

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

Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
February 27, 2013

Parent,<sup>1</sup> on behalf of,  
Student,

Petitioner,

Date Issued: February 26, 2013

Hearing

Officer: Melanie Byrd Chisholm

v.

Case

No: 2012-0814

Respondent.

Hearing

Dates: February 13-14, 2013

Room

s: 2004, 2003

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND PROCEDURAL HISTORY**

The student is a [REDACTED] who is a [REDACTED] grade student attending School A. The student's current individualized education program (IEP) lists Other Health Impairment (OHI) as his primary disability and provides for him to receive ten (10) hours per week of specialized instruction within the general education setting, four (4) hours per week of specialized instruction outside of the general education setting and one (1) hour per week of behavioral support services outside of the general education environment.

On December 7, 2012, Petitioner filed a Due Process Complaint (Complaint) against Respondent [REDACTED] alleging that [REDACTED] denied the student a free appropriate public education (FAPE) by failing to comprehensively and timely evaluate the student, identify him as eligible for services and provide him with an IEP; and failing to provide the student with an appropriate IEP on or about September 28, 2012 and/or failing to subsequently revise the IEP to provide the student with pull-out instruction. As relief for this alleged denial of FAPE, Petitioner requested revision of the student's IEP to include not less than ten (10) hours of specialized instruction outside of the general education environment; and compensatory education.

On December 17, 2012, Respondent filed a timely Response to the Complaint. In its Response, Respondent asserted that on September 1, 2011 the parent requested an evaluation and

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

the multidisciplinary team (MDT) met on October 7, 2011 to determine what assessments should be conducted and determined to that a psycho-educational evaluation be conducted; the psycho-educational evaluation was conducted on October 19, 2011 and the results reviewed at a January 12, 2012 MDT meeting; the IEP Team, including the parent, agreed that the student did not qualify for special education and related services; on or about January 24, 2012, the parent requested auditory processing and neuropsychological evaluations and based on the student's progress and prior eligibility determinations, [REDACTED] sent the parent prior written notice (PWN) explaining its decision not to conduct a neuropsychological evaluation and to conduct an auditory processing assessment; the MDT reviewed the auditory processing assessment on July 2, 2012 and again determined that the student did not qualify for special education and related services however the MDT agreed to conduct an attention deficit hyperactivity disorder (ADHD) screening and to review the independent neurological assessment being obtained by the parent; the MDT convened on August 28, 2012 to review the ADHD screening and agreed to find the student eligible for special education and related services although the evaluator concluded that the student did not appear to meet the criteria for special education and related services; after conducting observations of the student, the student's IEP Team reconvened on September 28, 2012 to draft an IEP for the student; the IEP Team proposed specialized instruction inside of the general education environment and behavioral support services outside of the general education environment to ensure the student's education in the least restrictive environment (LRE); the student's IEP Team met on October 31, 2012 to review the student's IEP. The team also reviewed data demonstrating the student was making progress and based on the student's progress, the IEP Team agreed that the services were being provided to the student in the LRE despite the parent's request for additional services outside of the general education environment; at the beginning of November 2012, [REDACTED] determined that the student required specialized instruction outside of the general education environment in mathematics and discussed the need for additional services for the student. Following with discussion with the parent, [REDACTED] began providing the student with four (4) hours per week of specialized instruction outside of the general education environment in math; the student continues to progress in all other academic areas with specialized instruction inside of the general education environment; and [REDACTED] has provided the student with a FAPE in the LRE.

On December 13, 2012, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on January 7, 2013, following the conclusion of the 30-day resolution period, and originally ended on February 20, 2013. Due to circumstances beyond control of the parties or Hearing Officer, the prehearing conference in this matter had to be rescheduled from its original date. Since the prehearing conference was held later than anticipated, the parties and the Hearing Officer had few dates collectively available prior to the end of the 45-day timeline. The parties were able to identify dates for the hearing prior to the 45-day timeline however the second date is less than one week prior to the 45-day timeline. The parties jointly agreed to extend the 45-day timeline for nine (9) days. The Petitioner filed an unopposed Motion for Continuance on January 17, 2013 and an Interim Order on Continuance Motion was issued on January 17, 2013. Therefore, the Hearing Officer Determination (HOD) is due on March 1, 2013.

On January 14, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on January 17, 2013. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order.

On February 6, 2013, Petitioner filed Disclosures including sixty-nine (69) exhibits and four (4) witnesses.<sup>2</sup> On February 6, 2013, Respondent filed Disclosures including thirty-four (34) exhibits and eight (8) witnesses.

The due process hearing commenced at approximately 9:04 a.m. on February 13, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-2, 6-7, 11-22, 24-48 and 50-69 were admitted without objection. After a discussion regarding relevancy and stipulated facts, the Respondent withdrew its objections to page 1 of Petitioner's Exhibit 3 and Petitioner's Exhibits 4-5 and 8-10. Petitioner voluntarily withdrew Petitioner's Exhibit 23. Respondent voluntarily withdrew Respondent's Exhibit 11. Respondent's Exhibits 1-10 and 12-34 were admitted without objection. Petitioner's Exhibit 49 was admitted over Respondent's objection during the Mother's testimony.

The hearing concluded at approximately 10:55 a.m. on February 14, 2013, following closing statements by both parties.

### Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

### ISSUES

The issues to be determined are as follows:

1. Whether [REDACTED] failed to timely evaluate the student after the parent's request on September 1, 2011 and, if so, whether the failure constitutes a denial of a FAPE?
2. Whether [REDACTED] failed to conduct a comprehensive evaluation of the student, after the parent's September 1, 2011 request, specifically by failing to assess whether the student has ADHD, failing to evaluate the student's social/emotional functioning, failing to conduct a neuropsychological evaluation and failing to conduct an auditory processing assessment, and whether this failure constitutes a denial of a FAPE?

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<sup>2</sup> A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

3. Whether [REDACTED] denied the student a FAPE by failing to find the student eligible for special education and related services and developing an IEP within 120 days of the parent's request on September 1, 2011?
4. Whether [REDACTED] failed to develop an appropriate IEP for the student on September 28, 2012, specifically by failing to provide ten (10) hours of specialized instruction outside of the general education environment for the student rather than ten (10) hours of specialized instruction within the general education environment, and whether this failure constitutes a denial of a FAPE?
5. Whether [REDACTED] failed to review and revise the student's September 28, 2012 IEP after additional data became available to [REDACTED] on October 31, 2012, and whether this failure constitutes a denial of a FAPE?

