District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
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STUDENT[1], by and through his Parent Petitioners, v. District of Columbia Public Schools "DCPS" Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Dates: May 10, 19, 2010 Representatives: Counsel for Petitioners: Roberta Gambale 1220 L Street NW Suite 700 Washington, DC 20005 Counsel for DCPS: Nia Fripp, Esq. Assistant Attorney General District of Columbia DC Public Schools 1200 First Street, NE Washington, DC 20002 Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

BACKGROUND:

Student or "the student" is age and attends a DCPS public middle school, where he began attending at the start of the current school year ("SY"): 2009-10. The student was determined eligible for special education services while in elementary school with a disability classification of specific learning disability ("SLD") and brought an individualized educational program ("IEP") with him when he enrolled in his current middle school. In November 2009 DCPS authorized the parent to obtain an independent comprehensive psychological evaluation. The comprehensive psychological evaluation was conducted in December 2009 and an independent speech and language evaluation was conducted in January 2010. These evaluations were reviewed at an IEP meeting on March 2, 2010. Petitioner filed the current due process complaint on March 10, 2010, raising the issues, including the allegations that the IEP developed at his previous school as well as the IEP developed on March 2, 2010, are inappropriate.

A Due Process Hearing was convened May 10, 2010, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003, and concluded on May 19, 2010. The hearing was held pursuant to a due process complaint submitted by counsel for the parent and student filed on March 16, 2010, alleging the issue(s) outlined below. A pre-hearing conference in this matter was conducted on April 20, 2010, and a pre-hearing order was issued on April 23, 2010. Petitioner's counsel filed a motion for continuance at the conclusion of the first day of hearing so that testimony could be completed. The date for a final decision in the matter was extended by nine (9) calendar days by an interim order dated May 14, 2010.

ISSUE(S): [2]

(1) Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing provide the student with an appropriate IEP (dated January 29, 2009) [3]? This is the IEP was developed at the student's prior school and was in effect when he began his current middle school. Petitioner alleges the IEP was inappropriate for the following reasons: (a) it did not provide for speech language services, (b) it did not contain social and emotional goals, (c) it did not contain a behavior intervention plan ("BIP"), and (d) was not based on current evaluations:

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[2] The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

[3] Although this IEP is dated January 29, 2009, the date used for the IEP hereafter is the date the IEP was signed by the parent: February 6, 2009.

psychological and speech and language. Petitioner alleges there was evidence available to DCPS that should have put DCPS on notice the student had social and emotional and behavior issues during the 2008-09 school year that warranted DCPS include social/emotional goals and/or a BIP in his IEP. Petitioner also alleges the student was in need of speech language services during the period this IEP covered.

(2) Whether DCPS denied the student a FAPE by failing to provide the student an appropriate IEP (dated March 2, 2010)? Petitioner alleges the IEP is inappropriate because (a) it does not include the accommodations of additional time to complete assignments and priority seating, (b) it does not include direct speech/language services, (c) it does not provide for the student to be in a resource setting for all of his academic courses; (Petitioner alleges the student needs a full time special education program) and (d) it does not contain adequate social/emotional/behavioral goals, a BIP and does not include sufficient counseling services.

(3) Whether DCPS denied the student a FAPE by failing to implement the student's IEP from September 2009 to March 2010?

Petitioner seeks the following as relief for the alleged denial(s) of FAPE: DCPS fund a behavior assessment and develop a behavior plan, increase the student's specialized instruction in a resource setting to encompass all academic courses, increase the student's counseling hours to 2 hours of individualized counseling per week, provide the student related speech services in an out of general education setting, add accommodations based on recommendations of the independent evaluations including preferential seating, additional time, and provide compensatory education consistent with the compensatory education plan presented by Petitioner during the hearing.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 & 51 and DCPS Exhibits1-9) which were admitted into the record.

