

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

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

[STUDENT],¹
through the Parent/Guardian,*

Petitioner,

v

DCPS,

Respondent.

Date Issued: 2/11/11

Hearing Officer: Seymour DuBow

Case No:

Hearing Date: 2/3/11 Room: 2009

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

The student is a -year-old male who is currently attending

He has been found eligible for special education and related services with the disability classification of Intellectual Disability (formerly known as Mental Retardation). On December 10, 2010 counsel for the petitioner filed a due process complaint alleging the following issues: 1. That DCPS denied a Free Appropriate Public Education (FAPE) to the student by failing to develop an appropriate IEP on October 8, 2009 and February 1, 2010 in failing to provide sufficient specialized instruction and behavioral support in light of the student's severe disability, failing to provide measurable goals and setting goals too high for the student to achieve in math, reading, and written expression, and failing to have current levels of performance that provide accurate baselines and in the current IEP of October 6, 2010 still

¹ Personal identification information is provided in Appendix A.

failing to provide sufficient hours to meet the student's needs, setting IEP goals too high for the student to achieve and failing to provide measurable transition/vocational goals; 2. DCPS denied a FAPE in failing to provide Extended School Year (ESY) services for the 2009-2010 school year; 3. DCPS denied a FAPE in not providing an appropriate placement at _____ for the 2009-2010 and 2010-2011 School Years; 4. DCPS failed to implement the student's IEPs for the 2009-2010 School Year; 5. DCPS failed to provide current evaluations. On December 23, 2010 counsel for the respondent DCPS filed a Response denying the above allegations. On December 29, 2010 a resolution meeting was convened and the parties failed to reach an agreement. The forty-five day time line began to run on December 30, 2010 and the HOD is due February 13, 2011. On January 10, 2011 a pre-hearing conference was held by telephone with counsel for the petitioner Alana Hecht and counsel for the respondent DCPS Cheri Cooley. A pre-hearing Order was issued on January 11, 2011. The Order stated that the above five issues were to be addressed at the due process hearing.

The due process hearing convened at 9 a.m. on February 3, 2011 in Room 2009 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Alana Hecht represented the petitioner and Cheri Cooley represented the respondent DCPS at the hearing. The hearing was closed. At the outset of the hearing, both the petitioner's documents P-1-27 and respondent's documents DCPS-1-13 were admitted into evidence without objection. All witnesses were sworn under oath prior to testifying. Counsel for petitioner called as witnesses the mother and the educational advocate who testified in person and Dr. Sharon Lennon of Newlen Educational Services and _____ of _____ who testified by telephone. Counsel for respondent did not call any witnesses.

JURISDICTION

The hearing was convened on February 3, 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 been found eligible for special education and related services. The student has a disability classification of Intellectual Disability (formerly Mental Retardation). The student has been in a full-inclusion program in the general education setting at _____ for the 2009-2010 School Year and the beginning of the 2010-2011 School year until his IEP was changed on October 6, 2010 to 19.5 hours per week of specialized instruction outside of general education. The student failed all his classes in the 2009-2010 School Year. He has received poor grades the first advisory of this school year. The student has extensive attendance issues with numerous unexcused absences. He is frequently at school, but not attending classes. Petitioner has filed this due process complaint alleging that DCPS has denied the student a FAPE in failing to provide appropriate IEPs for the 2009-2010 and 2010-2011 School Years. The petitioner also claims that DCPS failed to provide ESY for the student for the 2010 summer. The petitioner further claims that _____ has been and is an inappropriate placement for the student. The petitioner also alleges DCPS failed to implement the student's IEPs in the 2009-2010 School Year. Finally, the petitioner claims that DCPS failed to provide current evaluations.