### **FINDINGS OF FACT**

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

1. From January 2011 through May 2011, LEA 2 conducted a behavioral observation, a psychoeducational evaluation, a speech-language evaluation and a clinical psychological evaluation of the student. (Petitioner's Exhibits 48, 60, 61, 62 and 63; Respondent's Exhibits 1, 2, 3 and 4)
2. During the January 31, 2011 observation, while the student, at times, was distracted, he was able to regain focus without prompting, was engaged in his tasks and was able to complete assignments. (Petitioner's Exhibits 62 and 63; Respondent's Exhibits 1 and 4)
3. The evaluator who conducted the May 10, 2011 Clinical Psychological Evaluation of the student administered the Attention Deficit Hyperactivity Disorder Test (ADHDT), the Behavior Assessment System for Children Second Edition (BASC-2), behavioral observations, clinical interview and mental status examination of the student, the Children's Depression Inventory Short Version, Conners' Teacher Rating Scale Revised Short Form (Conners), Revised Children's Manifest Anxiety Scale Second Edition (RCMAS-2), Robert's Apperception Test Second Edition (Roberts-2), Sentence Completion Test, Three Wishes, Trauma Symptom Checklist for Children, a review of prior evaluations, consultation with the student's general education teachers, phone contact with the student's mother and a record review. (Petitioner's Exhibit 63; Respondent's Exhibit 4)
4. The evaluator who conducted the May 10, 2011 evaluation utilized data gathered only from the student's general education teachers to complete the ADHDT, BASC-2 and Conners. (Petitioner's Exhibit 63; Respondent's Exhibit 4; Psychologist's Testimony; Clinical Psychologist's Testimony)
5. The student made grade letter A's and B's at LEA 2. (Petitioner's Exhibits 58, 60 and 63; Respondent's Exhibits 2 and 4)
6. The MDT at LEA 2 concluded that the student was not eligible for special education and related services. (Petitioner's Exhibits 32, 43 and 48)

7. The parent did not disagree with the evaluations conducted at LEA 2 and did not request an independent educational evaluation (IEE). (Petitioner's Exhibit 48; Mother's Testimony; Special Education Coordinator's Testimony)
8. The student began [REDACTED] at the beginning of the 2011-2012 school year. (Petitioner's Exhibit 48; Respondent's Exhibits 10 and 18; Mother's Testimony; Special Education Coordinator's Testimony)
9. [REDACTED] began using the Common Core Standards at the beginning of the 2012-2013 school year. (Head of School's Testimony)
10. [REDACTED] does not utilize the grade letter D. If a student falls below 70% mastery, the student receives the grade letter F. (Petitioner's Exhibits 52, 53 and 65; Respondent's Exhibits 24, 25 and 26; Head of School's Testimony)
11. [REDACTED] belongs to an "Achievement Network" which is a network of schools that assess students every 8-9 weeks and compares student scores against the scores of other students in the same grade in the network. (Head of School's Testimony; Respondent's Exhibits 7 and 8)
12. The [REDACTED] 2011-2012 school year began on August 22, 2011. (Special Education Coordinator's Testimony; Head of School's Testimony)
13. On September 1, 2011, parent, through counsel, sent a letter to [REDACTED] requesting evaluations for the student. (Stipulated Fact)
14. [REDACTED] held an MDT meeting on October 7, 2011. (Stipulated Fact)
15. On October 7, 2011 [REDACTED] did not have any concerns regarding the student's academic or behavioral functioning. (Petitioner's Exhibits 32, 41, 42 and 43; Special Education Coordinator's Testimony; General Education Teacher's Testimony)
16. As of October 7, 2011, the student had neither displayed ADHD type behaviors in the school environment nor displayed an inability to process information delivered orally within the school environment. (Petitioner's Exhibits 41, 42 and 43; Special Education Coordinator's Testimony; School Psychologist's Testimony; General Education Teacher's Testimony)
17. At the October 7, 2011 MDT meeting, the parent only expressed concerns regarding the student's progress in math and reading. (Petitioner's Exhibits 41, 42 and 43; Respondent's Exhibit 12; Special Education Coordinator's Testimony)
18. During the October 7, 2011 MDT meeting, the parent stated that she felt that the student was "doing well with his behavior" and that she did "not think that [student] has a disability." (Petitioner's Exhibit 43)
19. During the October 7, 2011 MDT meeting, neither the LEA nor the parent expressed concerns regarding the student's auditory processing or potential ADHD. (Petitioner's Exhibits 41, 42 and 43; Special Education Coordinator's Testimony)
20. The evaluations conducted by LEA 2 and used to determine that the student did not have ADHD and was not eligible for special education and related services were discussed by the [REDACTED] MDT on October 7, 2011. (Petitioner's Exhibit 43; Special Education Coordinator's Testimony)
21. The October 7, 2011 MDT determined that a psychoeducational evaluation of the student should be conducted. (Petitioner's Exhibit 41; Special Education Coordinator's Testimony)
22. [REDACTED] conducted a psychoeducational evaluation in October 2011. The final report of the psychoeducational evaluation was issued on October 22, 2011. (Stipulated Fact)