FINDINGS OF FACT [4]:

1. The student is years old and resides in the District of Columbia with his parent(s), (hereinafter "Petitioner" or " Parent"). At the start of the 2008-09 School Year ("SY") the student attended School B, a DCPS public elementary school and was in the grade. The student's IEP developed at School B and signed by the parent on February 6, 2009, identified the student has having a specific learning disability ("SLD") and prescribed the student receive 10 hours of specialized instruction "Outside General Education." The copy of the IEP in the record appears to have had academic goals in at

[4] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer may only one party's exhibit.

least reading and written expression.[5] The IEP's the Least Restrictive Environment ("LRE") section stated: "Pull out services provides the student with the necessary support to enable him to function adequately within the general education setting." (Petitioner's Exhibit 13)

2. The student has been in receiving special education services since early in elementary school. While the student was at School B in the and grade he received specialized instruction in a resource classroom. The parent believes the student was making progress at School B and did not received complaints from teachers regarding the student's academic performance. The student sometimes, however, had behavior difficulties at School B and was suspended on occasion. (Parent's testimony)

3. When the parent enrolled the student at School A at the start of SY 2009-10 she was informed that the student's special education services would be provided in classrooms with general education students. Since the student has been attending School A he has had increased behaviorally difficulties. The parent is concerned that the student is refusing to do class work. However, she believes the student performs better when he can receives one to one instruction. (Parent's testimony)

4. Prior to development of the February 6, 2009, IEP the student's most recent evaluations included a psychological evaluation conducted in November 2004, when the student was age seven in the second grade, a speech and language evaluation conducted in February 2005 and a Social Work Evaluation conducted in October 2004. The 2004 psychological evaluation described the student as a "non reader" with variable math skills and borderline written language skills. The speech language evaluation concluded the student's "overall language skills fell in the severely impaired range and were characterized by severely impaired receptive language skills coexisting with moderately impaired expressive language skills." The evaluation concluded the student met the criteria for services as a student with "impaired speech-language skills." The evaluation recommended the student receive speech therapy 1 hour per week. (Petitioner's Exhibits 33, 36, 37)

5. The student's prior IEPs included in the record are dated December 7, 2006, and November 8, 2005. The November 2005 IEP contained the following weekly services: 17.5 hours of specialized instruction and 1 hour of speech and language services. In the December 7, 2006, IEP the student's specialized instruction was reduced from 17.5 hours to 10 hours weekly and the speech language services were discontinued. The student's December 7, 2006, IEP, when he was in the grade, reflected his present levels of performance in reading and math were generally at the second grade level. There were no IEP notes in the record to explain why the student's specialized instruction was reduced and the speech and language services discontinued. (Petitioner's Exhibits 31 & 32)

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[5] The IEP presumably had math goals since the student was receiving math instruction pursuant to his IEP at School A from September 2009 to March 2009 but the copy in the record does not have a page that reflects math goals.

6. The student began attending School A, a DCPS public middle school at the start of SY 2009-10. When the student enrolled in school A the student's February 6, 2009, IEP was in effect. The specialized instruction provided the student pursuant to his IEP was not provided in a pull out setting or resource room. Rather, the instruction was provided in a general education setting with a special education teacher co-teaching with the general education teacher. The student was in the inclusion math class from the start of SY 2009-2010 until March 2010. testimony, Petitioner's Exhibit 11)

7. The student attended the inclusion math class for every school day for eighty minutes. The student had trouble focusing and getting started on work assignments. Often the student thought the curriculum was too difficult despite being provided modified assignments from the special education teacher in the class. The special education teacher was often able to get the student to attend to work by using different strategies including group work, one to one instruction and pull-out services. The student was playful flippant or shut down and refused to do work in his History class. The student had a behavior contract in his English class in order to get him to start and complete his work and not disrupt the classroom. The student was sometimes sent to the school's "Respect Center" where students are sent when they are disruptive. testimony, Petitioner's Exhibit 11)

8. The student received a failing grade in English and History in the first advisory of SY 2009-2010. He received a grade of "D" in his remaining classes that advisory: Math, Science, and Computer Applications. In the second advisor the student received a failing grade in Math and a grade of "D" in English, History, Science; he received a grade of "B" that advisory in his Computer Applications class. (Petitioner's Exhibits 27, 28 & 29)

