

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

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STUDENT,<sup>1</sup> )  
By and through PARENTS, )

*Petitioner,* )

v. )

DISTRICT OF COLUMBIA )  
PUBLIC SCHOOLS, )

*Respondent.* )

Bruce Ryan, Hearing Officer

Issued: November 3, 2011

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STUDENT HEARING OFFICE  
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**HEARING OFFICER DETERMINATION**

**I. INTRODUCTION AND PROCEDURAL BACKGROUND**

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed September 7, 2011, on behalf of a 10-year old student (the "Student") who resides in the District of Columbia, has been determined to be eligible for special education and related services under the IDEA, and currently attends his neighborhood DCPS elementary school (the "Current School").

Petitioners are the Student's parents. They claim that DCPS has denied the Student a free appropriate public education ("FAPE") by failing to provide an appropriate individualized education program ("IEP") and educational placement for the Student from March 29, 2011, to the present, in that the Student allegedly requires more specialized instruction outside the general education setting. DCPS filed a late Response on October 3, 2011, which denied the allegations. DCPS responds that it has provided an appropriate IEP and placement.

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<sup>1</sup> Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

A resolution meeting was held September 19, 2011, which did not resolve the Complaint. The parties agreed to end the 30-day resolution period early, and thus the 45-day IDEA timeline for decision began to run, on that date. A Prehearing Conference ("PHC") was held on October 5, 2011, at which the parties discussed and clarified the issues and requested relief.

Five-day disclosures were filed by both parties on October 11, 2011, and the Due Process Hearing was held on October 18, 2011. Petitioner elected for the hearing to be closed. During the hearing, the following Documentary Exhibits were admitted into evidence without objection:

**Petitioners' Exhibits:** P-1 through P-3.<sup>2</sup>

**Respondent's Exhibits:** R-1 through R-3.

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

**Petitioners' Witnesses:** (1) Father; (2) Mother; and (3) Educational Advocate ("EA").

**Respondent's Witnesses:** (1) Special Education Coordinator, Prior School ("Prior SEC"); (2) Special Education Coordinator, Current School ("SEC"); and (3) Special Education Teacher, Current School ("Teacher").

## II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*. The HOD deadline is November 3, 2011.

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<sup>2</sup> Petitioners withdrew Exhibit P-4 (CV/resume of witness who did not testify), which had been included in their five-day disclosures.

### III. ISSUES AND REQUESTED RELIEF

The following issue was presented for determination at hearing:

**Failure to Provide Appropriate IEP and Placement** – Did DCPS deny the Student a FAPE by failing to provide an appropriate IEP and educational placement (*i.e.*, that was reasonably calculated to provide educational benefit), as of March 29, 2011, and continuing to the present?

Specifically, Petitioners claim that the 03/29/2011 IEP/placement was and continues to be inappropriate for the Student because he is very low functioning, particularly in reading and writing, and thus his academic needs are not being met. Petitioners allege that his IEP should be changed to include at least five (5) hours or more of specialized instruction per week outside of the general education setting. *See Complaint, pp. 3-4.*

As clarified at the PHC, Petitioners allege that DCPS had an affirmative obligation to review and revise the IEP as needed to address the Student's needs, and that his poor academic performance during the 2010-11 school year (including after 03/29/2011) was a "clear indicator of needs that are not being met." *Complaint, p. 4; see also Maynard v. District of Columbia, 54 IDELR 158 (D.D.C. 2010)* (LEA must periodically update and revise an IEP "in response to new information regarding the child's performance, behavior, and disabilities."). The parties discussed and agreed at the PHC that this Issue shall be limited to the specific points alleged in the Complaint and shall not include any other aspects of the IEP. Among other things, Petitioners' counsel confirmed that there is no challenge being made to any related services.

Petitioners request that the Hearing Office order DCPS to convene an IEP meeting to review and revise the IEP to provide an appropriate amount and setting of specialized instruction. (Petitioner originally had requested compensatory education relief for educational harm caused to the Student since 03/29/2011, but that request was withdrawn at hearing, and no evidence was presented to support such relief. Nor was any specific educational harm alleged or proved for the period following the 03/29/2011 IEP.)

