DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
OFFICE OF COMPLIANCE & REVIEW
STATE ENFORCEMENT & INVESTIGATION DIVISION
STUDENT HEARING OFFICE

CONFIDENTIAL

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STUDENT HEARING OFFICE

HEARING OFFICER'S DETERMINATION

IN THE MATTER OF:	)	
	)	
DOB	)	DATE OF HEARING
	)	January 11, 2010
Petitioner,	)	
	)	DATE OF COMPLAINT
V.	)	November 18, 2009
	)	
The District of Columbia	)	ATTENDING SCHOOL:
Public Schools,	)	
Respondent	)	

COUNSEL FOR PARENT/STUDENT: **Donna Wulkan**
1020 16th Street, NW, Ste 602
Washington, DC 20036

COUNSEL FOR DCPS: **Daniel Kim**
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STUDENT[1], by and through his Parent Petitioners, v. DCPS Respondent.	HEARING OFFICER'S DETERMINATION January 14, 2010 Representatives: Petitioner – Donna Wulkan DCPS – Daniel Kim Hearing Officer: Jane Dolkart

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

HEARING OFFICER'S DECISION AND ORDER

I. INTRODUCTION

This is a year old student presently attending the grade at During the 2007-2008 school year the student attended which is its own LEA. During the three previous years the student attended schools in Prince Georges County, Maryland. On September 25, 2009, an IEP meeting was held for the student at A draft IEP was completed providing for 20 hours of specialized instruction out of a general education setting. At the meeting Petitioner requested that DCPS conduct comprehensive psychological and speech and language (S/L) evaluations. The parent signed a consent form for the evaluations. In October 2009, it came to light that the student had received a psycho-educational evaluation and a S/L evaluation in 2008, while attending On October 29, 2009, Petitioner requested an IEE letter authorizing comprehensive psychological and S/L evaluations on the grounds that the 2008 evaluations were inadequate.

A due process complaint was filed on November 18, 2009, alleging that DCPS had failed to evaluate the student in all areas of disability, that the student had an inappropriate IEP and that the student was in an inappropriate placement. Petitioner asserted that the student required a comprehensive psychological evaluation and a S/L evaluation, that the student required a full-time special education program with small classes, counseling, and possibly S/L therapy, and that could implement an appropriate IEP for the student. Petitioner requested placement at a full-time special education school with small classes, compensatory education in the form of reading and math programs, reimbursement for a completed comprehensive psychological evaluation, and an IEE letter for a S/L evaluation.

DCPS responded alleging that the 2008 evaluations were adequate that the placement was appropriate, and that DCPS was attempting to hold an IEP meeting to review the 2008 evaluations and revise the IEP, if necessary.

A pre-hearing conference was held on December 14, 2009, and a pre-hearing order was issued on December 15, 2009. The Hearing Officer requested that the parties submit memoranda on the question of whether the parent is entitled to independent evaluations when DCPS itself has not had an opportunity to evaluate the student but the student's previous LEA conducted still current evaluations. DCPS submitted a brief on December 21, 2009, and Petitioner submitted a response on December 29, 2009. The Hearing Officer issued an Order on January 10, 2010, finding that Petitioner was entitled to independent evaluations and that DCPS was to reimburse Petitioner for the cost of the comprehensive psychological evaluation that had been independently obtained and issue an IEE letter for the S/L evaluation. Thus, the Hearing Officer has already determined that DCPS failed to evaluate the student in all areas of disability.

At the commencement of the due process hearing the parties provided the Hearing Officer with a Joint Statement of Facts Not in Dispute. Statement 12 reads as follows

> At the January 4, 2010 meeting, the school psychologist agreed with independent evaluator Dr. David Missar that [the student] was eligible for services as a student with Other Health Impairment [OHI], because of his Attention Deficit Hyperactivity Disorder, as well as a Learning Disabled [LD] student. and the MDT Team agreed that Solomon needed a full time special education placement that will provide specialized instruction and the related service of counseling for sixty minutes a week.