23. The October 22, 2011 evaluation included the Berry-Buktenica Developmental Test of Visual Motor Integration (VMI), the Wechsler Individual Achievement Test – 2<sup>nd</sup> Edition (WIAT-II) and the Woodcock-Johnson – 3<sup>rd</sup> Edition of Cognitive Abilities (WJ-III Cog.) assessments, a review of the student’s evaluations from February 2011 and May 2011, a review of the student’s educational record, and contact with the student’s English teacher and mother (Petitioner’s Exhibit 39; Respondent’s Exhibits 12 and 13; Special Education Coordinator’s Testimony)
24. In October 2011, the student was functioning in the average range of achievement in reading, writing and math. (Petitioner’s Exhibit 39; Respondent’s Exhibits 7 and 12)
25. A meeting to review the psychoeducational evaluation and determine the student’s eligibility for special education and related services under the Individuals with Disabilities Education Act (IDEA) was held on January 12, 2012. (Stipulated Fact)
26. The January 12, 2012 MDT reviewed the student’s weekly quizzes/tests, anecdotal information from teachers and Achievement Network scores for the student. (Special Education Coordinator’s Testimony)
27. At the January 12, 2012 meeting, the student was determined to be ineligible for special education and related services under the IDEA but was found eligible for services under Section 504 of the Rehabilitation Act of 1973. (Stipulated Fact)
28. The student does not meet the criteria for a specific learning disability (SLD). (Petitioner’s Exhibits 39 and 60; Respondent’s Exhibits 2, 12 and 13; Special Education Coordinator’s Testimony; School Psychologist’s Testimony; Clinical Psychologist’s Testimony)
29. Based on the advocate’s concerns regarding large differences in the student’s Visual-Auditory Learning and Visual-Auditory Learning – Delayed scores within the October 22, 2011 evaluation, █████ agreed to conduct an auditory processing assessment. (Petitioner’s Exhibits 34 and 39; Respondent’s Exhibits 12 and 15; Special Education Coordinator’s Testimony)
30. An auditory processing evaluation was conducted on the student. The final report of the auditory processing evaluation was issued on May 9, 2012. (Stipulated Fact)
31. An MDT meeting to review the auditory processing evaluation was held on July 2, 2012. (Stipulated Fact)
32. The student is not in need of any specific services, accommodations or therapy to overcome any auditory processing problems. (Petitioner’s Exhibit 29; Respondent’s Exhibit 16; Special Education Coordinator’s Testimony)
33. At the July 2, 2012 MDT meeting, █████ agreed to conduct a clinical evaluation. (Stipulated Fact)
34. █████ agreed to conduct the clinical evaluation based on the student’s inconsistencies in the May 9, 2012 auditory processing assessment. (Petitioner’s Exhibit 27; Respondent’s Exhibit 17; Special Education Coordinator’s Testimony)
35. █████ conducted a psychological evaluation of the student. The Psychological Evaluation is dated August 2, 2012. (Stipulated Fact)
36. The evaluator who conducted the student’s August 1, 2012 psychological evaluation administered the BASC-2 Child, Parent and Teacher Rating Scales, the Conners 3 Self-Report Student Form, the Incomplete Sentence Test, the Million Pre-Adolescent Clinical Inventory (M-PACI), behavioral observations, interviews with the student and the student’s mother, and reviewed the October 22, 2011 Psychoeducational

- Evaluation, the May 2011 Clinical Psychological Evaluation and the July 2012 Neurological Report. (Petitioner's Exhibit 25; Respondent's Exhibit 18)
37. A meeting to review the August 2, 2012 Psychological Evaluation was held on August 28, 2012. (Stipulated Fact)
  38. The evaluator who conducted the August 2, 2012 psychological evaluation concluded that the student did not qualify for special education and related services under the IDEA. (Petitioner's Exhibit 25; Respondent's Exhibit 18; Special Education Coordinator's Testimony)
  39. At the August 28, 2012 meeting, the student's IEP Team determined that the student was eligible for special education and related services under the IDEA and agreed to reconvene to develop an IEP. (Stipulated Fact)
  40. The student's IEP Team met on September 28, 2012 to develop an IEP for the student. (Stipulated Fact)
  41. The September 28, 2012 IEP Team discussed the student's present levels of performance, including his strengths and weaknesses in academics and in in group counseling. (Petitioner's Exhibits 13 and 14; Respondent's Exhibits 21 and 22; Advocate's Testimony)
  42. On September 28, 2012, the student was receiving the grade letters F in reading, C in science, C in writing, F in Math Procedures, B in history, and F in Math Problem Solving. (Petitioner's Exhibits 52 and 65; Respondent's Exhibits 24 and 25)
  43. On September 28, 2012 the student had a classwork average of 73% in reading and a classwork average of 87% in both Math Procedures and Math Problem Solving. (Petitioner's Exhibits 52 and 65; Respondent's Exhibits 24 and 25)
  44. On September 28, 2012, the student had mastered his math facts and computation skills including multiplying multi-digit numbers, dividing by two-digit divisors and solving two-step equations. (Petitioner's Exhibits 13 and 14; Respondent's Exhibits 21 and 22; Special Education Teacher's Testimony)
  45. On September 28, 2012, the student was able to read fluently in class and identify details within a fiction text. (Petitioner's Exhibits 13 and 14; Respondent's Exhibits 21 and 22; General Education Teacher's Testimony)
  46. On September 28, 2012, the student had good mastery of sentence level grammar. (Petitioner's Exhibit 14; Respondent's Exhibit 22)
  47. On September 28, 2012, the student's IEP Team developed social/emotional, math, ELA and writing goals for the student. (Petitioner's Exhibits 13 and 14; Respondent's Exhibits 21 and 22; Special Education Coordinator's Testimony)
  48. The September 28, 2012 IEP Team discussed the type and amount of specialized instruction needed to support the student in mastering his IEP goals. (Petitioner's Exhibit 13; Respondent's Exhibit 21; Advocate's Testimony)
  49. The September 28, 2012 IEP Team prescribed specialized instruction within the general education environment for ten hours per week and behavioral support services outside of the general education environment for one hour per week for the student. (Petitioner's Exhibits 13 and 14; Respondent's Exhibits 21 and 22; Special Education Coordinator's Testimony)
  50. The [REDACTED] members of the September 28, 2012 IEP Team and the student's mother and mother's advocate disagreed as to the environment in which the student should receive specialized instruction for academic areas. (Petitioner's Exhibit 13;