9. Since the third quarter of the SY 2009-2010 the student has received his specialized instruction in Math and English in a resource classroom. There are approximately thirteen students in the Math classroom with one certified special education teacher. The students in the class vary in academic ability from very low to a high of approximate grade ability. The student's is one with lower academic ability; he is operating at about the grade level. The student is often disruptive in class, talkative and disrespectful and refusing to work on many days. The teacher has difficulty addressing and redirecting the student's behavior and consequently often calls the student's parent about his behavior. The teacher is not aware of any behavior plan in place for the student and the staff has not conferred with her about strategies to address the student's classroom behavior and refusal to do work. testimony)

10. DCPS conducted a comprehensive psychological evaluation[6] of the student in October 2009. DCPS also conducted a Woodcock Johnson III educational assessment. The DCPS evaluation concluded the student's cognitive abilities were in the extremely low range and his academic performance was generally at the second to third grade level. The

[6] The evaluation consisted of the following assessments: WISC-IV, The Beery-Buktenica Developmental Test of Visual Motor Integration (VMI), Conner's Teacher rating scale.

evaluator stated "the student may experience great difficulty in keeping up with his peers in a wide variety of situations that require age-appropriate thinking and reasoning abilities... [his] verbal and nonverbal reasoning abilities are in the Borderline range" (Petitioner's Exhibits 34 & 35)

11. Petitioner was not satisfied with the comprehensiveness of the DCPS evaluation and requested and obtained DCPS authorization to conduct an independent comprehensive psychological evaluation. The independent evaluation was conducted on December 2, 2009. (Petitioner's Exhibit 44, 45 & 49)

12. The December 2, 2009, a comprehensive psychological evaluation assessed the student's cognitive abilities, academic functioning and social emotional functioning.[7] The evaluator conducted assessments, interviews of the student and parent and observed the student in one his classrooms at School A. The evaluation revealed the student's cognitive abilities fell in extremely low range and his working memory in the low average range. The evaluator diagnosed the student with Attention Deficit Hyperactive Disorder ("ADHD"), An Adjustment Disorder with Anxiety and Depressed Mood, as well as, a Learning Disorder. (Dr. Graham's testimony, Petitioner's Exhibit 14)

13. The evaluator noted "[the student] does not exhibit good numerical operation skills and conceptual understating. Additionally, he has not grasped a good comprehension of language and was not able to express verbally the meaning of simple everyday usage of words at a level that is average for his age. Of most concern is his verbal comprehension, which assesses one's ability to listen to a question, draw upon learned information from both formal and informal education and reason through an answer. These scores suggest that his cognitive abilities are decreasing over time." (Petitioner's Exhibit 14)

14. The evaluator concluded the student is functioning significantly below age/grade level expectations in academics at generally the second grade level in reading and math. The evaluator also noted the student's social and emotional issues and that his self esteem has negatively impacted his overall academic performance. Consequently, the evaluator recommended the student receive specialized instruction with students of similar academic abilities in a smaller class size setting to help address his academic deficits and that he receive 45 minutes of counseling per week of counseling to address depression, self esteem and school adjustment. "Specifically, he should address problem solving, anger and self concept related issues." (Dr. Graham's testimony, Petitioner's Exhibit 14)

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[7] The evaluation consisted of the following assessments: Review of Records, Behavioral Observation, Clinical Interview with Student, Interview with Parent and Teachers, the Kaufman Test of Educational Achievement 2nd Edition, the Naglieri Nonverbal ability Test, The Wechsler Abbreviated Scale of Intelligence (WASI) The Comprehensive Test of Phonological Processing, Wide Range Assessment of Memory and Learning 2nd Edition, The Mini Mental State Examination, House Tree Person, The adolescent Apperception Cards, the Reynolds Adolescent Depression Scare -2, Behavior Assessment System for Children (BASC) Parent, Teacher and Self Report.