ISSUES AND RELIEF SOUGHT

The issues to be determined are as follows:

1. **Did DCPS deny a FAPE to the student by failing to develop appropriate IEPs on October 8, 2009 and February 1, 2010 in failing to provide sufficient specialized instruction and behavioral support in light of the student's severe disability, failing to provide measurable goals and setting goals too high for the student to achieve in math, reading, and written expression, and failing to have current levels of performance that provide accurate baselines and in the current IEP of October 6, 2010 still failing to provide sufficient hours to meet the student's needs, setting IEP goals too high for the student to achieve and failing to provide measurable transition/vocational goals?**
2. **Did DCPS deny a FAPE to the student in failing to provide Extended School Year (ESY) services for the 2009-2010 school year?**
3. **Did DCPS deny a FAPE in not providing an appropriate placement at
for the 2009-2010 and 2010-2011 School Years?**
4. **Did DCPS fail to implement the student's IEPs for the 2009-2010 School Year?**
5. **Did DCPS fail to provide current evaluations?**

**Counsel for the petitioner is seeking as relief placement of the student at
compensatory education, and funding of independent evaluations.**

4. Both the October 8, 2009 IEP and the February 1, 2010 IEP have identical goals in reading, math and writing skills. The goals are to demonstrate one year's growth in reading, math and writing skills with 80% accuracy. (P-19, P-16)
5. The October 6, 2010 IEP contains present levels of educational performance based on his Woodcock Johnson III test scores administered on November 14, 2009. (P-8, R-3, P-18)
6. The October 6, 2010 IEP calls for 19.5 hours of specialized instruction per week outside of general education and 30 minutes per week of behavioral support outside of general education. (P-8 at p.6, R-3 at p.5)
7. The October 6, 2010 IEP annual goal on reading states the student will be given high interest grade books with low readability and the student will analyze the main idea in passages, compare and contrast, determine cause and effect, describe the plot, characters, and setting with 80% accuracy within 8 of 10 trials. (P-8 at p.4, R-3 at p.3)

The IEP states under area of concern: "Based on his Woodcock Johnson III scores, his reading skills are way below average. His reading score has an age equivalency of 6-11 and a grade equivalency of 1.6. He is currently reading in the first grade level, his letter word identification's age equivalency is 6-11, grade equivalency of 1.6. His reading fluency is less than kindergarten and his spelling scores falls in the 1.4 level. His comprehension is the same level as his spelling." (P-8 at p.3, R-3 at p.2) Based on his W-J III test scores, the reading goal is set too high for the student to achieve. The second annual goal in math is that the student will solve everyday grade math problems including fractions, ratios and percentages by applying his knowledge and skills on the basic math operations with 80% accuracy within 10

months. The W-J III test scores, however, show that the student's math skills are on the fourth grade level. (P-8 at p.3 and R-3 at p.2) This annual goal is set too high for the student to achieve. Based on the W-J III test results, the annual writing goal of using 9th grade word list to write a short summary of a selection, story, idea or feeling with complete details with 80% accuracy is also set too high for the student to achieve. The IEP includes the W-J III test results stating that the student is writing on the first grade level and his writing fluency is on the kindergarten level. (P-8 at p.4)

8. The October 8, 2009, February 1, 2010 and October 6, 2010 IEPs all have the identical Post-Secondary Transition Plan that states that upon graduation, he will enroll in a vocational or trade school for post-secondary education and training and will work part-time or full-time in a company that he is interested in depending on his skills acquired in high school and seek full-time competitive employment. (P-19 at p.10, P-16 at p.9, P-8 at p.11, R-3 at p.10, R-4 at p.9) The Post-Secondary Transition Plan does not identify specific fields of employment. The Plan does not indicate the student's preferences or interests. The Plan's goal to seek competitive employment does not take into account the student's extremely low functioning and is not based on the student's individual needs.