- Respondent's Exhibit 21; Advocate's Testimony; Head of School's Testimony; Special Education Coordinator's Testimony; Special Education Teacher's Testimony; General Education Teacher's Testimony)
51. Following the implementation of the student's September 28, 2012 IEP, the student demonstrated improvement. (Petitioner's Exhibits 12, 52, 53 and 65; Respondent's Exhibits 23, 24, 25 and 26; Advocate's Testimony; Special Education Coordinator's Testimony; Head of School's Testimony; Special Education Teacher's Testimony; General Education Teacher's Testimony)
  52. Following the development of the student's September 28, 2012 IEP, the student's grade letter increased from an F to a C in reading and from a B to an A in writing. (Petitioner's Exhibits 52, 53 and 65; Respondent's Exhibits 24, 25 and 26; Special Education Coordinator's Testimony; General Education Teacher's Testimony)
  53. In reading and writing, the student demonstrates a high level of skill including inference, analyzing and abstract thinking. (General Education Teacher's Testimony)
  54. In reading and writing, the student is performing higher than most of the peers in his class, benefits from other students by building off of their ideas and is a leader in the class. (General Education Teacher's Testimony)
  55. Following the implementation of the student's September 28, 2012 IEP, the student's grade increased from an F to a C in Math Problem Solving. (Petitioner's Exhibits 52, 53 and 65; Respondent's Exhibits 24, 25 and 26; Special Education Coordinator's Testimony; Special Education Teacher's Testimony)
  56. Following the implementation of the September 28, 2012 IEP, the student's grade in Math Procedures remained an F however the student's overall percentage increased from 54% to 65%. (Petitioner's Exhibits 12, 52, 53 and 65; Respondent's Exhibits 23, 24, 25 and 26; Special Education Coordinator's Testimony; Special Education Teacher's Testimony)
  57. █████ held a "45-Day Meeting" on October 31, 2012 to review the student's progress. (Stipulated Fact)
  58. The student's October 31, 2012 IEP Team did not make revisions to the student's September 28, 2012 IEP. (Stipulated Fact)
  59. On January 10, 2013, a meeting was held to amend the student's IEP to include four (4) hours per week of specialized instruction outside of the general education environment in math. (Stipulated Fact)
  60. The student's overall intellectual ability falls at the upper bound of the low-average range. (Petitioner's Exhibits 15, 39, 60 and 63; Respondent's Exhibits 2, 4 and 12; School Psychologist's Testimony; Clinical Psychologist's Testimony)
  61. The student has intellectual abilities in the low average to average range. (Petitioner's Exhibits 15, 39, 55, 56, 60 and 63; Respondent's Exhibits 2, 4, 7, 8 and 12; School Psychologist's Testimony; Clinical Psychologist's Testimony; Special Education Teacher's Testimony; General Education Teacher's Testimony)
  62. The student's strongest area is in cognitive efficiency and his area of greatest struggle is in thinking ability. (Petitioner's Exhibit 39; Respondent's Exhibit 12)
  63. The student engages in social interaction during classroom instruction. (Petitioner's Exhibit 64; School Psychologist's Testimony; Special Education Teacher's Testimony)

64. The student falls asleep in class. (Petitioner's Exhibits 25 and 27; Respondent's Exhibits 13, 17 and 18; Mother's Testimony; Special Education Coordinator's Testimony; General Education Teacher's Testimony)
65. The student has a diet of primarily carbohydrates and sugar. (Petitioner's Exhibit 25; Respondent's Exhibit 18)
66. The student has witnessed severely violent episodes in his neighborhood. (Petitioner's Exhibits 48, 25, 61 and 63; Respondent's Exhibits 4 and 18; Mother's Testimony; School Psychologist's Testimony)
67. When the student is motivated, he is able to attend to a task and retain information. (Petitioner's Exhibit 39; Respondent's Exhibits 12 and 16; Mother's Testimony; Special Education Teacher's Testimony; General Education Teacher's Testimony)
68. During the 2011-2012 and 2012-2013 school years, the student's math and reading Achievement Network scores fell above the average scores of other same grade students in the network. (Petitioner's Exhibits 15, 43, 55 and 56; Respondent's Exhibits 7 and 8; Head of School's Testimony)
69. In order for the student to be diagnosed with ADHD, the student would have to exhibit ADHD behaviors in more than one environment. (Psychologist's Testimony; School Psychologist's Testimony; Clinical Psychologist's Testimony)
70. The student's September 20, 2012 and December 10, 2012 Patient Instruction Sheets list ADHD as the student's diagnosis however there is no supporting documentation for the basis of this "diagnosis." (Petitioner's Exhibits 17, 18, 19, 30 and 66; Respondent's Exhibit 20)
71. The student has not received an appropriate affirmative diagnosis of ADHD. (Petitioner's Exhibits 17, 18, 19, 25, 30, 39, 48, 49, 63 and 66; Respondent's Exhibits 4, 12, 16, 18 and 20; School Psychologist's Testimony)

### **CONCLUSIONS OF LAW**

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

#### **Burden of Proof**

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

#### **Issue #1**

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The United States Supreme Court has established a two-part test for

determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

Under the IDEA, a state must, *inter alia*, identify and evaluate children with disabilities, and develop an “individual education program” for each child with a disability. *See* 20 U.S.C. §§1412(a)(3)(A),(a)(4). An initial evaluation must be conducted 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 that timeframe. The timeframe must include the procedures to determine if the child is a child with a disability under §300.8 and to determine the educational needs of the child. *See* 34 CFR §300.301(c). The District of Columbia has established a 120-day timeline. *See* D.C. Code §38-2561.02. The 120-day period for evaluation in the District of Columbia is the period for evaluation and determination of eligibility. *D.L. v. District of Columbia*, 845 F. Supp. 2d 1, 05-1437 (RCL) (D.D.C. November 16, 2011).

The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit.

The Petitioner alleges that █████ failed to timely evaluate the student after the parent’s request on September 1, 2011. The facts in the case regarding the evaluation timeline are uncontested. The parent, through counsel, requested an initial evaluation of the student on September 1, 2011. On October 7, 2011, █████ convened an MDT meeting to discuss the parent’s request. The MDT determined that a psychoeducational evaluation was necessary to determine if the student is a student with disabilities as defined by 34 CFR §300.8. The psychoeducational evaluation was completed on October 22, 2011. █████ held a meeting to review the results of the psychoeducational evaluation and determine whether the student was eligible for special education and related services on January 12, 2012.

Based on the date of the parent’s request for an evaluation, █████ should have conducted the evaluation and determined if the student is a child with a disability by December 30, 2011. █████ did not complete the evaluation procedures within 120 days as required by 34 CFR §300.301 and D.C. Code §38-2561.02. █████ argued that although the LEA may not have completed the evaluation procedures within the 120-day timeframe, the 13 day delay did not result in substantive harm to the student because the 120-day timeline ended during the Winter Break therefore any services missed by the student prior to January 12, 2012 would have been minimal and ultimately the student was found not to be eligible for special education and related services on January 12, 2012.