15. On January 10, 2010, a speech language evaluation was conducted of the student.[8] The evaluator determined the student's receptive and vocabulary skills are below his developmentally appropriate range. The student's core language score was in the first percentile. The student's scored below average performance within his overall linguistic competencies. The evaluator reviewed the student's prior speech language evaluation. The student's most recent speech language evaluation indicates the student's language deficits that existed in his prior evaluation persist. However, the student's speech sound production was age appropriate – his speech can be clearly understood. The evaluator concluded, nonetheless, based on the student's language deficits that the student meets the criteria as a student with speech language impairment and recommended the student received speech language therapy for 1 hour per week. testimony, Petitioner's Exhibit 41)

16. The evaluation included suggestion receptive and expressive language goals and objectives to be included in the student's IEP.[9] The evaluator was of the opinion that speech language services the student needed could be provided in an inclusion setting based on the decision of the IEP team so the student would not miss academic instruction and be able to work on the language goals within the academic setting. However, the evaluator clearly stated the student's language difficulties would specifically prevent him from assessing his academic curriculum and thus the goals should be addressed by speech therapist because the classroom teacher may be less able focus directly on the student's receptive and expressive language deficits. testimony, Petitioner's Exhibit 41)

17. On March 2, 2010, DCPS convened an IEP meeting for the student to review the student's December 2009 comprehensive psychological evaluation and the January 2010 speech and language evaluation. The parent's educational advocate attended the March 2, 2010, IEP meeting. The DCPS participants included the student's special education teacher and case manager, his general education teacher, the school psychologist, social worker, speech pathologist and special education coordinator. (Petitioner's Exhibit 11)

18. The DCPS members of the IEP team determined the student was not in need of direct speech language services. Rather, the DCPS speech language pathologist who reviewed

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[8] The evaluation consisted of the following assessments: Receptive and Expressive One Word Picture Vocabulary Tests, Clinical Evaluation of Language Fundamentals 4th Edition, Goldman Fristoe Test of Articulation -2.

[9] The recommended receptive language therapy goal is: [Student] will apply critical thinking to comprehend, describe and solve problems: Objectives: ... will answer basic wh-questions relevant to home, school and personal aspects, will compare and contrast two or more objects/persons based on descriptive features (i.e. size, shape, weight, texture, function, color, location), will demonstrate understanding of math language concepts, e.g. quantity, spatial, ordinal, temporal, sequential and operational. The recommended expressive language therapy goal is: [Student] will use age appropriate linguistic rules for conveying ideas through speech or writing: Objectives: ...will define curriculum based vocabulary terms, will improve work fining by demonstrating understanding of and proper use of antonyms, synonyms and categories, given several phrases or fragments, ... will create complete thoughts including compound and complex statements. will utilize dependent conjunction involving contrast, time and cause-effect to formulate grammatically correct complex statements.

the independent evaluation and had observed the student in the classroom concluded the student's fluency was within normal limits and that his receptive and expressive deficits could be addressed with the classroom setting without a separate speech language consult. However, since the March 2010 IEP meeting the speech therapist has been in the student's special education classroom assisting a number of students but the services she is providing are not in the student's IEP and there are no specific language goals in the IEP. testimony, Petitioner's Exhibit 11)

19. During the March 2009 IEP meeting the student's general education teacher noted the student was very slow to start work in the classroom and rarely completed work and was often disruptive in class. The teacher reported the student has difficulty with oral communication and the student does better in small group or partner work. Consequently, the IEP team concluded the student would be moved from the inclusion classrooms and receive English and Math instruction in a self contained setting and would remain in an inclusion setting for Science and Social Studies. (Petitioners' Exhibit 11)

20. Following the March 2, 2010, IEP meeting DCPS prepared a draft IEP which proposed the student receive the following weekly services 5 hours of specialized instruction in math, 2.5 hours in reading and 2.5 hours in written expression. The draft also includes 90 minutes a month of behavioral support services and includes classroom accommodations. The draft IEP states "[the student's] behavior makes it very difficult for him to complete assignments in the inclusion classroom. He requires pull out to help build his coping skills and address his behavior issues. He will now be receiving services in the self-contained setting for math and English and in the inclusion classroom for social studies and science." (DCPS Exhibit 4)