II. This hearing officer's Findings of Fact as to the second issue of not providing ESY for the summer of 2010 are as follows:

1. Both the IEPs of October 8, 2009 and February 1, 2010 do not provide for ESY services. Both of these IEPs are blank on the rationale for denying services. (P-16 at p.8 and P-19 at p.9)

III. This hearing officer's Findings of Fact as to the third issue of whether

was an appropriate placement for the 2009-2010 School Year and the 2010-2011 School Year are as follows:

1. During the 2009-2010 School Year the student attended _____ The student's IEPs for the 2009-2010 School Year called for five hours of specialized instruction outside of general education and five hours of specialized instruction in general education. The student received all his specialized instruction in a full-inclusion program in the general education setting. (P17 at p.5)
2. The student failed all his classes for the 2009-2010 School Year. (P-12 at p.2)
3. The student had numerous unexcused absences in the 2009-2010 School Year. (P-14)
The student will be in the building, but not attend classes. His October 6, 2010 IEP states: "He has difficulty remaining focused in the classroom and is found in the hallway most of the time. He also has a chronic attendance problem." (P-8 at p.5) He told his mother that he does not attend classes because they are too large and he cannot read. (Testimony of Mother)
4. The student attended _____ for the 2010-2011 School Year. His October 6, 2010 IEP called for 19.5 hours per week of specialized instruction outside of general education. (P-8)
5. The student is repeating the _____ grade. The student received grades of a D in reading resource, a D in Library and Study Skills and a B in math resource for the first advisory in the 2010-2011 School Year. The resource classes are self-contained special education classes.(P-12)

6. As of January 18, 2011, the student only attended 18.5 days out of 83 school days in the 2010-2011 School Year. For his individual classes he had 16 excused absences and 267 unexcused absences and 24 times being late. (R-7)

7. _____ is a large public high school with several hundred students per grade level. (Testimony of educational advocate)

8. The student has been accepted at _____ a non-public full-time year round day special education program in the District of Columbia. _____ offers small class size with a 6:1 ratio of students to teachers. Every class is taught by a special education teacher certified both in special education and subject area.

_____ follows DCPS's curriculum. _____ also serves Intellectually Disabled (ID) students.

_____ offers career focus and transition to work with four academies- culinary, vocational/building, art/technology and cosmetology and barbering. This student would be assigned to the class with ID students where there are currently five students. He would stay primarily with this class, but would go to another class with higher functioning students for math since he has some strength in math. There are four clinical social workers for the high school program who provide individual and group counseling. (Testimony of _____ of _____)

IV. This hearing officer's Finding of Fact as to the fourth issue of whether the 2009-2010 IEP was implemented is as follows:

1. The student's IEPs for the 2009-2010 School Year called for five hours per week of specialized instruction in general education and five hours per week of specialized instruction outside of general education. _____ has a full inclusion program and

the student was provided all his specialized instruction in a general education class.

(P-17 at p.5)

V. This hearing officer's Findings of Fact as to the fifth issue of whether DCPS failed to provide current evaluations are as follows:

1. DCPS did a psycho-educational evaluation on the student in December 2003, a speech language evaluation in November 2003 and an educational evaluation in November 2003. (P-20-22) The speech and language evaluation of 2003 found the student's overall language ability in the below average range and found severe overall language delay when compared to children his age. (P-21 at p.3)
2. DCPS did a Woodcock-Johnson III Tests of Achievement on November 4, 2009. (P-18, R-5) The W-J III test results are referenced in the October 6, 2010 IEP and are reported in Findings of Fact I. #7.
3. An independent educational evaluation was done in January 4, 2011. (P-3) The independent educational evaluation administered the Wechsler Individual Achievement Test-Second Edition (WIAT-II). The student was assessed in Reading, Mathematics and Written Language. The student in overall reading displayed extremely low skills with a standard score of 40 and the same score of 40 on the word reading subtest; grade equivalent= 1.8 In overall mathematics he also showed extremely low skills with a standard score of 47. On Math reasoning his standard score was 56; grade equivalent=4.0. In overall written language he again showed extremely low skills with a standard score of 46. On the subtest on written expression his standard score was 57; grade equivalent=2.6. The independent educational evaluation's academic achievement testing found extremely low scores in all areas

without any significant strengths. (P-3 at p.2-3) The independent educational evaluation recommended a current Cognitive Evaluation to determine his level of functioning and a clinical evaluation to determine his social-emotional functioning. (P-3 at p.3)