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issue specified above. DCMR 5-3030.3; *see Schaffer v. Weast, 546 U.S. 49 (2005).*

#### IV. FINDINGS OF FACT

1. The Student is a -year old student who resides in the District of Columbia. He has been determined to be eligible for special education and related services under the IDEA as a child with a Specific Learning Disability (“SLD”). *See P-1; P-2; Father Test.*
2. During the 2010-11 school year, the Student attended the 4<sup>th</sup> grade at the DCPS neighborhood elementary school assigned to his mother’s residence (“Prior School”). *P-1; Father Test.* For the 2011-12 school year, the Student attends the 5<sup>th</sup> grade at the DCPS neighborhood elementary school assigned to his father’s residence (“Current School”). *Id.* Petitioners share custody of the Student. *Id.*
3. On or about March 29, 2011, DCPS convened a meeting of the Student’s multi-disciplinary team (“MDT”) to develop the Student’s most recent IEP. The 03/29/2011 IEP provides for 10 hours of specialized instruction per week in the General Education setting, along with related services.<sup>3</sup> *P-2, p. 7.*
4. The Student’s Present Levels of Educational Performance reflected in the 03/29/2011 IEP for all academic areas are based on Woodcock-Johnson III Tests of Achievement from 02/09/2011. *See P-2, pp. 2-3.* In the area of Reading, the Student scored as follows: Letter-Word Identification Standard Score (“SS”) = 56, Grade Equivalency (“GE”) = 1.4; Passage Comprehension SS=69, GE=1.5. *P-2, p. 2.* According to the IEP, the Student’s deficits in reading cause him to perform below grade level. *Id.* (describing “Needs” in Reading). The deficits also negatively impact the Student’s performance in the general education class. *Id.* (describing “Impact on the student”). Similar deficits and weaknesses were recognized in Written Expression. *Id., p. 3.*
5. According to the Student’s 4<sup>th</sup> grade report card for the 2010-11 school year, he received a grade of “1” during each of the four advisory periods in Reading/English Language Arts. *P-3, p.1.* A grade of “1” represents the lowest possible grade on the report card and is described as “Does Not Meet the Standard (Below Basic): Student does not show basic working knowledge of skills/concepts; seldom produces work of satisfactory quality.” *Id.*

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<sup>3</sup> The related services, which are not at issue in this case, consist of 240 minutes (four hours) per month of speech/language pathology services in the General Education setting and 240 minutes (four hours) per month of occupational therapy in an Outside General Education setting. *P-2, p. 7.*

6. Reading is the Student's greatest area of need, according to both his parents and teachers. *See Mother Test.; Father Test.; Teacher Test.* While he has been making some progress toward achieving his IEP goals, he is still reading at a kindergarten to first grade level in the 5<sup>th</sup> grade. *Teacher Test.* His oral reading fluency is only 13 words per minute. *Id.*
7. To address the Student's current needs in reading, his special education teacher at Current School provides approximately five (5) hours per week of specialized reading instruction within a small pull-out group of not more than six (6) students that meets daily in a separate resource room. All of the students in his small pull-out group are special education students. *See Teacher Test.* The sessions are designed to provide "more intense" instruction to build up the Student's phonemic awareness, vocabulary, and language skills. *Id.; see also SEC Test.*
8. The evidence indicates that the Student receives 10 hours or more of total specialized instruction per week. *Teacher Test.* The five hours per week of small-group, pull-out instruction are counted toward the 10 hours of specialized instruction required by the Student's IEP, although these hours are actually delivered outside the regular general-education classroom setting. *Teacher Test.; SEC Test.*
9. It is undisputed that the 03/29/2011 IEP has not been revised to require DCPS to provide the Student any amount of specialized instruction within a small-group, pull-out environment.
10. DCPS has not scheduled any MDT/IEP team meeting to review and revise the 03/29/2011 IEP, and it takes the position that a meeting is not required to be held until the next annual IEP review, since (a) the Student transferred from another DCPS public school (*i.e.*, Prior School), and (b) Petitioners have not requested a meeting other than through the present due process complaint. *See SEC Test.; Teacher Test.; DCPS Closing Argument.*

## V. DISCUSSION AND CONCLUSIONS OF LAW

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

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

In this case, the evidence reveals a material inconformity between the Student's IEP as written and the services the educators have determined that he needs and that are actually being provided at Current School. The 03/29/2011 IEP states that all 10 hours of his specialized instruction will be provided within a General Education setting, while DCPS' witnesses testified that the Student requires and is being provided pull-out services as needed totaling approximately five (5) hours per week. The Hearing Officer therefore concludes that Petitioners have proved by a preponderance of the evidence that the IEP as written does not offer an appropriate program to meet the special education needs of the Student for the 2011-12 school year. *Cf. N.S. v. District of Columbia*, 709 F. Supp. 57, 73 (D.D.C. 2010) (DCPS denied FAPE where IEP by its terms failed to offer needed pull-out instruction).