21. Since March 2010 the student has been receiving individual and group counseling services from the school's social worker. The student is receiving approximately 30 minutes to an hour per week of counseling services. The social worker drafted social/emotional goals for the student's draft IEP and developed a behavior intervention plan ("BIP"). The goals address the student's behavior and anger management. The BIP has not yet be reviewed and approved by an IEP team and social emotional goals have not yet been included in the student's IEP. testimony, DCPS Exhibit 5)

22. At the March 2, 2010, IEP meeting DCPS offered the student 30 hours of tutoring because the student had academic deficits and in an effort to satisfy the parent's concerns. However, DCPS personnel did not believe the student had been deprived any services. At the meeting neither the parent nor the advocate stated that the proposed tutoring services were insufficient. testimony, Petitioner's Exhibits 11 & 20)

23. The offer of tutoring by DCPS is currently available for the parent and student to avail. DCPS has already agreed to provide the tutoring services. DCPS would have considered additional tutoring for the student if the 30 hours proved to be insufficient after the tutoring was completed. testimony)

24. The parent's educational advocate prepared a proposed compensatory education plan. The plan was developed to address what the advocate considered to be a period of fifteen months from January 2009 through March 2010 that "DCPS filed to develop an IEP reasonably calculated to address the student's needs. The educational advocate believed the IEPs lacked appropriate levels of service in both specialized instruction as well as related services and as a result the student has made little if any progress. She proposed the following services be considered in a compensatory education award: 120 hours of individual tutoring in reading, written expression and math, 50 hours of individual speech and language therapy service to improve receptive and expressive language deficits, 75 hours of individual male mentoring with emphasis on social skills self esteem and self concept. testimony, Petitioner's Exhibit 21)

25. Petitioner presented the testimony of a DCPS approved independent tutor who had reviewed the student's evaluations and IEP. The tutor proposed to provide the student 1 to and hour and half of tutoring per week for about a year to redress the student's academic deficits. The tutor has met the student; however, she has not yet provided services to the student to assess his rate of progress and has not had any communication with the student's teachers regarding his academic abilities or rate of academic progress. testimony)

26. School A has in school and after school tutoring and mentoring available to the school students to provide comprehensive services to assist all students with success in school. The tutoring and after school mentoring is available to and can be used by the student. In some of the student's current general education classes there are special education teachers assisting. Consequently, the student may be actually receiving as many 15 hours of instruction per week from a special education teacher. The student's current Social Studies class is an inclusion classroom. His Science class, however, is not an inclusion classroom and has no special education teacher assisting. School A has a full time self contain classroom; however, the students in those programs have an emotional disturbance classification. testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.[10] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

(1) Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing provide the student with an appropriate individualized educational program ("IEP") (dated January 29, 2009)? Petitioner alleges the IEP was inappropriate for the following reasons: (a) it did not provide for speech language services, (b) it did not contain social and emotional goals, (c) it did not contain a BIP, and (d) it was not based on current evaluations: psychological and speech and language. Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence with regard to (d) only.

IDEA requires evaluations be sufficiently comprehensive so as to provide "relevant functional, developmental and academic information.... To assist in developing the content of the child's individualized education program". See 20 U.S.C. 1414(a); 1414(a)(1)(e). Further, the public Agency has an obligation to re-evaluate at least every three years and upon the request of the parent and/or the recommendations of teachers or service providers.

The evidence is demonstrates that the student's IEP was not based on comprehensive or current evaluations in that triennial evaluations were never completed for this student and/or reviewed by the team in drafting the student's February 6, 2009, IEP that was being implemented from SY 2009-10. As a result the student was denied a FAPE.

There was insufficient proof of any major disciplinary actions involving the Student over the 2008-2009 school year requiring behavioral interventions to be included in his January 29, 2009 IEP. Petitioner did not present sufficient evidence that would have required DCPS to address behavioral concerns or speech and language concerns at the time the January 29, 2009 IEP was developed. The parent's testimony that the student had behavioral difficulties and was suspended on occasion at his previous school was not sufficient evidence to demonstrate the student was in need of social emotional goals or a BIP during the time this IEP was in effect. With respect to the speech-language services, it is apparent that the services were discontinued in the 2006 school year. Although the student's current evaluations reflect that the student is now in need of services this current evaluation or even the student's 2005 evaluation is not sufficient to prove that the student's speech language services were inappropriately discontinued or that services were required prior to the most recent speech language evaluation being conducted.

