

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office  
810 First Street, N.E.  
Washington, DC 20002

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[STUDENT],<sup>1</sup>  
through the Parent/Guardian,\*

Petitioner,

v

DCPS,

Respondent.

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Date Issued: 10/7/11

Hearing Officer: Seymour DuBow

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STUDENT HEARING OFFICE  
2011 OCT - 0

**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

A due process complaint was filed by counsel for petitioner on August 11, 2011. Counsel for petitioner alleged five issues including that DCPS denied a Free Appropriate Public Education (FAPE) to the student by failing to provide an appropriate IEP that can provide 27.5 hours of specialized instruction a week outside of general education and failing to propose an appropriate placement at \_\_\_\_\_ School. (P-3) Counsel for the respondent DCPS filed her response on August 24, 2011 denying the above allegations. (P-4) On August 25, 2011 a resolution meeting was held and the parties failed to reach an agreement. (P-6) On September 2, 2011 a prehearing conference was held with counsel for petitioner Domiento Hill and counsel for respondent DCPS Laura George. The prehearing Order was issued on September 2, 2011.

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<sup>1</sup> Personal identification information is provided in Appendix A.

(P-2) Counsel for petitioner withdrew the first, second and fifth issues in his due process complaint at the prehearing conference. (P-2)

The hearing was closed. At the outset of the hearing, petitioner's documents P-1-P-28 and respondent's documents R-1-R-4 were admitted into evidence without objection. All witnesses were sworn under oath prior to testifying. Counsel for petitioner called as witnesses: the parent and the educational advocate who both testified in person and administrative head of who testified by telephone. Counsel for respondent called as witnesses: the special education coordinator at School, the program director at Academy, the special education coordinator at Center and the school psychologist at Center who all testified by telephone.

### **JURISDICTION**

The hearing was convened on September 26, 2011 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004 (hereinafter referred to as IDEA), Title 34 of the Code of Federal Regulations, Part 300 (2006) and Title V-E of the District of Columbia Municipal Regulations.*

## **BACKGROUND**

The student is a \_\_\_\_\_-year old male who has the disability classification of multiple disabilities. The student completed the eighth grade last school year at DCPS's \_\_\_\_\_ with an IEP calling for 27.5 hours of specialized instruction per week outside of general education. \_\_\_\_\_ is a DCPS program for students with primarily learning disabilities and goes through the eighth grade. On August 3, 2011 an MDT changed the student's IEP to 26.5 hours per week of specialized instruction outside of general education and proposed the ED/LD cluster program at \_\_\_\_\_ School to implement the student's IEP. Counsel for petitioner filed this due process complaint alleging that changing the student's IEP to reduce his specialized instruction by one hour and proposing

\_\_\_\_\_ School as the student placement for the current school year denied a FAPE. Counsel for respondent counters that the August 3, 2011 IEP is reasonably calculated to provide educational benefits and the ED/LD cluster program at \_\_\_\_\_ School can implement the student's current IEP.

## **ISSUES AND RELIEF SOUGHT**

The issues to be determined are as follows:

1. Did DCPS deny a Free Appropriate Public Education (FAPE) to the student by failing to provide an appropriate IEP that can provide 27.5 hours of specialized instruction a week outside of general education?
2. Did DCPS fail to propose an appropriate placement to \_\_\_\_\_ School because the student allegedly needs a full-time day special education program?

The relief requested is reconvening of the MDT to review and revise the student's IEP to provide no less than 27.5 hours of specialized instruction per week outside of general education and placement at Academy in Lanham, Maryland-a non-public day special education program.

### **FINDINGS OF FACT**

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue one-failure to provide an appropriate IEP- are as follows:

