



Office of Review & Compliance

Student Hearing Office
 Van Ness Elementary School
 1150 5th Street, S.E., 1st Floor
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Confidential

The Student Through their)
 Parents,*)
 Case No.:)

**IMPARTIAL
 DUE PROCESS HEARING**

Petitioner,)
 vs.)

DECISION AND ORDER

The District of Columbia Public Schools,)
 Home School:)
 Attending:)
 Respondent.)

Due Process Compl. Filed: Feb. 23, 2009
 Resched. Hr'g Dates: Apr. 13 & 20, 2009
 Held at: Van Ness Elementary School
 1150 5th Street, S.E., 1st Floor
 Washington, D.C. 20003
 Pre-Hr'g Conference Held By-Phone on
 Friday, Mar. 13, 2009 at 4:30 p.m.

2009 MAY -1 AM 9:56

OSSE
 STUDENT HEARING OFFICE

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Independent Hearing Officer:

Frederick E. Woods

- Party identification information is stated in Appendix A of this order and Appendix A shall be removed from this order before public dissemination.

I. Case Background and Procedural Information

A. JURISDICTION

This Decision and Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, codified at 20 U.S.C. §§ 1400 -1482, 118 Stat. 2647; and its implementing regulations codified at 34 C.F.R. §§ 300.01 – 300.818; 5 D.C.M.R. §§ 3000 - 3033; and Section 327 of the D.C. Appropriations Act.

B. DUE PROCESS RIGHTS

Before the hearing the parents had been advised of their due process rights.

C. FIVE-DAY DISCLOSURES

Petitioner: Admitted, without objection, a disclosure letter filed on 04/06/09 that list six (6)-witnesses and attached thirty-two exhibits sequentially labeled Parent-01 through Parent-32. Three witnesses were called to testify: (1) a private psychologist; (2) the student's mother; and (3) the student's probation officer.

Respondent: Admitted, without objection, a disclosure letter filed on 04/06/09 that list nine (9)-witnesses and attached eleven exhibits sequentially labeled DCPS-01 through DCPS-11. Three witnesses were called to testify: (1) the student's special education teacher; (2) the student's general education Science teacher; and (3) a DCPS school psychologist.

D. STATEMENT OF THE CASE

The student, born _____ age _____-years 8-months, is an _____ grade general education student who was attending _____ located at _____ From January 21, 2009 - March 13, 2009 the student was incarcerated at the _____ Since March 13, 2009 the student is living and attending school at _____ a residential treatment center located in Bristol, Virginia. (R. at Parent-01.)

The parent alleged three things: (1) that DCPS failed to identify, locate, and evaluate the student for a suspected disability due to her poor academic performance and behavior problems in school; (2) that DCPS failed to evaluate the student in all areas of her suspected disability—Emotional Disturbed (“ED”), and Specific Learning Disabled (“SLD”) and (3) DCPS failed to find the student eligible for special education services and provide her a therapeutic special education program. (R. at Parent-01.)

Consequently, on 02/23/09 parent's counsel filed the student's 02/23/09 Due Process Complaint ("DPC") alleging that DCPS as the LEA violated the IDEA and denied the student a Free Appropriate Public Education ("FAPE") by doing three things: (1) failing to locate, identify and evaluate the student to determine her eligibility for special education services; (2) failing to find the student eligible for special education services and develop an appropriate IEP for the student during the 2008-09 school year; and (3) failing to provide the student a therapeutic special education program. (R. at Parent-01.)

As relief, the parent wants the student determined eligible for special education services; and Compensatory Education. (R. at Parent-01.)

DCPS' 03/10/09 Response to the student's DPC was (1) "DCPS no longer had jurisdiction [over] the student's site placement since the student was incarcerated." (R. at DCPS' 03/10/09 Response to the DPC.)

