

District of Columbia  
Office of the State Superintendent of Education  
Office of Review and Compliance  
Student Hearing Office  
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STUDENT HEARING OFFICE  
2009 MAY 11 AM 7:59

**Confidential**

STUDENT, through the legal guardian<sup>1</sup> )  
 )  
 Petitioner, )  
 )  
 v. ) Hearing Dates: April 21, 2009 and  
 ) April 28, 2009  
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 )  
 THE DISTRICT OF COLUMBIA )  
 PUBLIC SCHOOLS, )  
 )  
 Respondent. )  
 )

**HEARING OFFICER DETERMINATION**

**Counsel for Petitioner:** William Purcell, Esquire  
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<sup>1</sup> Personal identification information is provided in Attachment A.

## **I. JURISDICTION**

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"), re-promulgated on February 19, 2003; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

## **II. BACKGROUND**

Petitioner is the mother of an \_\_\_\_\_-year-old student ("Student") at a District of Columbia elementary school. Both Petitioner and the Student are residents of the District of Columbia. On March 17, 2009, Petitioner filed a Due Process Compliant Notice ("Complaint") alleging that District of Columbia Public Schools ("DCPS") denied the Student a free, appropriate, public education by failing to:

- (A) Develop an appropriate educational program ("IEP") for the Student;
- (B) Evaluate the Student in all areas of suspected disability; and
- (C) Provide an appropriate educational placement for the Student.

In the Complaint, the relief Petitioner sought included a Hearing Officer Determination requiring DCPS to fund:

- (A) Comprehensive evaluations of the Student, including comprehensive cognitive, educational, clinical, and social history evaluations as well as a functional behavioral assessment; and
- (B) Full-time educational placement for the Student at a non-public, full-time, special education program

The Complaint also requested that this Hearing Officer order DCPS to convene a meeting of the multidisciplinary team to review the evaluations once they are completed and to develop and fund a compensatory education plan for the Student.

Counsel for DCPS filed a Response, Notice of Insufficiency, and Motion to Dismiss Petitioner's Due Process Complaint Notice ("Response") on April 2, 2009. The Response was five days overdue but the Notice of Insufficiency was timely filed. On April 21, 2009, this Hearing Officer issued an order denying the Notice of Insufficiency. The Response asserted that a meeting was being scheduled to determine if the Student needed additional evaluations. The Response asserted that, since the Student had previously been found eligible for special education, "there are no other ripe claims until such time as the IEP team discusses the evaluation data." The Response sought an order of dismissal for failure to state a claim and for lack of subject matter jurisdiction.

The due process hearing convened at 9:00 a.m. on April 21, 2009. Petitioner participated in the hearing by telephone. The parties' proposed exhibits, Petitioner's exhibits 1-14 and DCPS Exhibit 1, were admitted into evidence at the inception of the hearing.

### III. RECORD

*Due Process Complaint Notice*, filed on March 17, 2009;  
DCPS Response, Notice of Insufficiency, and Motion to Dismiss Petitioner's Due Process Complaint Notice, filed on April 2, 2009;  
Petitioner's Five-Day Disclosure, dated April 13, 2009 (Exhibits 1-14);  
DCPS Five-Day Disclosure, filed April 14, 2009 (Exhibit 1);  
Compact Disc of Hearing conducted on April 21, 2009; and  
Compact Disc of Hearing conducted on April 28, 2009;

### IV. ISSUES PRESENTED

1. Whether DCPS denied the Student FAPE by failing to develop an appropriate IEP;
2. Whether DCPS failed to evaluate the Student in all areas of suspected disability; and
3. Whether DCPS failed to provide an appropriate placement for the Student.

