

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

Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Office of Dispute Resolution  
November 3, 2014

---

STUDENT, <sup>1</sup>	)	
through the Parent,	)	
	)	Date Issued: October 31, 2014
Petitioner,	)	
	)	Hearing Officer: John Straus
v.	)	
	)	
District of Columbia Public Schools (“DCPS”)	)	
	)	
Respondent.	)	
	)	
	)	
	)	
	)	

---

**HEARING OFFICER DETERMINATION**

**Background**

The Petitioner, the Student’s mother, filed a due process complaint notice on June 23, 2014, alleging that Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”).

The Petitioner alleged that the DCPS failed to provide an appropriate IEP on November 20, 2012, November 19, 2013 and April 25, 2014; specifically, the IEP does not provide full time special education services outside the general education setting. Petitioner also alleged that DCPS failed to place the student in separate special education day school since November 20, 2012.

The Petitioner sought a meeting to review and revise the student’s individualized education program (“IEP”) by including 27.5 hours of specialized instruction outside the general education setting and place the student and provide transportation to the Non Public School. The Petitioner also requested the Hearing Officer to award the student compensatory education in the form of services at tutoring service to redress the alleged lack of appropriate special education and related services since November 20, 2012.

---

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

## Hearing Officer Determination

DCPS asserts the student has made significant grade level progress in reading and writing each school year since the 2011-2012 school year. DCPS further states the Student's past three IEPs contain the same least restrictive environment because it has been demonstrated that student can make real progress in all academic areas in that setting. DCPS intends to continue educating student in his least restrictive environment.

### **Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R."); and 38 D.C. Code 2561.02.

### **Procedural History**

The due process complaint was filed on June 25, 2014. On July 30, 2014, the Petitioner filed an unopposed motion to continue the hearing due to an upcoming surgical procedure for the Petitioner's counsel. The motion was granted and the hearing was continued for 10 calendar days. On August 25, 2014, the Petitioner filed a second unopposed motion for continuance due to complications resulting from the surgery. The motion was granted and the hearing continued for 34 additional calendar days. The hearing took place on October 7, 2014; however, at the end of the day, the Petitioner still did not complete presenting her case in chief and the Respondent had not presented its case in chief. A third unopposed motion to continue was filed by the Respondent. The motion was granted and the hearing was continued for an additional 14 calendar days. The second day for the hearing was on October 21, 2014. The parties concluded their case in chief and the record was closed.

The Petitioner waived the resolution meeting, but the Respondent did not. A resolution meeting took place on July 9, 2014, at which time parties agreed to keep the resolution period open. The 30-day resolution period ended on July 25, 2014, the 45-day timeline to issue a final decision began on July 26, 2014 and the final decision was initially due by September 8, 2014. *See* 34 C.F.R. §§ 300.510 and .515. The final decision is due October 31, 2014.

The due process hearing was a closed hearing.

The Petitioner participated in person on October 7, 2014 but did not participate in person on October 21, 2014.

The Petitioner presented five witnesses: the Petitioner, an Educational Advocate ("EA"), a Representative from Non-public school (Non-public rep"), a representative from tutoring service ("Tutoring rep") and a Paralegal.

DCPS presented two witnesses: the Special Education Coordinator, Education Campus ("SEC") and the Special Education Teacher, Education Campus ("SET").

## Hearing Officer Determination

The Petitioner's Disclosure Statement, filed and served on September 30, 2014, consisted of a witness list of six witnesses and documents P-01 through P-52. The Petitioner's documents, P-48 was admitted over objection and all other documents were admitted without objection.

The Respondent's Disclosure Statement, filed and served on September 30, 2014, consisted of a witness list of five witnesses and documents R-1 through R-15. The Respondent's documents R-1 and R-15 were admitted in to evidence without objection.