The OSSE Student Hearing Office ("SHO") rescheduled, at parent counsel's request, the eight-hour due process hearing scheduled for 03/27/09 until 9:00 a.m. on Monday, April 13, 2009. That hearing convened as scheduled and lasted eight-hours and still required a second hearing date. That second hearing date was scheduled and held on Monday, April 20, 2009 at 9:30 a.m. Both hearings were held at Van Ness Elementary School, 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003. The parties' waived participation in a Resolution Session. And the parents selected to have a closed due process hearing that convened, as rescheduled, 53-days after the 02/23/09 DPC was filed.

Assistant Attorney General Daniel McCall appeared in-person representing DCPS. Attorney Sarah Tomkins appeared in-person representing the student who was not present; and the student's mother who was present.

II. Issues

- 1. Did DCPS, as the LEA, violate the IDEA and deny the student a FAPE by failing to identify, locate, and evaluate the student to determine her eligibility for special education services pursuant to its IDEA child find duties?**
- 2. Did DCPS as the LEA violate the IDEA and deny the student a FAPE by failing to evaluate the student in all areas of her suspected disability?**
- 3. Did DCPS as the LEA violate the IDEA and deny the student a FAPE by failing to determine the student's eligibility for special education services; develop her IEP; and provide her a therapeutic special education program setting?**

Brief Answers

1. Yes. DCPS failed to timely locate, identify, and evaluate the student to determine her eligibility for special education services.
2. Yes. DCPS failed to timely evaluate the student in all areas of her suspected disability—ED/SLD.
3. Yes. The student requires a therapeutic special educational program as called for by one of her evaluators; and DCPS did not provide the student with that recommended program at

III. FINDINGS OF FACT

1. The student, born _____ age _____-years 8-months, is an _____ grade general education student who was attending _____ located at _____. From January 21, 2009 - March 13, 2009 the student was incarcerated at the _____. The student is now living and attending school at _____ a residential treatment center located in Bristol, Virginia. (R. at Parent-01.)
2. According to the student's mother and the 02/03/09 Psycho-Educational Evaluation Report, written by the private psychologist who evaluated the student, the student has shown signs of a Mood Disorder for the past several years. The mother said that the student disobeys her; has problems following directions; has temper outbursts that sometimes result in physical fights in and suspensions from school; and she ran away from home. In the pasts four-to-five months [December 2008 -February 2009] she has mood swings, bouts of crying, and irritability. (R. at Parent-22-4; testimony of the parent and private psychologist.)
3. Prior to being incarcerated, the student was repeating the 8th grade for the second time at _____. She has been habitually truant from school for the past two years. And she does not have any friends. She typically earns poor grades and functions below her 8th grade level. (R. at Parent-22-4.)
4. Functioning below grade level is also supported by the student's 02/03/09 Psychological Assessment Report and the evaluator's testimony about the student's intellectual and academic functioning which are as follows:

- i. Based on the student's test results from the Wechsler Intelligence Scale for Children, fourth edition ("WISC-IV"), she has a Full Scale Intelligence Quotient ("FSIQ") of 74—placing her intelligence in the 4th percentile when compared with other adolescents her age. That classifies her in the borderline range of intelligence meaning that her overall performance exceeds about 4% of other adolescents.
- ii. Her academic achievement, based on his subtest scores from the Woodcock-Johnson Test of Achievement, third edition ("WJ-III"), places her between 2-5 grade levels below her 8th grade level in all subjects tested, among them—
 - a.) Reading Comprehension, 4.1 G.E.;
 - b.) Basic Reading Skills, 6.0 G.E.;
 - c.) Math Reasoning, 4.9 G.E.;
 - d.) Written Expression, 3.9 G.E; and
 - e.) Writing Fluency, 3.1 G.E.
- iii. Her emotional/personality functioning diagnostically shows that she is suffering from a Mood Disorder, Not Otherwise Specified ("Mood Disorder NOS"). Since the 7th grade, the student has been depressed throughout the day, has difficulty sleeping, and has difficulty enjoying things she once took pleasure in. She fails to comply with adult directives, violated her curfew, and ran away from home. Her life experiences to date taught her that others will disappoint, betray, and eventually abandon her. She is now four months pregnant and has smoked marijuana once a month since she was 13-years old.
- iv. Her Diagnoses on Axis I was as follows: (1) Mood Disorder, NOS; (2) Reading Disorder [SLD in Reading], (3) Nicotine Dependence, and (4) Cannabis Abuse.
- v. And based on the student's test results and diagnoses her evaluator recommended, among other things, the following—
 - a.) The student needed a placement in a therapeutic group home with other expectant mothers.
 - b.) Academically, she needs supports to improve her behavior and to help her be more available for instruction. Consultation with a school psychologist may prove especially useful in accomplishing this.