“[P]rocedural violations of IDEA do not, in themselves, inexorably lead a court to find a child was denied FAPE.” *Schoenbach v. District of Columbia*, 309 F. Supp. 2d 71, 78 (D.D.C. 2004); 20 U.S.C. § 1415(f)(3)(E)(ii). An IDEA claim is viable only if the procedural violations

of procedural affected the student's substantive rights. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). The plaintiff bears the burden of proving a violation of substantive rights. *See Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); *see also Krivant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying parents relief 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"). "A delay does not affect substantive rights if the student's education would not have been different had there been no delay." *D.R. ex rel. Robinson v. Gov't of D.C.*, 637 F. Supp. 2d 11, 18-19 (D.D.C. 2009) (finding that the defendant's delay affected the student's substantive rights because the student's most recent IEP differed from the one previously issued).

The Hearing Officer agrees with the Respondent's position on this issue. First, the 120-day timeline concluded during the typical school Winter Break. While neither party presented evidence as to the [REDACTED] school calendar for the 2011-2012 school year, it is likely that the parties would not have been able to agree on a meeting date during the typical Winter Break period. Next, even had the student been found eligible for special education and related services, those services would not have begun before January 2, 2012 thereby creating a delay of no more than eight school days. Finally, as discussed in Issue #3, [REDACTED] did not deny the student a FAPE by finding the student not eligible for special education and related services on January 12, 2012 therefore, the student was not entitled to services during the delay from December 30, 2011 to January 12, 2012. The Hearing Officer concludes that the failure of [REDACTED] to timely evaluate the student after the parent's request on September 1, 2011 was not a denial of a FAPE in that the procedural violation did not impede the child's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child or caused a deprivation of educational benefit to the student.

The Petitioner failed to meet its burden with respect to Issue #1.

#### Issue #2

Evaluation is defined as, "procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 CFR §300.15. In conducting an evaluation, an LEA must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability" and the content of the child's IEP. 34 CFR §300.304(b). IDEA regulations at 34 CFR §300.304(c)(4) require a student to be "assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities."

As a part of an initial evaluation (if appropriate), the IEP Team and other qualified professionals must- (1) review existing evaluation data on the child including- (i) Evaluations and information provided by the parents of the child; (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers; and (2) On the basis of that review, and input from the child's parents,

identify what additional data, if any, are needed to determine- (i)(A) Whether the child is a child with a disability and the educational needs of the child; (ii) The present levels of academic achievement and related developmental needs of the child; (iii) Whether the child needs special education and related services; and (iv) Whether any additions or modifications to the special education and related services are needed. *See* 34 CFR 300.305.

In the present case, the Petitioner argues that ██████ should have evaluated the student's social/emotional functioning and conducted a neuropsychological evaluation and an auditory processing assessment following the parent's request on September 1, 2011. The Petitioner explained that these specific measures should have been used because ██████ should have suspected that the student had ADHD.

During the period of January 2011 through May 2011, LEA 2 conducted a behavioral observation, a psychoeducational evaluation, a speech-language evaluation and a clinical psychological evaluation of the student. While the student, at times, was distracted, he was able to regain focus without prompting. He was engaged in his tasks and was able to complete assignments. In February 2011, the parent was concerned about the student's academic progress but the student was receiving grade letter A's and B's at LEA 2. The MDT at LEA 2 concluded that the student was not eligible for special education and related services. The evaluations conducted by LEA 2 and used to determine that the student did not have ADHD and was not eligible for special education and related services were discussed by the ██████ MDT on October 7, 2011 and reviewed by the psychologist as a part of the October 22, 2011 psychoeducational evaluation.

When ██████ received the parent's request for evaluations, the student had attended ██████ for less than two weeks. Based on the parent's request, the ██████ MDT met on October 7, 2011, although ██████ did not have any concerns regarding the student's academic or behavioral functioning. The MDT, including the parent, discussed concerns regarding the student. ██████ noted that the student lacked some foundational skills but was progressing as expected. The parent expressed concerns regarding the student's progress in math and reading.

During the October 7, 2011 MDT meeting, neither the LEA nor the parent expressed concerns regarding the student's auditory processing or potential ADHD. ██████ did not suspect that the student had ADHD because the student had not displayed ADHD type behaviors in the school environment. Likewise, the student had not displayed an inability to process information delivered orally within the school environment. The parent expressed to the team that she felt that the student was "doing well with his behavior" and that she did "not think that [student] has a disability." The parent also informed the MDT that the student's 2011 clinical evaluation found that the student "is currently free of any significant social-emotional and behavioral issues." The parent's advocate stated that the mother is "still concerned with his math and wants him tested for a disability." Based on the parent's academic concerns for the student, expressed through the advocate, the MDT agreed to conduct a psychoeducational evaluation of the student.

A district has the prerogative to choose assessment tools and strategies. *See Amanda Ford v. Long Beach Unif. Sch. Dist.*, 291 F.3d 1086 (2002) (parents did not provide any empirical grounds on which to base a challenge to the district's choice in assessment tools and

strategies). The IDEA does not require LEAs to administer every test requested by a parent or educational advocate. Rather, to ensure that a child with a disability receives a FAPE, an LEA must use “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information.” *Long v. District of Columbia*, 780 F. Supp. 2d 49, (D.D.C. March 23, 2011) (quoting 20 U.S.C. § 1414(b)(2)(A)).

The psychologist who conducted the October 22, 2011 psychoeducational evaluation administered the VMI, WIAT-II and the WJ-III Cog. The psychologist also reviewed the student’s evaluations from February 2011 and May 2011, reviewed the student’s educational record, and communicated with the student’s English teacher and mother. In addition to the October 22, 2011 Psychoeducational Evaluation, the January 12, 2012 MDT reviewed the student’s weekly quizzes/tests, anecdotal information from teachers and Achievement Network scores for the student.

While the parent may have desired that ██████ conduct specific evaluations, ██████ was not required to conduct additional assessments in the areas previously assessed by LEA 2 less than one year prior to the parent’s request. The court in *Richardson v. District of Columbia*, 541 F. Supp. 2d 346 (D.D.C. 2008), found that an MDT evaluating a student may determine that it needs copies of relevant information already available from evaluations or treatment of the child privately obtained by the parent in order to determine whether additional examinations are required. Where such relevant information exists, a parent cannot insist that the LEA conduct its own examinations. While the evaluations conducted by LEA 2 were not private evaluations, it was reasonable for ██████ to use the relevant information from LEA 2 rather than submit to the parent’s insistence that ██████ conduct its own examinations. The Hearing Officer concludes that ██████ used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that assisted in determining if the student is a student with a disability and assessed the student in all areas related to the suspected disability as discussed during the October 7, 2011 MDT meeting.