In *N.S. v. District of Columbia*, the court explained that "the IDEA requires that a school district do more than simply provide services adequate to meet the needs of disabled students; it requires school districts to involve parents in the creation of individualized education programs tailored to address the specific needs of each disabled student." 709 F. Supp. 2d at 70 (citations omitted). "The IEP must be specific enough to allow parents to understand what services will be provided and make a determination about whether the proposed placement is adequate." *Id.*

Similar to the situation addressed in *N.S.*, DCPS' witnesses acknowledged that the Student's 03/29/2011 IEP does not prescribe any pull-out specialized instruction (*SEC Test.*; *Teacher Test.*), and that this appears to have been driven at least in part by the needs of Prior School's school-wide inclusion model at the time the IEP was developed. *Prior SEC Test.* (noting "policy decision" to provide all services in general education inclusion setting). DCPS then presented testimony concerning the services being provided to the Student at Current School "that goes beyond what was prescribed by the IEP." 709 F. Supp. 2d at 72. For example, the Special Education Teacher testified that she provides reading instruction to the Student within a small group of no more than six (6) students; that all of the children in Student's group are special education students with IEPs; and that she pulls students out of the regular classroom for this instruction for approximately five (5) hours each week. *Teacher Test.* She also testified that the Student needs such pull-out instruction given his severe reading deficits, as he is functioning on "Level C" (described as the "end of kindergarten"), reads only 13 words per

minute, and is still reading words and letters backwards. *Id.*<sup>4</sup> *Accord SEC Test.* (noting that special education teacher works with Student both in general education classroom and resource room to build up phonemic awareness, vocabulary, and language skills).

As in *N.S.*, the Hearing Officer finds that the March 2011 IEP gives Petitioners “an incomplete picture” of the educational services being provided to the Student. 709 F. Supp. 2d at 72-73. An LEA cannot simply respond by saying that a student is getting more than what is required. *See SEC Test. (redirect examination).* “One of the purposes of the IEP is to ensure that the services provided are formalized in a written document that can be assessed by parents and challenged if necessary.” *Id.* at 73; *see also Alfono v. District of Columbia*, 422 F. Supp. 2d 1, 6 (D.D.C. 2006). Therefore, the Hearing Officer concludes that the 03/29/2011 IEP is inadequate on its face and that DCPS has failed to offer a FAPE to this extent.

DCPS appeared to argue at hearing that the pull-out services being provided to the Student still qualify as specialized instruction within a “general education” setting because they are part of a school-wide program to “re-teach” (*SEC Test.*) both general education and special education students who are performing below grade level. However, the testimony of DCPS’ own witnesses is to the contrary. As noted above, the Special Education Teacher testified that the services are delivered outside the regular classroom and that there are no non-disabled students in the Student’s pull-out group – facts which would seem to preclude categorizing the setting as General Education. In addition, the SEC agreed that the resource room was “more restrictive” than the regular general education classroom and that the IEP “says nothing” about pull-out instruction.<sup>5</sup> *See SEC Test. (cross examination).*

DCPS also argued that Petitioners’ claim should be rejected because they never requested that DCPS hold an MDT meeting to revise the IEP before filing their due process complaint. While that fact might be relevant to an award of equitable relief in the form of compensatory education or private placement, the Hearing Officer does not find that it should preclude the

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<sup>4</sup> The Special Education Teacher has over 30 years experience and has taught in DCPS schools for over 25 years, including the past 4-5 years at Current School. *See Teacher Test.* The Hearing Officer finds her testimony to be very credible and entitled to substantial weight.