#### I.

1. The student is a -year-old male who has been found eligible for special education services by DCPS as a student with the disability classification of multiple disabilities. (P-7) The multiple disabilities are Learning Disability (LD) and Other Health Impaired (OHI). (R-3)
2. The student completed the grade at Center, a DCPS day special education program for children with primarily learning disabilities last school year -2010-2011. (P-3, Testimony of mother and
3. The student's IEP of March 8, 2011 developed at Center called for 27.5 hours of specialized instruction per week outside of general education and 1 hour a week of behavioral support services. (P-7 at p.11 & 12)
4. The student's special education teacher administered The Woodcock-Johnson III Tests of Achievement to him on September 16, 2010. The student was in the eighth grade at Center and was thirteen and half years old. The student in Broad Reading had a standard score of 73 with a grade equivalent of 3.4 and an age equivalent of 8-8 with a percentile rank of 4, in Broad Math a standard score of 76

with a grade equivalent of 4.4 and an age equivalent of 10 and a percentile rank of 6 and in Broad Written Language a standard score of 75 with a grade equivalent of 3.8 and an age equivalent of 9 and a percentile rank of 5. (P-9 at p.2)

5. On January 10, 2011 an independent comprehensive psychological evaluation report was completed on the student. The evaluator stated in her report under behavioral observations that: “[Student]... turned and walked away when he was informed that he would be undergoing an evaluation....[Student] repeatedly stated that he wanted to attend Physical Education class. [Student] hurried through the projective tasks, asking how long the evaluation would last and why he had to be tested. On another projective test in which he was required to complete a series of questions, [student] answered all the questions except one with ‘good’. [Student] was generally uncooperative throughout the evaluation. He answered a lot of questions on the cognitive and achievement tasks with, ‘I don’t know,’ without bothering to look at the test questions. [Student] looked very irritated; he frequently placed his hand on his eyes and swore under his breath. Thirty minutes before his scheduled lunch break, [student] requested to end the evaluation because he reported, ‘I’m hungry; I don’t want to do this.’ However, when the bell sounded for lunch, [student] decided to skip lunch to complete the evaluation. [Student] was provided with lunch during the evaluation. On the very last subtest, which was Math Fluency, [student] did not follow instructions about working with the assigned time limits. He continued to write after he was asked to stop work, turning his body and blocking the evaluator from collecting the answer booklet from him, thus, spoiling those particular tests. Despite his lack of cooperation and inability to follow instructions at times, [student]

completed the entire evaluation with prompting and encouragement.” (P-12 at p.5)

The January 10, 2011 independent psychological evaluation report stated the student’s full scale IQ was 64 which is extremely low. (P-12 at p. 13) The student’s performance on the WIAT-III achievement tests were in the one percentile rank in Basic Reading which is the low range and the student performed in the very low range in both Written Expression at .1 percentile rank and Math at the .1 percentile rank. (P-12 at p.13) The independent evaluator’s diagnosis of the student was that he has a Cognitive Disorder, Learning Disorder, Attention-Deficit/Hyperactivity Disorder, and Oppositional Defiant Disorder. (P-12 at p.14) The evaluator recommended the student continue to receive services under the classification of Multiple Disabilities. (P-12 at p.15)

6. On March 6, 2011 a Discovery Education Assessment was done on the student in reading and math. The student scored below basic in subject proficiency in reading (P-10) and mathematics (P-11).
7. On June 15, 2011 the student’s IEP Progress Report was completed by the student’s special education teacher for the reporting period March 26, 2011 through June 17, 2011. The IEP Progress report stated the student mastered one of his mathematics goals and was progressing on his other three mathematics goals. The IEP Progress reports showed he mastered one of his reading goals and was progressing on his other reading goal. The report also stated he was progressing on all his written expression goals. The school social worker stated in the IEP Progress Report that the student was progressing on his two emotional, social and behavioral development goals. (R-4)

8. On June 22, 2011 the school psychologist at \_\_\_\_\_ Center completed her report on her psychological evaluation of the student. The report states:

“[Student] was referred for a cognitive evaluation at the request of the MDT. The MDT agreed that [student] should be administered another cognitive instrument other than the WISC-IV to assess his cognitive abilities. The results of the previous independent evaluation (of January 10, 2011) indicated that the WISC-IV test was administered within two years therefore, rendering the results invalid. Also [student’s] motivation during testing impacted the results reported in the previous independent evaluation. An alternative cognitive instrument was administered to obtain a better estimate of his cognitive abilities.” (R-3 at p.1) The evaluator administered the Reynolds Intellectual Assessment Scales (RIAS) The student’s overall intelligence score, called the Composite Intelligence Index (CIX) was 75 which was in the Moderately Below Average range. This level of performance exceeded only 5% of the individuals at his age. The evaluator reported: “There’s a 95% chance that [student’s] true score is within the range of scores from 70-82. [Student’s] overall intelligence score indicates that he has difficulty keeping up with his same-age peers in a variety of thinking and reasoning tasks during instruction.” (R-3 at p.5) On the Verbal Intelligence Index (VIX), the student scored a 77 on verbal abilities and scored an 80 on the Non-Verbal Intelligence Index (NIX) which the evaluator stated was consistent with his Composite Intelligence Index (CIX). (R-3 at p.9) The report includes the results of the Woodcock-Johnson Tests of Achievement (WJ-III ACH) administered by the special education teacher in May, 2011. The student received a standard score of 74 in Broad Reading which is in the

