

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

Student Hearing Office
810 First Street, N.E., 2nd floor
Washington, D.C. 20002

STUDENT, a minor, by and through
her Parent¹

Petitioner,
v

Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

2011 DEC 22 AM 8:51
OSSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE

On October 7, 2011 Parent, on behalf of her child (“Student”), filed an Administrative Due Process Complaint Notice (“Complaint”), HO 1,² requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education (“FAPE”) to Student by District of Columbia Public Schools (“DCPS”) under the Individuals with Disabilities Education Act, as amended (“IDEA”).³ 20 U.S.C.A. §1415(f)(1)(A) (Supp. 2010). Respondent filed a Response to Parent’s Administrative Due Process Complaint Notice

¹ Personal identifying information is provided in Appendix A, attached hereto.

² Hearing Officer Exhibits will be referred to as “HO” followed by the exhibit number; Petitioner’s Exhibits will be referred to as “P” followed by the exhibit number; and Respondent’s Exhibits will be referred to as “R” followed by the exhibit number.

³ Petitioner’s Complaint was faxed to the District of Columbia, Office of the State Superintendent of Education, Student Hearing Officer at approximately 4:30 PM on October 7, 2011. Due to the late afternoon time, the Complaint was not physically received and filed into the record until October 11, 2011. The Hearing Officer Determination due date was calculated from October 11, 2011 rather than October 7, 2011. On December 6, 2011, I realized the date on the Complaint and the filing date were not the same. I then confirmed Respondent had received the Complaint on October 7, 2011 thereby making October 7, 2011 the official date of filing. I issued an Order, on December 9, 2011, correcting the filing date to October 7, 2011. HO 12.

(HO 4) on October 18, 2011. A resolution meeting was held on October 18, 2011. The parties were not able to reach an agreement and executed a Resolution Period Disposition Form on the same date so indicating. HO 5. The 45 day timeline began to run on November 7, 2011, and my Hearing Officer Determination is due on December 21, 2011.

I held a telephone prehearing conference on November 14, 2011. HO 8. By agreement of the parties, the hearing was scheduled for December 16, 2011. The hearing was held as scheduled in Room 2006 of the Student Hearing Office.

Respondent filed DCPS' Motion to Dismiss Petitioner's Administrative Due Process Complaint on the record as a preliminary matter at the opening of the hearing on December 16, 2011. I heard argument and took the Motion under advisement. I stated I would address the Motion in the instant Hearing Officer Determination ("HOD"). Petitioner agreed to an accelerated briefing schedule to assure the HOD would be filed on a timely basis. Petitioner's response was due by midnight on December 19, 2011 and was filed timely on December 18, 2011. Respondent's counsel was to file a Reply, if he so chose, by noon on December 20, 2011. I also stated that I would assume Respondent was choosing not to file a reply if one was not received by noon on December 20, 2011. No reply was received.

Prior to closing arguments, Petitioner's counsel referred to the pending appeal of the HOD of January 20, 2011 (HO 9) which underlies the claims in the instant matter. Respondent's Counsel immediately moved for a dismissal due to the appeal. I denied the request, noting that I had requested information from counsel during the prehearing conference regarding the status of

the appeal and received no information. I further stated that the appeal alone did not stay the implementation of the January 20, 2011 HOD.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2010); and the District of Columbia Municipal Regulations, Title 5e, Chapter 30, Education of Handicapped (2003).

ISSUES

The issues are:

Whether DCPS denied Student a free, appropriate public education ("FAPE") by failing to comply with the Hearing Officer Determination dated January 20, 2011, specifically:

- a) *DCPS did not revise Student's individualized education program ("IEP") to include the requirements ordered by the January 20, 2011 HOD. A meeting was held on or about February 1, 2011, but the IEP developed did not include all the hours of special instruction and/or support required by the HOD, and the IEP did not indicate the hours that were to be provided on a one on one basis. DCPS indicated it would make revisions to the IEP following the meeting, but these revisions were not made;*
- b) *DCPS has not assured the dedicated aide provided to Student in the 2010 – 2011 and 2011-2012 school years provided the academic support services required. The aide did not sit with Student and did not assist Student in turning in his assignments;*
- c) *DCPS has not assured Student received 1 on 1 inclusion support for 2.5 hours per week in reading and 2.5 hours per week in mathematics from a certified special education teacher in the 2010 – 2011 and the 2011 – 2012 school years;*
- d) *DCPS has not provided a dedicated aide qualified in mathematics and reading for the 2011 – 2012 school year;*
- e) *During the 2011 – 2012 school year the dedicated aide has been working with Student in and science and mathematics. The aide is not working with Student in reading as required by the January 20, 2011 HOD; and*
- f) *DCPS has not assured Student received 15 hours of specialized instruction in a combination inclusion/pull-out program in the 2011-2012 school year.*

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are⁴:

- P-1 Acceptance Letter to December 2, 2011
- P-3 Documents Related to Attempted Observation, November 2011
- P-4 Advocate's Follow Up Letter From October 3, 2011 Meeting, October 7, 2011
- P-5 Advocate's MDT Meeting Notes, October 3, 2011
- P-6 Progress Reports, 2011-2012 School Year
- P-7 Progress Reports, 2010-2012 School Year
- P-8 Email Communications regarding Jonathan's School Work and Progress, October 2010 to December 2011
- P-10 HOD, January 18, 2011
- P-11 IEP, February 1, 2011⁵
- P-12 Advocate's and DCPS' Notes from IEP Meeting, February 1, 2011
- P-13 IEP, August 18, 2010
- P-14 Advocate's and DCPS' Notes from IEP Meeting, August 18, 2010
- P-16 Review of Evaluations, March 15, 2010
- P-17 Psychological Evaluation, March 15, 2010
- P-18 Occupational Therapy Evaluation, February 12, 2010

Exhibits admitted on behalf of Respondent are:⁶

- | | | |
|------|-----------------------------------|------------------|
| R-1 | Authorization of Comp Ed Services | Date: 02/04/2011 |
| R-4 | Report Card | Date: 06/20/2011 |
| R-5 | Report Card | Date: 10/28/2011 |
| R-6 | Report Card | Date: 12/06/2011 |
| R-7 | IEP Progress Report | Date: 06/02/2011 |
| R-8 | IEP Progress Report | Date: 11/01/2011 |
| R-9 | Meeting Notes | Date: 10/18/2011 |
| R-10 | Read 180 Reports | Date: various |
| R-11 | Work Samples | Date: various |
| R-12 | Daily Summaries | Date: various |

Exhibits admitted by the Hearing Officer are:⁷

Administrative Due Process Complaint Notice dated October 7, 2011; Rec'd October
2011

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⁴ Petitioner's exhibits 2, 9 and 15 were withdrawn at hearing.

⁵ The IEP developed on February 1, 2011 is incorrectly dated. The parties stipulated the IEP dated February 1, 2010 is the IEP developed on February 1, 2011.

⁶ Respondent's exhibits 2 and 3 were withdrawn at hearing.

⁷ Hearing Officer Exhibits 12 - 14 were filed subsequent to the filing of the list of proposed hearing officer exhibits and therefore were not included on the list. They are added here to complete the record.

- 2 Notice of Hearing Officer Appointment dated October 13, 2011
- 3 Prehearing Conference Scheduling Letter and Timeline Order of October 15, 2011
- 4 DCPS Response, dated October 18, 2011 to Administrative Due Process Complaint
- 5 Resolution Period Disposition Form executed October 18, 2011
- 6 Prehearing Conference Notice dated October 23, 2011
- 7 Prehearing Conference Order dated November 16, 2011
- 8 Prehearing Conference Order, Amended dated November 18, 2011
- 9 Prior HOD dated January 20, 2011
- 10 Miscellaneous emails
- 11 Proposed Hearing Officer Exhibit list of December 6, 2011
- 12 Order of December 8, 2011 Adjusting the Hearing Officer Determination Due Date
- 13 DCPS' Motion to Dismiss Petitioner's Administrative Due Process Complaint of 12/16/11
- 14 Petitioner's Opposition to Motion to Dismiss

B. Testimony

Petitioner testified and presented the following witnesses:

- Student
- Tutor, Educational Services
- Chithalina Khanchalern, Educational Advocate, Brown & Associates
- Associate Head of School, School

DCPS presented the following witnesses:

- Case Manager, Teacher,
- Special Education Teacher,
- Special Education Teacher,
- Special Education Coordinator,

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:

1. Student is a _____ year old, _____ grade student at _____ School. (“Hobson”). He is classified under IDEA as a student with multiple disabilities due to having Attention Deficit Hyperactivity Disorder (“ADHD”) and Specific Learning Disabilities in reading and mathematics. Testimony of Petitioner; Testimony of HO 1; P 11; P 17.

2. Pursuant to a January 20, 2011 HOD Student is to receive 15 hours of special education instructional services per week. He also is to receive 4 hours of service from a dedicated aide each day⁸ and 154 hours of tutoring in reading and in mathematics. The services provided to Student are to be structured as follows:

- a) Support from a dedicated aide qualified in mathematics and reading for 4 hours a day. The aide is to work with both Student and Student’s’ teachers. The aide is to provide Student academic support in reading and mathematics in the classroom. The aide’s services were to be provided for the remainder of the 2010 -2011 school year and for the 2011- 2012 school year.;
- b) Two hours and thirty minutes per week of mathematics instruction and the same amount of reading instruction in the general education classroom by a special education teacher on a one on one basis;
- c) Two hours per day of specialized instruction outside the general education classroom by a special education teacher on a one on one basis. These specialized instruction services were to be provided for the remainder of 2010 – 2011 school year and for the 2011 -2012 school year;
- d) One hundred fifty hours of tutoring in reading and 150 hours of tutoring in mathematics after school.

⁸ These 4 hours of service by the aide also include time supporting student’s teachers as well as student.

P 10.