The issues to be determined in this Hearing Officer Determination is as follows:

1. Whether Respondent denied the Student a FAPE by failing to provide an appropriate IEP on November 20, 2012; specifically, the IEP does not provide full time special education services outside the general education setting.
2. Whether Respondent denied the Student a FAPE by failing to provide an appropriate IEP on November 19, 2013; specifically, the IEP does not provide full time special education services outside the general education setting.
3. Whether Respondent denied the Student a FAPE by failing to provide an appropriate IEP on April 25, 2014; specifically, the IEP does not provide full time special education services outside the general education setting.
4. Whether DCPS denied Student a FAPE by failing to place the student in separate special education day school since November 20, 2012.

For relief, the Petitioner requested a meeting to review and revise the student's IEP to include 27.5 hours of specialized instruction outside the general education setting, placement at the Non Public School and tutoring from the tutoring service.

### **Findings of Fact**<sup>2</sup>

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The Student is \_\_\_\_\_ residing in the District of Columbia who has attended Education Campus since Kindergarten. The Petitioner is the Student's mother.<sup>3</sup>
2. The Student was retained in the first grade.<sup>4</sup>

---

<sup>2</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>3</sup> Petitioner

<sup>4</sup> P-38

## Hearing Officer Determination

3. On March 24, 2010, the student received a Woodcock-Johnson III Normative Update, Test of Achievement (“W-J III Achievement”) which yielded the following standard scores:

Broad Reading	57
Broad Math	73
Broad Written Language	65

The test was normed on the Student’s grade (1.7) and not his age (8.1) which affects the validity of the test because the scores would be low if normed on age. The evaluator recommended the student receive instruction at the phoneme level. Examples of instructional programs include the Lindamood Phoneme Sequencing Program for Reading, Spelling and Speech and Wilson Reading.<sup>5</sup>

4. On April 13, 2010, the student received a psychological assessment. The assessment included, among others, a Reynolds Intellectual Assessment System which yielded the following scores:

Total Test Battery	106	Average
Total Verbal Battery	115	High Average

The evaluator stated there is evidence to suggest the student is a student with Attention Deficit Hyperactivity Disorder and a Learning Disability in the area of math and reading.<sup>6</sup>

5. On May 4, 2010, the IEP team convened.

A sleep study was completed when the Student was younger and indicates the Student does not have a sleep disorder. The team reviewed the assessments and determined the student is a student with a Learning Disability under the IDEA.<sup>7</sup>

6. On May 12, 2010, the IEP team convened to develop an IEP. The team determined the student required 4 hours per week of Reading outside general education, 3 hours per week of written expression outside general education, 3 hours per week of Mathematics in the general education setting and 30 minutes per week of Occupational Therapy outside general education.<sup>8</sup>
7. On September 22, 2010, the student received a psychological assessment. The assessment included a Woodcock-Johnson III Normative Update, Test of Cognitive Abilities (“W-J III Cognitive”) which yielded the following standardized scores:

---

<sup>5</sup> P-8, P-33

<sup>6</sup> P-37

<sup>7</sup> P-4

<sup>8</sup> P-6

## Hearing Officer Determination

General Intellectual Ability	73	Low Range
Verbal Ability	95	Average
Thinking Ability	75	Low Range
Cognitive Efficiency	65	Very Low

The assessment also included a W-J III Achievement which yielded the following standardized scores:

Broad Reading	50	Very Low
Broad Math	64	Very Low
Broad Written Language	22	Very Low

The teacher was interviewed and reported the student slept many times throughout the day, he puts his head on the desk, and he sleeps. The evaluator opined that the Student uses sleep as an escape from the curriculum, which he perceives as overly demanding and grueling. The evaluator stated the student is not a student with an intellectual disability due to a scores on a Vineland Adaptive Behavior Evaluation administered on September 29, 2010. The evaluator stated the student is a student with a Reading Disorder, Mathematics Disorder, Disorder of Written Expression, Attention Deficit/Hyperactivity Disorder and Oppositional Defiant Disorder by history. The evaluator further stated it seems obvious that the Student will require intensive special education services in a full time special education class. The evaluator recommends the student be taught in a group of no more than three other children to facilitate individualized instruction. Without proper intervention, current problems will worsen, negatively impacting the student's academic growth. The evaluator provided specific procedures for bolstering the Student's reading skills in the classroom.<sup>9</sup>