low range in basic reading skills. His skills in this area exceed 4% of students in his grade level. The student received a standard score of 86 in Broad Math placing his overall math skills in the low average range. The student received a standard score of 88 in Written Language which placed his overall writing skills in the low average range. (R-3 at p.7) The evaluator concluded that the student “demonstrates a personal academic strength in mathematics. His academic weakness is in reading and written expression. Despite the interventions and strategies used to help [student] access grade-level curriculum, he has difficulty accessing it without modifications and accommodations.” (R-3 at p.10)

9. A comparison of his WJ-III Achievement scores in September 16, 2010 and May, 2011 show that his Broad Reading standard score stayed at the same level going from 73 to 74. His Broad Math and Written Language standard scores, however, improved going from 76 and 75 respectively in 2010 to 84 and 86 in 2011. (See Findings of Fact I. #3 and #7)
10. On August 3, 2011 an MDT meeting was convened with the parent, her educational advocate a DCPS social worker, special education teacher, school psychologist, case manager and the special education coordinator at School participating. The school psychologist reviewed an independent comprehensive psychological evaluation. The MDT, over the objections of the educational advocate, revised the student’s IEP to change his hours of specialized instruction from 27.5 hours a week to 26.5 hours a week and continue the one hour a week of behavioral support services. (Testimony of P-26, P-25 at p.11 & 12)

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue two-failure to propose an appropriate placement at

School- are as follows:

II.

1. The student had been attending \_\_\_\_\_ Center, a DCPS day special education program for children with primarily learning disabilities for several years. The program goes through eighth grade and the student completed the \_\_\_\_\_ grade at the end of the 2010-2011 school year. (Testimony of \_\_\_\_\_ special education coordinator at \_\_\_\_\_ Center)
2. At the August 3, 2011 MDT meeting, DCPS proposed the cluster program for learning disabled and emotionally disturbed students at \_\_\_\_\_ School. (Testimony of \_\_\_\_\_ special education coordinator at \_\_\_\_\_ School, P-26) The special education coordinator at \_\_\_\_\_ participated in the MDT meeting and explained their program. (P-26, Testimony of special education coordinator at \_\_\_\_\_ The ED/LD cluster program at \_\_\_\_\_ only includes students with learning disabilities (LD) and/or emotional disturbance (ED) who are together all day except for lunch. The lunch is provided in the school cafeteria with non-disabled students. The group in the cluster moves to four different classes for different subjects in a block schedule. The students in the cluster would have 6.5 hours a week in each of four academic subject areas which totals 26 hours a week of specialized instruction.. They would have no electives, but would be in a learning lab. The students are taught by special education teachers

dually certified in special education and content area. There is a teacher's aide in each of the four block classes. There are nine to ten students in the ninth grade ED/LD cluster program. It is possible that the one hour of behavioral support services a week can be taken from instructional time. (Testimony of special education coordinator at

3. Both Center and the ED/LD Cluster program at School provide for small classes for all instruction with only students with disabilities taught by a certified special education teacher. (Testimony of special education coordinator at Center and special education coordinator at School)

4. A Prior Written Notice was issued on August 3, 2011 proposing School, the student's neighborhood school, as the student's placement. (P-27)

5. The student has been accepted at the in Lanham, Maryland, a full-time day special education program. (P-23, Testimony of The student would be placed in a ninth grade class with seven students who are primarily LD or Other Health Impaired (OHI) taught by a special education teacher and an assistant teacher with a college degree. The special education teacher is provisionally certified in the content area of English, but is not certified in the content area of Math. There are social workers on staff. There are currently 75 students in the program of which 45 are from DCPS. The cost of tuition is to dollars a year and the related services of counseling and speech therapy are additional costs of approximately an hour. There is a DCPS monitor of the program. (Testimony of

