



## Hearing Officer Determination & Order

### **JURISDICTION**

The Due Process Hearing was convened and this Hearing Officer Determination ("HOD") and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq., the implementing regulations for IDEIA; 34 Code of Federal Regulation ("C.F.R.") Part 300; and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

### **INTRODUCTION**

On 05/21/09, a Due Process Complaint Notice ("Complaint") was filed by the parent ("Parent" or "Petitioner") on behalf of the year old student ("Student"), alleging that District of Columbia Public Schools ("DCPS") denied Student a Free Appropriate Public Education ("FAPE") in violation of IDEIA when DCPS failed to provide Student with an appropriate Individualized Education Program ("IEP"), when DCPS failed to place Student in an appropriate school, and when DCPS failed to implement Student's IEP by failing to provide specialized instruction, transportation and a dedicated aide; with all failures resulting in the denial of a FAPE. Petitioner asserts that Student is entitled to compensatory education due to the denials of a FAPE on each of the issues presented.

The parties did not engage in mediation or the resolution process prior to the due process hearing.

### **THE DUE PROCESS HEARING**

The due process hearing convened on 07/16/09 at the Van Ness Elementary School located at 1150 5<sup>th</sup> Street, S.E., 1<sup>st</sup> Floor, Washington, D.C. 20003.

Petitioner was represented by Miguel Hull, Esq. ("Petitioner's Attorney") and DCPS was represented by Candace Sandifer, Esq. ("DCPS' Attorney"). Petitioner participated in the due process hearing by telephone.

The parties engaged in settlement discussions prior to the commencement of the due process hearing, but settlement was not reached.

#### **Disclosures:**

Petitioner's Five-Day Disclosure letter dated 06/19/09 contained Petitioner's Exhibits #1-19. Petitioner's Exhibits #1-15 were admitted into evidence without objection. Petitioner withdrew Petitioner's Exhibits #16-19.

DCPS' Disclosure Statement dated 06/18/09 contained DCPS' Exhibits #1-6. DCPS' Exhibits #1-6 were admitted into evidence without objection.

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Witnesses:

Witnesses for Petitioner included: (1) Petitioner, (2) Juan Fernandez, educational advocate, and (3) Director at school.

DCPS presented no witnesses.

Stipulations: Parties reached the following stipulations:

(1) The 04/27/09 IEP team intended that Student receive placement in a full time Mental Retardation ("MR") out of general education setting, with 1 hour/week of speech and language therapy outside the general education setting, 1 hour/week of behavioral support services outside the general education setting, a dedicated aide and school bus transportation; and

(2) First Home Care is a social services agency that provided social services to Student prior to 04/27/09.

Issues Presented in the Complaint:

Issue #1 – Whether DCPS failed to provide Student with an appropriate IEP, thereby denying Student a FAPE? Petitioner contends that due to the following procedural violations under IDEIA, Petitioner was significantly impeded in participating in the decision making process with respect to the IEP:

- (a) The 04/27/09 IEP is inconsistent in that it classifies Student as MR; however, the IEP prescribes specialized instruction in a full time Learning Disabled ("LD") cluster;
- (b) The 04/27/09 IEP is inconsistent in that one part of the IEP specifies 6.5 hours/week of specialized instruction in the general education setting and another part of the IEP defines Student's needs as specialized instruction in a full time cluster;
- (c) The 04/27/09 IEP is inconsistent in that one part of the IEP specifies Extended School Year Services and another part of the IEP doesn't; and
- (d) Student requires a full time MR placement.

At the due process hearing, parties agreed that Issue #1(a) was resolved by way of Stipulation #1 above and therefore Issue #1(a) was no longer an active issue for litigation. Issues #1(b) and #1(c) were withdrawn by Petitioner. Issue #1(d) was modified to read, "Student requires a full time MR out of general education placement," and Issue #1(d) remained an active issue for litigation.