The Petitioner also argued that ██████ should not have relied on the May 10, 2011 Clinical Psychological Evaluation because the evaluator only administered the BASC and Connors rating scales to the student’s teacher rather than to both the teacher and the parent. First, while it is best practice to administer the rating scales to both teachers and parents, the lack of the parent rating scale does not invalidate the findings in the evaluation. The Psychologist, the School Psychologist and the Clinical Psychologist testified that in order for the evaluator to determine that the student had ADHD, the student would have had to exhibit ADHD behaviors in more than one environment. The fact that the student did not exhibit ADHD type behaviors in the school environment, as measured by the teacher rating scales, precluded the evaluator from concluding that the student had ADHD even if the student exhibited ADHD behaviors in the home. Next, although the Petitioner challenged the validity of the May 10, 2011 Clinical Evaluation, the parent did not disagree with the evaluation after it was conducted at LEA 2 and did not request an IEE.

Under the IDEA, the parents of a child with a disability have the right to obtain an IEE if the parent disagrees with an evaluation obtained by the public agency. 34 CFR §300.502(b)(1).

Upon request, without unnecessary delay, the public agency must either file a due process complaint to request a hearing to show that its evaluation is appropriate or ensure that an IEE is provided at public expense, unless the LEA demonstrates in a hearing that the evaluation obtained by the parent did not meet the LEA's criteria. *See* 34 CFR §300.502(b)(2). Since the parent did not disagree with the May 10, 2011 Clinical Evaluation or request an IEE, [REDACTED] had no reason to question the validity or reliability of the evaluation and properly used the evaluation as a relevant functional and developmental information about the student.

The Petitioner failed to meet its burden with respect to Issue #2.

### Issue #3

The IDEA and its implementing regulations define “child with a disability” to mean “a child evaluated in accordance with §§300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.” 34 CFR §300.8(a). The fact that a child may have a qualifying disability does not necessarily make him “a child with a disability” eligible for special education services under the IDEA. *See Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007). The child must also need special education and related services. *Id.* The Petitioner alleges that [REDACTED] should have found the student eligible for special education and related services and developed an IEP within 120 days of the parent's request on September 1, 2011.

Specific learning disability means “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” 34 CFR §300.8(c)(10); *see also* 20 U.S.C. §1401; *Nguyen v. District of Columbia*, 681 F. Supp. 2d 49, 52 (D.D.C. 2010).

IDEA regulations further provide that an MDT Team “may determine” that a child has a SLD as defined in §300.8(c)(10) if three requirements are met. First, the child “does not achieve adequately for the child's age or to meet State-approved grade-level standards” in one or more basic academic skill areas (e.g. written expression, reading comprehension or mathematics calculation). 34 CFR §300.309(a)(1). Second, the child “does not make sufficient progress to meet age or State-approved” standards “when using a process based in the child's response to scientific, research-based intervention” or the child “exhibits a pattern of strengths and weaknesses in performance, achievement, or both” relative to relevant areas. 34 CFR §300.309(a)(2). Third, the MDT Team determines its findings are not the result of factors such as a visual or hearing disability, cultural or environmental factors. 34 CFR §300.309(c)(3).

Each State must adopt criteria, consistent with 34 CFR §300.309, for determining whether a child has a SLD as defined in §300.8(c)(10). Local educational agencies (LEAs) must use the State criteria in determining whether a child has a SLD. *See* 34 CFR §300.307. The

criteria adopted by the State must not require the use of a severe discrepancy between intellectual ability and achievement; must permit the use of a process based on the child's response to scientific, research-based intervention; and may permit the use of other alternative research-based procedures for determining if a child has a SLD. *See* 34 CFR §300.307(a). The District of Columbia Office of the State Superintendent (OSSE) has adopted criteria by implementing the rules in 5 DCMR §E-3006.

These rules provide that the "IEP team shall determine that a child has a SLD if: a disorder is manifested in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to learn, think, speak, read, write, or do mathematical calculations." 5 DCMR §E-3006.4(a). The rules also provide that LEAs "may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedure." 5 DCMR §E-3006.4(d). In addition, LEAs must prepare a written evaluation report that includes the basis for making the determination regarding SLD, including a "statement whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services." 5 DCMR §§E-3006.5(g)(2), (6). Finally, OSSE states that the "IEP team may not determine that a child is a child with a disability if it determines that the determinant factor for the child's eligibility determination is: (a) lack of instruction in reading or mathematics; or limited English proficiency; and (b) the child does not otherwise meet the eligibility criteria." 5 DCMR §E-3006.6; *see also* 34 CFR §300.306(b). The determination of a child's eligibility for special education under the SLD classification is a primarily fact-based inquiry. *See Michael P. v. Dept. of Educ. State of Hawaii*, 656 F.3d 1057 (9<sup>th</sup> Cir. 2011).

In the present matter, when the student's MDT met on January 12, 2012, the team reviewed information from the student's October 22, 2011 Psychoeducational Evaluation, which included a review of the student's February 3, 2011 Psychoeducational Evaluation and May 10, 2011 Clinical Psychological Evaluation, the student's weekly quizzes/tests, anecdotal information from teachers and Achievement Network scores for the student. The information reviewed indicated that the student has intellectual abilities in the low average to average range. His strongest area is in cognitive efficiency and his area of greatest struggle is in thinking ability. The student's cognitive abilities indicate that he should have low average to average achievement and his scores on the WIAT-II were all in the average range, with the exception of Oral Language, which was in the high average range.

The student's October 22, 2011 Psychoeducational Evaluation, which included the VMI, WIAT-II and the WJ-III Cog. assessments, concluded that the student did not display evidence of a learning disability. Likewise, the student's February 3, 2011 Psychoeducational Evaluation, which includes the Bender Gestalt II, WISC-IV and WJ-III assessments, concluded that the student's pattern of scores was not suggestive of any type of SLD, and his academic scores in all areas are commensurate with his measured intelligence. Additionally, the student's teachers believed that the student demonstrated that he was able to achieve at grade level and the student's math and reading Achievement Network scores all fell above the average scores of other 5<sup>th</sup> grade students in the network. The Hearing Officer concludes that the student's January 12, 2012 MDT properly determined that the student was not eligible for special education and related services under the category of SLD.