### V. FINDINGS OF FACT

1. The Student is an \_\_\_\_\_-year-old, \_\_\_\_\_-grade, learning-disabled student who attends a District of Columbia elementary school.<sup>2</sup> The Student's special education teacher recommended that the Student receive more special education classes than he is currently receiving and that his placement should be in a full-time, special education setting.<sup>3</sup> Petitioner informed the special education teacher that she wanted to request new evaluations for the Student but no one from the Student's school ever followed up on her request.<sup>4</sup>

2. The Student's most recent psycho-educational evaluation was conducted on October 19, 2007.<sup>5</sup> The evaluation included a review of a previous assessment of the Student on May 18 and July 30, 2004.<sup>6</sup> These prior evaluations included a Woodcock-Johnson test, which attempts to provide a measure of the Student's academic achievement.<sup>7</sup> The 2004

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<sup>2</sup> Testimony of Petitioner; Petitioner Exhibit 9 (May 2, 2008, IEP). DCPS also admitted this IEP as DCPS Exhibit 1.

<sup>3</sup> Testimony of Petitioner, Petitioner Exhibit 7 (December 6, 2007, MDT notes).

<sup>4</sup> *Id.*

<sup>5</sup> Petitioner Exhibit 2.

<sup>6</sup> *Id.*

<sup>7</sup> Petitioner Exhibits 3, 4.

Woodcock-Johnson revealed that the Student had exhibited average cognitive abilities and mild academic delays.<sup>8</sup>

3. The October 2007 educational evaluation also included a Woodcock-Johnson test.<sup>9</sup> The 2007 Woodcock-Johnson revealed that the Student's academic achievement was within the very low range with a percentile rank of < 1 to 1 and a standard score range of 58 to 61.<sup>10</sup> Thus, the Student had severe academic regression between the 2004 and the 2007 Woodcock-Johnson evaluations.<sup>11</sup>

4. The October 2007 educational evaluation revealed that the Student's academic achievement in 2007 was within the very low range with a standard score of 58 and a grade equivalent of 1.7.<sup>12</sup> The Student's sight reading ability and spelling were negligible.<sup>13</sup> He also demonstrated limited skills in the areas of written expression and reading comprehension.<sup>14</sup> The Student's overall reading ability was negligible; reading tasks above the level of a seven-year-old were quite difficult for him.<sup>15</sup> His spelling ability, writing fluency, and quality of written expression were similarly very limited.<sup>16</sup> His mathematics standard score was within the low average-to-average range (percentile range of 16 to 26, standard score range of 85 to 90). His overall mathematics ability is limited and math tasks above the age 9.5 years were quite difficult for him.<sup>17</sup> The evaluator recommended that the Student receive specialized instruction to address these academic deficits.<sup>18</sup>

5. The Student's most recent clinical psychological evaluation was conducted in May 2004.<sup>19</sup> This evaluation included a WISC-III, which showed that the Student's general cognitive ability was average; his full scale IQ was 94.<sup>20</sup> His general verbal abilities were in the average range and general nonverbal abilities were in the low average range.<sup>21</sup> The evaluator noted a sixteen-point difference between the Student's verbal and performance scores, which was indicative of a learning disability.<sup>22</sup> The recommendations of the evaluator included a clinical

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<sup>8</sup> *Id.*

<sup>9</sup> Petitioner Exhibit 2.

<sup>10</sup> *Id.*

<sup>11</sup> Testimony of Psychologist. The Psychologist was admitted as an expert in child psychology and the components of an appropriate IEP for a child with the Student's disabilities. Compare Petitioner Exhibit 3 and Petitioner Exhibit 4 with Petitioner Exhibit 2 (both parts of 2004 psycho-educational evaluation with 2007 evaluation).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Petitioner Exhibit 5.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

evaluation to determine the Student's social emotional needs and an occupational therapy screening to rule out visual perceptual motor planning issues.<sup>23</sup>

6. The Student's most recent clinical psychological evaluation was conducted on October 7, 2004.<sup>24</sup> This evaluation included a behavioral classroom evaluation and the evaluator noted that the Student was significantly hyperactive and demonstrated considerable inattention.<sup>25</sup> The results of the clinical evaluation suggested an Axis 1 diagnosis of ADHD and an Axis 4 diagnosis of behavioral difficulties that would impact the Student's educational performance.<sup>26</sup> The Student's behavioral difficulties could have been addressed through the Student's IEP by providing psychological counseling and conducting a functional behavior assessment ("FBA") to develop a behavior implementation plan ("BIP") to address the Student's behavior.<sup>27</sup>

7. The 2004 clinical psychological evaluation recommended that the Student's IEP be revised to include social/emotional goals and one thirty-minute session of individual counseling per week to address behavioral concerns.<sup>28</sup> The evaluator suggested that the IEP team monitor the Student's behavior and academic progress over a ninety-day period following the implementation of the alterations to the Student's IEP.<sup>29</sup> It recommended that the Student be removed from the open-space environment should he continue to demonstrate difficulties.<sup>30</sup> Finally, the evaluator stated that the Student required a behavior plan to address simple, achievable, target behaviors in the classroom.