3. A multidisciplinary team ("MDT") meeting was held at Hobson on February 1, 2011 to develop an IEP to implement the January 20, 2011 HOD. The IEP developed on February 1st references the January 20, 2011 HOD and identifies the services, noted above in ¶ 2 of the Findings of Fact, to be provided to Student. A draft IEP was provided to Student's parents at this February 1 MDT meeting. Corrections were made to the draft IEP after the parents and their advocate reviewed it and made comments. A final version of the IEP then was printed at the meeting and provided to the parents who signed and dated the IEP. They also checked the box indicating their agreement with it. Thus the IEP with Petitioner's signature dated 2/1/11 is final. P 11; P 12.
4. Petitioner is actively involved in Student's education. She is aware of his educational needs. She provides him many supports both directly by working with him on his assignments and indirectly by communicating regularly with his teachers, reviewing his progress on Edline and arranging for extra educational support. Her efforts have helped Student get credit for work he has completed, have the opportunity to do make up work and supported him in gaining academic skills. Testimony of Petitioner; Testimony of Testimony of P 8; P 12.
5. DCPS provided Student a dedicated aide from February 2011 through the end of the 2010- 2011 school year. DCPS provided a different dedicated aide for the 2011 – 2012 school year. Both aides have provided services for four hours per day.
 - a) The aide provided for the second semester of the 2010 -2011 school year was certified in reading and mathematics. He sat at the back of the classroom, away from Student, and would help Student when Student raised his hand to ask for

assistance. Student continued to have difficulty turning in homework and completing and turning in classwork. Following a request from Petitioner, the aide began to sit next to Student. There was some improvement in Student's turning in assignments.

b) The aide provided for the 2011 – 2012 school year is an ex-music teacher. He is not certified in reading or mathematics. He too sat at the back of the classroom, away from student, at the beginning of school. Following a meeting on October 3, 2011 he began to sit next to Student. Student continues to have difficulty turning in homework and completing and turning in classwork.

Testimony of Student; Testimony of Petitioner; Testimony of _____ Testimony of
P 4; P 5; P 11; P 12.

6. Student's poor grades are not caused solely by his not turning in homework assignments. He also does not consistently complete in-class assignments, quizzes and tests.

Sometimes he does not turn in class. Student works slowly and is easily distracted.

Testimony of Student; Testimony of Petitioner; Testimony of _____ P 6; P 8;

7. In addition to the services provided by the dedicated aide in the 2011 – 2012 school year, Student receives educational support, for approximately 3 hours per day. He receives:

a) 4.33 hours of reading per week in Read 180;⁹

b) 4.25 hours of co-taught English per week; 4.25 hours of co-taught math per week, and

c) 2 hours of pull out service per week.

⁹ This class is identified as Reading Workshop on Student's schedule. of Read 180 in the testimony of Landers is the teacher of Reading Workshop.

who was identified as the teacher

This is a total of 14.83 hours per week. The educational supports are provided in different environments and take different approaches. Not all of these supports are special education. Testimony of Testimony of Testimony of Testimony of
of

8. Read 180 is not a special education class. It is a remedial, general education class.

Student also was in a Read 180 class in the 2010 -2011 school year. Testimony of
Testimony of R 4; R 5.

9. The two hours of pull out service is provided when other students are in the room.

Student is not pulled for two hours each day. The direct service provided to Student does not include the entire ten hours specified in the January 20, 2011 IEP each week.

Testimony of

10. Student's English and mathematics classes are co-taught. There is a special education

teacher who is assigned to each class. The special education teacher in each of these classes does not work with Student for two hours and thirty minutes on a one-on-one basis in the class each week. There are approximately 20 students total in each of these classes. Testimony of Student; Testimony of Testimony of

11. Each of Student's classes meets three times per week. Each class meets on Mondays for

45 minutes. The classes then meet two additional times each week for 1 hour and 45 minutes each time. At the beginning of the school year, the aide was providing Student support in history and mathematics for three days and in science and reading for three

days. Testimony of P3.

12. The Academy is private, special education school providing services to students in grades Pre –K to 12. Student has visited the school and been accepted.

Testimony of

13. Student has a tutor who meets with him after school two times a week. The tutor communicates with Student's teachers so he can coordinate the tutoring service with Student's school work. He began working with Student in the 2010-2011 school year and understands Student's academic needs. Testimony of

DISCUSSION

Motion to Dismiss

At the hearing, on December 16, 2011, Respondent made a motion, on the record, to dismiss this matter. See discussion *Supra* at p. 2. Respondent then filed, on the same date, *DCPS' Motion to Dismiss Petitioner's Administrative Due Process Complaint* ("Motion") arguing that under both the IDEA and under the Blackman/Jones Consent Decree I have limited jurisdiction that does not extend to the matter before me.

Under the Federal Rules of Civil Procedure, a Motion to Dismiss should be granted only when it can be shown beyond doubt that Petitioner can prove no set of facts under her pleadings for which relief can be granted. See Fed. R. Civ. P 12(b)(6); *Friendship Edison Public Charter School Collegiate Campus. v. Murphy*, 48 F. Supp. 2d 166, 169 (D.D.C. 2006) ("*Friendship*") citing, *Warren v. Dist. of Columbia*, 353 F.3d 36, 37 (D.C.Cir.2004); *Kingman Park*, 348 F.3d at 1040. While the Federal Rules of Civil Procedure are not binding in an IDEA due process hearing, it is well settled law that a complaint should not be dismissed unless it is likely the petitioner can prove no set of facts that would entitle her to relief. *Friendship*, 48 F. Supp. 2d