c.) And overall, she will continue to need a substantial amount of home, school, and community support to experience more success

(R. at Parent-22; testimony of the private psychologist.)

5. According to the student's 01/30/09 Psychiatric Evaluation Report, the psychiatrist who evaluated the student said that the student's DSMV IV Diagnoses on Axis I is Mood Disorder, NOS; and Cannabis Abuse. And the evaluator recommended a laundry list of services for the student within a residential treatment program that includes: (1) individual therapy three (3) x week; monitoring by a psychiatrist due to her Mood Disorder, NOS; anger management classes; and MST—Multi-systemic Therapy-intensive, multi-modal family based treatment approach. (R. at Parent-23.)
6. During the last two school years, the student was failing all but one of her classes. Her 10/28/07 Report Card shows that in her first advisory she received an "F" grade in her 5-core academic classes and a "U" [unsatisfactory] in Citizenship. (R. at Parent-16.) And her 10/24/08 Report Card shows that in her first advisory she received an "F" grade in her 3-core academic classes and a "C" grade in pre-Algebra. (R. at Parent-17.)
7. Albeit DCPS was aware of all the information just stated, on 04/03/09, almost two months after the parent's 02/23/09 DPC was filed, DCPS convened the student's MDT/Eligibility Meeting at and found the student ineligible for special education services. (R. at Parent 18; DCPS-09.)
8. According to the 04/03/09 MDT Meeting Notes, the IEP Team based its decision on "[the student's work at along with the less than two (2)-month timeframe she was at [Jan. 21, 2009 - Mar. 13, 2009]." (R. at Parent-18; DCPS-09, testimony of two teachers from a DCPS school psychologist.)
9. The DCPS school psychologist and the student's private psychologist agreed that the student has a Mood Disorder. But they disagreed on the cause of the Mood Disorder to wit: the DCPS psychologist said it is caused by the student's pregnancy and Cannabis Abuse. In contrast, the student's private psychologist said there was evidence of the student's mental health disorder before the student smoked and became pregnant. (R. at DCPS-07; Parent-22.)

10. The hearing officer finds that there was a history of the student's mental disorder before her pregnancy and Cannabis Abuse. That is because of the following:
 - i. According to the student's 01/30/09 Psychiatric Report the student told her psychiatrist that "she [the student] can't be around people because she is easily irritated. The girls at the 'get on my nerves.' The student thinks she had anger management problems since she was -years old. She fought other students, most of them boys, if they said something to her that she did not like." (R. at Parent-23-3.)
 - ii. The student's mother said her daughter's problems began several years ago while in the grade—that is three (3)-years age since she is now repeating the 8th grade. She said that "her emotional and behavior problems have escalated within the last 4-5 months—mood swings; poor anger management; and more crying episodes." (R. at Parent-23-5.)
 - iii. The student's personality profile test results generated by the valid MACI and PAI-A shows, based on the student's responses on self-reporting measures, that "she is oppositional; and hesitant about engaging in warm and affectionate relationships. ...She will likely have difficulty sustaining a therapeutic relationship because of her withdrawal tendencies and mistrust of others. ...Her primary therapeutic goals should focus on the acquisition of social skills, confidence building, and overcoming fears of self-determination." (R. at Parent-22-11.)
 - iv. And "diagnostically, as noted in her psychiatric evaluation report, the student is suffering from a Mood Disorder, being depressed throughout the day since at least the seventh grade. ...As a result of this she is easily 'set off' and prone to outburst. Her infractions in the community and at school are likely indicative of this [Mood Disorder]." (R. at Parent-22-12; Parent-13.)
11. The overwhelming evidence shows that for at least two years the student's poor academic performance; truancy; behavior problems; and mood swing existed before the student's now four month pregnancy. DCPS did not provide any evaluation evidence that contradicted that testimony. Nor did DCPS provide any persuasive evidence that the student is not suspected of being ED, and SLD in Reading. (R. at Parent-22.)