<sup>5</sup> In contrast, for his pull-out occupational therapy (“OT”) services, the LRE section of the IEP clearly sets forth that the Student “requires small group and individual intervention” to address his fine motor and other OT issues. *P-2, p. 8.* The small group and individual intervention in reading that the Special Education Teacher described is not set forth in a similar fashion.

limited prospective remedy ordered herein – which is designed simply to conform the written terms of the IEP to the educational program currently being provided. Moreover, DCPS’ witnesses clearly testified that an IEP meeting would *not* be held for this purpose before the next regularly scheduled annual meeting next March, *see SEC Test.*, and at the resolution meeting DCPS also refused to agree to such a meeting. *Mother Test.*; *EA Test.* So DCPS would penalize Petitioners for not asking for a meeting that DCPS is not willing to convene.

Finally, while judicial and hearing officer review of IEPs is “meant to be largely prospective and to focus on a child’s needs looking forward,”<sup>6</sup> the IEP also “must be regularly revised in response to new information regarding the child’s performance, behavior, and disabilities.” *Maynard v. District of Columbia*, 54 IDELR 158 (D.D.C. 2010), *slip op.* at p. 6, quoting *Board of Educ. v. Rowley*, 458 U.S. 176, 181 (1982) (“Because the IEP must be ‘tailored to the unique needs’ of the child”). Thus, regardless whether the 03/29/2011 IEP was inappropriate at the time it was created,<sup>7</sup> the undisputed evidence shows that the Student now requires at least five hours of specialized instruction in reading in a small group, pull-out setting in order to meet his unique special education needs. When such facts are presented, the Hearing Officer does not believe it is appropriate or consistent with IDEA for an LEA to simply wait for the next annual meeting.<sup>8</sup> This should especially be the case where, as here, the current IEP document is known to provide an incomplete picture of the student’s current program. The staff at Current School also expects to issue its first IEP progress report sometime this month, *see Teacher Test.*, which would be appropriate for the IEP team to review at that time.

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<sup>6</sup> *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207) (“courts thus ask whether, at the time an IEP was created, it was ‘reasonably calculated to enable the child to receive educational benefits’”).

<sup>7</sup> The Hearing Officer notes that Petitioners did present substantial evidence indicating that the Student required some pull-out instruction in reading as of 03/29/2011. *See P-2, p. 2* (noting 02/09/2011 academic achievement scores in reading); *P-3, p. 1* (below-basic scores in reading as of the 1<sup>st</sup>, 2<sup>d</sup> and 3<sup>d</sup> advisories); *Father Test.* However, Petitioners withdrew their request for any retroactive compensatory education relief and failed to present evidence of specific educational harm during the 2010-11 school year. Petitioners seek only prospective relief in the form of ordering an IEP meeting to revise the IEP to include at least five hours of pull-out instruction. To award such relief, it is not necessary to find a denial of FAPE prior to the 2011-12 school year.

<sup>8</sup> *See* 34 C.F.R. 300.324 (b) (i) (each public agency must ensure that IEP team reviews child’s IEP “periodically, but not less than annually”); *see also id.* 300.320, 323 (agency required to have an IEP that meets child’s educational needs in effect at beginning of each school year).

## VI. ORDER

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

1. Within **30 calendar days** of this Order (*i.e.*, by **December 3, 2011**), DCPS shall convene a meeting of the Student's MDT/IEP Team with all necessary members, including at least one Parent and the Student's Special Education Teacher and a General Education Teacher, to review and revise the Student's IEP dated March 29, 2011, consistent with this HOD.
2. Specifically, at the meeting convened pursuant to paragraph 1 of this Order, DCPS shall:
  - (a) Revise the "Special Education and Related Services" section of the IEP to provide for Specialized Instruction of at least five (5) hours per week in an Outside General Education setting to address the Student's needs in Reading, in addition to at least five (5) hours per week in a General Education setting;
  - (b) Revise the Least Restrictive Environment (LRE) section to provide an appropriate justification for removing the Student from General Education for up to five (5) hours of specialized instruction in his pull-out setting (*e.g.*, that he requires small group and individual interventions to address his severe reading deficits); and
  - (c) Review and revise, as appropriate, any other portions of the IEP based on all updated information regarding the Student's educational needs and performance at Current School, including but not limited to his IEP progress reports, academic report cards, and other teacher and parent input.
3. Petitioners' other requests for relief in the Due Process Complaint filed September 7, 2011 are hereby **DENIED**; and
4. This case shall be, and hereby is, **CLOSED**.



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Impartial Hearing Officer

Dated: November 3, 2011

### NOTICE OF RIGHT TO APPEAL

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