166, 169. In deciding a motion to dismiss, the petitioner's factual allegations, as well as mixed questions of law and fact are treated as true, and all reasonable inferences drawn are resolved in petitioner's favor. *Friendship* at 169 citing *Macharia v. United States*, 334 F.3d 61, 64, 67 (D.C.Cir.2003); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C.Cir.2003); *Browning*, 292 F.3d at 242. These standards are viewed particularly broadly in an IDEA due process hearing where the Federal Rules of Civil Procedure are not binding. "IDEA hearings are deliberately informal and intended to give [hearing officers] the flexibility they need to ensure that each side can fairly present its evidence." *Schaffer v. Weast*, 546 U.S. 49 (2005). For the reasons discussed below, this I conclude Respondent has failed to meet the minimal standards needed to prevail on a Motion to Dismiss, and the Motion is denied.

The argument that I lack jurisdiction under IDEA misconstrues the issues before me. In making this argument Respondent states Petitioner's due process complaint issues fail to raise any of the issues specified in 34 C.F.R. § 300.507(a)(1) as a basis for a due process hearing. *Motion* at p.2. Yet this is not the case. A parent or school district may initiate a due process hearing on matters relating to the identification, evaluation or educational placement of, or the provision of FAPE to, a child with a disability, 34 CFR § 300.507(a); *See also* D.C. Code § 3029.1. In the instant matter, Petitioner has alleged an on-going denial of FAPE resulting from Respondent's failure to comply with a January 20, 2011 HOD, and it is this alleged denial of FAPE, one of the issues identified in 34 CFR § 300.507(a), that I hear.

In reaching the determination that I do have jurisdiction under IDEA to hear this matter I note hearing officers have been found to have the authority to hear matters alleging the failure to comply with the terms of a settlement agreement insofar as the matter involves an alleged failure to supply a child with FAPE. *See, for example, Dukes v. Enterprise City Board of Education*, 273

F.Supp.2d 1252 (M.D. Ala. 2003). It is only logical that a hearing officer who has the authority to hear matters alleging the failure to comply with the terms of a settlement agreement insofar as the matter involves an alleged failure to supply a child with FAPE also has the authority to hear matters involving the failure to comply with a hearing officer determination to the extent this failure results in a denial of FAPE, and I am doing so in this matter.

Respondent's second argument, that the Blackman/Jones consent decree limits my jurisdiction, addresses a case in a different posture than the one before me. Respondent argues, in reference to the January 20, 2011 HOD underlying this matter, that once a written decision is issued it is a final decision, and with this I agree. I cannot, and do not, here address the decision made in the prior HOD. Rather the issue before me is one regarding whether there is a new and on-going denial of FAPE resulting from an alleged failure to implement the prior HOD. The Blackman/Jones consent decree does not limit my jurisdiction as to new matters. Blackman/Jones limits my authority to hear matters addressed by extant HODs. The instant matter, the issues before me occurred subsequent to the filing of the HOD on January 20, 2011 and involve on-going, current denials of FAPE.

For the forgoing reasons I deny Respondent's Motion and proceed to the substantive issues before me.

Substantive Matters

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. While I find all witness testimony presented in this matter to be credible, some witnesses were more persuasive than others. Where the differences in persuasiveness are relevant to my determination, I so indicate.

The following issues all address alleged denials of FAPE. Under the IDEA each local education agency is required to provide a FAPE to each student found eligible for special education and related services. A FAPE is:

Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . . [a]re provided in conformity with an . . . IEP that meets the requirements of [the IDEA regulations]. 34 C.F.R. § 300.17. *See also*, D.C. Code § 30.3001.1.

An IEP is a written statement that memorializes the eligible student's special education program, including, in pertinent part, the eligible student's measurable annual academic and functional goals designed to meet the student's educational needs resulting from his/her disability; a statement of the special education and related services, supplementary aids and services, and program modifications and supports to be provided to the student to allow him to advance toward attaining the IEP goals and progress in the general curriculum and to participate in nonacademic activities. In addition the extent of the student's participation with nondisabled peers must be addressed. 34 C.F.R. § 300.320. *See also*, D.C. Code § 30.3009. In developing the IEP the team¹⁰ is to consider the strengths of the child, the concerns of the parent for enhancing the education of the student, the results of the most recent evaluation and the academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a). *See also*, D.C. Code § 30.3007. An IEP that memorializes the FAPE determination must be designed to provide the student with some educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982).

¹⁰ Here the IEP developed by the team at the February 1, 2011 MDT meeting includes the requirements delineated in the January 20, 2011 HOD. *See discussion Infra* at pp. 13 – 15. Thus the determination of what was required to provide FAPE to Student was made by the hearing officer in the January 20, HOD and then incorporated in the IEP developed at the MDT meeting on February 1, 2011.

Whether DCPS denied the student a FAPE by failing to comply with the HOD dated January 20, 2011, specifically:

a) DCPS did not revise Student's IEP to include the requirements ordered by the January 20, 2011 HOD. A meeting was held on or about February 1, 2011, but the IEP developed did not include all the hours of special instruction and/or support required by the HOD, and the IEP did not indicate the hours that were to be provided on a one on one basis. DCPS indicated it would make revisions to the IEP following the meeting, but these revisions were not made.