## DISCUSSION/CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer on issue one whether the IEP is inappropriate are as follows:

In determining if an IEP meets the substantive requirements of the IDEA, The United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) held that courts must determine "is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-07. In *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988) *cert denied*, 488 U.S. 1030 (1989), The Third Circuit held that appropriateness under *Rowley* as applied to a student with severe disabilities means more than trivial educational benefit. The Court held in *Polk* that "...using *Rowley*'s own terminology, we hold that Congress intended to afford children with special needs an education that would confer meaningful benefit." *Polk* at p.184 Other Circuits have endorsed the *Polk* court's interpretation of educational benefit in *Doe v. Smith*, 441 IDELR 544 (6<sup>th</sup> Cir. 1989); *Fort Zumwalt School District v. Clynes*, 26 IDELR 172 (8<sup>th</sup> Cir. 1991); *Roland M. v. Concord School Comm'n*, 16 IDELR 1129 (1<sup>st</sup> Cir. 1991) and *Hall v. Vance County Board of Education*, 557 IDELR 155 (4<sup>th</sup> Cir. 1985) In *Ridgewood Bd. of Educ. v. N.E.*, 30 IDELR 41,44 (3d Cir. 1999) and *T.R. v. Kingwood Township Board of Education*, 32 IDELR 30 (3d Cir. 2000) the Third Circuit held that an IEP must provide "meaningful benefit." *See also A.I. Iapalucci v. D.C.*, 402 F. Supp. 2d 152 (D.D.C. 2005) ("...the appropriate focus of the court's review should be on whether DCPS is

providing A.I. with an IEP that is reasonably calculated to provide meaningful educational benefit.” *Id.* at p.167)

The student’s March 8, 2011 IEP at \_\_\_\_\_ Center provided for 27.5 hours of specialized instruction outside of general education per week with one hour a week of behavioral support services outside of general education. The student, based on the results of the Woodcock-Johnson-III Achievement scores, made progress from September 2010 to May 2011 in mathematics and written language while staying at the same level in reading. (See Findings of Fact I. #9) The IEP Progress Report of June 15, 2011 showed the student mastered one of his math goals and one of his reading goals and was progressing on all his other IEP goals. (See Findings of Fact I. #7) The above results of the WJ-III Achievement tests and IEP Progress Report shows the student’s March 8, 2011 IEP was calculated to provide educational benefit to the student. The August 3, 2011 IEP reduced the student’s hours from 27.5 to 26.5 hours of specialized instruction outside of general education a week and kept the behavioral support services at one hour per week. The student’s current IEP will still require that the student receive all his specialized instruction for all academic instruction outside of general education. Counsel for the petitioner has failed to meet his burden of proof that the August 3, 2011 IEP by reducing one hour of specialized instruction per week from the previous IEP will deny him “meaningful educational benefit” that will result in a denial of a FAPE.

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer on issue two whether the proposed placement at the ED/LD cluster program at \_\_\_\_\_ is inappropriate are as follows:

The legal standard for educational placements was stated in the U.S. Department of Education interpretative guidelines that “educational placements under Part B must be individually determined in light of each child’s unique abilities and needs, to reasonably promote the child’s educational success.” *Appendix A to 34 C.F.R. Part 300 Question 1*. Following the development of an IEP, the public school system is required to provide an appropriate educational placement that meets the needs set forth in the IEP and allows for its implementation. See *Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22, 25 (D.D.C. 2004) (citing *Petties v. District of Columbia*, 238 F. Supp. 2d 114, 116 (D.D.C. 2002) and 34 CFR 300.116

DCPS’s proposed placement of the ED/LD cluster program at School can provide 26 hours per week of specialized instruction outside of general education. (See Findings of Fact II. #2) While the IEP calls for 26.5 hours per week of specialized instruction, the ED/LD cluster program can substantially and materially implement the student’s IEP.