8. On October 15, 2010, the IEP team convened to review the September 22, 2010 psychological assessment.

The Petitioner stated the student received a sleep study at Children's Hospital where it was determined he does not have a sleep disorder. The staff stated that they could not keep the student awake. The team agreed to conduct a Functional Behavior Assessment ("FBA") to determine whether the student's sleeping is an escape from school work. The team determined the student continues to require 4 hours per week of Reading outside general education, 3 hours per week of written expression outside general education, 3 hours per week of Mathematics in the general education setting, 90 minutes per month of behavior support services outside general education and 30 minutes per week of Occupational Therapy outside general education.<sup>10</sup>

9. On December 1, 2010 the IEP team convened. The team reviewed a FBA that indicates sleeping allows the student to escape instruction.

The team developed a Behavior Intervention Plan ("BIP") based on the FBA.

---

<sup>9</sup> P-38

<sup>10</sup> P-10, P-11, Petitioner

<sup>11</sup> P-13

## Hearing Officer Determination

10. On March 15, 2011, the IEP team convened.

The SEC stated she worked with the student on reading using the Wilson Reading program. The SEC reported that the Student's frustration is high but when he works, he does well.<sup>12</sup>

11. On October 26, 2011, the IEP team convened again. The team determined the student requires 3 hours per week of Reading outside general education, 2 hours per week of written expression outside general education, 3 hours per week of Mathematics in the general education setting, 90 minutes per month of behavior support services outside general education and 30 minutes per week of Occupational Therapy outside general education.<sup>13</sup>

12. On January 18, 2012, the IEP team convened again. The team noted the student continues to sleep in school. He also has behavior problems as a result of inadequate feelings because he cannot read. The team determined the student continues to require 3 hours per week of Reading outside general education, 2 hours per week of written expression outside general education, 3 hours per week of Mathematics in the general education setting and 90 minutes per month of behavior support services outside general education. The team reduced the student's Occupational Therapy to 15 minutes per week of outside general education.<sup>14</sup>

13. During the 2011-2012 school year, when the student was in third grade, the student's reading level went from a mid-Kindergarten level to a low first grade level as measured by the Dynamic Indicators of Basic Early Literacy Skills ("DIBELS"), Text Reading Comprehension ("TRC").<sup>15</sup>

14. On November 20, 2012, the IEP team convened. The Petitioner and the general education teacher stated the Student is insecure because kids are teasing him regarding his low reading levels. The SEC stated the Student is provided the Wilson Reading Program on a one to one basis for one hour three day per week. The SEC stated the student is beginning to learn to read and to understand strategies. The student did not receive the Wilson Reading Program during the 2011-2012 school year because the special education teacher was not certified to provide the Wilson Reading Program. The general education teacher stated that when presented with difficult tasks the student will sleep in class to escape stress. The Petitioner requested the student be placed in a full time school placement. The SEC refused to provide the student a full time school placement and that the team should try the Wilson Reading Program. The advocate requested the team keep OT services due to the low scores on the Bender II. However, the team determined the student continues to require 3 hours per week of Reading outside general education, 2 hours per week of written expression outside general education, 3 hours per week of Mathematics in the general education setting, 90 minutes per month of

---

<sup>12</sup> P-14

<sup>13</sup> P-15, P-16

<sup>14</sup> P-17, P-18, R-1

<sup>15</sup> P-27, EA

## Hearing Officer Determination

behavior support services outside general education and 120 minutes per month of Occupational Therapy outside general education.<sup>16</sup>