Issue #2 – Whether DCPS failed to place Student in an appropriate school, thereby denying Student a FAPE? Petitioner alleges that:

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(a) is not an appropriate school in that it cannot provide Student with all classes outside of the general education setting as is required by the IEP. Petitioner asserts that Student's 04/27/09 IEP mandates a full time special education placement, and that cannot provide a full time special education out of general education setting; and

(b) Student's 01/09/09 psychoeducational assessment indicates the need for a full time, or close to full time placement, and cannot provide this educational setting.

At the due process hearing, Issue #2(a) was modified by Petitioner to read, is not an appropriate school in that it cannot provide Student with a full time MR out of general education placement with all classes outside of the general education setting." Issue #2(b) was modified to read, "Student's 01/09/09 psychoeducational assessment indicates the need for a full time, or close to full time out of general education placement, and cannot provide this educational setting." Issue #2(a) and 2(b), as modified, remained active for litigation.

Issue #3 – Whether DCPS failed to implement Student's IEP, thereby denying Student a FAPE? Specifically, Petitioner asserts that:

(a) Student's 04/27/09 IEP prescribes transportation services for Student and due to DCPS' failure to provide transportation services, Student was unable to attend school from 04/28/09 until the end of the 2008-2009 school year;

(b) DCPS has not provided Student with a dedicated aide because DCPS failed to provide transportation services and therefore Student was unable to attend school; and

(c) Since Student was unable to attend school because DCPS did not provide transportation services, DCPS did not implement Student's IEP in its entirety.

Issues #3(a), #3(b), and #3(c) remained active for litigation.

Issue #4 – Whether Student is entitled to compensatory education for the denials of a FAPE? Petitioner asserts that Student is entitled to compensatory education for the denial of a FAPE on Issues #1, #2, and #3.

Issue #4 remained active for litigation.

Relief requested:

(1) A finding of a denial of a FAPE on Issues #1 - #3; and

(2) DCPS to fund and provide transportation to a full time special education school such as School or some other public or non-public school that can provide Student with an educational benefit *in a full time MR out of general education program* (italics indicate modifications to relief as requested by Petitioner at the due process hearing); or

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(3) DCPS to convene a Multidisciplinary Team ("MDT") meeting within 10 business days to review and revise the IEP as necessary, determine appropriate placement with placement to be made within 5 days if to a public school or 30 days if to a non-public school, determine any compensatory education due; and

(4) DCPS to provide a dedicated aide and transportation or fund privately *once school begins* (italics indicate modifications to relief as requested by Petitioner at the due process hearing).

**FINDINGS OF FACT**

#1. The 04/27/09 IEP team intended that Student receive placement in a full time MR out of general education setting, with 1 hour/week of speech and language therapy outside the general education setting, 1 hour/week of behavioral support services outside the general education setting, a dedicated aide and school bus transportation. (*Stipulation #1*).

#2. Student's 04/27/09 IEP classified Student with a MR primary disability and prescribed 21 hours/week of specialized instruction outside of general education, 6.5 hours/week of specialized instruction in general education, 1 hour/week of speech-language pathology services outside of general education, 1 hour/week of behavioral support services outside of general education, school bus transportation and a full time dedicated aide; with services to be provided in a MR cluster program at Student was not eligible for Extended School Year services for the summer of 2009. Petitioner participated in the 04/27/09 IEP team meeting. (*Petitioner's Exhibit #2, IEP dated 04/27/09*).

#3. The areas of concern to be addressed by services prescribed in the 04/27/09 IEP were mathematics, reading, written expression, and speech and language. Special education services for the academic area of mathematics were prescribed based on Student's 4.0 grade point level in Broad math and a 4.6 grade point level in math calculation skills. Special education services for the academic area of reading were prescribed based on Student's 2.0 grade point level in reading comprehension and a 2.8 grade point level in basic reading. Special education services for the academic area of written expression were based on Student's test performance on a K-1 grade level and a 2.3 grade level in vocabulary. Student's special education services for the area of communications/speech and language were based on Student's need to improve receptive language skills due to Student having difficulty in understanding, retaining and recalling orally presented classroom instruction. Student's grade point levels were determined by a Woodcock Johnson assessment dated 01/18/08. (*Petitioner's Exhibit #2, IEP dated 04/27/09*).