By virtue of this statement, DCPS has admitted that the student's September 25, 2009 IEP is inappropriate and that the student's present placement at is inappropriate. DCPS has also agreed that the student should be classified as LD and OHI. The sole issues remaining for resolution by the Hearing Officer are the student's placement and whether the student is entitled to compensatory education and, if so, what compensatory education.

II. JURISDICTION

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶ 1400 *et seq.,* 34 CFR Part 300 *et seq.,* and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

III. ISSUES

1. At what location should the student be placed in order to implement a full time special education placement with one hour per week of counseling?

2. What, if any, compensatory education is the student entitled to?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated January 5, 2010, containing a list of witnesses with attachments P 1-49. The disclosure was admitted with the exception of exhibit 33. Petitioner agreed to revise Exhibit 47 to delete references taken from exhibit 33. Petitioner called as witnesses a private psychologist who conducted a comprehensive psychological evaluation of the student, the Education Coordinator at Hope and a Home, and the Associate Head of School,

DCPS submitted a five day disclosure letter dated January 5, 2010, containing a list of witnesses with attachments DCPS 1-6. The disclosure was admitted with the exception of DCPS 3.3 and 3.4 which were voluntarily withdrawn. DCPS did not call any witnesses.

The parties submitted a five day disclosure letter dated January 5, 2010, containing joint exhibits J 1-3.

V. FINDINGS OF FACT

The parties submitted a joint statement of facts not in dispute. This document is incorporated into the following findings of fact. Some of these facts will be referenced as 1, etc.

1. This is a year old student presently attending the grade at During the 2007-2008 school year the student attended which is its own LEA. During the three previous years the student attended schools in Prince Georges County, Maryland. On September 25, 2009, an IEP meeting was held for the student at A draft IEP was completed providing for 20 hours of specialized instruction out of a general education setting and no related services. The student's mother requested that the student be provided with counseling because he was depressed and an older brother had died some months ago. The request was rejected. (J 6, 7, 9, Testimony of

2. At the meeting Petitioner requested that DCPS conduct a comprehensive psychological and a speech and language (S/L) evaluation. The parent signed a consent form for the evaluations. (P 26, 27)

3. In October 2009, it came to light that the student had received a psycho-educational and a S/L evaluation in 2008, while attending On October 29, 2009, Petitioner requested an IEE letter authorizing a comprehensive psychological and S/L evaluation on the grounds that the 2008 evaluations were inadequate. (P 16)

4. Petitioner did not receive authorization for independent evaluations. The Hearing Officer ordered DCPS to provide independent evaluations on January 10, 2010.

5. Petitioner obtained her own independent comprehensive psychological evaluation and forwarded it to DCPS on December 2, 2009.

6. On January 4, 2010, a meeting was held at to review evaluations, review and revise the student's IEP, and discusses placement and compensatory education, if warranted. (J 10).

7. In attendance at the meeting were the Parent, Ms. Sarah Tomkins from the Law Office of Donna L. Wulkan (by phone), Coordinator), Mr. Daniel Kim, (School Psychologist), and (Special Education Coordinator from (J 11)

8. At the January 4, 2010 meeting, the school psychologist agreed with independent evaluator Dr. David Missar that [the student] was eligible for services as a student with Other Health Impairment [OHI], because of his Attention Deficit

Hyperactivity Disorder, and remained eligible as a Learning Disabled [LD] student. and the MDT Team agreed that Solomon needed a full time special education placement that will provide specialized instruction and the related service of counseling for sixty minutes a week. (J 12)

9. The student's IEP was not revised at the meeting and had not been revised as of the date of the hearing. (Testimony of

10. DCPS has not proposed a placement for the student. cannot provide full time specialized instruction in an out of general education small class setting. (Testimony of representation of Daniel Kim)

11. Dr. C. David Missar, a psychologist, conducted the November 16, 2009 testing of the student and also testified at the hearing. The parties stipulated that Dr. Missar is an expert in clinical psychology. For eight years, from 1998-2002, Dr. Missar was a psychologist with Youth Forensics, a program connected with the District of Columbia Superior Court which deals with youth in the foster care system. Since 1993, Dr. Missar has been in private practice. Dr. Missar has conducted many comprehensive psychological evaluations testing children who are or might be eligible for special education. His evaluation report for the student was well-written and thorough. His testimony was very credible and will be given great weight.