8. The Student's most recent IEP was developed on May 5, 2008.<sup>31</sup> This IEP requires DCPS to provide the Student ten (10) hours of specialized instruction weekly by a special education teacher in a general education classroom, a setting known as "inclusion."<sup>32</sup> The IEP also requires DCPS to provide one half-hour of psychological services from a school social worker and one half hour of occupational therapy from an occupational therapist weekly.<sup>33</sup>

9. The Student's IEP includes goals in reading, written expression, math, visual perception and motor integration skills.<sup>34</sup> It also contains behavioral-social/emotional goals.<sup>35</sup> The least restrictive environment ("LRE") determination in the IEP was that the Student

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<sup>23</sup> *Id.*

<sup>24</sup> Petitioner Exhibit 5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; Testimony of Psychologist.

<sup>27</sup> Testimony of Psychologist.

<sup>28</sup> Petitioner Exhibit 5.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Petitioner Exhibit 9.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Petitioner Exhibit 9.

<sup>35</sup> *Id.*

“requires a small structured environment” to accommodate his disabilities.<sup>36</sup> His placement was in a combination general education and resource classroom, an inclusion setting.<sup>37</sup>

10. Petitioner attended the May 5, 2008, IEP team meeting.<sup>38</sup> The IEP was developed at that meeting but not by the full IEP team.<sup>39</sup> Neither the occupational therapist nor the social worker attended the meeting.<sup>40</sup> Petitioner was a participant in the development of this IEP.<sup>41</sup> She requested that the IEP require DCPS to provide more hours of specialized instruction to the Student and objected when the team provided only ten hours.<sup>42</sup> Petitioner signed the IEP to convey her consent to the implementation of the services in the IEP.<sup>43</sup>

11. At a November 2008 meeting of the multidisciplinary team (“MDT”), which included only three members of the team, including Petitioner, the MDT noted that the Student’s school requested an FBA and a Connors rating scale.<sup>44</sup> The team noted that the Student’s behavior “shuts down the classroom.” These recommendations indicate that the MDT suspected that the Student was emotionally disturbed (“ED”).<sup>45</sup> DCPS never conducted an FBA or Connors rating scale for the Student.<sup>46</sup>

12. The Student’s most recent report card is “better than usual” and his grades have improved.<sup>47</sup> However, the failure of DCPS to address the Student’s ADHD and behavioral difficulties exacerbated the Student’s condition and it is likely that the Student is now ED.<sup>48</sup> The Student’s untreated condition has had an adverse impact on his educational performance.<sup>49</sup> A student diagnosed as ADHD, who meets criteria for ED, and has academically regressed significantly requires a full-time, therapeutic setting out of the general education environment.<sup>50</sup>

13. The IEP team plans to examine whether to increase the specialized instruction hour on the Student’s IEP when the team meets to develop the Student’s next IEP.<sup>51</sup>

14. Petitioner’s proposed private placement, \_\_\_\_\_ would be able to implement the Student’s IEP.<sup>52</sup> The classrooms at \_\_\_\_\_ are small, therapeutic settings and High

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Testimony of Petitioner.

<sup>39</sup> *Id.*; Petitioner Exhibit 9 (page 1 sign-in sheet).

<sup>40</sup> Petitioner Exhibit 9.

<sup>41</sup> *Id.*; Testimony of Petitioner.

<sup>42</sup> Testimony of Petitioner.

<sup>43</sup> Petitioner Exhibit 9.

<sup>44</sup> Petitioner Exhibit 6. The Connors rating scale uses observer ratings and self-report ratings to help assess ADHD and evaluate problem behavior. Testimony of Psychologist.