CONCLUSIONS OF LAW/DISCUSSION

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 are as follows:

The first issue to be addressed is whether the October 8, 2009, February 1, 2010 and October 6, 2010 IEPs are appropriate under IDEA. The Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) set out two questions for a court or hearing officer to analyze (1) whether the IEPs for this student were procedurally deficient and (2) "is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-207 Counsel for petitioner has raised several procedural defects with the above IEPs. However, "procedural flaws do not automatically render an IEP legally defective." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc). Rather, "an IDEA claim is viable only if ...procedural violations affected the student's substantive rights." *Lesesne ex rel. B.F. v. District of Columbia*, 447 F. 3d 828, 834 (D.C.Cir. 2006). "Before an IEP is set aside, there must be some rational basis to believe the procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of education benefits." *Roland M.* 910 F.2d at 994. Cited with approval in *N.S., by his parents, Bruce and Susan Stein v. D.C.*, Civil Action No. 09-621, (May 4, 2010)

Findings of Fact I. #2 shows that the October 8, 2009 and February 1, 2010 IEPs did not have present levels of performance level as required by *IDEA* at 20 USC 1414 (d)(1)(A)(i)(I) and 34 C.F.R. 300.320 (a)(1), but instead relied on an outdated 2003 psycho-educational evaluation. Present levels of performance are the baseline by which the MDT/ IEP team establishes goals and objectives and assesses the student's progress toward meeting those goals. These IEPs were therefore not providing the accurate current baseline to develop an appropriate IEP for this student. This procedural defect is severe enough to result in a denial of a FAPE. See *Evans v. Bd. of Ed. of Rhinebeck Cent. Sch. Dist.*, 930 F. Supp. 83 (S.D.N.Y. 1996); *Pocatello School District*, 18 IDELR 83 (SEA ID 1991) and *Larson by Larson v. Independent School District No. 361*, 40 IDELR 231 (D. Minn. 2004) finding violations of a FAPE for failure to have current levels of performance. Without current accurate levels of performance, the goals developed in those IEPs cannot be determined to be appropriate. The IEPs state the student will make one year's progress, but it is impossible to know what one year's progress is when you do not have a current baseline to measure progress.

As Findings of Fact I. #7 shows, the goals for the student in reading and math in the October 6, 2010 are set too high for him to achieve in light of his severe low functioning. An IEP that expects a student who is reading at the first grade level to understand grade books and perform grade reading tasks and for a student at the fourth grade math level to perform grade math work is a recipe for failure.

The identical post-secondary transitional plans in all the above challenged IEPs are seriously deficient. As this hearing officer has found in Findings of Fact I. #8, the plan is not based on the student's individual needs taking into account his strengths, preferences and interests as is required by *IDEA* at 20 U.S.C. Section 1401 (34) and 34 C.F.R. Section 300.43.

All of the above procedural defects in these IEPs seriously affect the student's substantive rights and deny him a FAPE. See *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F. Supp. 2d 152, 163-164 (D.D.C. 2005) ("Given the importance of the IDEA's procedural safeguards, it should be of no surprise that when a school district or other state agency violates 'the procedural requirements of the Act by failing to develop an IEP in the manner specified, the purposes of the Act are not served, and the district may have failed to provide a FAPE.'" (quoting *W.G. v. Bd. of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479, 1485 (9th Cir. 1992)). The above quote was cited with approval in *N.S., by his parents Bruce and Susan Stein v. D.C.*, *Id.* that found a denial of a FAPE because of several procedural defects in the IEP.