12. The student was administered the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), the Woodcock-Johnson Psychoeducational Battery – Third Edition (WJ-III) Tests of Achievement, and a number of other tests, including tests of personality. Cognitive testing shows that the student's intellectual abilities fall in the High Deficient to Average range. The student presently performs at or near the third grade level in reading, spelling and writing, and at or near the fifth grade level in math. While the student has made some progress in math since 2005, his reading, writing, and spelling levels have remained stagnant. The student had made virtually no progress in reading, writing, and spelling in over a year. The student has serious delays in processing information, a poor working memory, and problems with attention. His ability to take in information, process it, learn from it, and retrieve it is significantly limited. The student also has problems with executive functioning. (Testimony of Dr. Missar, P 35)

13. Dr. Missar also diagnosed the student with ADHD, Primarily Inattentive Type as a result of the student's attention problems and overall depressive, unemotional affect. (Testimony of Dr. Missar, P 35

14. is the student's educational advocate. She has a masters degree in special education with an emphasis in Learning Disabilities and has worked with special education students since 1970. Since 1986 has been the Educational Advocate for a transitional housing program called Hope and A Home. She monitors all the children with special education needs who are in the program. This includes observing students in class, monitoring report cards and obtaining other educational documents on the students, and attending IEP meetings. has been to

on behalf of students on many occasions. is well qualified and experienced in the work of an educational advocate, knows the student well and was a credible witness. (Testimony of

15. has known this student since 2002, when his family entered the transition housing program at Hope and A Home. was involved in the process whereby the student became eligible first for 504 services and then in 2004 for special education services. continued to have some contact with the student when he left her organization in 2005, but had lost touch with the student for several years until his mother contacted her in 2008. (Testimony of

16. went to to observe the student and speak with his teachers on November 12, 2009 and December 16 & 17, 2009. She observed the student in D.C. history, Spanish, and math. She spoke with the student's history, biology, and Spanish teachers as well as the SEC. Based on her observations there was no inclusion teacher in the student's history and Spanish classes and the teachers did not know the student was a special education student. There was a person who was supposed to be an inclusion teacher in math, but the person does not know algebra and only helps manage the class. There is an inclusion teacher in biology. All of the teachers spoke with indicated that the student is unable to understand the concepts being taught in class because he is so far behind in basic skills. All of the teachers said that is not an appropriate setting for the student. He is failing all of his classes except art. Testimony of P 36, 37)

17. is not implementing the student's September 25, 2009 IEP in that the student is not receiving any specialized education in an out of general education setting and is receiving at most five hours of specialized education in an inclusion setting. (Testimony of

18. Both Dr. Missar and reviewed the student's September 25, 2009 IEP. Both found that the goals and objectives in the IEP are not appropriate for the student. All of the goals are taken directly from the District of Columbia ninth grade standards. None of the goals are individualized for this student and the student is unable to meet most or all of the goals. For example, Math, Goal 3 says "Student will be able to demonstrate an understanding of the relationship between various representations of a line. Correctly determine a line's slope and x and y intercepts from a graph or from a linear equation that represents the line on 4 out of 5 attempts." (Testimony of Dr. Missar, J 1)

19. DCPS has agreed that the student requires a full time special education program, but has not proposed a placement for the student. Based on comments made by DCPS counsel during off the record questioning by the Hearing Officer, DCPS is not likely to offer a DCPS placement any time soon.

20. The student has been accepted into the eighth grade class at a private therapeutic special education school in the District of Columbia. The school serves mostly LD and S/L impaired students, although some students also have an OHI

classification. Associate Head of the school testified about the program at has 32 years of experience in special education, a masters degree in special education and has completed the course work for a PhD in special education. She has worked at since 1993. At present she is responsible for delivery of special education services to the students at This includes developing and implementing IEPs, reviewing data on students, monitoring student progress, implementing the curriculum, and supervising program managers and teachers. The parties stipulated that was qualified as a special education expert in the development and implementation of individualized education programs, including placement. was very knowledgeable concerning the needs of the student and what could offer him. She was a credible witness. (Testimony of P 38, 39, 41)