<sup>45</sup> Testimony of Psychologist.

<sup>46</sup> *Id.*

<sup>47</sup> Testimony of Petitioner.

<sup>48</sup> Testimony of Psychologist.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Testimony of Special Education Coordinator.

Roads would be able to implement the Student's IEP.<sup>53</sup> There are no general education students enrolled at the private school and no general education classes offered there.<sup>54</sup> The private school would have to revise the Student's IEP to meet their student body and curriculum.<sup>55</sup> The Student's IEP would be revised to require him to be out of the general education setting for 100 percent of the time.<sup>56</sup> Tuition at the private school would be more than \$30,000 a year.<sup>57</sup>

## VI. CREDIBILITY DETERMINATIONS

This Hearing Officer finds that all of the witnesses who testified were credible with the exception of some of Petitioner's testimony. None of the witnesses who testified contradicted any other witness's testimony, and most of the testimony was corroborated by Petitioner's exhibits. Petitioner appeared to lack a full understanding of the IEP process and she appeared to have an unreliable recollection of which members of the IEP attended the meeting at which the Student's 2008 IEP was developed as the sign in sheet directly contradicts her testimony. The other aspects of Petitioner's testimony were reliable and corroborated by Petitioner's exhibits. The testimony of the Psychologist was both credible and compelling.

## VII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005). Under IDEA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence. 20 U.S.C. § 1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

IDEA requires DCPS to assure a "free appropriate public education" ("FAPE") for all disabled children. 20 U.S.C. § 1412(1). A free, appropriate public education "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982) (citation omitted). DCPS is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive." 34 C.F.R. § 300.101.

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. 20 U.S.C. § 1415 (f)(3)(E)(ii). In other words, an IDEA claim is viable only if those procedural

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<sup>52</sup> Testimony of

Director.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

violations affected the student's substantive rights. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error").

## VIII. DECISION

### A. Petitioner Established by a Preponderance of the Evidence that DCPS Failed to Develop an Appropriate IEP for the Student in 2008.

A free, appropriate, public education "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982) (citation omitted). DCPS is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive." 34 C.F.R. § 300.101.

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals. *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted). The court should not "disturb an IEP simply because [it] disagree[s] with its content." *Id.* The court is obliged to "defer to educators' decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides." *Id.*

#### 1. The Student's IEP is Procedurally Flawed Because DCPS Failed to Convene a Full IEP Team to Develop the IEP.

DCPS must ensure that the IEP team for each child with a disability includes an individual who can interpret the instructional implications of evaluation results and, at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel. 34 C.F.R. 300.321. Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.<sup>58</sup> The court should not "disturb an IEP simply because [it] disagree[s] with its content."<sup>59</sup> The court is obliged to "defer to educators' decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides."<sup>60</sup>

The testimony at the hearing, as well as the remarks of the Student's teachers May 2008 IEP was developed by an incomplete IEP team. The school social worker and the school

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<sup>58</sup> *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

psychologist did not participate in the development of the Student's IEP. Yet the social worker and psychologist were the only persons qualified to interpret the instructional implications of evaluation results, including potential behavioral interventions for the Student. Thus, Petitioner proved by a preponderance of the evidence that the May 2008 IEP was procedurally flawed.

**2. The Student's 2008 IEP was Substantively Flawed Because DCPS Failed to Update the Clinical Evaluation, Complete Evaluations Recommended by the IEP Team at the Student's Prior School, and Address the Student's Academic Regression in the IEP.**

The services provided on a disabled student's IEP "must address *all* of the child's identified special education and related services and must be based on the child's unique needs and not on the child's disability." 30 DCMR § 3002.1(f) (emphasis added). "The IEP is in brief a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs. *Burlington School Comm. v. Dep't of Educ. of the Commonwealth of Massachusetts*, 471 U.S. 359, 368. (1985).