The second question to answer "is the individualized education 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 (6th Cir. 1989); *Fort Zumwalt School District v. Clynes*, 26 IDELR 172 (8th Cir. 1991); *Roland M. v. Concord School Comm'n*, 16 IDELR 1129 (1st Cir. 1991) and *Hall v. Vance County Board of Education*, 557 IDELR 155 (4th 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 significant learning and "meaningful benefit." See also *A.I. ex rel. 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 IEPs of October 8, 2009 and February 1, 2010 provide for five hours of specialized instruction in general education and five hours outside of general education. The student has been classified as Intellectually Disabled. The student’s 2003 test scores on the WISC-III showed he had very low cognitive ability and his achievement scores on the WIAT were well below average. (Findings of Fact I. # 2). The student failed all his classes for the 2009-2010 School Year. (P-12 at p.2) (Findings of Fact III. #2) The number of hours of specialized instruction in the October 8, 2009 IEP and February 1, 2010 IEP were insufficient to address his needs in light of his low cognitive ability, well below average achievement scores and failing grades. As pointed out above, the October 2009 and February 2010 IEPS did not have present levels of performance and were relying on the old 2003 psycho-educational evaluation test scores. Without current accurate levels of performance, the goals developed in those IEPs cannot be determined to be appropriate. The IEPs state the student will make one year’s progress, but it is impossible to know what one year’s progress is when you do not have a current baseline to measure progress. These IEPS were not reasonably calculated to provide meaningful educational benefit.

The October 6, 2010 IEP sets out goals that are too high for this student to achieve. As Findings of Fact I. #7 finds, the IEP is expecting the student to do many aspects of grade work when that IEP recognizes based on the W-J III Achievement test results of November 4, 2009, that he is performing in reading and written expression at the first grade level and in math at the fourth grade level.

The October 6, 2010 also calls for 19.5 hours of specialized instruction per week outside of general education and 30 minutes per week of behavioral support outside of general education. This is an improvement on his previous IEPs, but in light of the student's serious academic deficits, these hours are still insufficient to meet his unique needs. This hearing officer concludes that both the goals set and the hours provided in the October 6, 2010 IEP are not reasonably calculated to provide educational benefit and meet his unique needs.

The second issue to be addressed is whether DCPS denied a FAPE to the student by failing to provide ESY during the summer of 2010. As Finding of Fact II. #1 found, DCPS denied ESY services but did not state a rationale for their decision. *IDEA* requires at 300.106 (2) that ESY "must be provided only if a child's IEP Team determines, on an individual basis...that the services are necessary for the provision of FAPE to the child." The failure to indicate any rationale for the denial of ESY in the IEPs demonstrates that DCPS did not comply with the above *IDEA* requirement to make the decision on an individual basis. The District of Columbia's 2007-2008 Guidelines for Extended School Year sets out several categories for determining if a student is eligible for ESY (Due Process Complaint at p.12), but there is no rationale set out in the IEP indicating consideration of any of these categories.

The third issue to be addressed is whether _____ was an appropriate placement for the 2009-2010 School Year and the 2010-2011 School Year. A guiding principle in determining whether a placement is appropriate is provided in the U.S. Department of Education interpretative guidelines to the 1999 Regulations 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* For the last two years this student has attended his neighborhood high school, Roosevelt S.H.S.. Until

his October 6, 2010 IEP, the student was in a full inclusion program. He failed all his classes in the 2009-2010 School Year. This school year he has received Ds in two of his classes and a B in his math resource class for the first advisory of this school year. is a large

public high school with several hundred students per grade level. (Findings of Fact III. #7)

When the student goes to school, he frequently does not go to class and is found in the hallways.

His reason for not going to class is that the classes are too large and he cannot read. (Findings of

Fact III. #3) The student is in the ninth grade for the second year and is expected to do ninth grade work with modifications, but is functioning on a first grade reading and writing level.

After the October 6, 2010 IEP changed his program to 19.5 hours of specialized instruction outside of general education, the student has done better in math in a resource room, but is still receiving low grades in his other courses. He has made little educational progress at Roosevelt S.H.S..

