with a disability.
2. A psycho-educational evaluation of Petitioner was completed in January 2005 -11); a psychological update was completed in November 2007 -13).
3. An FBA were completed for Petitioner in November 2007. -12.
4. A speech/language re-evaluation was conducted for Petitioner in February 2008. 14.
5. A Vineland II Survey Interview Report was completed in February 2008; and an Adaptive Behavior Skills Assessment was completed in March 2008.
6. A further educational evaluation was completed in April 2008. 18.
7. In September 2008, the MDT/IEP team changed Petitioner's disability classification from emotional disturbance ("ED") to learning disabled ("LD"). *See DCPS-2*, p. 4.
8. In October 2008, an HOD was issued finding that DCPS had failed to develop an appropriate IEP and failed to provide an appropriate educational placement for Petitioner. The HOD placed Petitioner at Private School A for the remainder of the 2008-09 school year. *DCPS-2*.
9. On or about February 13, 2009, while Petitioner was attending Private School A, DCPS developed an IEP for the Student, which provides 27 hours of specialized instruction, one (1) hour of behavioral support services, and two (2) hours of speech/language pathology services per week, all in a setting Outside General Education. *See DCPS-16*, pp. 14-15. The IEP included a Least Restrictive Environment ("LRE") justification, which stated that "Student requires a full-time placement in an educational environment specifically designed to address the needs of students with disabilities within a special educational school." *Id.*, p. 19.<sup>4</sup>

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<sup>4</sup> Petitioner submitted a copy of what appears to be the same IEP dated 2/13/2009, but without the parent's signature. -6. Petitioner's copy of the IEP provides 29 hours of specialized instruction and no speech/language services; it also is missing the names and signatures of the DCPS SLP and Petitioner's educational advocate under the meeting participants. *Id.*, pp. 1, 10-11. The impact of these discrepancies are discussed in Part V *infra*.

10. On or about April 15, 2009, DCPS authorized a compensatory education plan for Petitioner to cover missed specialized instruction from September 2006 to December 2008, and pursuant to the October 2008 HOD. The plan authorized Linda-Mood Bell intensive reading instruction for four (4) hours per day, five (5) days per week, for 10 weeks during the 2009 summer, to be completed by 9/01/2009. <sup>7.5</sup> However, Petitioner did not avail himself of any of these services. *Persett Test*.
11. Petitioner completed the 2008-09 school year at Private School A, and then returned for the 2009-10 school year, where he again was in a full-time special education program. While at Private School A, the Student experienced behavioral difficulties. During the 2009-10 school year, records show that Petitioner engaged in 28 incidents of misconduct between 9/22/2009 and 3/03/2010, including verbal abuse to staff, destruction of school property, threatening peers, inappropriate touching, and other disruptive behaviors. *See* -9.
12. The parties stipulated that Petitioner attended Private School A through March 8, 2010.
13. On or about March 15, 2010, DCPS issued a Prior to Action Notice proposing to change Petitioner's placement and/or location of services to Private School B. -8. In explanation of the proposed agency action, the Notice stated that Petitioner's "parents contacted the school to advise that he will no longer be attending [Private School A]. Further, she requested that [Petitioner] be enrolled in an adult vocational program that she selected." *Id.* *See also* 9 (4/6/2010 advocate notes). Petitioner's parent also was advised by a counselor at Private School A that she should remove Petitioner due to recent behavior incidents and because the school was not a good fit for his needs. *See Parent Test*.
14. Petitioner began attending Private School B on or about March 15, 2010. *See* -22; *Parent Test*. Private School B is a non-public special education program providing educational services and transition planning to older students wishing to complete their high school education, which OSSE certified in late 2009. *See Private School Ex. Director Test.*; 25;  
26. Private School B is generally a half-day program, delivering 17.5 hours per week of academic instruction in content areas pertaining to the GED; it includes no behavioral