21. Before being accepted at the student was required to spend two full days attending classes. and others observed the student during these two days and the student's teachers submitted their own observations. Additionally, the student's parent was given a tour of the school and the admissions committee reviewed all current assessments. (Testimony of

22. has identified an eighth grade class for the student. He would be the 10th student in the class. There is one certified special education teacher and an assistant teacher who in this case is in the process of receiving her MA in special education. The school can provide counseling and S/L therapy if deemed appropriate. has placed the student in the grade because he requires an intensive remedial program to allow the student to make rapid progress and be ready for the more advanced work and increased needs for attention and executive functioning required in the grade. (Testimony of

23. implements a special reading program called Reading Intervention Program which provides very intensive focus on decoding, encoding, phonics, phonetic awareness, and fluency. The program is administered for 90 minutes, 3 times per week, and 60 minutes 2 times per week in groups of 3-4 students. (Testimony of

24. program is diploma based although is does have a certification program. Most of its students are diploma bound. (Testimony of

25. is an appropriate placement for the student.

26. The student was provided no appropriate special education services by DCPS from the start of the 2009-2010 school year to the present and has made no academic progress. The student is eligible for compensatory education for the 2009-2010 school year up to the present.

27. Dr. Missar prepared a compensatory education plan for the student. He noted that the student remains far below grade level and requires intensive individualized instruction to remediate his learning disabilities. He must learn the basic building blocks of academic

achievement. Dr. Missar recommended that the student receive intensive instruction with the which would address foundational issues of reading, math and writing. Dr. Missar indicated that the student could be expected to improve one month for each month he was enrolled in the because of the low level at which the student must start. He believed the student could take at the same time as he attended classes at but if that was too overwhelming for him, classes during the summer would work as well. also approved of the for the student and also believed the student would make one months progress for each month of the program. (Testimony of Dr. Missar,

VI. DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Act (IDEA), 20 U.S.C. ¶ 1400 *et seq.,* guarantees "all children with disabilities" "a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. ¶ 1400 (d)(1)(A). The IDEA defines FAPE as

> Special education and related services that – (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the State educational agency…, (c) Are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 – 300.324.

Central to the IDEA's guarantee of FAPE "is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982). The educational agency must provide a "basic floor of opportunity" for students with disabilities. It need not provide the best education possible, but the educational benefit must be more than de minimus or trivial. *Polk v. Central Susquehanna Intermediate Unit 16,* 331 IDELR 10 (3rd Cir. 1988).

As a condition of receiving funds under the Act, IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See,* 20 U.S.C. ¶ 1413. In addition, school districts must develop comprehensive plans for meeting the special education needs of disabled students. *See,* 20 U.S.C. ¶ 1414(d)(2)(A). These plans or Individualized Education Programs (IEPs), must include "a statement of the child's present levels of educational performance, … a statement of measurable annual goals, [and] a statement of the special education and related services … to be provided to the child…." 20 U.S.C. ¶ 1414(d)(1)(A).

Pursuant to IDEA § 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 IDEA § 1415 (f)(3)(E)(ii), in matters alleging a procedural violation a hearing officer may find that the 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.

Petitioner has the burden of proof in this case. *Schaffer et al. v. Weast,* 546 U.S. 49 (2005).

A stipulation by the parties has already determined that the student's present IEP and placement are inappropriate and that the student requires a full time special education program with small classes and one hour per week of counseling. The student is classified as LD and OHI. Remaining are determinations concerning placement of the student and compensatory education. DCPS has denied the student FAPE by failing to provide the student with an appropriate IEP and an appropriate placement.

Placement

Once an IEP is developed, the school district must determine an appropriate placement for the child that is designed to meet the child's needs as set out in the IEP. Placement decisions must be made in conformity with the child's IEP. 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006). Thus, it is the IEP which determines whether a placement is appropriate, not the other way around. *See, Rourke v. District of Columbia,* 460 F.Supp.2d 32, 44 (DDC 2006).