12. Therefore, the student was entitled to the protections of the IDEA because (1) DCPS knew or should have known that the student had a suspected disability based on her poor behavior at school; and for the past two years the student failed all but one of her classes and is repeating the 8th grade. (R. at Parent-16, 17, parent's testimony.)
13. Based on those facts the hearing officer found three things: (1) that DCPS defaulted on its IDEA obligations by failing, for more than two years, to identify and evaluate the student to determine her eligibility for special education services under its child find obligation; and once found eligible for services, providing her an appropriate IEP and placement to implement her IEP for the 2008-09 school year. (2) That failure, an inexplicable two year delay in evaluating the student, resulted in a procedural violation of the IDEA that denied the student a FAPE. And (3) the parent's requested relief of finding the student eligible for special education services as an ED/SLD student is granted.
14. So that student is hereby found eligible for special education services as an ED/SLD student effective Thursday, April 30, 2009.

IV. DISCUSSION and CONCLUSIONS OF LAW:

I.

DCPS is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The IDEA codified at 20 U.S.C. §§ 1400 - 1482. and 5 D.C.M.R. § 3000.1 requires DCPS to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide them with special education and related services through an appropriate IEP and Placement.

DCPS did not meet its legal obligation under the IDEA. Here is why.

1. "If a child's initial evaluation suggests [s/he] is entitled to a FAPE, IDEA then requires the school district to create and implement an IEP, which is the 'primary vehicle' for implementing the Act." Hoing v. Doe, 485 U.S. 305, 311 (1988).
2. Pursuant to Initial Evaluations at 34 C.F.R. § 300.301 (a): "Each public agency shall conduct a full and individual initial evaluation in accordance with § 300.305 and § 300.306 before the initial provisions of special education and related services [are provided] to a child with a disability under this part [Part B of the IDEA]."

3. Pursuant to Initial Evaluations at 34 C.F.R. § 300.304 (c)(4): “Each public agency must ensure that ... (4) “the child is assessed in all areas related to the suspected disability, including, if appropriate ... [their] social and emotional status.”
4. Pursuant to Initial Evaluations at 34 C.F.R. § 300.304 (c)(6): “Each public agency must ensure that ... (6) “in evaluating each child with a disability under §§ 300.304 - 300.306, the evaluation is sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.”
5. Pursuant to 20 U.S.C. § 1414 (c)(1), “initial evaluation shall consist of procedures to determine whether a child is a child with a disability ... within 60-days of receiving parental consent for the evaluation, or if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe.” The District of Columbia’s established evaluation timeline codified at D.C. Code Ann. § 38-2051(a) was [within 120-days of receipt of the referral].
6. Pursuant to 5 D.C.M.R. § 3002.1, LEA Responsibility, “[t]he services provided to the child must address all of the child’s identified special education and related services needs and must be based on the child’s unique needs and not on the child’s disability.”
7. Pursuant to 5 D.C.M.R. § 3013.1(e), Placement, “[t]he LEA shall ensure that the educational placement decision for a child with a disability is ... based on the child’s IEP.”
8. Pursuant to the IDEIA at 20 U.S.C. § 1414 (d) (A), (B); 34 C.F.R. § 300.323 (a) Requirement that Program be in Effect—

At the beginning of each school year, each local educational agency ... shall have in effect for each child with a disability in the agency’s jurisdiction an IEP.