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<sup>5</sup> This plan was based on an evaluation of Petitioner conducted by the Linda-Mood Bell Learning Processes program ("LMB") in January 2009, as ordered by the October 2008 HOD. *See* -20 (LMB testing summary); *Persett Test*. It found that Petitioner was reading on a 1<sup>st</sup> to 2<sup>d</sup> grade level despite being in 9<sup>th</sup> grade. 20.

support services or other related services; and it is not designed to meet specific IEP requirements beyond the GED. *See Private School Ex. Director Test.*

15. The evidence shows that Private School B was not an appropriate fit for Petitioner's needs as of March 2010 forward. Private School B was unable to implement Petitioner's full-time IEP; he did not make significant academic progress there; and he did not receive meaningful educational benefit at the school. *See Private School Ex. Director Test.; White Test* (testifying that there was "no way" Petitioner could be "productive in that sort of environment"). He could not even read well enough to take the GED test. *Petitioner Test.*
16. On or about March 1, 2011, Petitioner informed DCPS that he was seeking placement at \_\_\_\_\_ of Virginia "or similar educational placement/program." *DCPS-26.*
17. On or about March 2, 2011, DCPS agreed to fund and place Petitioner at \_\_\_\_\_ *DCPS-26.* DCPS confirmed at the hearing that this agreement also extended to funding and placement at \_\_\_\_\_ since its program would be more appropriate to meet Petitioner's current needs. *See Davis Test.; White Test.*<sup>6</sup>
18. Also on or about March 2, 2011, as a result of the resolution process, DCPS authorized 100 hours of individual tutoring (at rates not to exceed \_\_\_\_\_ per hour) and 50 hours of mentoring (at rates not to exceed \_\_\_\_\_ per hour by independent providers of Petitioner's choice, to be completed by June 1, 2012. *DCPS-25; Persett Test.* In addition, DCPS issued a letter ("IEE letter"), which authorizes Petitioner to obtain the following independent educational evaluations of the Student, at DCPS expense: FBA; comprehensive psychological; and speech and language. *DCPS-23.*<sup>7</sup>

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<sup>6</sup> It appears that the original designation of \_\_\_\_\_ in the proposed settlement agreement may have been in error, based on Petitioner's prior classification as an ED student, rather than his current classification as learning disabled.

<sup>7</sup> The form IEE letter is dated October 28, 2010, but the parties stipulated that the letter was actually issued and emailed to Petitioner's counsel on March 2, 2011, the same date as the proposed settlement agreement that incorporated such IEEs. *See DCPS-24; Davis Test.*

## V. DISCUSSION AND CONCLUSIONS OF LAW

### A. Summary

The Hearing Officer concludes that Petitioner met his burden of proving that DCPS denied the Student a FAPE by failing to conduct a timely reevaluation and annual IEP review, failing to develop an appropriate IEP, and failing to provide an appropriate educational placement and/or location of services as of March 2010. DCPS is directed to place Petitioner at High Road Academy (as proposed in a March 2, 2011 PNOP), and Petitioner is awarded further equitable relief in the form of compensatory education services as specified herein.

### B. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to develop an appropriate IEP or to provide an appropriate educational placement for a student. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-E3030.3. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

### C. Issues/Alleged Denials of FAPE

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

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; DCMR 5-E3001.1.

In this case, Petitioner has proved by a preponderance of the evidence that DCPS violated the IDEA and denied the Student a FAPE under the issues specified above.

## 1. Triennial Reevaluation

Petitioner claims that DCPS denied the Student a FAPE by failing to conduct a timely re-evaluation of the Student pursuant to 34 C.F.R. 300.303, and that such failure harmed the Student. The IDEA provides that DCPS “must ensure that a reevaluation of each child with a disability is conducted ... if [DCPS] determines that the educational or related services needs ... of the child warrant a reevaluation” or the child’s parent or teacher requests it. 34 C.F.R. §300.303 (a). Such a reevaluation “may occur” not more than once a year and “must occur” at least once every three years, unless the parent and DCPS agree otherwise. *Id.* §300.303 (b)(2). *See, e.g., Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005) (giving effect to clear statutory language, without triggering conditions). The reevaluation must be conducted in accordance with §§300.304 through 300.311, which includes the requirement that the evaluation be “sufficiently comprehensive to identify all of the child’s special education and related services needs....” §300.304(c) (6); *see also Letter to Tinsley*, 16 IDELR 1076 (OSEP June 12, 1990) (triennial reevaluation “must be a complete evaluation of the child in all areas of the child’s suspected disability....”).

