

**THE STATE OF NEW MEXICO**  
**BEFORE THE PUBLIC EDUCATION DEPARTMENT**

**No. DPH 1011-28**

**HEARING OFFICER'S**  
**MEMORANDUM DECISION AND ORDER**

**THIS MATTER** arises on the Petitioners' Request for Due Process, filed with the State of New Mexico Public Education Department on February 16, 2011, *Due Process Request, February 16, 2011*, and Amended Due Process Hearing Request. *Amended Due Process Hearing Request, September 19, 2011*. The Petitioners' Request and Amended Request for Due Process is granted in-part.

**Procedural Background**

Petitioners' allegations were initially against the Charter School as the party in interest, not the Local Educational Authority (LEA). *Id.* The hearing officer's appointment by the State Educational Authority (SEA) joined the LEA with the Charter School as parties Respondent. *SEA Appointment Letter, February 16, 2011*. Counsel for the Charter School entered an appearance on February 28, 2011, and noted, as well, a special entry of appearance for the LEA for the purpose of having the LEA dismissed or removed from the caption. *Entry of Appearance, February 28, 2011*. On March 7, 2011 the Charter School filed a Response to the Due Process Request. *Respondent [Charter School's] Response to Due Process Hearing Request, March 7, 2011*. The LEA then filed an unopposed request for dismissal, *see Unopposed Motion to Dismiss the Board of Education of the [LEA], March 11, 2011*, upon which a dismissal order was entered dismissing the LEA. *Order of Dismissal, March 11, 2011*.

The Petitioners requested an unopposed extension for issuance of the hearing

officer's decision to on or before May 13, 2011, which was granted. *Pre-Hearing and Extension Order, March 9, 2011*. On April 6, 2011, a subsequent joint request to continue, see *Joint Motion for Continuance, April 6, 2011*, was filed, upon which another extension order was entered for a decision on or before June 12, 2011. *Continuance and Extension Order, April 7, 2011*. The due process hearing commenced on May 11, 2011, at which time the Petitioners' requested that their counsel be relieved due to cause, which was granted. *Withdrawal and Extension Order, May 12, 2011*. Petitioners were to seek substitute counsel and have the matter reset. *Id.* The decision date was extended to on or before July 11, 2011. *Id.* An additional continuance to obtain counsel was entered on June 13, 2011. *Continuance Order to Obtain Counsel, June 13, 2011*.

Substitute counsel entered an appearance on June 20, 2011. *Entry of Appearance, June 20, 2011*. Another extension order was entered which allowed the due process hearing officer's decision to be issued on or before October 21, 2011. *First Amended Pre-Hearing and Extension Order, October 21, 2011*. On June 30, 2011 the Petitioners moved to join the previously dismissed LEA. *Motion to Join [LEA] as Respondent, June 30, 2011*. The LEA opposed the request. *[LEA's] Response to Petitioners' Motion to Join [LEA], July 11, 2011*. On August 30, 2011 an order was issued allowing Petitioners to add the LEA as a party. *Order Granting Petitioners' Motion to Add Additional Party, August 30, 2011*. On September 14, 2011, the Petitioners were granted leave to amend their Due Process Complaint. *Order Granting Amendment, September 14, 2011*.

An Amended Due Process Hearing Request was filed by Petitioners on September 19, 2011, with allegations against the LEA. *Amended Due Process Hearing Request, September 19, 2011*. The LEA responded on October 5, 2011. *[LEA's] Response to Due*

*Process Hearing, October 5, 2011.*

The parties filed a preliminary Joint Statement of Issues on October 13, 2011. *Joint Statement of Issues, October 13, 2011.* Issues raised in the preliminary Joint Statement of Issues, yet not subsequently presented in the parties' proposed Findings-of-Fact and Conclusions-of-Law, are considered abandoned.