Following the issuance of the HOD on January 20, 2011, DCPS held an MDT meeting on February 1, 2011 to review and revise Student's IEP. At the February 1, 2011 meeting the team added language to Student's IEP specifically referencing the requirements of the January 20, 2011 HOD. On page 6 of the IEP in the section labeled Least Restrictive Environment, the following statement appears:

Per Hearing Officer Determination on January 19, 2011 [sic]

The student's IEP is revised to reflect the support of a dedicated aide, qualified in mathematics and reading four (4) hours a day. The dedicated aide shall provide the student academic support in mathematics and reading, in the classroom; and provide the student and student's teachers the support necessary to ensure that the student receives the services in his IEP. These services shall be provided to the student for the remainder of the 2010/11 school year; and for the 2011/12 school year.

The student's IEP is amended to reflect that instead of 4 hours a week of specialized instruction, the student shall receive 2 hours a day, 10 hours a week of specialized instruction, outside general education.

IEP has to reflect compensatory education is warranted and will be funded by DCPS independently; 152 hours of tutoring in math and 152 hours of tutoring in reading.

In addition, the IEP states Student will receive specialized instruction outside the general education setting 1 hour per day in reading and 1 hour per day in math. The IEP indicates both of these services are to be on a one on one basis. The compensatory education section of the IEP repeats the HOD required 152 hours, each, in reading and math tutoring identified above.

¹¹ The IEP actually states one-one-one. I am reading this as a typographical error that should have been one-on-one.

According to Petitioner's advocates' notes taken at this February 1, 2011 MDT meeting, the parents were given a draft copy of the IEP at the meeting. Student's parents noted the section regarding the services to be provided Student was somewhat confusing because the 10 hours per week of specialized instruction outside general education did not specifically include the total number of hours (10). According to the advocate's notes, the special education coordinator agreed. She changed the description of these services to specify that 10 hours of such services were to be provided. The number of hours is included in the IEP. See quotation at p. 13, *supra*.

Petitioner's advocate's notes of this February 1, 2011 meeting also refer to the draft copy of the IEP that was provided to parents and then amended following the parent's review. The notes state a "Final copy will be issued for signatures." The allegation, herein, that DCPS indicated it would make revisions to the IEP appears to be based on this statement. It is my opinion that Petitioner misconstrued this statement. A final copy for signatures was presented to parents at the February 1, 2011 MDT meeting. They signed the copy and indicated their agreement with the contents. I find DCPS did not intend to suggest another, i.e., third, copy of the IEP with additional revisions would be issued at a later date. In reaching this determination I am not suggesting that DCPS intentionally mislead Petitioner, nor am I suggesting Petitioner's expectation that a third IEP would be issued is not based on DCPS' statements. Rather, it is likely that in the context of the meeting each party believed they had reached a mutual understanding of the process, but each party's individual understanding of the process that had occurred and expectations as to further steps, unfortunately, was different from the understanding of the other party.

For these reasons I conclude DCPS did revise Student's IEP on February 1, 2011 to reflect the January 20, 2011 HOD and, therefore, I find, by a preponderance of the evidence,

DCPS did not deny Student a FAPE by failing to revise Student's IEP to include the requirements of the January 20, 2011 IEP.

b) DCPS has not assured the dedicated aide provided to Student in the 2010 – 2011 and 2011-2012 school years provided the academic support services required. The aide did not sit with Student and did not assist Student in turning in his assignments.

The parties agree a dedicated aide has been assigned to Student for both the 2010-2011 and 2011-2012 school years. A dedicated aide was assigned to Student at the February 1, 2011 IEP meeting, and one of two individuals has continued to be assigned to Student as a dedicated aide since that meeting. In each school year the aide has provided service to Student from a seat at the back of the room while Student sat at the front of the room. In each year, Petitioner has raised concerns about the aide's location *vis a vis* Student, and in each year, the aide has moved to sit next to Student. The HOD does not specify that the aide is to sit next to Student, and Petitioner has not provided any evidence demonstrating this is a requirement for a one-on-one aide. I, therefore, find, by a preponderance of the evidence, Petitioner has failed to meet the burden of proof as to this issue, and DCPS failure to require the aide to sit next to Student has not denied Student a FAPE .

Petitioner also alleges the aide did not assist Student in turning in his assignments. The testimony does not support this position. Petitioner has established that Student has not consistently turned in his homework and classwork. On some occasions he has received zeros on tests and quizzes. It is not clear whether these scores result from a failure to complete this work or from a failure to turn them in. What is clear is that not turning in work consistently is an on-going issue for Student. Testimony identified at least one instance when the aide went to Student's locker to try to help him find a missing homework assignment. Testimony further identified other efforts made by the aide to assist Student in turning in his assignments, both

homework and classwork. Petitioner attributes the failure to turn in assignments to the aide, suggesting the aide is not making the appropriate effort. Respondent indicates this issue results, at least in part, from a choice made by Student. Several DCPS witnesses stated this behavior was not entirely a symptom of Student's disability, but rather more purposeful. In either event, Student's failure to turn in his homework assignments does not mean the aide did not attempt to assist him in this area. The reason Student did not turn in assignments is not clear and cannot be solely ascribed to the efforts or lack of efforts of the aide. Each party appears to be attempting to assign blame for Student's behavior, rather than addressing the behavior anew and finding a resolution that will assure Student turns in his work, gets credit for what he has done and improve his grades..