In developing an IEP, the team must consider (i) the strengths of the child; (ii) concerns of the parents for enhancing the education of the child; (iii) the results of the initial or most recent evaluation of the child; and (iv) the academic, developmental, and functional needs of the child. 34 C.F.R. § 300.324. In the case of a child whose behavior impedes the child's learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *Id.*

Here, the 2007 MDT notes and the testimony of the Psychologist established that the Student's ADHD and behavioral difficulties significantly impeded his ability to learn. The evaluator who conducted the 2004 clinical psychological recommended a clinical evaluation to determine the Student's social-emotional needs. As stated above, the IEP team at Student's previous school had requested an FBA and a Connors rating scale. The team noted that the Student's behavior "shuts down the classroom."

Despite the Student's reported behavioral problems that impeded his ability to access his education, DCPS failed to update the Student's clinical evaluation, which was last conducted in October 2004 and expired in October 2007. *See* 34 C.F.R. § 300.303 (reevaluations must occur at least once every three years unless the parent and the public agency agree that a reevaluation is unnecessary). DCPS also never conducted an FBA or Connors rating scale for the Student. Without the FBA, DCPS was unable to develop a behavior implementation plan for the Student.

Because DCPS failed to update the Student's clinical evaluation or conduct the recommended FBA and Connors rating scale, the IEP team had no current information on the disabilities that most impeded the Student's ability to access his education. Without this information, the IEP team could not properly consider the Student's academic, developmental, and functional needs. *See* 34 C.F.R. § 300.324. Without an updated clinical evaluation, the team also was unable to determine whether any additions or modifications to the special education and related services are needed to enable the Student to meet the measurable annual goals set out in the IEP and to participate, as appropriate, in the general education curriculum. *See* 34 C.F.R. § 300.305 (a) (2) (B) (iv). Despite the recommendation of the IEP team at the

Student's prior school, the IEP lacked a behavioral implementation plan. The Student has very likely developed an emotional disturbance as a result of the failure by DCPS to, among other things, implement a BIP for him.<sup>61</sup> Equally egregious is that the team failed to increase the hours of specialized instruction on the Student's 2008 IEP despite that the Student's most recent Woodcock-Johnson showed significant academic regression in the prior three years.

Thus, DCPS's failure to develop an appropriate IEP to address the Student's behavioral difficulties has caused significant harm to the Student.

**B. Petitioner Established by a Preponderance of the Evidence that DCPS Denied the Student a FAPE by Failing to Evaluate the Student in All Areas of Suspected Disability.**

A public agency must ensure that a reevaluation of each child with a disability is conducted if the public agency determines that the educational or related services needs, including improved academic performance and functional performance of the child warrant reevaluation. 34 C.F.R. § 300.303 (a)(1). A reevaluation must occur at least once every three years, unless the parent and the public agency agree otherwise. *Id.* at (b) (2).

Reevaluations should be conducted in a "reasonable period of time," or "without undue delay," as determined in each individual case. *Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005). The parent of a child with a disability has the right to obtain an independent educational evaluation ("IEE") at public expense if the parent disagrees with the evaluation obtained by the public agency. 34 C.F.R. § 300.502 (b)(1).

Here, the Student's clinical evaluation expired in October 2007, and despite the Student's serious behavioral problems, DCPS never re-evaluated the Student. DCPS failed to evaluate the Student within the mandated three years, which was a procedural violation of IDEA.

Moreover, in November 2008 the MDT noted that the Student's school requested an FBA and a Connors rating scale. More than six months later, DCPS has not conducted the FBA or Connors rating scale. The Student's behavioral difficulties could have been addressed through the Student's IEP by conducting the FBA to develop a behavior implementation plan to address the Student's behavior. Instead, DCPS sat on its hands while the Student's behavior impeded his access to education. That the Student's behavior shut down the classroom put DCPS on notice that the Student should be evaluated and interventions put in place to reduce the Student's outbursts.

The Psychologist's testimony established that the failure of DCPS to address the Student's ADHD and behavioral difficulties exacerbated the Student's condition and it is likely that the Student is now ED. The Student's untreated condition has had an adverse impact on his educational performance. Thus, the failure of DCPS to timely evaluate the Student in all areas of suspected disability denied the Student a FAPE.

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<sup>61</sup> Testimony of Psychologist.