The due process hearing commenced on October 18, 2011, and concluded on October 20, 2011. *Transcript, Vols. I-III.* Proposed Findings-of-Fact and Conclusions-of-Law were ordered due on December 1, 2011, as were closing arguments. *Tr. at 685.* The parties requested an extension for the hearing officer's decision, which was granted, for filing on or before December 15, 2011. *Id.*

The Respondents filed their proposed Findings-of-Fact and Conclusions-of-Law on December 1, 2011. *Respondents' Proposed Findings and Conclusions, December 1, 2011.* The Petitioners filed their proposed Findings-of-Fact and Conclusions-of-Law on December 1, 2011, as well. *Petitioners' Proposed Findings of Fact and Conclusions of Law, December 1, 2011.* Petitioners also submitted their closing argument in written form. *Petitioners' Closing Argument, December 1, 2011.*

This decision is due on or before December 15, 2011. *Tr. at 685.*

### **Legal Overview**

The burden of proof rests with the party challenging the IEP. *Schaffer v. Weast*, 44 *IDE LR 150 (U.S. 2005)*. *Johnson v. Independent School Dist. No. 4 of Bixby*, 921 *F.2d 1022 (10<sup>th</sup> Cir. 1990)*. In this action, the burden rests, therefore, with the student.

A twofold inquiry is demanded to determine if a child has been provided with FAPE. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 156

(1982). The initial inquiry is whether the State has complied with the procedures set forth in the Act. The second inquiry is whether the individualized educational program developed through the procedures of the Act is reasonably calculated to enable the child to receive educational benefits. *Id.* at 207. Meaningful educational benefit is to be provided to the child, although that means neither maximizing the potential of the child nor minimizing the benefit provided. *O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10<sup>th</sup> Cir. 1998). Some benefit and meaningful benefit are similar, although not synonymous. See *Los Alamos Public Schools v. Dreicer*, D.N.M. No. 08-233 (2009)(distinguishing *Systema v. Academy School District No. 20*, 538 F.3d 1306 (10<sup>th</sup> Cir. 2008) stating that the test is some benefit as compared with meaningful benefit).

Various steps must be followed not only to design an IEP, but to implement it as well. See *Johnson v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 316 F. Supp. 960 (D. Kan. 2003). An IEP is to be in place at the beginning of each school year. See 34 C.F.R. § 300.342(a). The IEP is to be implemented as soon as possible after the IEP meeting. 34 C.F.R. § 300.342(b)(ii). An appropriate plan considers the particular needs of the child and the child's potential, while providing meaningful learning, and must be calculated to provide educational benefit at the time it is offered and developed. *Id.* A child's unique needs in obtaining a free appropriate education, as well as the services to meet those needs, are developed through the IEP. See 20 U.S.C. § 1410(20). Nonetheless, parents do not have the right to compel a school district to employ a specific methodology, provide a specific teaching program, or assign a particular teacher. *Rowley*, 458 U.S. at 207-208. The IEP is to be used in analysis of whether a free appropriate public education has been or is being provided. *Systema v. Academy School Dist. No. 20*, 538 F.3d 1306 (10<sup>th</sup> Cir. 2008).

A hearing officer's determination must be generally based on substantive grounds as to whether a child received a free, appropriate public education (FAPE). 34 C.F.R. § 300.513(a). If a procedural violation occurs, then it results in a denial of a FAPE only if the procedural inadequacies: (1) impeded a child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a FAPE; or (3) caused deprivation of educational benefit. *Id.* at (a)(2).