9. To ensure that each eligible student receives a FAPE, the IDEIA requires that an IEP be developed to provide each disabled student with a plan for educational services tailored to that student’s unique needs. See 20 U.S.C. § 1414 (d)(3).
10. Pursuant to 34 C.F.R. § 300.321 (a)(5), IEP Team, “[t]he public agency must ensure that the IEP Team for each child with a disability includes—an individual who can interpret the instructional implications of evaluation results.”

11. "School districts may not ignore disabled students' needs nor may they await parental demands before providing special instruction. Rather, the IDEA requires that school districts must identify, locate, and evaluate all children with [suspected] disabilities who are in need of special education and related services." Reid v. District of Columbia, 401 F.3d 516, 519 (D.C. Cir. 2005); See also 20 U.S.C. § 1414 (a)(3)(A).
12. Further, according to 34 C.F.R. § 300.311 (a)(1)(i), Child Find, "The State must have in effect policies and procedures to ensure that all children with disabilities residing in the State, including children with disabilities who are ... wards of the State."
13. Pursuant to 34 C.F.R. § 300.40, State, "State means each of the 50 States, the District of Columbia and the Commonwealth of Puerto Rico, and each of the outlying areas."
14. According to case law, "in order to establish that the school violated the identification requirements of the IDEA, a [Petitioner] must show that the school officials overlooked clear signs of a disability and were negligent in ordering testing, or that there was no rationale justification for deciding not to evaluate." Clay T. v. Walton County School District, 952 F. Supp. 817, 823 (M.D. Ga. 1997).
15. The record evidence supports a finding that for over two year DCPS overlooked clear signs of a disability and was negligent in ordering testing because the confluence of the student's poor academic performance, behavior problems, suspension from school, and any classroom tried by failed behavior interventions are clear signs that the child may have a disability and should have been evaluated in all areas of her suspected disability—ED/SLD.
16. More specifically those signs include that during the last two school years the student was failing all but one of her classes. Her 10/28/07 Report Card shows that in her first advisory she received an "F" grade in her 5-core academic classes and a "U" [unsatisfactory] in Citizenship. (R. at Parent-16.) And her 10/24/08 Report Card shows that in her first advisory she received an "F" grade in her 3-core academic classes and a "C" grade in pre-Algebra. (R. at Parent-17.)
17. Prior to being incarcerated, the student was repeating the 8th grade for the second time at She had been habitually truant from school for the past two years. And she does not have any friends. She typically earns poor grades and functions below her 8th grade level. (R. at Parent-22-4.)
18. Functioning below grade level is also supported by the student's 02/03/09 Psychological Assessment Report and the evaluator's testimony about the student's intellectual and academic functioning which are as follows:

- i. Based on the student's test results from the Wechsler Intelligence Scale for Children, fourth edition ("WISC-IV"), she has a Full Scale Intelligence Quotient ("FSIQ") of 74—placing her intelligence in the 4th percentile when compared with other adolescents her age. That classifies her in the borderline range of intelligence meaning that her overall performance exceeds about 4% of other adolescents.
- ii. Her academic achievement, based on his subtest scores from the Woodcock-Johnson Test of Achievement, third edition ("WJ-III"), places her between 2-5 grade levels below her 8th grade level in all subjects tested, among them—
 1. Reading Comprehension, 4.1 G.E.;
 2. Basic Reading Skills, 6.0 G.E.;
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 5. Writing Fluency, 3.1 G.E.
- iii. Her emotional/personality functioning diagnostically shows that she is suffering from a Mood Disorder, Not Otherwise Specified ("Mood Disorder NOS"). Since the 7th grade, the student has been depressed throughout the day, has difficulty sleeping, and has difficulty enjoying things she once took pleasure in. She fails to comply with adult directives, violated her curfew, and ran away from home. Her life experiences to date taught her that others will disappoint, betray, and eventually abandon her. She is now four months pregnant and has smoked marijuana once a month since she was age 13.
- iv. Her Diagnoses on Axis I was as follows: (1) Mood Disorder, NOS; (2) Reading Disorder [SLD in Reading], (3) Nicotine Dependence, and (4) Cannabis Abuse.
- v. And based on the student's test results and diagnoses her evaluator recommended, among other things, the following—
 1. The student needed a placement in a therapeutic group home with other expectant mothers.
 2. Academically, she needs supports to improve her behavior and to help her be more available for instruction. Consultation with a school psychologist may prove especially useful in accomplishing this.