**C. Petitioner Failed to Establish that Academy is an Appropriate Placement for the Student.**

To the maximum extent possible children with disabilities should be educated with children who are non-disabled. 34 C.F.R. § 114 (a)(2)(i). Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *Id.* at 114 (a)(2)(ii).

IDEA requires that unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. 34 C.F.R. § 300.116 (c). In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs. 34 C.F.R. § 300.116 (d). A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum. *Id.* at (e).

To the maximum extent appropriate, children with disabilities, including children in public or private institutions with other care facilities, are to be educated with children who are nondisabled. 34 C.F.R. 300.114 (2) (i). This requirement also applies to non-academic and extracurricular services and activities such as recess, meals, athletics, counseling, groups, and clubs. 34 C.F.R. § 300.117.

In a perfect world, Petitioner would receive one-on-one instruction and a multitude of services to address her suspected disabilities. However, IDEIA does not require DCPS to “maximize the potential” of this Student. *McKenzie*, 882 F.2d at 886 (noting that the Supreme court stressed the lack of any such requirement four separate times in *Rowley*, 458 U.S. at 189, 197 n. 21, 198, 199). Rather, it only has to provide a “basic floor of opportunity.” 882 F.2d at 886.

While Petitioner may have preferred IDEA guarantees special education students only a “basic floor of opportunity.” *See Rowley*, 458 U.S. at 200 (“basic floor of opportunity” consists of access to specialized instruction and related services individually designed to provide educational benefit). Moreover, placement decisions must be made in conformity with the child’s IEP. 34 C.F.R. § 300.116 (a)(2)(b); D.C. Mun. Regs. Tit. 5 § 3013 (2006). Thus, the IEP determines whether a placement is appropriate, not the other way around. *See Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006).

Here, the Student’s IEP requires him to receive only ten hours of specialized instruction in an inclusion setting. Pursuant to his current IEP, the Student is in the general education setting for 100 percent of the time, except for the half hour of counseling and half hour of occupational therapy he is to receive each week.

All students have full-time IEPs that provide for 27.5 hours of specialized instruction outside of the general education setting. There are no general education students and no general education or inclusion classes at Were the Student to attend his IEP would have to be revised to reflect the curriculum at which would require

the Student to be in a full-time, out of general education setting.

Thus, Petitioner failed to establish by a preponderance of the evidence that is the least restrictive environment for the Student.

### **IX. ORDER**

Upon consideration of Petitioner's requests for a due process hearing, the parties' Five-Day Disclosures, and the testimony at the hearing, it is this 8th day of May 2009 hereby:

**ORDERED** that Petitioner shall obtain an independent clinical evaluation, a psychoeducational evaluation, a functional behavior assessment, and a Connors Scale evaluation of the Student at the expense of DCPS on or before June 1, 2009;

**IT IS FURTHER ORDERED** that within 5 business days of the receipt of each evaluation, counsel for Petitioner shall forward copies of all evaluations conducted pursuant to this Order to the special education coordinator of the Student's school as well as DCPS counsel Harsharen Bhuller and Daniel McCall;

**IT IS FURTHER ORDERED** that within ten business days of the receipt of the last evaluation conducted pursuant to this order, DCPS shall convene the MDT team to develop a behavior plan, revise the Student's IEP to include behavioral goals and objectives, and any increased specialized education recommended by the independent evaluator and agreed upon by the MDT, and discuss whether the Student needs a change in placement;

**IT IS FURTHER ORDERED** that DCPS shall include all independent evaluators, the school psychologist, and the DCPS social worker assigned to the Student in the MDT meeting at which the Student's IEP will be reviewed and revised, and any behavior plan implemented, after receipt of the evaluations conducted pursuant to this order;

**IT IS FURTHER ORDERED** that for scheduling of the meeting only, DCPS shall receive one day of delay for every day of delay caused by Petitioner, her counsel, or her advocate; and

**IT IS FURTHER ORDERED** that this Order is effective immediately.

/s/

\_\_\_\_\_  
Frances Raskin  
Hearing Officer

### **NOTICE OF APPEAL RIGHTS**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).

Distributed to:

William Purcell, Attorney at Law  
Harsharen Bhuller, Attorney at Law  
Daniel McCall, Attorney at Law  
Hearing Office