Written notice is required regarding issues for the identification, evaluation or placement of a child. *See* 34 C.F.R. § 300.503; 6.31.2.13(D) NMAC. Parents are afforded an opportunity to participate in the IEP meetings by ensuring the District provide them with a notice of the meeting, which is to include, among other things, the purpose, time, and location of the meeting, as well as who will be present. *See* 34 C.F.R. § 300.345(a). In the context of requiring meaningful involvement and input from a student's parents in the IEP, the parents must be provided with prior written notice of any change in the provisions of a student's FAPE. *See Logue v. Unified Sch. Dist. No. 512*, 153 F.3d 727 (10<sup>th</sup> Cir. 1998). The IDEA requires notice of a proposed change before the change is made – not notice of the proposed change prior to commencement of the IEP meeting where the change will be discussed. *See Masar v. Bd. of Educ. of the Fruitport Community Schools*, 39 IDELR 239, 103 LRP 37950 (W.D. Mich. 2003). *See also Tenn. Dept. of Mental Health and Mental Retardation v. Paul B., et al*, 88 F.3d 1466 (6<sup>th</sup> Cir. 1996) (failure to provide notice of “stay-put” not prejudicial for summary judgment proceedings). Nonetheless, a predetermination by the District of the student's placement and services does not allow the student's parents to meaningfully participate in the process and results in substantive harm to the student. *See Deal v. Hamilton County Bd. of Ed.*, 42 IDELR 109, 104 LRP 59544 (6<sup>th</sup> Cir. 2004).

Misinformation provided to parents may prevent them from meaningfully participating in the IEP process. *Bell v. APS*, 52 IDELR 161 (D.N.M. 2008).

Related services include transportation and psychological services. *See* 34 C.F.R. § 300.24(a).

Procedural defects are insufficient to set aside an IEP unless a rational basis exists to believe the procedural errors seriously hampered the parents' opportunity to participate in the decision process, comprised the student's right to an appropriate education, or caused a deprivation of educational benefits. *O'Toole*, 144 F.3d at 707. In other words, technical deviations alone are insufficient to establish a denial of FAPE. *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720 (10<sup>th</sup> Cir. 1996). Procedural defects must amount to substantive harm for compensatory services. *Garcia v. APS*, 520 F.3d 1116 (10<sup>th</sup> Cir. 2008).

Hearing officers have authority to grant relief as deemed appropriate based on their findings. *See* 20 U.S.C. § 1415(e)(2). Equitable factors are considered in fashioning a remedy, with broad discretion allowed. *See Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). The form of compensatory education as a remedy is intended to cure the deprivation of the student's rights while reviewing the length of the inappropriate placement. *See Murphy v. Timberlane*, 973 F.2d 13 (1<sup>st</sup> Cir. 1992). As to the compensatory education component of the remedy, under persuasive authority for a qualitative approach, compensatory education awards should be reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005). Indeed, even with a FAPE denial, subsequent placement may remedy the prior violation. *Wheaten v. Dist. of Columbia*, 55 IDELR 12

(D.D.C. 2010).

**Findings-of-Fact**

1. The Student is 14 years of age. *Ex. A.*
2. He is qualified eligible for special education services under the specific learning disability category in reading, written language and math, at all material times. *Id.*
3. He presently attends G Middle School, which he has attended since August 2010.  
*Ex. 2.*
4. He is in the eighth grade. *Tr. at 606.*
5. Under his present IEP he is receiving seventeen hours of special education services per week, three hours of speech/language support services per month, thirty minutes per week of occupational therapy, and general education for thirteen hours per week. *Ex. 2.*
6. The LEA school year consists of 36 weeks. *Tr. at 595; Respondent's December 1, 2011 FOF (69); Petitioner's December 1, 2011 Proposed Conclusion 17, fn. 7.*
7. Prior to attending G Middle School he was enrolled in the Charter School, which he attended from September 2009 through May, 2010. *Tr. at 288.*
8. Charter School's school year began the week after Labor Day, in September 2009. *Respondent's December 1, 2011 FOF (11); Petitioner's December 1, 2011 Proposed Finding of Fact (9).*
9. Charter School usually relied on parents to provide prior IEPs to it. *Tr. at 92, 147.*
10. Prior to the beginning school with the Charter School for the 2009-2010 school year the Student's parents provided the March 20, 2009 IEP to Charter School agents on two separate occasions. *Tr. at 90, 289-291.*