Petitioner has shown by a preponderance of the evidence that DCPS should have conducted an updated psychological and FBA as part of a triennial reevaluation of Petitioner by approximately November 2010. DCPS did not issue an IEE letter authorizing independent evaluations in these areas until March 2011. While DCPS should be permitted a reasonable period of time to complete a triennial re-evaluation, *see Herbin, supra*, the Hearing Officer concludes that it did not act timely in this case.

Accordingly, DCPS’ failure to conduct re-evaluations on a timely basis constitutes a denial of FAPE to Petitioner. *See, e.g., Harris v. DC, supra*, 561 F. Supp. 2d at 68-69 (failure to act on request for independent evaluation is not a “mere procedural inadequacy”; “such inaction jeopardizes the whole of Congress’ objectives in enacting the IDEA”). Alternatively, the Hearing Officer concludes that DCPS’ procedural violation impeded the child’s right to a FAPE in this regard. *See* 34 C.F.R. 300.513 (a) (2); *Lesesne v. District of Columbia*, 447 F. 3d 828 (D.C. Cir. 2006).

## **2. Annual IEP Review**

Petitioner next claims that DCPS denied the Student a FAPE by failing to review and revise the Student's IEP annually in violation of 34 C.F.R. 300.324 (b). *See also Maynard v. District of Columbia*, 54 IDELR 158 (D.D.C. 2010), *slip op. at p. 6* (DCPS must periodically update and revise an IEP "in response to new information regarding the child's performance, behavior, and disabilities").

It is undisputed that DCPS has not conducted any annual review or update of Petitioner's IEP since February 13, 2009. DCPS' witnesses agreed that the IEP was not updated and had therefore "expired." *E.g., White Test*. Thus, DCPS has been in violation of the IDEA's annual review requirements since approximately February 2010. The Hearing Officer concludes that DCPS' failure to conduct an annual IEP review for over a year beyond its due date constitutes a denial of FAPE to Petitioner. *See, e.g., Harris v. DC, supra*. Alternatively, DCPS' procedural violation impeded the child's right to a FAPE in this regard. *See 34 C.F.R. 300.513 (a) (2); Lesesne v. District of Columbia*, 447 F. 3d 828 (D.C. Cir. 2006).

## **3. Claim that February 2009 IEP was Inappropriate**

Petitioner next claims that the February 2009 IEP was inappropriate (*i.e.*, was not reasonably calculated to provide meaningful educational benefit to the Student) because the IEP failed to provide speech/language services.

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). An IEP is a comprehensive written plan that must include, among other things: (1) "a statement of the child's present levels of academic achievement and functional performance, including ... how the child's disability affects the child's improvement and progress in the general education curriculum"; (2) "a statement of measurable annual goals, including academic and functional goals, designed to ... meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum...and meet each of the child's other education needs that result from the child's disability"; (3) "a description of how the child's progress toward meeting the annual goals...will be measured"; (4) "a statement of the special education and related services and supplementary aids and services ...and a statement of the

program modifications or supports for school personnel that will be provided for the child”; and (5) an explanation of the extent, if any, to which the child will not participate with non-disabled children in any regular classes. 20 U.S.C. 1414(d)(1)(A)(i).