The petitioner has met the first prong of the *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) test that DCPS has not provided a FAPE to the student through its placement of the student at Roosevelt S.H.S.. Once a court or hearing officer finds that the public school district has failed to offer a FAPE, the court or hearing officer is authorized to “grant such relief as the court determines is appropriate.” 20 U.S.C. Section 1415 (i)(2)(C)(iii). “Under this provision equitable considerations are relevant in fashioning relief, and the Court enjoys broad discretion in so doing.” *Carter*, 510 U.S. at 16

The petitioner has requested as relief placement of the student at
The second prong of the *Burlington* and *Carter* test and the *IDEA Regulation* at 34 C.F.R. 300.148 (c) is that the private placement must be appropriate. Based on the description of the

program by _____ of the _____ at the hearing, it is the conclusion of this hearing officer that _____ is an appropriate placement for the student that will meet his unique needs and provide educational benefit. (See Findings of Fact III.#8).

_____ program serves students with severe cognitive deficits such as this student. _____ offers a full-time special education program taught by certified special education teachers in a small setting with a student to teacher ratio of 6:1. _____ also provided counseling services by four clinical social workers in the high school. _____ offers career focus and transition to work with four academies- culinary, vocational/building, art/technology and cosmetology and barbering. _____ can address his severe deficits and provide him with an opportunity for educational success.

The fourth issue to be addressed is whether the October 8, 2009 and February 1, 2010 IEPs were implemented. This hearing officer has found in Findings of Fact IV. #1, that the student's IEPs for the 2009-2010 School Year called for five hours per week of specialized instruction in general education and five hours per week of specialized instruction outside of general education. _____ has a full inclusion program and the student was provided all his specialized instruction in a general education class. (P-17 at p.5) This hearing officer concludes that the above IEPs were not implemented.

The fifth issue to be addressed is whether DCPS failed to provide current evaluations. Based on Findings of Fact V.#1-#3, this hearing officer has found that DCPS has not done a speech and language evaluation since 2003 even though that evaluation stated he had severe language deficits. DCPS did not do an educational evaluation from 2003 until the Woodcock-Johnson III Achievement Test in November 2009. DCPS has still not done any cognitive tests since 2003. DCPS failed to follow *IDEA's* requirement at 300.303 (b)(2) that a reevaluation

“must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.”

In addition to placement at _____ petitioner has requested as relief compensatory education. Counsel for petitioner has presented a compensatory education plan developed by Dr. Sharon Lennon. Dr. Sharon Lennon’s written plan calls for 200 hours of academic tutoring. This 200 hour figure is derived according to her plan from the five hours per week of specialized instruction outside of special education that were not provided in the 2009-2010 school year at five hours per week for 40 weeks of school. The plan also requests 75 additional hours of academic tutoring and 40 hours of behavioral support. Finally the plan requests full tuition for a ten week vocational training program. (P-1) Dr. Lennon’s testimony was that she developed her plan based on a review of the documents, but did not interview the student or parent, did not visit his school, and did not talk to his teachers. (Testimony of Dr. Lennon)

This Circuit in *Reid by Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005) has joined other circuit courts of appeal in recognizing compensatory education as an available remedy under IDEA. The Court stated that an award of compensatory education is an equitable remedy that “should aim to place the disabled children in the same position they would have occupied but for the school district’s violation of IDEA.” *Reid*, 401 F.3d at 518. The Court in *Reid* rejected an hour of compensatory instruction for each hour that a FAPE was denied as a “cookie-cutter approach” and instead required an individually tailored approach to meet the student’s unique needs. *Reid*, 401 F.3d at 523.

The starting point in calculating a compensatory education award is when the period of denial of a FAPE begins. Counsel for the petitioner is requesting compensatory education for the

denials of FAPE beginning in the 2009-2010 School Year and through the current 2010-2011 School Year which is within the two year statute of limitations. *20 U.S.C. Section 1415 (f)(3)(C)*

When a parent has presented evidence that the student has been denied a FAPE as has been found in this case, the parent has met her burden of proving that the student may be entitled to compensatory education. *Mary McLeod Bethune Day Acad. Pub. Charter Sch v. Bland*, 534 F. Supp. 2d 109 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010) The parent, however, has the burden of “propos[ing] a well-articulated plan that reflects [the student’s] current education abilities and needs and is supported by the record.” *Phillips v. District of Columbia*, 55 IDELR 101 (D.D.C. 2010) quoting *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt (Nesbitt II)*, 583 F. Supp. 2d 169 (D.D.C. 2008)

The petitioner’s compensatory education plan submitted into evidence mainly requests hour for hour compensation for a denial of FAPE that was rejected in *Reid* as a “cookie cutter approach”. The plan does not reflect the student’s current education abilities and needs supported by the record.