11. Prior to attending Charter School, he attended C Elementary School. *Ex. A.*
12. An IEP was completed on March 20, 2009, while the Student was at C Elementary School. *Ex. A.*
13. An addendum to the IEP was completed on May 1, 2009, while the Student was at C Elementary School. *Ex. 33.*
14. The March 20, 2009 IEP with the May 1, 2009 addendum (hereinafter jointly as the March 20, 2009 IEP) both reflected that a re-evaluation was due on August 25, 2009, with an annual review date of August 20, 2010. *Exs. A and 33.*
15. The March 20, 2009 IEP prescribed ten hours per week of special education services in a segregated setting for services in reading, writing and math skills. *Ex. A.*
16. The additional services were prescribed for the Student to make gains in reading, writing and math with small group instruction. *Id.*
17. The March 20, 2009 IEP prescribed one hour per week of speech and language services (SLP) in segregated small group settings. *Id.*
18. Small group instruction typically means a group of two to five students. *Tr. at 556.*
19. The March 20, 2009 IEP prescribed one hour per week of occupational therapy services (OT) through June 30, 2009, to be reduced to 45 minutes a week commencing in the 2009-2010 school year. *Ex. A.*
20. Notwithstanding the March 20, 2009 IEP, the Charter School provided services to the Student in an all inclusive educational setting. *Tr. at 49.*
21. Notwithstanding the March 20, 2009 IEP, the Charter School's inclusive setting services were provided without a new IEP meeting for team consideration of the inclusive

setting environment, in which parent participation regarding the changes from segregated to inclusive would have been appropriate. *Tr. at 50, 152.*

22. Prior written notice or any notice of the change in services was not provided to the Student's parents. *Tr. at 50.*

23. At the start of the school year Charter School provided Student with reading under the Soar to Success Reading Program, *tr. at 148,49, 195-96, 703,* and, a few weeks into the school year, with the Wilson Reading Program. *Tr. at 196-97.*

24. The Wilson reading program was in a group in six to eight students, *tr. at 706,* in which individualized instruction was provided. *Tr. at 717-720.*

25. Although there were some educational gains with phonics related skills, *tr. at 714, 716-19,* Charter School did not otherwise provide specialized reading instruction in a frequency appropriate to meet the Student's needs to satisfy the IEP. *Tr. at 245, 276-277, 555-556.*

26. Student's reading was at the third grade level in March 2009. *Ex. A, Tr. at 294.*

27. On November 12, 2009, the Student's psychoeducational re-evaluation found Student's basic reading at a 3.0 grade level, with reading comprehension at a 3.0 grade level. *Ex. D.*

28. In March 2010, while at Charter School, his reading level regressed to the first grade level. *Ex. J, Tr. at 157.*

29. Charter School placed Student in an unsegregated study skills class for one period per day for three days a week for assistance with homework in general education. *Tr. at 38-39.*

30. In February 2010, the Student began tutoring sessions in reading, speech and

language, and language arts, with two private tutors, C.L., and J.L. *Tr. at 327-396; 518-598.*

31. C.L. provided instruction in reading and writing. *Tr. at 327-380.*

32. J.L. provided instruction in speech and language services and in reading, which were interconnected with one another. *Tr. at 544-547.*

33. Student progressed under J.L.'s instruction. *Tr. at 544-552, 559.*

34. Parents paid J.L. a total of \$4,220.00 for her services from February 6, 2010 to September 20, 2010. *Ex. 25; Tr. at 571.*

35. C.L. provided tutoring to Student for reading and written language. *Tr. at 364.*

36. Student progressed under his tutoring with C.L. *Tr. at 342, 385-386.*

37. Parents paid C.L. \$2,680.00 for her services for the Student. *Ex. 25, Tr. at 345.*

38. Fifty percent of the tutoring provided by C.L. related to language arts instruction, as well as to reading, yet there were all interconnected, one with the other. *Tr. at 364.*

39. The Student's tutoring time for reading and for speech and language cannot be delineated because both we worked on at the same time. *Tr. at 571.*

40. J.L. seeks opines she needs additional testing to determine deficits for compensatory education. *Tr. at 596-98.*

41. For mathematics instruction, Student was placed in a general education classroom with fifteen to sixteen students, *tr. at 665*, rather than in a small segregated class prescribed by the March 20, 2009 IEP. *Ex. A.*