However, based upon the evidence that became apparent to DCPS regarding the student's behavior, classroom disruption and refusal to do work in the current school year it was apparent by the time of the student's latest IEP meeting in March 2010 that the student was in need of social emotional goals, a BIP, classroom accommodations and speech language services. In fact DCPS drafted such goals and developed a BIP following the meeting. DCPS has begun to

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[10] Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

provide the student counseling and speech services in a classroom setting. However, none of these items have yet to be reviewed by a team and incorporated into the student's IEP.

(2) Whether DCPS denied the student a FAPE by failing to provide the student an appropriate IEP (dated March 2, 2010)? Petitioner alleges the IEP is inappropriate because (a) it does not include the accommodations of additional time to complete assignments and priority seating, (b) it does not include direct speech/language services, (c) it does not provide for the student to be in a resource setting for all of his academic courses – he allegedly needs a full time program, (d) it does not contain adequate social/emotional/behavioral goals, a behavior intervention plan ("BIP") and does not include sufficient counseling services. Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence on all items.

34 C.F.R. §530(f) requires that a child with a disability receive, as appropriate, a functional behavioral assessment, and behavioral intervention plan and modifications that are designed to address the child's behavior if that behavior that behavior interferes with the child's learning. 34 C.F.R. §300.324(a)(2)(i) requires that a student's IEP Team consider adoption of "strategies, including positive behavioral interventions, strategies and supports" to address behavior that "impedes the student's learning and that of others."

IDEA imposes an affirmative duty on the local and state educational agency to ensure that each student with a disability in need of services within its jurisdiction is provided with an IEP that contains a statement of the child's present levels of academic achievement and functional performance, measurable annual goals and a description of how the child's progress toward meeting the annual goals will be measured, a statement of special education needs and related services and supplementary aids or a student to advance properly toward attaining annual goals, as well as, a statement of transition service needs for all students who have attained the age of 16. (See 34 C.F.R. Section 300.320)

34 C.F.R. Section 300.324 requires that in the development of the IEP, certain factors be taken into account; "The IEP team must consider:

(i) The strengths of the child;
(ii) The concerns of the parent for enhancing the education of their child;
(iii) The results of the initial or most recent evaluation of the child; and
(iv) The academic, developmental and functional needs of the child."

In the current school year at least as of the time of the March 2010 IEP meeting the student clearly demonstrated continued behavior difficulties, refusal to do work and academic failure. The student's psychological and educational assessments clearly demonstrate the student has not made academic progress since he was last assessed in 2004. The student has continued to receive specialized instruction in a part time program and has remained operating on a 2nd to 3rd grade academic level. The student is now in the grade and although the student may benefit socially by being in a general education setting, the student's continued academic failure, refusal to do work and behavioral difficulties is sufficient evidence that the student is in need of specialized instruction is all of his academic subjects. The student general education teacher

noted at the most recent IEP meeting the student is disruptive and failing to progress academically.

Based upon the evidence that became apparent to DCPS regarding the student's behavior, classroom disruption and refusal to do work in the current school year it was apparent by the time of the student's latest IEP meeting in March 2010 that the student was in need of social emotional goals and a BIP. In fact DCPS drafted such goals and developed a BIP following the meeting. However, those items have yet to be reviewed by a team and incorporated into the student's IEP.

Although had not observed the student in his classroom she conducted a comprehensive speech language evaluation and has determined the student's language skills have not progressed since his prior speech language evaluation. She noted that in order for the student to be academically successful his language difficulties should be directly addressed. Although she suggested that the services could be provided in an inclusion setting she was emphatic the services should be provided by a speech therapist. The Hearing Officer credits testimony in this regard and finds it, coupled with the student's two speech language evaluations, to be more credible that of the witnesses that stated the student has functional language skills. Given the student's poor academic performance and diagnosed language deficits the Hearing Officer concludes the student is in need of speech language services. Although is in the student's classroom assisting, that service is not in the student's IEP. Consequently, there is no guarantee these services the student's clearly needs will continue to be provided. Thus, the Hearing Officer concludes the student is being denied a FAPE without those services in his IEP.