I find Petitioner has not met her burden of proof. She has not shown the aide did not provide the academic support services required by the January 20, 2011 HOD and the February 1, 2011 IEP. Therefore, I find, by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to require the aide to provide the academic support services required.

c) DCPS has not assured the student received 1 on 1 inclusion support for 2.5 hours per week in reading and 2.5 hours per week in mathematics from a certified special education teacher in the 2010 – 2011 and the 2011 – 2012 school years.

The 2010 -2011 school year

There is little, if any, evidence suggesting Student received one-on-one support from a special educator in either reading or math in the general education classroom during the 2010-2011 school year. Student testified he received none. He was very specific, and, therefore, credible, in testifying that he did not get support in class. Petitioner also testified he did not

receive such support, but her testimony relied on Student's report to her and, therefore, did not add to the evidence. DCPS provided little evidence that DCPS had provided these services as specified in the January 20, 2011 HOD during the 2010-2011 school year. Witness testified these services had occurred without any documentary evidence to support this assertion. I find this statement, without supporting documentary evidence or testimonial corroboration is not persuasive.

I find, therefore, by a preponderance of the evidence, DCPS denied Student a FAPE because he did not receive one-on-one inclusion support for 2.5 hours in reading and 2.5 hours in mathematics per week from February 1, 2011 through the end of the 2010-2011 school year.

The 2011-2012 school year

Student's English class and mathematics class are co-taught. Each class has both an assigned general education teacher and an assigned special education teacher. Each teacher is in each classroom for the entire English or mathematics period. Each of these classes meets three times each week. One class meeting is for fifty minutes, and two class meetings are for 1 hour and 45 minutes each. This means Student is co-taught in his English class and co-taught in his mathematics class for a total of 4 hours and 20 minutes each on a weekly basis.

The HOD requires student receive 2 hours and 30 minutes of reading and mathematics instruction in the general education classroom from a special education teacher on a one-on-one basis each week. There is a special education co-teacher in Student's English and mathematics classes. However, because these are co-taught classes it is not possible to determine how much of each special education teacher's time is spent with Student alone. A co-teacher is responsible for providing instruction to the entire class. Each special education co-teacher revealed she was very familiar with Student. Each was able to testify to Student's needs. However, the testimony

indicated Student is not receiving the full 30 minutes per day of one-on-one instruction in reading and mathematics from a special education teacher in the general education classroom. Yet he is receiving on-going support from a special education teacher in each class. While the teacher's attention is not directed at Student exclusively for 30 minutes per day, each teacher provides on-going instruction and support in these classes. Moreover, it is not possible to determine the content of the subject matter he is receiving instruction on from the special education teacher in his English class. While the loss of some number of minutes of direct one-on-one instruction each week could be of a *de minimis* nature, the lack of evidence that Student is receiving mathematics instruction for approximately 2 hours and 30 minutes per week from the special educator in the general education classroom nor the same amount of reading instruction from the special educator in the general education classroom is problematic.

I find, therefore, by a preponderance of the evidence, DCPS has denied Student a FAPE by failing to provide two hours and thirty minutes per week of one-on-one reading instruction from a special educator in Student's general education classroom during the 2011-2012 school year. I further find DCPS has denied Student a FAPE by failing to provide two hours and thirty minutes per week of one-on-one mathematics instruction from a special educator in Student's general education classroom during the 2011-2012 school year.

d) *DCPS has not provided a dedicated aide qualified in mathematics and reading for the 2011 – 2012 school year.*

The January 20, 2011 HOD specifically requires the dedicated aide provided to Student be qualified in mathematics and reading. The HOD does not define what is meant by qualified. Petitioner argues that qualified means certified, and Respondent argues it does not. During the

¹² Student does have a general education reading class, Read 180. It is taught by a general educator. There is no evidence that a special educator provides Student one-on-one instruction in that class.

February 1, 2011 MDT meeting the special education coordinator stated the aide provided in the 2010-2011 school year would be certified in reading and mathematics. Parent was subsequently informed that the dedicated aide was so qualified. It is understandable, under these circumstances, that Petitioner would assume the dedicated aide provided to Student in the 2011-2012 school year also would be certified. However, the dedicated aide provided in the 2011-2012 school year is not certified in either reading or mathematics. This dedicated aide has two bachelor's degrees and is an ex-music teacher. He, therefore, has experience teaching.

I find there is no requirement that the dedicated aide be certified in reading and mathematics. The plain language of the HOD states otherwise. Qualified and certified do not have the same meaning. I must assume that an Independent Hearing Officer who writes an HOD chooses language to reflect her intent. Therefore, if the hearing officer had intended the dedicated aide to be certified, the HOD would have so stated. It did not. The HOD required the aide to be qualified, and I find he is. He is an ex-teacher.