42. In a fifty minute math class, the Student would get one-on-one math time with the teacher from between four to six minutes a 50 minute period, *tr. at 665*, rather than in

a small segregated class prescribed by the March 20, 2009 IEP. *Ex. A.*

43. In March 2009, the Student's math performance level was at the third grade level. *Ex. A.*

44. On November 12, 2009, the Student's psychoeducational re-evaluation found Student's math calculation to be at a 3.6 grade level, with math fluency at a 2.2 grade level. *Ex. D.*

45. In March, 2010, while at Charter School, his math level regressed to below the second grade, at MAPS 176. *Ex. J.*

46. For written language, the Student's educational performance level was at a 2.5 grade level in March, 2009. *Ex. A.*

47. On November 12, 2009, the Student's psychoeducational re-evaluation found Student's broad written language at 3.0 grade level, with written expression at a 3.6 grade level. *Ex. D.*

48. Although the Student had shown some educational gains in written expression while at Charter School in November 2009, he subsequently regressed by the time the October 25, 2010 IEP took place, noting the Student to be significantly below average. *Ex. 2.*

49. Charter School placed Student in an unsegregated study skills class for one period per day for three days a week for assistance with homework in general education, rather than as a provision of special education services in math, reading and written language. *Tr. at 38-39, 41, 43-44, 75, 84-85.*

50. The study skills class was not a substitute for special education services in a segregated special education setting as required by the March 20, 2009 IEP.

51. Charter School placed the Student in an English as a second language class (ESL) for one period two days a week during the 2009-2010 school year, tr. at 59, yet Student was not a speaker of English as a secondary language – he was not a Spanish speaker. *Tr. at 116.*

52. ESL was not a substitute for special education services in a segregated special education setting as required by the March 20, 2009 IEP.

53. IEP therapy time is not considered as a standard practice to include evaluations, file review, and report drafting. *Tr. at 561.*

54. This does not discredit the need for knowledge of the classroom support function, tr. at 761, but, in review of the entire March 20, 2009 IEP, particularly with the changes under the May 1, 2009 addendum, *Bates Stamp 00-36*, the ten hours of special education services, with the .45 hour of weekly OT services and one hour per week of SLP, when read as a whole and in context of one another, the prescribed OT by the March 20, 2009 IEP is for direct Student/therapist service time, not for indirect collateral services, however logged – had indirect services been allowed then they would have been specifically stated in the IEP as being appropriate, as they are stated as appropriate in the SLP section of the IEP. *Ex. A, Bates Stamp 0322.*

55. Although the occupational therapist worked on Student's file beginning on about November 10, 2009, the related service of occupational therapy required by the March 20, 2009 IEP – direct occupational therapy services themselves to the Student – were not provided to the Student until February 4, 2010. *Ex. I.*

56. Student did not receive the required OT services from September 8, 2009 (school started on the Tuesday after Labor Day), through February 4, 2010.

57. From February 4, 2010 onward through the close of the 2009-2010 school year, the Student only received direct services for 9.5 hours. *Ex. I.*

58. At .45 minutes per week for 36 weeks the Student should have received 16.2 hours of occupational therapy services.

59. On December 10, 2010 an OT evaluation was conducted. *Ex. F.*

60. A new OT evaluation took place on July 26, 2010. *Ex. G.*

61. Both evaluations were completed at the school's expense. *Ex. U.*

62. All evaluations of record are found appropriate, except for the December 10, 2010 evaluation, which was then remedied by the July 26, 2010 evaluation.

63. The one weekly hour of SLP services are specifically noted in the March 20, 2009 IEP to include training, documentation, classroom observance, teacher consultation, report drafting, and etc., as well as that the SLP would not be substituted if ill or away from school during scheduled sessions. *Ex. A, Bates Stamp 0322.*

64. SLP services were not provided by Charter School until November 2, 2009. *Ex. H.*

65. Nine weeks of services were not provided from September 8, 2009 through November 2, 2009.

66. Student was given a private SLP evaluation by J.L. in February 2010. *Ex. 1.*

67. This evaluation was not an independent evaluation based on a disagreement with an evaluation obtained by a public agency as contemplated under 34 C.F.R. § 30.502.(b)(1).