(3) Whether DCPS denied the student a FAPE by failing to implement the student's IEP from September 2009 to March 2010? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

The IDEA guarantees to children the right to receive a free, individually appropriate, public education. 20 U.S.C. § 1400(d)(1)(A). A free individually appropriate public education or a FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child `to benefit' from the instruction." See Board of Educ. Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 188-89 (1982). (3) Whether DCPS denied the student a FAPE by failing to implement the student's IEP from September 2009 to March 2010? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

The public agency has an obligation to "provide special education and related services to a child with a disability in accordance with the child's IEP; and to make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP. See 34 CFR Section 300.350.

The student was not been provided a free and appropriate public education in that the student's IEP has not been fully implemented from the start of the current school through March 2010. The student IEP clearly required that his specialized instruction be provided in an out of general education setting. DCPS failed to convene a meeting to adjust the IEP and officially discuss with the parent a change in the method the IEP would be implemented. The student was never provided with the resource instruction required by his program and as a result he was harmed. He has been denied a free and appropriate public education. He has been unable to progress in the inclusion setting provided and he is failing academically as demonstrated by his report cards, educational testing and the testimony of his teachers.

In *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) the Court stated that "courts and hearing officers may award 'educational services . . . to be provided prospectively to compensate for a past deficient program.'" Id. citing *G. ex. Rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003). Compensatory education is an equitable remedy crafted to remedy educational deficit created by "an educational agency's failure over a given period of time to provide FAPE to a student'" Id. "Appropriate compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place." Id.

In *Mary McLeod Bethune Day Academy Public Charter School v. Bland*, Civil Action No. 07-1223, the U.S. District Court for the District of Columbia found that, "if a parent presents evidence that her child has been denied FAPE, she has met her burden of proving that he is entitled to compensatory education."

Petitioner seeks 120 hours of individual tutoring in reading, written expression and math, 50 hours of individual speech and language therapy service to improve receptive and expressive language deficits, 75 hours of individual male mentoring Although the plan Petitioner proposed sighted the student's educational assessments and noted the student's lack of educational progress since January 2009, the facts do not demonstrate that the student was denied FAPE for that period. DCPS failed to timely conduct the student's triennial evaluations and as result the student's 2009 IEP was not appropriate. However, Petitioner failed to demonstrate a nexus between that particular violation and the harm suffered and the compensation proposed.

On the other hand the evidence is clear that the student was not being provided specialized instruction in a out of general education setting as his IEP required and the students experienced academic failure and little progress as result. The 30 hours tutoring offered by DCPS at the MDT meeting seem reasonable to the Hearing Officer to compensate the student for the missed services and to place him in a position he would have been had not suffered the loss. As to the other violations proved, the period from which those violations have occurred is from the time of the student's most recent IEP meeting in March 2009. The Hearing Officer concludes that any loss of services the student has incurred have been minimal as DCPS has taken action to begin to develop social emotional goals for the student, provided counseling services, develop and BIP and provide speech language services in an inclusion setting. The deficiency has been that these services have not been incorporated into and delivered pursuant to the student's current IEP. The remedy set forth in the order below is designed to correct that.

ORDER:

1. DCPS shall, within thirty calendars days of this Order, convene a IEP meeting to review and revise the student's IEP to include: (1) specialized instruction in all academic subjects and in a resource setting, (2) a behavior intervention plan, (3) social and emotional goals, (4) 30 minutes per week of direct individualized counseling, (5) 1 hour per week of individualized speech language services and (6) accommodations of preferential seating and additional time to complete assignments.

2. As compensatory education for the student not receiving specialized instruction a resource setting from the start of SY 2009-10 through the student's IEP meeting on March 2, 2010, DCPS shall fund for this student thirty (30) hours of independent tutoring at the current DCPS approved rate.

3. The notice of the IEP meeting shall be communicated to both the parent and parent's counsel.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).

Coles B. Ruff, Esq.
Hearing Officer
Date: May 29, 2010