The Petitioner argued that the student should have been found eligible for special education and related services under the category of OHI at the January 12, 2012 MDT meeting because ultimately the student was found to have ADHD and since the condition of ADHD does not “just appear” the student was therefore ADHD on January 12, 2012. Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) Adversely affects a child’s educational performance. 34 CFR §300.8(c)(8). As discussed in Issue #2, the MDT on October 7, 2011 had no reason to suspect that the student had ADHD. The student had not displayed ADHD type behaviors in school and the parent did not express concerns regarding any student behavior during the October 7, 2011 MDT meeting.

The student’s January 31, 2011 Behavioral Observation noted that while the student, at times, was distracted, he was able to regain focus without prompting. He was engaged in his tasks and was able to complete assignments. The student’s May 10, 2011 Clinical Psychological Evaluation concluded that the student did not meet the criteria for a diagnosis of ADHD. The evaluator who conducted the student’s February 3, 2011 psychological evaluation stated that she did not observe any symptoms of ADHD during the evaluation even though the mother had expressed concerns about the student’s attention span. In the June 1, 2011 MDT meeting at LEA 2, the student’s teacher stated that the student did not display any signs of hyperactivity. Contrary to the Petitioner’s assertion, the neurologist who treated the student on December 13, 2010 did not diagnose the student with ADHD. At the January 12, 2012 MDT meeting, all evaluators who had evaluated the student until that date found that the student either did not have ADHD or found inconclusive evidence as to whether the student has ADHD.

Following the January 12, 2012 MDT meeting, the student’s parent, through the advocate, requested an auditory processing assessment based on the October 22, 2011 evaluator’s note that the student had a significant difference between his Visual-Auditory Learning and Visual-Auditory Learning – Delayed scores which indicated that the student may have trouble remembering new information after a delay of time. [REDACTED] agreed to conduct an auditory processing assessment.

The May 9, 2012 auditory processing assessment found that the student demonstrated excellent attention, excellent focusing and no problems with responding impulsively. His attention was well within age level norms even though at the end of the assessment he simply stopped responding. The evaluator concluded that the student’s problems with sustained auditory attention were not likely related to an underlying attention deficit such as ADHD but likely due to the student choosing not to pay attention. Therefore, the student was not in need of any specific services, accommodations or therapy to overcome any auditory processing problems.

Based on the student's inconsistencies in the May 9, 2012 auditory processing assessment, [REDACTED] agreed to conduct a psychological evaluation. The August 1, 2012 psychological evaluation noted that parent reported that the student is happy at home and the school reported that the student does not have behavioral problems but has been "zoning out" and falling asleep in class. The student explained that he does not get enough sleep and reported eating diet consisting primarily of carbohydrates and sugar which the evaluator rationalized could cause the student to "crash" or fall asleep during school. While the assessments indicated that the student struggles with inattentiveness, the evaluator could not determine if the inattentiveness was a "stand-alone" problem, a symptom of a trauma or due to poor eating/sleeping habits and therefore could not make a definitive diagnosis of ADHD and concluded that the student did not appear to meet criteria for special education services under IDEA.

The student's April 13, 2012 Neurology Clinic Letter noted "questionable" ADHD. The student's July 1, 2012 Neurology Clinic Letter could not determine if the student's difficulty maintaining attention was due to ADHD or the student's poor sleeping habits. While September 20, 2012 and December 10, 2012 Patient Instruction Sheets list ADHD as the student's diagnosis, there is no supporting documentation for the basis of this diagnosis. Likewise, the listed "treatment" of an "IEP for reading and math" on the September 20, 2012 Patient Instruction Sheet is an inappropriate prescription to be made by the doctor or nurse practitioner absent an IEP Team determination of eligibility.

The Hearing Officer concludes that the student's January 12, 2012 MDT did not have the necessary data to determine that the student was eligible for special education and related services under the category of OHI for an ADHD diagnosis. Indeed, the student has yet to have an appropriate affirmative diagnosis of ADHD. [REDACTED] did not deny the student a FAPE by failing to find the student eligible for special education and related services and developing an IEP within 120 days of the parent's request on September 1, 2011.

The Petitioner failed to meet its burden with respect to Issue #3.

#### Issues #4 and #5

Despite the fact that the student did not have an affirmative diagnosis of ADHD, in an "abundance of caution," the student's August 28, 2012 MDT found the student eligible for special education and related services under the category of OHI. The Petitioner alleged that [REDACTED] failed to develop an appropriate IEP for the student on September 28, 2012, specifically by failing to provide ten hours of specialized instruction outside of the general education environment for the student rather than ten hours of specialized instruction and/or failed to review and revise the student's September 28, 2012 IEP to provide ten hours of specialized instruction outside of the general education environment after additional data became available to [REDACTED] on October 31, 2012.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). The program must be implemented in the LRE. 20 U.S.C. § 1412(a)(5); 34 CFR §§300.114(a)(2),

300.116(a)(2). For an IEP to be “reasonably calculated to enable the child to receive educational benefits,” it must be “likely to produce progress, not regression.” *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

Designing an appropriate IEP is necessary but not sufficient. The public agency must also implement the IEP, which includes offering placement that can fulfill the requirements set forth in the IEP. *See O.O. v. District of Columbia*, 573 F. Supp. 2d 41 (D.D.C. 2008). Placement decisions must be determined individually based on each child’s abilities, unique needs and IEP, not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. *See Analysis and Comments to the Regulations*, 71 Federal Register 46540:46588 (14 August 2006); *see also Letter to Anonymous*, 21 IDELR 674 (OSEP 1994) (clarifying that the LEA does not have a “main goal” which it must achieve when making a placement decision and that what is pertinent in making the placement decision will vary based upon the child’s unique and individual needs.)

“Educational placement,” as used in IDEA, means the educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003) (citations omitted); *see also, A.K. v. Alexandria City School Board*, 484 F.3d 672, 680 (4th Cir. 2007) (citing *AW v. Fairfax County School Board*, 372 F.3d 674, 676 (4th Cir. 2004)). In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. *Id.* Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.

On September 28, 2012, the student’s IEP Team developed an initial IEP for the student. The IEP Team began the meeting by discussing the student’s present levels of performance, including his strengths and weaknesses in academics and in group counseling. The IEP Team then developed social/emotional, math, ELA and writing goals for the student. After developing the student’s annual goals, the team discussed the type and amount of specialized instruction needed to support the student in mastering his IEP goals.