If there is an appropriate public placement available that is "reasonably calculated to enable the child to receive educational benefits," the District need not consider private placement. This is true even though a private placement might better serve the child, *See Hendrick Hudson Dist. Bd. Of Educ. V. Rowley,* 458 U.S. 176, 207 (1982). However, "[i]f no suitable public school is available [DCPS] must pay the costs of sending the child to an appropriate private school." *Jenkins v. Squillacote,* 935, F.2d 303, 305 (D.C. Cir. 1991). See also, *Burlington School Committee v. Mass. Dept. of Education, 471 U.S. 359 (1985) and Florence County School District Four v. Carter, 510 U.S. 7 (1993).*

In this case DCPS has not been able to offer a public placement to the student that can implement his IEP. Therefore, the student can be sent to an appropriate private school at DCPS expense. There has been ample testimony that School is an appropriate school for the student and the school is located in the District of Columbia. testified extensively concerning the programs offered at The school can provide a full time special education setting with a special intensive program to improve the student's skills in reading, writing, and spelling. The school can provide the counseling on the student's IEP and can provide S/L therapy if deemed necessary upon completion of the student's S/L evaluation. will revise the student's IEP within one month of his arrival there. An appropriate class has been identified for the student. The recommendation that the student begin at in the grade makes a

great deal of sense. Both Dr. Missar and are familiar with and both endorsed as an appropriate placement for the student.

DCPS shall place the student at at DCPS expense.

Compensatory Education

Pursuant to the Hearing Officer's equitable powers to fashion appropriate relief, she can order compensatory education as a replacement for services the child should have received in the first place. *Reid v. DCPS,* 401 F.3d 516, 518 (D.C.Cir. 2005). Such an award must rely on an individualized assessment. *Id.* at 524. A compensatory 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." *Id.* While an IEP need only provide some benefit to the student going forward, a compensatory award must do more – it must compensate the student for the full loss of educational benefit the student should have received. *Id.* at 525.

Petitioner has met her burden of proof that the student has made almost no educational progress during the present school year while attending DCPS schools. The lack of educational benefit was caused by DCPS' failure to place the student in an educational setting and in an educational program geared to his learning style and needs. The student was in an inappropriate placement, had an inappropriate IEP, and DCPS was not implementing the IEP he did have. It is not necessary to determine when DCPS should have been on notice that the student required a full time program. DCPS was required to provide at least the 20 hours of services the student received at and which was required per his September 25, 2009 IEP.

Both Dr. Missar and testified credibly that at this stage of the student's educational development an intensive remedial program should provide the student with one months progress for each month of the program. The student has lost 5 months of educational benefit while at He is entitled to 5 months of compensatory education. Both Dr. Missar and endorsed the programs at as appropriate for the student. The compensatory Education Plan requests individualized tutoring through in reading and writing. offers 4 programs that address various aspects of reading and writing.

Petitioner did not put on testimony concerning which courses the student required or how many hours of intensive instruction he should get. Based on the 1 month of course work to 1 month of progress formula, and using the 20 hours a week of special education the student was absolutely entitled to from day one of the 2009-2010 school year, the student should receive 400 hours of intensive instruction through The student should receive a diagnostic learning evaluation from to determine which of the programs are appropriate for the student. Petitioner, and will determine how to allocate these hours between the regular school year and the summer.

VII. SUMMARY OF RULING

1. DCPS has denied the student FAPE by failing to provide an appropriate IEP, failing to provide an appropriate placement, and failing to implement the IEP the student did have.

2. The student shall be placed at the School at DCPS expense.

3. The student shall receive 400 hours of compensatory education through the

VIII. ORDER

It is hereby **ORDERED** that

1. The student shall be placed at the at DCPS expense, including transportation. The student shall commence classes at starting on January 19, 2010, and DCPS shall complete the paperwork to fully effectuate the placement no later than 30 days from the date of this order.

2. DCPS shall ensure that an IEP meeting is convened and the student's IEP is revised no later than 30 days from the date the student begins attending classes at

3. DCPS shall pay for the student to receive a diagnostic learning evaluation from the Thereafter, the student shall receive 400 hours of compensatory education to be implemented through the

4. Any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, shall extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.

/s/ Jane Dolkart
Impartial Hearing Officer

Date Filed: January 16, 2010