15. During the 2012-2013 school year, when the student was in fourth grade, the student's reading level went from a low first grade level to a high first grade level as measured by the DIBELS, TRC.<sup>17</sup>
16. On November 19, 2013, the IEP team convened without the advocate present. The team determined the student continues to require 3 hours per week of Reading outside general education, 2 hours per week of written expression outside general education, 3 hours per week of Mathematics in the general education setting, 90 minutes per month of behavior support services outside general education and 120 minutes per month of Occupational Therapy outside general education.<sup>18</sup>
17. On December 17, 2013, the IEP team convened. The Occupational Therapist ("OTR") stated the Student needs a visual model because he cannot create a sentence on his own and he is not spacing words. The OTR does not think the Student knows where words start or where they end. The OTR would like to have an updated OT assessment. The general education teacher noted the student is falling short in making sentences, construction of sentences and semantics. The Student is not able to read; however, he is proficient in listening comprehension. The SEC stated she used the Wilson Reading program during the 2012-2013 school year; however, she is not using the Wilson Reading program during the 2013-2014 school year. The team determined the student would receive an OT assessment and cognitive and academic assessment.<sup>19</sup>
18. On January 28 and 29, 2014, the student received a psychological assessment. The assessment included the Wechsler Intelligence Scale for Children-Fourth Edition ("WISC-IV") which yielded the following standard scores:

Verbal Comprehension	98	Average
Perceptual Reasoning	88	Low Average
Working Memory	88	Low Average
Processing Speed	91	Average
Full Scale	89	Low Average

The assessment included the WJ-III which yielded the following standard scores:

Broad Reading	55	Very Low
Broad Math	89	Low Average
Broad Written Language	56	Very Low

---

<sup>16</sup> P-19, P-20, R-3, Petitioner

<sup>17</sup> P-27, EA

<sup>18</sup> P-22, R-6

<sup>19</sup> P-23, Petitioner, Paralegal

## Hearing Officer Determination

These scores were normed on the student's then current grade 5.5; however, it should be noted the student was retained in first grade so the results are not valid. The actual standard scores based on the student's age are lower. The evaluator stated the student is a student with a Learning Disability under the IDEA and the student may benefit from reading and writing daily, drill and practice of sight words to build the Student's vocabulary and sight word recognition skills and having the text simplified.<sup>20</sup>

19. On April 25, 2014, the IEP team convened and reviewed the psychological assessment conducted on January 28 and 29, 2014. The team noted the student has low average cognitive scores. However, the paralegal noted the student made only one year of progress in Reading as measured by the WJ-III over a four year period. The team determined the student continues to require 3 hours per week of Reading outside general education, 2 hours per week of written expression outside general education, 3 hours per week of Mathematics in the general education setting and 90 minutes per month of behavior support services outside general education. However, the team determined the student does not require 120 minutes per month of Occupational Therapy outside general education. The team further determined the student does not require extended school year services. The team developed a Behavior Intervention Plan to address, among other behaviors, the student's persistent sleeping in class. The Petitioner did not agree with the IEP developed by the IEP team.<sup>21</sup>
20. During the 2013-2014 school year, when the student was in fifth grade, the student's reading level went from a mid-first grade level to a low-second grade level as measured by the DIBELS, TRC.<sup>22</sup>
21. On September 9, 2014, the tutoring service provided an initial assessment of the student using a test with national norms. Based on the assessment, the tutoring rep stated that the Student should receive 200 to 240 hours of tutoring, 4 hours per day, 5 days per week for 10 to 12 weeks initially. The tutoring rep opined that the student will make between one to three years of academic progress if he is provided 200 to 240 hours of tutoring. The tutoring rep recommended the student be reassessed after the initial 200 to 240 hours to determine if he would benefit from an additional period of instruction.<sup>23</sup>
22. Non-public school provides services to students with learning disabilities and other disabilities under the IDEA from grades K through 12. The teachers are certified special education teachers. The maximum number of students per class is nine. The school offers occupational therapy, speech and language and behavior support services. The curriculum is aligned to the Common Core State Standards. Non-public school offers the Wilson Reading program and the Lexia Reading program. Non-public school has been approved by the Office of the State Superintendent to service students, ages 5 through 19.

---

<sup>20</sup> R-8, R-9, EA

<sup>21</sup> P-24, P-25, P-46, R-12, Petitioner, Paralegal

<sup>22</sup> P-27, EA

<sup>23</sup> P-48, tutoring rep

## Hearing Officer Determination

The student has been accepted in to the Nonpublic school for the 2014-2015 school year.<sup>24</sup>

23. The Wilson Reading Program uses a phonetic approach to reading instruction. Students learn sight words to increase their vocabulary and learning occurs in a multimodal approach.<sup>25</sup>
24. The EA states the Student was harmed because he should have been in a full time out of general education IEP for the past two years instead of eight hours per week of inclusion support. The EA proposed the student receive 240 hours of tutoring services to redress the loss of special education services.<sup>26</sup>

### Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005).