68. It was, however, subsequently relied on by the special education team in the development of G Middle School's October 25, 2010 IEP. *Ex. 2.*

69. The March 20, 2009 IEP stated that IEP progress documentation would be

provided to the parents each grading period, via mail. *Ex. A, Bates Stamp 0324.*

70. Progress reports of some type were provided to the Student's parents. *Tr. at 447.*

71. During all times material hereto, the Student's parents were actively involved in the education of their son. *Tr. at 283-296, 442-517.*

72. Parents were not notified about the lack of related services at Charter School. *Tr. at 461, 510-511.*

73. Parents were not notified that Charter School deviated from the Student's March 20, 2009 IEP due to its full inclusion policy. *Tr. at 514, 471.*

74. Parents were provided with a copy of the psychoeducational evaluation on about January 11, 2010. *Tr. at 275.*

75. The psychoeducational evaluator discussed the results of the evaluation with the Student's parents in November, 2009. *Tr. at 488-89, 502, 505.*

76. The Student's parents were given a copy of the IDEA procedural safeguards at the March 20, 2009 IEP meeting. *Ex. A.*

77. The March 20, 2009 IEP reflected that a re-evaluation was due on August 25, 2009. *Ex. A.*

78. On January 20, 2010 the Student's parents were contacted to participate in an IEP meeting on February 2, 2010. *Ex. K.*

79. That meeting was cancelled because the Student's father was to be out-of-town. *Tr. at 113.*

80. It was rescheduled for March 10, 2010, *id.*, after attempts were made by the Charter School to have it rescheduled on February 10, 2010 and February 16, 2010. *Ex. V;*

*Tr. at 134-135.*

81. A written notice of the meeting was forwarded on February 16, 2010. *Ex. L.*

82. On March 5, 2010 the Student's parents requested additional records and information from Charter School. *Ex. 13.*

83. A draft IEP had been prepared for the March 10, 2010 IEP meeting, yet it was not shared with the Student's parents. *Tr. at 459.*

84. Neither the psychoeducational evaluator, the school's OT, the ESL teacher nor math teacher were present. *Tr. at 456-458.*

85. The IEP was cancelled before it was completed, in part due to more information the Student's parents had hoped to have prior to completing an IEP. *Tr. at 72.*

86. On April 13, 2010 the Student's parents requested educational records for OT, SLP, Wilson reading logs and MAPS test results. *Ex. 11; Tr. at 491.*

87. Parents were provided the records requested on April 13, 2010. *Tr. at 460-461.* The records were sent by letter on June 15, 2010. *Ex. 10. See Tr. at 186* (no objection and deemed admitted). *Ex. 10*, as a paper exhibit, holds greater credibility than the Student's mother's memory on this issue.

88. Mediation subsequently took place between the parties on June 12, 2010, where the parties agreed to a facilitated IEP. *Ex. U.*

89. The facilitated IEP did not take place. *Tr. at 187-188.*

90. It was to take place in mid-August, yet it never transpired because by that time the Student was to transfer from Charter School. *Tr. at 475.*

91. Respondents did not affirmatively misrepresent services provided to the Student and misinformation, if any, did not prevent meaningful participation in the IEP process.

92. The Student's lack of provision of the special education and related services prescribed by his March 20, 2009 IEP caused him educational harm by creating larger gaps between the Student and his peers and by creating gaps in his study skills. *Tr. at 544-545, 549-550, 565-566.*

93. While at Charter School the Student began to feel stupid; his self-esteem and school interests were negatively impacted, and he did not feel supported or successful. *Tr. at 334, 609-611.*

94. School staff were not properly aware of Student's accommodations while at Charter School so that, while in band, he was expected to read music, when he could not, failure to receive adequate instructions for ball practice, and an inability to participate in a true/false test. *Tr. at 609-616.*