Therefore, I find by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to provide him a qualified aide.

e) During the 2011 – 2012 school year the dedicated aide has been working with Student in science and mathematics. The aide is not working with Student in reading as required by the January 20, 2011 HOD.

The January 20, 2011 HOD requires the dedicated aide “provide the student academic support in mathematics and reading, in the classroom. . . .” Petitioner argues this means the aide is to provide Student support in English and in mathematics. At the beginning of the school year, the aide was providing Student support in history and mathematics for three days and in science

and reading for three days.¹³ At a meeting on October 3, 2011 Petitioner and her advocate indicated they would like the aide to be present in English and mathematics. The special education coordinator agreed to change the aide's schedule so he could be present in English and mathematics. While I understand Petitioner's preference that the aide provide support in English and mathematics, I must again find the plain language of the HOD does not so require. Rather it indicates the support must be provided in the classroom. Respondent argued, and I agree, that history requires significant amounts of reading, and the aide could provide support in reading in that class. Moreover, DCPS agreed to change the aide's schedule to allow him to provide support to Student in English when Petitioner made a request to allow this to happen.¹⁴

For these reasons I find the aide provided Student support in reading from the beginning of the 2011- 2012 school year through the present. I further find DCPS did not deny Student a FAPE by having the aide provide support in history rather than English.

f) DCPS has not assured the student received 15 hours of specialized instruction in a combination inclusion/pull-out program in the 2011-2012 school year.

During the current 2011- 2012 school year DCPS contends Student is receiving the 15 hours of specialized instruction required by the January 20, 2011 HOD. In taking this position DCPS points to the following service delivery configuration:

- a) 4.33 hours of reading per week in Read 180,¹⁵
- b) 4.25 hours of co-taught English per week; 4.25 hours of co-taught math per week, and
- c) 2 hours of pull out service per week

¹³ Student's schedule was such that the aide was present for two classes in which reading was a significant part of the class (history and reading) and two classes that appeared to include mathematics (mathematics and science)..

¹⁴ The issue of the aide providing support in science and mathematics was not raised and will not be addressed.

¹⁵ This class is identified as Reading Workshop on Student's schedule. Ms. Pearson who was identified as the teacher of Read 180 in the testimony of Landers is the teacher of Reading Workshop.

This is a total of 14.83 hours per week. It is not, I note, a service delivery configuration that matches that contained in the January 20, 2011 HOD nor the February 1, 2011 IEP. Were I to agree that this configuration of services provided Student the 15 hours of specialized instruction required by the January 20, 2011 HOD, I would not be concerned about the difference between the 14.83 hours of service actually provided and the 15 hours of service required by the HOD.

This time difference results from the configuration of the school week at However, I do not agree that Student is receiving 14.83 hours of specialized instruction each week. Moreover, the configuration of services itself creates a FAPE compliance issue. It is the IEP, as noted above, that defines FAPE for a particular child. Here, where the service delivery does not conform to the IEP, there is a FAPE compliance issue on that basis alone. Student is not receiving the combination inclusion/pull-out program as defined in his IEP. Significantly he also is not receiving the hours of specialized instruction required by the IEP.

DCPS includes Read 180 as a source of special instruction hours, but Read 180 is not a special education class. It is a remedial, general education class taught by a general education teacher. Student is in this class for 4.33 hours per week. Subtracting 4.33 hours of Read 180 from the total of 14.83 hours DCPS posits as special instruction per week leaves 10.5 hours.

Student also does not receive 10 hours of one-on-one instruction from a special education teacher in reading and mathematics on a pull out basis each week. Student credibly testified that he receives approximately one hour of support from his special education case manager each day. When he receives this support there are other students in the room. His case manager testified that he receives only 30 minutes of pull out, four days per week. She agreed other students were present but noted they were involved in other activities. She also was clear that she does not provide one-on one service to Student for the entire thirty minutes each time she pulls

him from his general education classroom. Thus, under either scenario, Student is not receiving the 10 hours of pull out service required by the January 20, 2011 HOD and written into the February 1, 2011 IEP. At best he is receiving 5 hours of pull out instruction rather than the 10 required. It is more likely, however, that Student is actually receiving 2 hours of pull out instruction per week as described by his case manager who provides it.

I note the 4.25 hours of co-taught mathematics and co-taught English have many benefits for Student as testified to by the special educators in these classes. While these hours of service are part of a combination inclusion/pull-out program, these hours do not comply with the requirements of the January 20, 2011 HOD nor the February 1, 2011 IEP.

I find Student is not receiving 15 hours of specialized instruction each week in a combination inclusion/pull-out program. I further find the hours of instruction that are provided to Student, as discussed above, are not provided in compliance with the January 20, 2011 HOD and February 1, 2011 IEP. He does not receive 2.5 hours of one-on-one instruction from a special educator in the general education classroom in reading nor is mathematics each week. He does not receive 10 hours of one-on-one pull out instruction in reading and mathematics each week.

I therefore find DCPS has denied Student a FAPE by failing to provide Student the fifteen hours of special instruction in a combination inclusion/pull out program as defined by the January 20, 2011 HOD.