The purpose of the IDEA is to provide a "cooperative process" between parents and schools, and a central component of this collaboration is the IEP process. *Schaffer v. Weast*, 546 U.S. 49 (U.S. 2005). The IEP<sup>27</sup> is the cornerstone of the IDEA that sets forth the FAPE that is offered to a child with a disability eligible to receive special education and related services under the IDEA. *See* 34 CFR 300.17.

The standard for determining if a student has received FAPE is whether the IEP was reasonably calculated to provide educational benefit to the student. A district's obligation to provide FAPE to a student with a disability is satisfied when the district provides the student with the personalized educational program necessary to allow the child to derive an educational benefit from that instruction. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982).

The IEP does not operate as a contract offering guarantees that a student will achieve a certain amount of academic proficiency. *Coale v. State Dep't of Educ.*, 35 IDELR 149 (D. Del.

---

<sup>24</sup> P-50, P-51, Non-public re

<sup>25</sup> SEC

<sup>26</sup> P-1, EA

<sup>27</sup> Pursuant to 34 C.F.R. § 300.320(a)(4), the IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals; to be involved in and make progress in the general education curriculum and to be educated and participate with other children with disabilities and nondisabled children.

## Hearing Officer Determination

2001). See *Schaffer v. Weast*, 51 IDELR 177 (4th Cir. 2009) (holding that the parents could not use the student's 10th-grade IEP to show that his eighth-grade IEP was inappropriate, as the eighth-grade IEP was reasonably calculated to provide FAPE at the time it was developed). However, the IEP must afford a student an opportunity for more than just "trivial advancement." *Woods v. Northport Pub. Sch.*, 59 IDELR 64 (6th Cir. 2012) (ruling that although a child made some progress in the second grade, his regression in reading, writing, and math showed that his IEP was inappropriate). The failure of an IEP team to address a child's educational needs will likely result in a denial of FAPE. *Forest Grove Sch. Dist. v. T. A.*, 52 IDELR 151 (U.S. 2009). Therefore, the hearing officer must determine whether the IEP team's failure to make changes to the IEP resulted in a denial of FAPE.

### **DCPS denied the Student a FAPE by failing to provide an appropriate IEP on November 20, 2012; specifically, the IEP does not provide full time special education services outside the general education setting.**

In this case, the Student was retained in the first grade; therefore, although the March 24, 2010 W-J III Achievement yielded very low scores, the test scores were actually inflated. The scores were affirmed by the September 22, 2010 re-administration of the W-J III Achievement, using a different form, which also yielded low scores. That assessment was a valid measure because the assessment was normed on the student's age, rather than the student's grade. The previous administration of the W-J III was not valid because the student was retained and the assessment was normed on the student's grade; thereby inflating the scores. Either way, the assessment indicated the student's academic performance in reading at a Kindergarten level or math at a 1<sup>st</sup> grade level even though the student was in second grade. During the 2011-2012 school year, when the student was in third grade, the student's reading level went from a mid-Kindergarten level to a low first grade level as measured by the DIBELS, TRC.

The Student sleeps in school nearly every day even though the Student does not have a sleep disorder. The Student requires intensive one to one instruction to stay on task. In the September 22, 2010 assessment report, the evaluator recommended the student receive instruction in instructional programs including the Lindamood Phoneme Sequencing Program for Reading, Spelling and Speech and Wilson Reading. In the March 24, 2010 assessment report, the evaluator recommended the Student receive intensive special education services in a full time special education class. The evaluator predicted that "without proper intervention, current problems will worsen, negatively impacting the student's academic growth."