The legal standard that applies to whether an implementation failure amounts to a denial of a FAPE, as recently stated in *Wilson v. D.C.* (Civil Action 09-02424 March 18, 2011) by Judge Henry Kennedy, is whether the aspects of the IEP not followed were “substantial or significant” or whether the deviations from the IEP’s stated requirements were “material”. Judge Kennedy relied on the above quoted language in the Fifth Circuit decision of *Houston Independent School District v. Bobby R.*, 200 F. 3d 341 at 349 (5<sup>th</sup> Cir. 2007). The Ninth Circuit Court of Appeals in *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5 J, 502 F. 3d 811 at 822 ((9<sup>th</sup> Cir. 2007) stated: “[A] material failure to implement an IEP violates IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school

provides to a disabled child and the services required by the child's IEP.”; accord *S.S. ex rel. Shank v. Howard Road Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008), *Catalan v. D.C.*, 478 F. Supp. 2d 73 (D.D.C. 2007). The student's educational progress, or lack of it, may be probative of whether there has been a significant shortfall. In *Catalan*, the district court found that missing a few speech and language sessions was not enough to constitute a substantial deviation from the IEP and a denial of a FAPE. In this case the student would be missing 30 minutes a week of specialized instruction since his IEP calls for 26.5 hours per week and the ED/LD cluster offers 26 hours of specialized instruction per week. (See Findings of Fact I. #9) This case is similar to the above cited *Catalan* case in that the missing of 30 minutes a week of specialized instruction when the student is receiving all his academic instruction outside of general education by a dually certified special education teacher is not enough to constitute a substantial deviation from the IEP and a denial of a FAPE.

The Supreme Court held in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 201 (1982) that IDEA was intended to provide a “basic floor of opportunity” and an individualized plan “designed to provide educational benefit to the handicapped child.” See *Schoenbach v. District of Columbia*, 309 F. Supp. 2d 71, at 80 (D.D.C. 2004) This Circuit has held that a school has met its obligation to provide a FAPE if the school's program “confers some educational benefit.” *Kerkam v. Superintendent, District of Columbia Public Schools*, 931 F.2d 84 (D.C. Cir. 1991) The analysis of the appropriateness of a public school placement “is not comparative.” *Jenkins. v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir. 1991) Although IDEA guarantees a FAPE, it “does not necessarily guarantee the child [with the disability] the best available education.” *Holland v. District of Columbia*, 71 F.3d 417,419 (D.C.Cir. 1995). Nor does IDEA ensure that a FAPE will consist of the precise plan that the parent desires. See *Shaw*

*v. District of Columbia*, 238 F.Supp. 2d 127,139 (D.D.C. 2002). An IEP must be ‘reasonably calculated’ to confer educational benefits on the child, ...but it need not “maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.” *Rowley* at 200, 207. , quoted in *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009)

The student last school year received 27.5 hours of specialized instruction outside of general education at \_\_\_\_\_ Center. As stated above on issue one, the student received educational benefit at \_\_\_\_\_ Center as evidenced by the student’s progress in math and written language shown on the Woodcock-Johnson-III Achievement test scores (See Findings of Fact I.#8) and his IEP Progress Report (See Findings of Fact I. #7) The proposed placement of the ED/LD cluster program at \_\_\_\_\_ is offering the student’s entire academic program with specialized instruction outside of general education taught by a dually certified special education teacher in a small class setting of nine to ten students. While the ED/LD cluster program is offering one and half hours a week less of specialized instruction than at \_\_\_\_\_ Center, this hearing officer finds that the ED/LD cluster program is substantially similar to the \_\_\_\_\_ Center program (See Findings of Fact II. #3) and can confer educational benefit to the student. Counsel for petitioner has failed to meet his burden of proof that DCPS denied a FAPE by failing to provide an appropriate placement at the ED/LD cluster program at \_\_\_\_\_ School.

The Supreme Court in *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985) and *Florence County School Dist. Four v. Carter*, 510 U.S. 7 at 15 (1993) has held that parents “are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the

Act.” Since this hearing officer has answered the threshold question that there is no denial of a FAPE with the proposed placement at the ED/LD cluster program at School, it is not necessary to do further analysis on the second prong of the Supreme Court test for reimbursement.

**ORDER**

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

**Counsel for the petitioner’s request for relief is DENIED and the case is DISMISSED with prejudice.**

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: 10/7/11

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*Seymour DuBow /s/*  
Hearing Officer