The Remedy

During her closing, Petitioner's counsel requested several alternative remedies.¹⁶ She asked I order student be placed at _____ Academy, a full time private special education school. I decline to do so. There has been no allegation nor evidence showing that Student's

¹⁶ Additional alternative remedies were included in Petitioner's complaint

current placement is not appropriate. Nor has Petitioner shown there is a problem with the February 1, 2011 IEP. Rather, Petitioner has shown that Student's IEP, which memorializes the January 20, 2011 HOD, is not implemented appropriately. Petitioner's second request is that I order the current aide be replaced with a special education teacher certified in reading and mathematics to serve as Student's aide. Again, I decline to do so. I have found the aide is not required to be certified, and it is unlikely, moreover, that DCPS would be able to locate a dually certified teacher willing to work as an aide. Petitioner's third request is that I order DCPS to create a program to comply with the prior HOD. Again I decline to do so. This alternative places me in the position of ordering compliance with an extant HOD. I do not have the authority to make such an order. The remedy I provide here can address only the denial of FAPE resulting from the failure to implement the January 20, 2011 HOD.

Petitioner's October 7, 2011 complaint includes a request for compensatory education. While I did not receive a compensatory education plan, it is this remedy option I find appropriate. The compensatory education ordered under the January 20, 2011 HOD has been proceeding. There were no issues raised as to its implementation, and the tutor providing these compensatory services was a witness in the instant matter. The tutoring process appears to have been helping Student, and the tutor appears to understand Student's needs. I, therefore, will add additional hours of compensatory education to the hours currently due to Student under the January 20, 2011 HOD.

Student has not received the 15 hours of special education instruction in the 2011- 2012 school year as defined in the January HOD. Instead he has received approximately 2 hours per week of pull out instruction rather than the 10 hours ordered, and he has received co-teaching in reading and mathematics for 8.5 hours per week rather than 2.5 hours per week of one-on-one

instruction in reading and mathematics from a special educator in the classroom ordered. This results in a total of 8 hours per week missed in pull out instruction and approximately two hours of direct one on one instruction lost in the general education classroom each week.¹⁷ As a result Student has missed a total of 10 hours of one-on-one service per week for the 2011-2012 school year. At the time of the filing of this complaint 7 weeks of the school year had passed. Since then an additional 9 weeks have passed. This results in a total of 190 (10 x 19) missed hours of one-on-one service. Student also was not provided 5 hours of one-on one instruction in reading and math in the general education classroom from February 1, 2011 through the end of the 2010-2011 school year. This is a total of 18 weeks of missed service for a total of 90 (18 x 5) hours of missed service. Student thus was not provided 280 hours total of one-on- one service in reading and mathematics. These services are equally divided between mathematics and reading. Student, therefore, should receive compensatory education for 140 missed hours in reading and 140 missed hours in mathematics.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law as follows:

1. Respondent's Motion to Dismiss is **DENIED**
2. DCPS did not deny Student a FAPE by failing to revise Student's IEP to include the requirements of the January 20, 2011 IEP.

¹⁷ It is not possible to determine exactly how many hours per week were not provided in the general education classroom. However, each special education teacher testified she provided service to all students in the classroom. There are approximately twenty students in each classroom. If the special education teacher divided her time equally among all students, Student would receive approximately 15 minutes of one-on-one on each class each week. I am using this as the estimate of one-on-one service received in each class each week. This results in a total of 30 minutes per week.

3. DCPS did not deny Student a FAPE by failing to require the aide to provide the academic support services required.
4. DCPS denied Student a FAPE by failing to provide two hours and thirty minutes of one – on-one inclusion support for two hours and thirty minutes per week in reading and two hours and thirty minutes in mathematics per week from February 1, 2011 through the end of the 2010-2011 school year.
5. DCPS denied Student a FAPE by failing to provide two hours and thirty minutes per week of one-on-one reading instruction and two hours and thirty minutes per week of one-on-one mathematics instruction from a special educator in Student’s general education classroom during the 2011-2012 school year.
6. DCPS did not deny Student a FAPE by failing to provide him a qualified aide.
7. DCPS did not deny Student a FAPE by having the dedicated aide provide reading support to Student in history rather than English.
8. DCPS denied Student a FAPE by failing to provide Student the fifteen hours of special instruction in a combination inclusion/pull out program each week.

ORDER

Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that:

1. DCPS is to provide Student with an additional 140 hours of compensatory education in mathematics and 140 hours of compensatory education in reading. These services are to be in addition to the hours of compensatory education currently provided to Student pursuant to the HOD of January 20, 2011. These additional hours are to be provided consecutively to the hours currently being provided. They are to be provided by the tutor currently providing tutoring

services to Student or by a tutor of Petitioner's choice. DCPS is to fully fund the provision of these tutoring services, including transportation, if it is required.

DCPS is to assure Student's teachers communicate with Student's tutor so that the tutor is aware of Student's academic needs at the time of tutoring. This includes providing the tutor information on missing classwork, missing homework, incomplete tests, quizzes and assignments so that the tutor is able to assist Student in completing his school based work. The information provided to the tutor is also to include the current subject matter being addressed in Student's classes and his assignments, including upcoming test, so that the tutor may assist Student in learning the material and meeting the requirements of the classes.

IT IS SO ORDERED:

Dec 21, 2011
Date

EAISO
Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).