#4. The student to teacher ratio in the MR cluster program at \_\_\_\_\_ is approximately 12 to 1. (*Petitioner's Exhibit #2, IEP dated 04/27/09*). The MR classes at \_\_\_\_\_ can accommodate as many as 15 students, and each MR class has a teacher with an assistant, and some of the students have aides. There are three classes in the MR

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cluster at \_\_\_\_\_ that service the MR cluster population, and the degrees of MR vary within each class. Student's core academic classes consisting of 21 hours/week of specialized instruction would be provided outside of general education and Student's elective classes consisting of 6.5 hours/week of specialized instruction in physical education, music and art would be provided in the general education setting. The general education classes contain approximately 25 students and there are no special accommodations provided for special education students; however, Student would be accompanied by a full time dedicated aide while participating in the general education curriculum. The only vocational program available at \_\_\_\_\_ is a shoe repair program available to all students. (*Testimony of Juan Fernandez, educational advocate*).

#5. Student's Vineland-II results and Student's reported IQ score suggest a classification of mild mental retardation. (*Petitioner's Exhibit #10, Vineland-II Assessment dated 04/24/09*).

#6. On 04/27/09, the MDT agreed with a disability classification of Mildly Mentally Retarded ("MMR"), and the disability classification was based on Student's diagnostic classification of MMR on a Vineland-II assessment dated 04/24/09, and the MMR classification was used as the basis for developing a special education program for Student. (*Petitioner's Exhibit #2, MDT Meeting Notes dated 04/27/09; Petitioner's Exhibit #10, Vineland II-Assessment dated 04/24/09*).

#7. \_\_\_\_\_ is Student's neighborhood school. (*Testimony of Juan Fernandez*).

#8. Student's 01/09/08 IEP, developed while Student was in the 8<sup>th</sup> grade at \_\_\_\_\_ classified Student with Multiple Disabilities ("MD") and prescribed 20 hours/week of specialized instruction and 1 hour/week of speech-language services with 62% of services to be provided out of the general education setting in a combination general education and resource classroom. (*Petitioner's Exhibit #5, IEP dated 01/09/08*).

#9. Student's 02/13/09 IEP classified Student with MD and prescribed 13 hours/week of specialized instruction in general education and 6.5 hours/week of specialized instruction outside general education, 1 hour/week of speech-language pathology services outside of general education, and 1 hour/week of behavioral support services outside of general education. (*Petitioner's Exhibit #4, 02/13/09 IEP*).

#10. Student's 04/03/09 IEP (the IEP that preceded the 04/27/09 IEP), classified Student with a Specific Learning Disability ("SLD") and prescribed 21 hours/week of specialized instruction outside of general education, 6.5 hours/week of specialized instruction in the general education setting, 1 hour/week of speech-language pathology services outside of general education, and 1 hour/week of behavioral support services outside of general education; with services to be provided in a full time Learning Disabled ("LD") cluster program at \_\_\_\_\_. The special education services were based on the same testing grade level equivalents specified in the

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04/27/09 IEP. (*Petitioner's Exhibit #3, IEP dated 04/03/09; Petitioner's Exhibit #2, IEP dated 04/27/09*).

#11. Student's grades at \_\_\_\_\_ School from the beginning of the 2008-2009 school year until 03/20/09 were failing grades, and Student's school and classroom attendance were poor. (*Petitioner's Exhibit #7, Report to Parents on Student Progress dated 01/16/09; Petitioner's Exhibit #11, Report to Parents on Student Progress dated 03/20/09; Petitioner's Exhibit #12, Student Progress Report dated 01/22/09; Petitioner's Exhibit #13, Student Progress Report dated 01/27/09; Petitioner's Exhibit #14, Student Progress Report dated 01/27/09*).