The IEP team met on May 4, 2010, May 12, 2010, October 15, 2010, March 15, 2011, October 26, 2011 and January 18, 2012. The Student initial IEP was developed on May 12, 2010. That IEP provided the student with 4 hours per week of Reading outside general education, 3 hours per week of written expression outside general education, 3 hours per week of Mathematics in the general education setting and 30 minutes per week of Occupational Therapy outside general education. The October 15, 2010 IEP and March 15, 2011 team did not make changes to the hours on the student's IEP. The October 26, 2011 IEP team actually reduced the student hours of instruction to 3 hours per week of Reading outside general education and 2 hours per week of written expression outside general education. The team stated that the student

## Hearing Officer Determination

was making great progress; however, there is no assessment data to back up the team's assertions. The January 18, 2012 IEP team did not make any changes to the Student's hours of service.

By the time the November 20, 2012 IEP team convened the Student is insecure because kids are teasing him regarding his low reading levels. The student was finally receiving instruction through the Wilson Reading program as recommended by the September 22, 2010 psychological assessment. However, instruction using the Wilson Reading program was only three days a week. The Petitioner requested the student be placed in a full time school placement. However, the DCPS did not make any changes to the student's IEP.

Based on the available data, the Hearing Officer finds the student should have received, at a minimum, five hours of instruction using the Wilson Reading program. Based on the September 29, 2010 psychological assessment, the student should have been in a full time placement. Therefore, the Hearing Officer finds that the Petitioner met her burden of proof on this issue.

**DCPS denied the Student a FAPE by failing to provide an appropriate IEP on November 19, 2013; specifically, the IEP does not provide full time special education services outside the general education setting.**

The student received instruction using the Wilson Reading program three times per week during the 2012-2013 school year and his reading level went from a low first grade level to a high first grade level as measured by the DIBELS, TRC. The Wilson Reading program was not offered to the Student at the beginning of the 2013-2014 school year. By the time the November 19, 2013 IEP team convened, the Student's reading level dropped to a mid-first grade level as measured by the DIBELS, TRC. However, not only did the team fail to determine the student required ESY services, the team also failed to increase the student's hours of service in his IEP. There was no attempt to find a program such as the Wilson Reading program to provide services to the student.

The Hearing Office finds that the IEP team denied the student a FAPE, based on the data available to them, in its failure to increase the services provided to the Student. Therefore, the Petitioner met her burden of proof on this issue.

**DCPS denied the Student a FAPE by failing to provide an appropriate IEP on April 25, 2014; specifically, the IEP does not provide full time special education services outside the general education setting.**

At the December 17, 2013 IEP team meeting, the general education teacher noted the student is falling short in making sentences, construction of sentences and semantics. The Student is not able to read; however, he is proficient in listening comprehension. No changes were made to the Student's IEP but the team did determine the student would receive a psycho-educational assessment.

## Hearing Officer Determination

The Student did receive a psycho-educational assessment on January 28 and 29, 2014. The assessment states the student has average intelligence. However, the W-J III indicates the student continues to have very low scores. The evaluator normed the scores on the student's grade which invalidated and inflated the actual scores. Despite the inflated scores, most of the standard scores did not increase and some actually decreased since the student was evaluated on March 24, 2010. Unfortunately, the prediction made in the March 24, 2010 assessment report was true. Although the student was at the end of fifth grade having been retained in first grade, he was still reading at a Kindergarten level.

The April 25, 2014 IEP team reviewed the psychological assessment conducted on January 28 and 29, 2014. However, the team made did not increase the hours of service in the IEP. In fact, the team actually determined the student would no longer receive OT services.

The Petitioner did not agree with the IEP developed by the IEP team. The Hearing Officer agrees with the Petitioner that the IEP is not reasonably calculated to provide the student a FAPE. Therefore, the Petitioner met her burden of proof on this issue.

### **DCPS denied Student a FAPE by failing to place the student in separate special education day school since November 20, 2012.**

A hearing officer or court may award a prospective private placement as relief to ensure that a child receives the education required by the IDEA in the future where a balance of the relevant factors justifies such a placement. In addition to the conduct of the parties, which is always relevant in fashioning equitable relief, the following factors must be balanced before awarding such relief: the nature and severity of a student's disability; the student's specialized individual educational needs; the link between those needs and the services offered by the private school; the private school placement's costs; and the extent to which the placement represents the least restrictive environment. *Branham ex rel. Branham v. District of Columbia*, 427 F. 3d 7; 44 IDELR 149 (D.C. Cir. 2005).