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 Supp. 2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. §1412(a)(5)); 5 DCMR §3011 (2006). The IDEA creates a strong preference in favor of “mainstreaming” or insuring that handicapped children are educated with non-handicapped children to the extent possible. *Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Ill. State Bd. of Educ.*, 184 F.3d 912, 915 (7th Cir. 1999). Furthermore, children with disabilities are only to be removed from regular education classes “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.” 34 CFR §300.114(a)(2).

The [REDACTED] members of the IEP Team recommended that the student receive specialized instruction for academic areas within the general education environment. The [REDACTED] team members strongly felt that the student was capable of achieving his IEP goals in the general education environment, was capable of accessing the general education curriculum in the general education environment and would derive greater educational benefit in the general education environment. The student’s mother and the mother’s advocate requested specialized instruction outside of the general education environment because the student “isn’t doing that well academically.” At the time, the student was receiving the grade letters F in reading, C in science, C in writing, F in Math Procedures, B in history, and F in Math Problem Solving. [REDACTED] does not utilize the grade letter D. If a student falls below 70% mastery, the student receives the grade letter F.

The student’s overall intellectual ability falls at the upper bound of the low-average range. In his October 2011 evaluation, the student scored in the average range of achievement in reading, writing and math. On September 28, 2012, the student had mastered his math facts and computation skills including multiplying multi-digit numbers, dividing by two-digit divisors and solving two-step equations. The student’s math IEP goals focused on computing with fluency, positioning integers on a number line and coordinate plane, percentages, using algorithms to solve problems with multi-digit decimals and positive and understanding positive and negative values. The student was able to read fluently in class and identify details within a fiction text. The student’s reading goals focused on comparing and contrasting the purpose of informational selections, determining the author’s position, using clues to determine the meaning of unfamiliar words, citing textual evidence to support analysis, determining the central idea of a text and analyzing text in detail. In writing, the student had good mastery of sentence level grammar and had goals related to supporting claims with creditable sources and introducing a topic and organizing ideas. The September 28, 2012 IEP also included behavioral support and accommodations to address the student’s difficulty with attention.

[REDACTED] suggested that the school be given the opportunity to provide behavior support services and specialized instruction in an inclusion environment as well as allowing the student the opportunity to attend Saturday Academy and adjust to taking medication newly prescribed for ADHD before educating the child in a more restrictive environment. The IEP Team ultimately prescribed specialized instruction within the general education environment for ten hours per week and behavioral support services outside of the general education environment for one hour per week. The team also agreed to reconvene in 30 days to review the student’s report card and updated Achievement Network scores to determine if the student needed a more restrictive setting.

While an IEP under the IDEA must be reasonably calculated to furnish educational benefits to the child and must be developed with parental involvement, it does not have to maximize the potential of a disabled child or include all the wishes of a child’s parents. *See Rowley*, 458 U.S. at 189-90; *Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C. Cir. 1988). The Hearing Officer concludes that the student’s September 28, 2012 IEP was reasonably calculated

to provide educational benefit to the student. The student's evaluations did not reveal significant academic deficits, the student was performing at the same level or above same grade peers in the Achievement Network and although the student had grade letter F's in reading and math, the student's grade was lowered because of weekly quiz scores. In reading, the student had a classwork average of 73% and in both Math Procedures and Math Problem Solving, the student had a classwork average of 87%. The student was maintaining a C in writing. The nature and severity of the student's "ADHD" was not such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. The IEP provided a program which addressed the student's needs, established goals related to those needs, provided appropriate specialized instruction and related services which was likely to produce progress and was in the LRE for the student.

The Petitioner also argues that even if the student's IEP Team developed an appropriate IEP on September 28, 2012, the student's IEP Team on October 31, 2012 should have prescribed specialized instruction for ten hours per week outside of the general education environment.

Following the development of the student's September 28, 2012 IEP, the student made evident, significant progress in reading and writing. The student's grade letter increased from an F to a C in reading and from a B to an A in writing. The student's reading/writing teacher testified that although the student displayed the typical struggle at the beginning of the year that most students display following a lower level of academic work during the summer, the student demonstrated a high level of skill including inference, analyzing and abstract thinking. The teacher also testified that the student is performing higher than most of the peers in his class, benefits from other students by building off of their ideas and is a leader in the class.

Although not as evident, the student also progressed in math. In Math Problem Solving, the student's grade increased from an F to a C. While the student's grade in Math Procedures remained an F, the student's overall percentage increased from 54% to 65%, five percentage point from a grade letter C. The Special Education Teacher testified that he discussed the student's progress in math during the October 31, 2012 IEP Team meeting, specifically that in the brief time the student's IEP had been implemented, the student had shown improvement in math in his percentage of mastery and in the math "Results" sessions. The Special Education Teacher also explained that the student's struggles in math were typical of other 6<sup>th</sup> grade students and that while small group instruction in an out of general education setting would yield additional progress because all students progress more quickly with additional instruction, out of general education instruction was not necessary because the student was able to access the general education curriculum and had a firm understanding of math concepts. The Special Education Teacher reasoned that the student had lower grades because he spent class time socially interacting with other students rather than attending to instruction.

Under *Rowley*, the factual showing required to establish that a student received some educational benefit is not demanding. A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. *Walczak v. Florida Union Free School District* (2nd Cir. 1998)

142 F.3d 119, 130; *E.S. v. Independent School Dist.*, No. 196 (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450.

At the October 31, 2012 IEP Team meeting, the student's September 28, 2012 IEP had been implemented fewer than 25 school days. The entire IEP Team, including the student's parent, noted that the student demonstrated improvement after the implementation of the September 28, 2012 IEP. While the student's IEP Team ultimately determined, in late November 2012, to implement four hours of specialized instruction outside of the general education environment in math for the student, the student's October 31, 2012 IEP Team's decision to maintain specialized instruction within the general education environment, for academic areas, for ten hours per week was reasonably calculated to confer educational benefit.

The Hearing Officer concludes that APA did not deny the student a FAPE by failing to provide ten hours of specialized instruction outside of the general education environment for the student on September 28, 2012 or after additional data became available to [REDACTED] on October 31, 2012.

The Petitioner failed to meet its burden with respect to Issues #4 and #5.

### **ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

The due process complaint in this matter is **dismissed** with prejudice. All relief sought by Petitioner herein is **denied**.

### **NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: February 26, 2013

  
Hearing Officer