To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child, but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.” *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176,200,207 (1982).<sup>8</sup> Judicial and hearing officer review of IEPs is “meant to be largely prospective and to focus on a child’s needs looking forward; courts thus ask whether, at the time an IEP was created, it was ‘reasonably calculated to enable the child to receive educational benefits.’”<sup>9</sup> And the issue of whether an IEP is appropriate is a question of fact for hearing. See, e.g., *S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003). “Ultimately, the question ...is whether or not [the] defects in the ...IEP are so significant that [DCPS] failed to offer [the Student] a FAPE.” *N.S. v. District of Columbia*, 2010 WL 1767214, Civ. Action No. 09-621 (CKK) (D.D.C. May 4, 2010), p. 20).

In this case, it appears undisputed that Petitioner has received no speech and language services as part of his educational program since February 2009. Petitioner alleged that this omission resulted from an inappropriate IEP, since his copy of the 2/13/2009 IEP did not include any provision for speech/language therapy. See -6. However, DCPS produced a signed copy of the 2/13/2009 IEP that did provide for two hours of speech/language therapy per week. See *DCPS-16*.

Under either scenario, the Hearing Officer concludes that DCPS denied Petitioner a FAPE since February 2009: *Either* (a) the Student’s February 2009 IEP was not reasonably calculated to confer educational benefits on the Student at the time it was created, because it failed to include speech/language services, or (b) DCPS failed to implement the IEP by not

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<sup>8</sup> See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *J.G. v. Abington School*, 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 (“while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit. “).

<sup>9</sup> *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207); see also *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993) (whether an IEP is appropriate “can only be determined as of the time it is offered for the student, and not at some later date”).

providing speech/language services that were included on the IEP. The Hearing Officer believes that scenario (b) is more likely because DCPS' copy of the IEP appears to be more recent, it is signed, and DCPS should be bound by the version of the IEP providing the greater amount of services. In any event, the record shows that by December 2008, it was strongly recommended that Petitioner receive at least 1 ½ hours of speech/language therapy. -20.

As provided in the Order below, DCPS should reconvene a meeting of the Student's MDT/IEP team following receipt of the recently authorized independent speech/language evaluation and consider any appropriate revisions to his IEP based on those results. In the meantime, DCPS should implement the two hours per week of speech/language services.

#### **4. Claim that March 2010 Placement was Inappropriate**

Finally, Petitioner claims that DCPS denied him a FAPE by failing to provide an appropriate educational placement and/or location of services as of March 2010. Petitioner alleges that Private School B was unable to implement his IEP and was unable to provide him with the services he needs in order to benefit educationally.

As noted above, under the IDEA, FAPE includes "an appropriate preschool, elementary school, or secondary school education ... provided in conformity with the [IEP]." 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; DCMR 5-E3001.1. "Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP." *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008); see also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988) (quoting *Board of Education of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 207 (1982); *T.T. v. District of Columbia*, 48 IDELR 127 (D.D.C. 2007) ("Once developed, the IEP is then implemented through appropriate placement in an educational setting suited to the student's needs").

Here, the evidence is largely undisputed that Private School B was unable to implement the requirements of the February 13, 2009 IEP, and that it was not able to provide an appropriate special education program for the Student between March 2010 and the present. Thus, the Hearing Officer concludes that Petitioner has met his burden of proof on this issue as well.

#### **D. Requested Relief**

The IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005). In this case, the Hearing Officer has fashioned appropriate equitable relief for the above violations and denials of FAPE as set forth in the Order issued below.

Petitioner primarily requests that DCPS be ordered to: (a) fund independent speech/language, psycho-educational, and FBA evaluations; (b) convene an IEP team meeting to review the evaluations and revise the IEP; (c) fund an appropriate educational placement; and (d) provide compensatory education in the form of independent tutoring. *See* 1; -4. The Hearing Officer finds that the first item of relief has been mooted by DCPS' issuance of the IEE letter, which authorizes each of the requested independent evaluations at DCPS expense. *DCPS-23*. The second item of relief was contained in the proposed settlement agreement (*DCPS-24*) and will be included in the Order herein. That leaves the third and fourth items for further analysis and discussion.