In this case, the Student was performing well below his peers. Despite Education Campus' efforts to provide intensive reading instruction such as Wilson Reading for three hours per week, the Student requires more intensive instruction. The January 18, 2012 IEP team noted the student develop feelings of inadequacy due to the fact he cannot read. The Student's feeling were also discussed during the November 20, 2012. The Petitioner shared with the team that the student felt embarrassed because the teacher posted the student's names and reading levels on the board. At that time, the IEP team should have determined the student should have been placed in a separate special education day school. The student continues to demonstrate feelings of inadequacy due to his poor academic achievement and will need intensive services to improve his reading level. In order to be successful, the student require a milieu where he can focus on his school work.

Non-public school provides services to students with learning disabilities and other disabilities under the IDEA from grades K through 12. The maximum number of students per class is nine. The school offers the Wilson Reading program and the Lexia Reading program.

## Hearing Officer Determination

This is the only program presented by either party that offers the Student. Therefore, the student should enroll in this school. The petitioner met her burden of proof on this issue.

DCPS cites *H.C. ex rel. M.C. v. Katonah-Lewisboro Union Free Sch. Dist.*, 113 LRP 26288 to support its contention that a nonpublic school placement is not an appropriate remedy for a student's widening gap in reading abilities. However, *H.C.* differs from this case in a significant way. In *H.C.* the 2d Circuit determined the child's progress was appropriate in light of the severity of her disability. The child made progress in reading levels during her kindergarten and first-grade years. Test results further demonstrated that the child's understanding of upper and lowercase letters, sight words, and letter sounds had increased. While the student was not performing at the same level as her general education classmates, the court explained that her deficits did not demonstrate a denial of FAPE. However, in this case, the student's disability is not severe enough to prevent the Student from making progress and test results indicate the student is not making progress. For students with disabilities, progress and educational benefit must be gauged and measured in relation to a student's own intellectual and functional capabilities and not judged in comparison to the abilities of other students -- in particular, the abilities of their nondisabled classmates. Districts are not required to maximize a child's potential or reduce the shortfall between potential and performance until it is no greater than that of children without disabilities. *Rowley*; accord, *T.J.W. v. Dothan City Sch.*, 26 IDELR 999 (M.D. Ala. 1997)

DCPS also cites *Klein v. Hovem*, at 112 LRP 39704, which cites *Rowley*, 553 IDELR 656, which only requires districts to ensure that students with disabilities receive some educational benefit. However, the court relied on the four requirements set forth in *Cypress-Fairbanks Independent School District v. Michael F.*, 26 IDELR 303 (5th Cir. 1997). Those requirements include whether: "(1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated." In this case, two of the factors are not met; the student's program was not based on any recommendations in his assessments and positive academic benefits are not demonstrated.

### **Compensatory Education**

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

The Hearing Officer finds that DCPS denied the Student a FAPE; however, the student did receive educational benefit when he was receiving one to one instruction using the Wilson

## Hearing Officer Determination

Reading program. The Student requires five hours per week of scientific based language instruction such as Wilson Reading. Therefore, during the past two years the student should have received 400 hours of Wilson Reading. During the applicable period, the student received three hours of instruction per week through the Wilson Reading program from November 2012 to June 2013 (about 100 hours of instruction) and from February 2014 to June 2014 (about 60 hours of instruction). Therefore, by subtracting the amount of tutoring from the total he should have received, the student is entitled to 240 hours of tutoring.

### **ORDER**

- (1) DCPS shall place the student in nonpublic school for the 2014-2015 school year, including transportation;
- (2) As compensatory education DCPS shall within 20 calendar days of the issuance of this Order provide the student 240 hours of independent tutoring through tutoring service, including transportation, as appropriate. The Petitioner shall use and complete this award by the beginning of the 2015-2016 school year; and
- (3) No further relief is granted.

**IT IS SO ORDERED.**

### **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 U.S.C. §1415(i).

Date: October 31, 2014

*/s/ John Straus*  
Hearing Officer