95. Student moved to G Middle School in August 2010. *Tr. at 318.*

96. He had not been provided a new IEP by that time. *Ex. 2.*

97. G Middle School did not receive educational records from Charter School at the commencement of the 2010-2011 school year. *Tr. at 324.*

98. On October 25, 2010, while at G Middle School, another IEP was completed. *Ex. 2.*

99. The October 25, 2010 IEP prescribed small group instruction in reading, written language and math. *Id.*

100. The October 25, 2010 IEP prescribed seventeen hours of special education services per week. *Id.*

101. The October 25, 2010 IEP prescribed three hours of speech/language support

services per month. *Id.*

102. The October 25, 2010 IEP prescribed thirty minutes per week of occupational therapy. *Id.*

103. Additionally, general education is prescribed under the October 25, 2010 IEP for thirteen hours per week. *Id.*

104. Petitioners do not raise any claims after the October 25, 2010 IEP. *Tr. at 21.*

105. Student missed 4.25 hours of SLP and 4.5 hours of OT while at G Middle School.

106. The October 25, 2010 IEP placed Student at third grade level for reading and comprehension, a 3 grade level for broad written language and a 3.6 grade level for written expression; math calculation at grade 3.6 and math reasoning at 2.7. *Ex. 2.*

107. C Elementary School, Charter School and G Middle School are each schools within the parent LEA. *Ex. A; Order Granting Petitioners' Motion to Add Additional Party, Aug. 30, 2011; Ex. 2.*

108. Finality in this action is necessary – Petitioners have presented their claims and evidence, as have the Respondents; therefore, an additional independent speech evaluation and updated achievement testing with results to be considered by a future facilitated IEP should be denied.

### **Conclusions-of-Law and Award**

1. Jurisdiction properly lies over the parties and over the subject-matter. 34 C.F.R. § 300.507(a); 6.31.2.13(I)(1) and 6.31.2.13(I)(3) NMAC.

2. The LEA is the real party in interest as the parent district for the Charter School, C Elementary School and G Middle School.

3. The statute of limitations period begins two years from the date the initial request for due process was filed against the Charter School as an agent school for the LEA – that is, February 16, 2009. *6.31.2.13(I)(19(b)*, NMAC.

4. LEA, through Charter School, unilaterally altered or changed the Students's educational program and placement outside of an IEP team meeting and without prior written notice, or any notice, to the Student's parents. 34 C.F.R. §300.503(a)(1). This did not comply with the procedures set forth in the IDEA, was not reasonably calculated to provide the Student with some and meaningful educational benefit and violated FAPE, impeded the Student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding this provision of FAPE, caused a deprivation of educational benefit and resulted in substantive harm for which compensatory services are appropriate.

5. The full inclusion program by LEA, through the Charter School, did not comply with the procedures set forth in the IDEA, was not reasonably calculated to provide the Student with some and meaningful educational benefit and violated FAPE, impeded the Student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding this provision of FAPE, caused a deprivation of educational benefit and resulted in substantive harm for which compensatory services are appropriate.

6. The LEA, through the Charter School, failed to implement the March 20, 2009 IEP, which did not comply with the procedures set forth in the IDEA, was not reasonably calculated to provide the Student with some and meaningful educational benefit and violated FAPE, impeded the Student's right to a FAPE, significantly impeded the parents'

opportunity to participate in the decision-making process regarding this provision of FAPE, caused a deprivation of educational benefit, and resulted in substantive harm for which compensatory services are appropriate.

7. Equitably, as reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place, while considering the present special educational and related services the Student is receiving, the Student's 14 years of age and special needs, and a balance between formal school and life, the Student is awarded compensatory educational services from the LEA as follows:

(a) 201.6 hours of special education services in a segregated setting for reading, writing and math skills (360 hours at a 36 week school year of 10 hours per week minus 160 hours provided by C.L. and J.L., plus 1.6 hours to round off schedule of services figure).

(b) These hours are to be divided over a period of four school years while the Student continues to attend school; therefore, a 50.4 hours a year at 36 week school year, the Student will receive 1.4 hours of compensatory special education services per week.