#12. 72 hours after the 04/27/09 IEP was developed, bus transportation arrived at Petitioner's home and took Student to \_\_\_\_\_ and when Student arrived at \_\_\_\_\_ Petitioner received a telephone call to retrieve Student from school because Student was not enrolled at \_\_\_\_\_ and \_\_\_\_\_ had no academic records pertaining to Student. That same day, Petitioner went to \_\_\_\_\_ School and conversed with the special education coordinator, and then returned to \_\_\_\_\_ at which time Petitioner enrolled Student. Subsequent to Student's enrollment, bus transportation never again came to Petitioner's home to take Student to \_\_\_\_\_ (*Testimony of Petitioner*).

#13. The 01/09/09 psychoeducational evaluation indicated that (a) Student is functionally illiterate with profound deficits in academic skills that require accurate or efficient verbal mediated information processing abilities, (b) Student should receive special education classes with services and accommodations designed to address Student's speech, language and reading disabilities, (c) individualized instruction and structured small classes are not just desirable but necessary, (d) repetition of instructions or important facts in the classroom is absolutely necessary if Student is to learn at all, (e) without intensive tutoring now, Student will fall further behind his peers, (f) specialized reading instruction is necessary to bring Student to a level required for vocational training, and (g) Student could not understand the gist of meaningful information and it is unlikely that this deficit can be remediated. (*Petitioner's Exhibit #6, Psychoeducational Evaluation dated 01/09/09*).

#14. The 06/17/09 vocational assessment indicated that (a) Student had a definite interest for Construction (plumber) and Consumer Services and Foods (dishwasher), (b) Student exhibited difficulties in Visual Motor Coordination which assesses the ability to use eye/hand coordination, preplanning and visual motor skills, (c) Student's Fine Motor Coordination, i.e., the ability to use hands to manipulate small hand tools such as tweezers needed improvement and performing detailed work in this area proved to be frustrating for Student, (d) Finger Dexterity testing, which assesses the ability to use fingers/hands to manipulate and handle small hand tools and instruments, such as picking up screws with fingers and inserting the screws in holes on a metal plate, resulted in a below average score for Student, (e) Student scored in the average range for Manual Dexterity, which assessed the ability of Student to use hands and larger hand tools such as pipe assembly and other plumbing materials, (f) Student's Wide Range Achievement

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Test-4 score revealed a kindergarten level for word reading and 2<sup>nd</sup> grade level for math computation, indicating that Student has serious academic deficiencies that must be taken into consideration when planning for vocational training and employment, (g) Student is an Auditory/Visual Kinesthetic learner who will have to manually manipulate tools, instrument and objects in order to learn skills, (h) instructions will have to be given to Student verbally and tasks will have to be demonstrated for Student in order for Student to learn them, and (i) Student's last two years in high school should include vocational training in a trade such as plumbing where career testing indicates interest and aptitude tests show potential for learning skills. (*Petitioner's Exhibit #15, Vocational Assessment dated 06/17/09*).

### DISCUSSION AND CONCLUSIONS OF LAW

"The burden of proof in an administrative hearing...is properly placed upon the party seeking relief." *Schaffer v. Weast, 44 IDELR 150 (2005)*. "Based solely upon 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 a FAPE." *5 D.C.M.R. 3030.3*

#### **Issue #1 – Whether DCPS failed to provide Student with a full time MR out of general education placement, thereby denying Student a FAPE?**

Student's 04/27/09 IEP prescribes a full time out of general education MR program (*Findings of Fact #1, #2*); however, Petitioner asserts that Student needs a full time out of general education MR program where all classes are outside of general education, instead of the 21 hours/week of specialized instruction in an out of general education setting and the 6.5 hours/week of specialized instruction in a general education setting that are prescribed by Student's 04/27/09 IEP. Petitioner asserts that the results of the 01/09/09 psychoeducational assessment, the 04/24/09 Vineland-II assessment and the 06/17/09 vocational assessment, taken individually and collectively, prove by a preponderance of the evidence that on 04/27/09, after the IEP team reviewed these assessments, the IEP team should have developed an IEP that prescribed 27.5 hours/week of specialized instruction with all classes in a MR out of general education setting.