In crafting a compensatory education award consistent with *Reid*, federal courts in the District of Columbia have looked to a record that includes the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services requested, and the student’s current educational abilities. *Branham v. District of Columbia*, 427 F.3d 7, 44 IDELR 149 (D.C.Cir. 2005) See also *Mary McLeod Bethune Day Acad. Pub. Charter Sch.*, 555 F. Supp. 2d 130, 50 IDELR 134 (D.D.C. 2008). The record in this case shows that the student has been classified as Intellectually Disabled (formerly Mental Retardation). (Findings of Fact I. #1) The 2003 psycho-educational evaluation found the student with an overall I.Q. of 57 and a verbal IQ of 71 showing extremely low cognitive abilities.

(Findings of Fact I. #2) The Woodcock-Johnson III achievement scores of the student in November 2009, when he was in the ninth grade at _____ demonstrated he was performing very poorly in all academic areas. He was at the first grade level in reading and written expression and the fourth grade level in mathematics. (Findings of Fact I.#7) The recent independent educational evaluation conducted on the student on January 11, 2011 is consistent with the W-J III Achievement scores in November 2009. The independent evaluator administered the WIAT-II achievement test and found the student performed extremely low in reading, mathematics and written language. The test scores showed the student at first grade level on reading, fourth grade level in math and second grade level in written language.

(Findings of Fact V. #3) The student is seventeen-years old and repeating the _____ grade at _____

The student had been for the entire 2009-2010 School Year and until October 6, 2010 this school year in a full-inclusion program in large classes at a large high school. He failed all his classes in 2009-2010. In the limited time the student has been in a resource room in math, an area he has more strengths than either reading or written language, he received a B. This indicates to this hearing officer that with a low student to teacher ratio in a special education classroom he can make progress. The provision of individual tutoring and summer school or the year round services at _____ can help raise him to where he should have been if DCPS would have provided him a FAPE in the first place. *Reid*, 401 F. 3d at 524 . In light of the student's low cognitive abilities and low achievement scores in the record, it is difficult to arrive at a precise calculation of compensatory education that should be awarded. This hearing officer will award compensatory education to the student in the form of summer school or participation in the year round program at _____ so that he retains skills learned during the school year and builds on

them. The student will also be awarded compensatory education in the form of independent individual tutoring in reading and written language that is coordinated with the staff at RCA.

Compensatory education is an equitable remedy and as the old legal maxim says in order to receive equity one must do equity. *Reid* recognized that the conduct of both parties may be considered in setting a compensatory education award. *Reid*, 401 F. 3d at 524. In this case, the student has had serious attendance issues. (Findings of Fact III. #3) Counsel for DCPS argues that the student has not made himself available for educational opportunities offered by DCPS. This hearing officer understands that part of the failure of the student to attend is that the educational program is at the grade level and he is very low functioning and it impacts his motivation to attend, as Dr. Wilder pointed out in his recent educational evaluation. (P3-p.3) The extensive amount of absences, however, also indicates a lack of willingness on the part of the student to even try to learn and is a factor to be considered in determining the amount of compensatory education.

ORDER

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

DCPS will fund and place the student at in Washington, D.C. including transportation costs within ten business days of the issuance of this Hearing Officer's Determination for the 2010-2011 School Year with "stay put" protections.

The student is awarded compensatory education in the form of summer school or participation in the year round program at for the summer of 2011 including transportation costs. The student is also awarded compensatory education in the form of independent individual tutoring in the areas of reading and written language that

is coordinated with the student's teachers at

The number of hours

of individual tutoring is five hours a week for twenty weeks.

DCPS will fund an independent speech and language evaluation.

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: 2/11/11

Seymour DuBow /s/

Hearing Officer