#### ***Prospective Placement***

With respect to prospective placement, both DCPS and hearing officers are directed to determine an appropriate placement based on a match between a student's needs and the services offered at a particular school. *Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005); *McKenzie v. Smith*, 771 F.2d 1527, 1531 (D.C. Cir. 1985). Based on the consideration of the entire record herein, the Hearing Officer concludes that DCPS has properly determined that  
would be an appropriate educational placement and/or location of services based on a fit between Petitioner's needs and the services offered at that school going forward. *See Davis Test.; White Test; Persett Test.; Admissions Director Test.* services primarily learning disabled students Ages 13-21; it has small class sizes of 8-10 students; students can earn either Carnegie units toward a regular diploma or a certificate of attendance; it has a transitional program in several vocational areas; and it has related service providers on staff or available by contract. *Test.* In addition, now has a full-time

reading specialist who performs initial reading assessments on all students and who then may provide one-to-one, pull-out reading instruction that supplement IEP requirements. The reading specialist is trained and certified under the LMB program. *Id.* Petitioner has been accepted into the program as of March 2011. *Id.* Currently, there are approximately four to five students at who are at least 20 years old. *Id.*

While Petitioner correctly points out that (a) DCPS originally designated for placement (*see DCPS-24, -26,-27*), and (b) and are two distinct programs serving students with different types of needs, the testimony makes clear that DCPS is actually authorizing and proposing for Petitioner in this instance. is more appropriate to meet Petitioner's unique needs as a learning disabled student, whereas is geared more toward the needs of ED students. *See Testimony of. and Director.*

Petitioner's proposed placement at in contrast, does not appear to be capable of implementing his IEP. Its program combines academic and vocational instruction. Students spend about half their time earning academic credits and the other half in a vocational program teaching residential construction skills at an actual job site. *See Test.* The school would count the time spent building houses toward the 27 (or 29) hours of instruction on the IEP because they consider it to utilize math and reading skills in the work-project environment. *Id.* However, this does not appear to constitute specialized instruction, and Petitioner presented insufficient evidence to demonstrate compliance with the other requirements in his IEP.

Moreover, where an appropriate non-public special education school or program is available within the District of Columbia, that option is given priority over facilities outside of the District. *See D.C. Code 38-2561.02.* is located in the District, whereas is located outside of D.C., in suburban Virginia.

### ***Compensatory Education***

Compensatory education is an equitable remedy available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA. Under the theory of 'compensatory

education,' courts and hearing officers may award 'educational services...to be provided prospectively to compensate for a past deficient program.'" *Reid v. District of Columbia*, 401 F. 3d at 521 (quotations omitted).

With respect to compensatory education for the denials of FAPE in this case, DCPS has already authorized 100 hours of individual tutoring (at rates not to exceed      per hour) and 50 hours of mentoring (at rates not to exceed      per hour by independent providers of Petitioner's choice, to be completed by June 1, 2012. *DCPS-25*. DCPS witnesses confirmed at hearing that the authorization of these compensatory education services is immediately effective, and the services are available to Petitioner, notwithstanding Petitioner's decision not to accept the proposed settlement agreement. *See Persett Test*. While the authorization does not explicitly state what period of missed services this relates to, it embodies the same amounts and types of services as were contained in the proposed settlement agreement, which was developed during the resolution process in response to the allegations of the 1/30/2011 complaint. *Compare DCPS 24 and 25*. This authorization also provides the same level of independent tutoring (100 hours) and one-half of the independent mentoring (50 hours) that Petitioner's compensatory education proposal claims is needed to address the harm caused to Petitioner. *See 10*.

Accordingly, based on careful consideration of all the testimony and evidence adduced in this case, the Hearing Officer concludes that the elements of compensatory education listed below (in addition to those contained in DCPS' 3/02/2011 authorization letter) would be an appropriate equitable remedy under the circumstances. The award meets the *Reid* standard<sup>10</sup> because it has been shown to be (1) reasonably calculated to provide the educational benefits that likely would have accrued from special education services that DCPS should have supplied in the first place during the relevant time periods, and (2) reasonably tailored to the unique needs and deficits of the Student. The compensatory education plan addresses the Student's specific deficiencies by enabling her to gain skills and other benefits she likely would have obtained had

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<sup>10</sup> *See Reid v. District of Columbia*, 401 F. 3d at 524 ("In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place."); *see also Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student'").

she not missed required services and had she not been placed in an inappropriate learning environment during the past two school years.