When Student began grade at at the beginning of the 2008-2009 school year, Student's educational program was designed using a 01/09/08 IEP that classified Student with a disability classification of MD and mandated 20 hours/week of specialized instruction and 1 hour/week of speech-language services in an out of general education setting, with 62% of specialized instruction and related services to be provided outside of the general education setting. The 01/09/08 IEP was developed while Student attended grade at (*Finding of Fact #8*). The exact nature of the disability and the specialized education program while the 01/09/08 IEP was in effect was not revealed by the evidence in the record. However, it is

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known that on 02/13/09, while Student attended \_\_\_\_\_ Student's 02/13/09 IEP reflected 13 hours/week of inclusion services and 6.5 hours/week of pull-out services, 1 hour/week of speech-language services in an out of general education setting, and 1 hour/week of behavioral support services in an out of general education setting for Student with a disability classification of MD. (*Finding of Fact #9*). It is also known that Student's attendance and academic performance were poor from the beginning of the 2008-2009 school year until 03/20/09. (*Finding of Fact #11*). Thus, the Hearing Officer concludes that Student did not fare well academically under the special education provisions of the 01/09/08 IEP or the 02/13/09 IEP.

In 2009, it was clear that Student needed a different academic program, and Student received it on 04/03/09 when Student was placed in a LD cluster program at \_\_\_\_\_ ostensibly in an effort to better address Student's academic difficulties. (*Finding of Fact #10*). In the record were Student's grade reports from the beginning of the 2008-2009 school year through 03/20/09 that reflected poor grades and attendance. (*Finding of Fact #11*); however, there were no grade reports in the record reflecting Student's adjustment in the LD cluster program when Student had 21 hours/week of specialized instruction in an out of general education setting and 6.5 hours/week of specialized instruction in a general education setting, with 1 hour/week of speech-language services and 1 hour/week of behavioral support services.

And, similarly, there was no evidence in the record regarding Student's adjustment to the full time MR out of general education program designed on 04/27/09, where Student was to receive 21 hours/week of specialized instruction in an out of general education setting, 6.5 hours/week of specialized instruction in a general education setting, 1 hour/week of speech-language services in an out of general education setting, 1 hour/week of behavioral support services in an out of general education setting, and a dedicated aide and school bus transportation; with services to be provided in the MR cluster program at \_\_\_\_\_. On 04/27/09, Student was classified with a MR disability and placed in the MR cluster program at \_\_\_\_\_ by the IEP team based on a review of the results of a 04/24/09 Vineland-II assessment that revealed that Student was mildly mentally retarded ("MMR"). (*Findings of Fact #2, #5, #6*).

On 04/27/09, the type of program changed for Student, i.e., from an LD program to a MR program, and the Hearing Officer concludes that on 04/27/09, DCPS developed an academic program for Student in the least restrictive environment, i.e., one that allowed Student to receive instruction in core academic subjects in an out of general education setting, while allowing Student to receive academic instruction in elective subjects in a general education environment with Student's non-disabled peers in Student's neighborhood school. (*Findings of Fact #2, #4, #7*). While it is true that Student is functionally illiterate (*Finding of Fact #13*), and the argument can be made that Student would be lost in elective classes in a general education setting with no special education supports (*Finding of Fact #4*), the fact that on 04/27/09, DCPS provided Student with a full time dedicated aide (*Finding of Fact #4*) is significant. There was no evidence in the record that the full time dedicated aide would not be able to render academic assistance to Student.