(c) 4.5 hours of speech and language services in a segregated small group setting ( $\frac{1}{2}$  of the 9 weeks of speech and language services lost, yet, because of a combination of services by J.L. and C.L. in which reading was intertwined with speech and language, and due to the award for reimbursement for those services, with an offset for special education services for the 160 hours provided, then  $\frac{1}{2}$  for speech and language is equitable, which is 4.5 hours).

(d) These hours are to be divided over a period of one school year while the Student continues to attend school; therefore, at 4.5 hours a year at 36 week school year, the

Student will receive .25 hours of compensatory speech and language services every other week.<sup>1</sup>

(e) 6.7 hours of occupational therapy ( $16.2 - 9.5 = 6.7$ , rounded to 7.2).

(f) These hours are to be divided over a period of one school year while the Student continues to attend school; therefore, at 7.2 hours a year at 36 week school year, the Student will receive .4 (rounded) hours of occupational therapy services every other week.

(g) While it is noted that some additional hourly services might be available due to the lapse in services while at G Middle School prior to the October 25, 2010 IEP, it is concluded that the services awarded above equitably compensate the Student for the loss of all of his deprived services from the LEA, which includes those services lost at the early part of G Middle School.

(h) The services are to be provided by the LEA by LEA personnel providers – the Petitioners request for a parent option for private services is denied.

8. Private services of a tutor were obtained by the Student to remedy the denial of FAPE, for which reimbursement is warranted. *See A.G., et al, v. Dist. of Columbia*, 57 IDELR 9 (D.D.C. 2011). Reading and speech and language tutoring services were interconnected with one another at the tutoring sessions. Thus, Petitioners are awarded reimbursement of \$2,680.00 for C.L.'s services and \$4,220.00 for J.L.'s services. J.L.'s services for the February 24, 2009 evaluation, upon which the October 25, 2010 relied, is part of the \$4,220.00 reimbursement sum. *See J.P. v. Anchorage School Dist.*, 57 IDELR 169 (Alaska 2011).

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<sup>1</sup> Services are already being provided at less than hourly increments (OT at .45); therefore, less than hourly increments to existing services is not unreasonable.

9. Petitioners' claims for updated achievement testing and updated SLP testing are denied, as is the requested claim for a facilitated IEP to consider the results of the requested future said achievement and SLP testings. The time to present evidence for the due process hearing's case-in-chief and for the remedy of compensatory education services is at the due process hearing.

10. Methodology is left to the District.

11. IDEA affords parents the right to inspect their child's educational records, 20 U.S.C. § 1415; it does not obligate a school to send copies of such records to parents, particularly when the parent never requested the records. *Bevis v. Jefferson County Bd. Of Educ.*, 48 IDELR 100 (U.S.D.C. Ala. 2007). Although the LEA, through Charter School, failed to develop a new IEP in a timely manner, nonetheless, it was due in some part to the parents' delay for evaluations of records. *See .J. v. Dist. of Columbia*, 768 F. Supp. 214 (D.D.C 2011). The LEA, however, did not otherwise develop the IEP absent the parents' delay. Therefore, the March 20, 2009 IEP remained in force through the October 25, 2010 IEP. As concluded above, the program under the March 20, 2009 IEP was a violation of FAPE.

12. 20 U.S.C. § 1412(a)(10)(C) is inapplicable because that provision applies to private school reimbursement – there was not private a school reimbursement issue in this matter.

13. Any claims or defenses otherwise raised which are not specifically addressed herein, and due to the order and remedy, are denied.

### **Order**

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioners'

request and amended request for due process is granted in-part.

**Review**

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 20 USC § 1415(I) (2004), 34 C.F.R. 300.516, and 6.31.2.13(I) (25) NMAC (2009). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

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**MORGAN LYMAN, ESQ.**  
**IMPARTIAL DUE PROCESS**  
**HEARING OFFICER**

Entered: December 13, 2011

I certify a true copy hereof was sent by facsimile transmission to D. Poulin, M. Carrico, and A. Gonzales, Esqs., on this 13th day of December 2011.

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