The additional elements of compensatory education awarded to Petitioner are as follows:

- (a) **50 hours of independent counseling services** to compensate for the missed behavioral support services at Private School B from March 2010 to March 2011 and get to a point he would have been expected to reach had he received such services; and
- (b) **60 hours of independent speech/language therapy services** to compensate for missed speech/language services under the February 2009 IEP and to remediate his low expressive language skills.<sup>11</sup>

The Hearing Officer concludes that Petitioner has not demonstrated a basis for awarding additional hours in the form of Linda-Mood Bell intensive reading instruction in order to address any specific deficits resulting from denials of FAPE between February 2009 and the present. One flaw in his proposal is that it uses a 01/08/2009 LMB assessment to try to prove reading deficits allegedly resulting from denials of FAPE that did not take place until February 2009, March 2010, or later. Additionally, the evidence shows that (a) will employ an LMB-type assessment and services as part of Petitioner's regular program (*see Test.*), and (b) Petitioner did not make use of prior LMB awards (*Persett Test.*).<sup>12</sup>

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<sup>11</sup> The amounts of independent speech/language services are in accordance with Petitioner's March 3, 2011 compensatory education proposal. <sup>10</sup> The independent counseling represents one-half of the hours requested by Petitioner in that area. *Id. See also EA Test.*

<sup>12</sup> As part of its next MDT/IEP team meeting, DCPS may wish to reconsider whether LMB or other intensive reading instruction would be appropriate to address Petitioner's poor foundational reading skills and deficits, depending on the results of initial reading assessment or other updated information at that time.

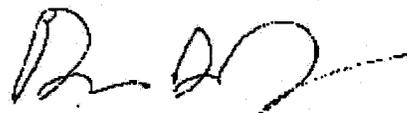
VI. ORDER

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

1. DCPS shall immediately issue a Prior Notice placing and funding Petitioner at including transportation and all other appropriate related services, effective April 25, 2011.
2. DCPS shall complete the funding of the independent FBA, comprehensive psychological, and speech/language evaluations of Petitioner authorized by DCPS on March 2, 2011; and Petitioner shall send copies of the evaluation reports to DCPS upon completion.
3. Within 15 business days of the receipt of the final report of independent evaluations as set forth above, DCPS shall convene a meeting of the Student's MDT/IEP Team to: (a) review the evaluations and other updated information; (b) review and revise, as appropriate, the Student's IEP; and (c) discuss and determine an appropriate educational placement and/or location of services that can meet the Student's needs and implement an appropriate revised IEP going forward. DCPS may also combine this meeting with a 30-day IEP review meeting relating to the placement, including review of the results of an initial reading assessment at
4. In addition to the services authorized in DCPS' March 2, 2011 letter, DCPS shall fund 50 hours of independent counseling services and 60 hours of independent speech/language therapy services, at rates not to exceed normal DCPS-approved rates. These services shall be completed by June 1, 2012.
5. All written communications from DCPS concerning the above matters shall include copies to Petitioner and to Petitioner's counsel, Darnell Henderson, Esq., by facsimile (202-742-2098) or email ([dhenderson@jebllaw.biz](mailto:dhenderson@jebllaw.biz)).
6. Any delay in meeting any of the deadlines in this Order caused by Petitioner or Petitioner's representatives (e.g., absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadlines by the number of days attributable to such delay.
7. Petitioner's other requests for relief in her Due Process Complaint filed January 31, 2011 are hereby **DENIED**.
8. This case shall be, and hereby is, **CLOSED**.

**IT IS SO ORDERED.**

Dated: April 16, 2011



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Impartial Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).