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Pursuant to 5 D.C.M.R. 3011.1, "the local education agency shall ensure that: (a) to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled; and (b) special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." This is considered the Least Restrictive Environment ("LRE"). Accordingly, with regard to the placement of a child, "the local education agency shall ensure that the educational placement decision for a child with a disability is: (a) made by a group of persons, including the parents or other persons, knowledgeable about the child, the meaning of the evaluation data, and the placement options; (b) made in conformity with the LRE provision of 5 D.C.M.R. 3011; ... (e) based on the child's IEP; and (f) is as close as possible to the child's home."

And, pursuant to 5 D.C.M.R. 3013.2, "unless the IEP of a child requires some other arrangement, the child shall be educated in the school that the child would attend if not disabled." Furthermore, "a child with a disability shall not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum." (5 D.C.M.R. 3013.4).

On 04/27/09, the IEP team designed a program for Student that met the requirements of the law in providing the least restrictive environment. The MR cluster program at \_\_\_\_\_ could support the requirements of Student's 04/27/09 IEP (*Findings of Fact #1, #2, #3*), \_\_\_\_\_ was Student's neighborhood school (*Finding of Fact #7*), Petitioner participated in the decision making process (*Finding of Fact #2*), and Student's program was designed so that Student could participate in elective classes in the general education setting with the assistance of a full time dedicated aide (*Findings of Fact #2, #4*).

If Student did not have a dedicated aide, then Petitioner's argument that classes in the general education environment would be totally inappropriate for Student because there are no supports for Student in the general education setting, would be persuasive. However, psychoeducational and vocational testing made clear that individualized instruction and repetition of instruction were absolutely essential to Student's success in the learning environment. (*Findings of Fact #13, #14*). And, to that end, DCPS assigned a full time dedicated aide to Student; with the assignment of the aide representing the pinnacle of assistance to Student. Therefore, regardless of whether the instruction is delivered in a special education class or a general education class, the availability of an exclusive dedicated aide to translate the academic material and assist Student with comprehension and completion of assigned tasks, debunks any argument against comingling Student with the general population for instruction in art, music and physical education, especially when the newly developed program prescribed by the 04/27/09 IEP had not yet been tried and proven unsuccessful. Issue #3 below discusses Student's failure to participate in the special education program designed in the 04/27/09 IEP.

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Free appropriate public education or FAPE means special education and related services that (1) are provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the SEA; (c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) are provided in conformity with an individualized education program (IEP) that meets the requirements of 34 C.F.R. 300.320 through 300.324. *34 C.F.R. 300.17.*

There was no evidence in the record showing that special education instruction in the general education setting with the assistance of a full time aide was or would not be unsuccessful. In fact, at the time of the due process hearing, Student still had not yet participated in the educational program prescribed by the 04/27/09 IEP, and thus Student's success or failure was yet to be determined. Inappropriateness of the 04/27/09 IEP would have to be shown by Student's failure to make educational progress, and this was impossible to show because Student had not attended \_\_\_\_\_ to participate in the MR cluster program in both out of general education classes and in general education classes with the assistance of a dedicated aide.

The Hearing Officer concludes that the educational program developed by DCPS on 04/27/09 represented the least restrictive environment for Student, as mandated by 5 D.C.M.R. 3013.1(b), and the Hearing Officer concludes that the 04/27/09 IEP was appropriate based on the information available to the IEP team at the time the 04/27/09 IEP was developed. Thus, the Hearing Officer concludes that the 04/27/09 IEP provided Student with a FAPE.

Therefore, Petitioner failed to meet its burden of proof that Student was or would be unsuccessful in 6.5 hours/week of elective classes in general education where a full time dedicated aide was available to assist Student. Petitioner did not meet its burden of proof in showing that Student was denied a FAPE because Student didn't have all classes in an out of general education setting from 04/28/09 until the end of the 2008-2009 school year.

Petitioner failed to meet its burden of proof on Issue #1.