3. And overall, she will continue to need a substantial amount of home, school, and community support to experience more success.

(R. at Parent-22; testimony of the private psychologist.)

19. Based on those facts, the confluence of the student's poor grades, test results, mood swings, social/emotional problems, and Reading problems had and adverse impact on the student's academic performance—almost a text book definition of an ED/SLD student. (R. at Parent-16, 17, 22, 23.)
20. That is because according to the IDEA at 34 C.F.R. § 300.8(c)(4)(i), “Emotional Disturbance” is defined as “[a] condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely effects the child's educational performance.” Two of the characteristics cited are “an inability to build or maintain satisfactory interpersonal relationships with peers and teachers” and “a general pervasive mood of unhappiness or depression.” § 300.8(c)(4)(i)(B), (D).
21. According to the IDEA at 34 C.F.R. § 300.8 (c)(10) a Specific Learning Disability is defined as a “disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations.”
22. The parent's Psycho-Educational Evaluation Report and expert testimony from Dr. Rachel L. Martell at the due process hearing shows that the student is ED and has a Specific Learning Disorder in Reading. Her cognitive testing indicates that her IQ is in the borderline range, and her academic testing showed that albeit she is presently in the 8th grade she was performing academically at a fourth to sixth grade level, and had already been held back in the 8th grade. Dr. Martell testified and reported in the psycho-educational evaluation report that the student's cognitive and academic scores would impact her, as “she will likely have difficulty completing a wide variety of age and grade level tasks.” (R. at Parent-22-12, testimony of the private psychologist.)
23. Those findings show that for over two years the student had a suspected disability yet received no effective interventions tailored to meet her unique needs; that DCPS knew or should have known that its interventions were not working; and DCPS did nothing to remediate that situation. So DCPS defaulted on its IDEA obligation to develop an appropriate IEP for the student. And the hearing officer has and exercised the authority to find the student eligible for special education services.
24. That is because the U.S. District Court for the District of Columbia held that a hearing officer has the authority to order a disability classification, and to

determine a student's eligibility for special education services. Lyons v. D.C., 829 F. Supp. 414, 418 (D.D.C. 1993) (upholding a hearing officer's determination that a student did not qualify for special education services as 'other health impaired').

25. In this matter, however, the hearing officer found that the student is eligible for special education services as a student with the disability classifications of ED and SLD in Reading.
26. And since the student has been evaluated and found eligible for special education services, she too, would have an educational placement to implement her IEP. According to 34 C.F.R. § 300.116 (a)(1), Placements, "[i]n determining the educational placement of a child with a disability, each public agency shall ensure the placement decision is made by a group of persons, including the parent, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options."
27. And her IEP would have been developed by a team of professionals, including the child's parents, "as well as a representative of the local educational agency with knowledge about the school's resources and curriculum." Branham v. District of Columbia, 427 F.3d 7, 8 (D.C. Cir. 2005). An appropriate IEP, at a minimum, "must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Board of Educ. v. Rowley, 458 U.S. 176, 204 (1982).
28. But the IEP can not be implemented without first identifying a placement because the provision of the IEP services, which must be based upon the child's IEP pursuant to 34 C.F.R. § 300.116(b)(2), with consideration given to the quality of services that the child needs. 34 C.F.R. § 300.116(b)(2)(d).
29. The IDEA was enacted to "ensure that children with disabilities have access to a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400 (d)(1)(A). A free appropriate public education, or FAPE, is delivered through the implementation of an Individualized Education Program, or "IEP." See Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985) (*describing* the IEP as the "modus operandi" of special education).
30. DCPS did not comply with those cited IDEA obligations. Here is why.
31. There was no evidence presented at the due process hearing that DCPS has provided the student with an IEP and placement that can address her unique needs. In fact the evidence presented points to the inescapable conclusion that DCPS cannot meet the student's needs.

32. Consequently, the student is an individual with a suspected disability within the meaning of the IDEA entitled to a free appropriate public education consistent with her unique needs. Towards this end, the student is already in a therapeutic residential placement at _____ in Bristol, Virginia. Consequently, the hearing officer made no findings about whether _____ can implement the student's full time IEP. But based on the student's evaluation reports a residential treatment program is the Least Restrictive Environment ("LRE") to implement the student's IEP at this time. (R. at Parent-21, 22, 23.)
33. That conclusion is further supported by the fact that an appropriate IEP, at a minimum, "must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Board of Educ. v. Rowley, 458 U.S. 176, 204 (1982).
34. An important factor in determining educational benefit is the "achievement of passing marks and advancement from grade to grade." Rowley, 458 U.S. at 207.
35. In this case, the confluence of unremediated severe behavior issues, failing all of her classes except one in the last two years; failing the 8th grade; and having several suspensions from school leads to the inescapable conclusion that DCPS defaulted on its IDEA obligations to find the student eligible for special education services and provide her with a FAPE. (R. at Parent-03, 04, 05, 06; DCPS-03.)
36. Therefore next, according to the United States Supreme Court, "[w]hen a public school system has defaulted on its obligation under the Act [the IDEA], a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefit.'" Florence County School District Four v. Carter, 510 U.S. 7, 11 (1993); See also Massey v. District of Columbia, 400 F. Supp. 2d 66 (D.D.C. 2005).
37. In this case, however, instead of another private school placement for the student the parent also seeks Compensatory Education. (R. at Parent-01.)
38. And albeit the parent presented no witness testimony regarding their requested Compensatory Education relief the parent submitted a proposed Compensatory Education Plan as exhibit 31 in the parent's five-day disclosure. (R. at Parent-31.)
39. That Compensatory Education Plan, however, does not meet all of the requirements for awarding Compensatory Education under applicable case law. So no such relief is awarded. Moreover, after the student's full time initial IEP is developed within two-weeks of this decision date, it will be

implemented in a full time therapeutic special education program housed within a residential treatment center. And there is no evidence of what else the student will need on top of a full time therapeutic IEP services.

40. Moreover, pursuant to Reid v. District of Columbia, 401 F.3d 516, 522 (D.C. Cir. 2005), “[u]nder the theory of ‘compensatory education’ Courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program.”
41. “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, 401 F.3d at 524.
42. Joining sister circuits, the District of Columbia Circuit Court held that “Compensatory Education awards fit comfortably within the ‘broad discretion’ of courts fashioning and enforcing IDEA remedies, see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993).” Reid, 401 F.3d at 523.
43. In sum, the Reid decision expressly states that courts and hearing officers may award Compensatory Education. Reid, 401 F.3d at 522. However, a BLMDT, as required under the IDEA, includes the LEA and SEA representatives who are employees of the state, who, under the IDEA, cannot conduct due process hearings. So if a hearing officer ordered a BLMDT to decide the parent’s Compensatory Education claim, that team is being ordered to engage in a function reserved to courts and hearing officers. And, according to Reid, “under the statute [IDEA] a hearing officer may not delegate his authority to a group that includes an individual specifically barred from performing the hearing officer’s functions.” Reid, 401 F.3d at 526.
44. So in light of Reid, there was no qualitative evidence presented about the educational benefits that likely would have accrued [to the student] from special education services the school district should have supplied [the student] in the first place.” Reid, 401 F.3d at 524. And in the absence of an agreement between the parties that a certain type, form and amount of Compensatory Education services are warranted, no Compensatory Education is ordered.
45. Further, in light of Reid, the hearing officer cannot send the matter of Compensatory Education to an IEP Team to decide if Compensatory Education services are warranted. Reid, 401 F.3d at 526.
46. Pursuant to 5 D.C.M.R. § 3030.3, “The burden of proof shall be the Responsibility of the party seeking relief; either the parent/guardian of the child or the LEA. Based solely upon the 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 a Free Appropriate Public Education (FAPE).”