**Issue #2 – Whether DCPS failed to place Student in an appropriate school, thereby denying Student a FAPE?** Specifically, Petitioner alleges that (a)

is not an appropriate school in that it cannot provide Student with a full time MR out of general education placement with all classes outside of the general education setting; and (b) Student's 01/09/09 psychoeducational assessment indicates the need for a full time, or close to full time out of general education placement, and \_\_\_\_\_ cannot provide this educational setting.

Petitioner failed to meet its burden of proof on Issue #2(a) insofar as success on Issue #2(a) necessarily rests on the success of Issue #1(a), and Petitioner failed to meet its burden of proof on Issue #1(a).

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Although the 01/09/09 psychoeducational assessment makes clear that Student should be provided with services and accommodations designed to address Student's speech, language and reading disabilities, and individualized instruction and structured small classes are necessary for Student's academic progress (*Finding of Fact #13*), the assessment does not state that *all* of Student's classes should be in an out of general education setting. The assessment makes clear that "repetition of instructions or important facts in the classroom is absolutely necessary if Student is to learn at all." (*Finding of Fact #13*). The most effective means of assuring repetition of instruction was to provide Student with a dedicated aide, which is what DCPS did. And for the reasons stated in the discussion of Issue #1 with regard to Petitioner failing to meet its burden of proof that Student's educational program of 6.5 hours/week of specialized instruction in the general education environment with the assistance of a full time aide was inappropriate, Petitioner did not meet its burden of proof by a preponderance of the evidence that Student's 01/09/09 psychoeducational assessment indicated the need for a full time, or close to full time out of general education placement with all classes outside the general education setting. Additionally, neither the Vineland-II assessment or the vocational assessment specified the need for *all* of Student's classes to be in an out of general education setting.

Petitioner proposed that Student be placed at \_\_\_\_\_ a vocational school offering career paths in barbershop, beauty/cosmetology, and automotive garage. (*Testimony of \_\_\_\_\_ Director at \_\_\_\_\_* Although Petitioner testified that Student had an interest in barbering, Student's vocational assessment indicates that the use of small hand tools, such as scissors, would be difficult if not impossible for Student to master. (*Finding of Fact #14*). Moreover, both the 01/09/09 psychoeducational evaluation and the 06/17/09 vocational assessment indicated that specialized reading instruction is necessary to bring Student to a level required for vocational training (*Findings of Fact #13, #14*), and vocational training should be provided during Student's last two years of high school. (*Finding of Fact #14*). It is apparent that due to Student's academic deficits, Student is not ready for and would not benefit from vocational training at the present time. When the time comes for Student to enter a vocational program, it is hoped that serious efforts will be made to find a plumbing vocational program for Student, as it is the only vocational area in which Student might be successful.

Petitioner failed to meet its burden of proof on Issue #2.

**Issue #3 – Whether DCPS failed to implement Student's IEP, thereby denying Student a FAPE?** Specifically, Petitioner asserts that (a) Student's 04/27/09 IEP prescribes transportation services for Student and due to DCPS' failure to provide transportation services, Student was unable to attend school; (b) DCPS has not provided Student with a dedicated aide because DCPS failed to provide transportation services and therefore Student was unable to attend school; and (c) since Student was unable to attend school because DCPS did not provide transportation services, DCPS did not implement Student's IEP in its entirety from 04/28/09 until the end of the 2008-2009 school year.

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Student's 04/27/09 IEP provided for bus transportation services. According to the credible testimony of Petitioner, the school bus arrived 72 hours after development of the 04/27/09 IEP and never came again to transport Student to school. (*Finding of Fact #12*). DCPS offered no evidence to explain or refute the lack of transportation services for Student. As a result of missed transportation services, Student missed attending school from 04/28/09 until the end of the 2008-2009 school year. Therefore, the Hearing Officer concludes that as a result of DCPS not providing transportation services for Student, Student's IEP was not implemented with respect to Student receiving specialized instruction and related services with the assistance of a full time dedicated aide.

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. *34 C.F.R. Section 300.513(a)*.