47. The parent who filed the DPC, had and met their burden of proof in this case because the parent:
- a. Proved that DCPS failed to identify and evaluate her daughter to determine her eligibility for special education services; and failed to develop an appropriate IEP and provide an appropriate placement to implement that IEP for the 2008-09 school year.

So in consideration of the hearing record, the hearing officer finds that DCPS did not evaluate the student; did not develop an IEP for the student for the 2008-09 school year; DCPS denied the student a FAPE; and provides the parent’s requested relief through this:

ORDER

DCPS shall

1. Either convene by May 15, 2009 the student’s BLMDT/IEP Team Meeting that can be scheduled by DCPS at and in coordination with special education coordinator; and if will not schedule or host the meeting, then DCPS will schedule and host the meeting in a DCPS school on or before May 15, 2009, for this purpose:
 - a. To review all of the student’s existing assessment results to determine her continued eligibility for special education services;
 - b. To determine if additional assessments are warranted, and if so, either perform them or fund independent assessment (s);
 - c. If light of this decision, and the review of the student’s evaluation, develop the student’s initial IEP as an ED/SLD student;
 - d. To discuss and decide placement; and issue her Prior Written Notice of Change in Placement (“PNCOP”), if warranted, for the 2009-10 school year at the conclusion of the meeting or as follows:
 - (i) Issue the PNCOP within 5-calendar days of the BLMDT Meeting if the change is to a public school placement; or

- (ii) Issue the PNCOP within 30-calendar days of the BLMDT Meeting if the change is to another non-public school placement.
2. Schedule all meetings at a mutually agreeable time through the parent and parent's counsel. And provide counsel a copy of the meeting notice by facsimile at (202) 955-1015.
3. Day-for-Day Caveat: Any scheduling, evaluation or meeting delay due to acts of the parent, student, student-advocate, student's attorney or because of an unscheduled school closing for any reason shall extend DCPS' performance timelines established in this Order by one day for each day of delay.
4. The 45-day time limit, from filing the Due Process Hearing Request to its Disposition after the expiration of the 30-day period under § 300.510 (b) — receipt of the final Hearing Officer's Decision (HOD) pursuant to 34 C.F.R. § 300.515 (a) (1)—was extended by the parents for good cause; and the time for disposition was extended, in accord with this Order, to accommodate the parents' requested and jointly agreed to continuance.

Furthermore, pursuant to SOP § 402 (B)(2) Continuances, states that "in general the parties' agreement to a continuance constitutes 'good cause' to reschedule the hearing to another date and to extend the deadline for issuance of a final determination."

5. This Order resolved all issues raised in the student's 02/23/09 Due Process Complaint that is dismissed; and the hearing officer made no additional findings.

This is the final ADMINISTRATIVE DECISION. An appeal can be made to a court of competent jurisdiction within ninety (90)-days from the date of this Decision and Order pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B); 34 C.F.R. § 300.516 (b).

/s/ Frederick E. Woods
Frederick E. Woods
Hearing Officer

April 30, 2009
Date

All papers returned in the student's SHO file are either the original or true copy of the original documents filed and presented to the hearing officer in this matter.

Executed this 30th day of April, 2009.

/s/ Frederick F. Woods
Due Process Hearing Officer