In this case, Student was without school instruction from 04/28/09 until the end of the 2008-2009 school year; approximately 6 weeks. DCPS' failure to provide transportation services for Student impeded Student's right to a FAPE because Student was totally deprived of the benefit of receiving any educational instruction. Student was denied a FAPE.

Petitioner met its burden of proof on all elements of Issue #3.

**Issue #4 – Whether Student is entitled to compensatory education for the denials of a FAPE?** Petitioner asserts that Student is entitled to compensatory education for the denial of a FAPE on all issues presented, i.e., for DCPS' failure to provide Student with an appropriate IEP and placement, and for the time Student was unable to attend Spingarn SHS due to lack of transportation services.

Petitioner has proven that Student was denied a FAPE with respect to Issue #3 and that Student missed all classroom instruction from 04/28/09 until the end of the 2008-2009 school year.

Where a school system fails to provide special education or related services to a disabled student, the student is entitled to compensatory education. *Mary McLeod Bethune Day Academy Public Charter School v. Bland*, 555 F. Supp. 2d 130 (2008), 50 IDELR 134, *Walker v. D.C.* 157 F. Supp. 2d 11, 30 (D.D.C. 2001). See also *Reid v. District of Columbia*, 401 F.3d 516, 522 (D.D.C. 2005), 43 IDELR 32 (2005).

“When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning “appropriate” relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.”

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The qualitative standard for determining compensatory education is that “compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA.” *Reid v. District of Columbia*, 401 F.3d 516, 522 (D.D.C. 2005), 43 *IDELR* 32 (2005). *Reid* provides that a compensatory education “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.” *Reid*, 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. The court must conduct a “qualitative inquiry” to determine whether the proposed compensatory placement and tutoring remedy are appropriate.” *Id.*

The problem with determining compensatory education in this case is that it is impossible to determine where Student would have been but for the missed services. Student was denied a FAPE and missed approximately 6 weeks of schooling due to DCPS’ inability to provide Student with transportation services. However, Student is functionally illiterate and requires constant repetition of instruction. (*Finding of Fact #13*). Even with constant repetition, Student usually doesn’t grasp or retain the information. (*Testimony of Petitioner*). Moreover, Student cannot understand the gist of meaningful information and it is unlikely that this deficit can be remediated. (*Finding of Fact #13*). Petitioner’s request for 100 hours of tutoring is rejected because the Hearing Officer concludes that (1) the harm done by the denial of a FAPE cannot be measured by the facts in this record, and (2) tutoring would be totally ineffective for this Student, because Student’s academic deficits are severe and are unlikely to be remediated by simple tutoring, whether it be 10 hours or 100 hours. Therefore, tutoring will not assist in putting Student in the position Student would have been but for the missed services.

Petitioner met its burden of proof that Student is entitled to compensatory education; however, Petitioner did not meet its burden of proof in showing that Student is entitled to 100 hours or less of tutoring services to compensate Student for the denial of a FAPE.

## **ORDER**

**WHEREFORE**, it is

**ORDERED** that

- (1) DCPS shall contact Petitioner no later than 7 calendar days prior to the beginning of the 2009-2010 school year to ascertain Petitioner’s correct address and provide Petitioner with a school bus schedule for the 2009-2010 school year, and DCPS shall take the appropriate measures to ensure that school bus service begins for Student on the first school day of the 2009-2010 school year and continues uninterrupted thereafter; and

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- (2) DCPS shall provide Student with a dedicated aide on the first day of the 2009-2010 school year and each school day thereafter that Student attends school; and
- (3) DCPS shall convene a MDT within 21 calendar days after Student achieves the first 25 days of attendance during the 2009-2010 school year, to review Student's progress, review and revise the IEP as appropriate, and discuss and determine whether any additional educational supplements or supports would be beneficial in order for Student to make educational progress.

**IT IS SO ORDERED.**

**This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).**

Virginia A. Dietrich /s/

Virginia A. Dietrich, Esq.  
Impartial Due Process Hearing Officer

07/25/09

Date

Issued: July 25, 2009