

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, D.C. 20003

STUDENT,¹

HEARING OFFICER DETERMINATION

Date Issued: March 25, 2011

Petitioners,

Wanda I. Resto Torres, Hearing Officer

versus

Case No:

District of Columbia Public Schools,

Hearing Date: March 2 and 7, 2011, Room: 2006

Respondent.

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INTRODUCTION

The Petitioners filed a Due Process Complaint ("Complaint") on January 12, 2011, alleging that the Student was denied a free appropriate public education ("FAPE"). The Petitioners asserted that the District of Columbia Public Schools ("DCPS") failed to timely determine the Student eligible for special education services and related services, failed to consider all relevant information prior to making the determination that the Student was not eligible for services, failed to propose an individualized education program ("IEP"), and failed to provide an appropriate educational placement during the 2009-2010 and 2010-2011 academic year.

On January 24, 2011, DCPS filed a response indicating that the Student is not a student with a disability and is not entitled to an IEP or a special education placement. In addition, the Respondent argued that delays in the eligibility process were due to the Petitioners' action or inaction. The Respondent asserted that there has been no denial of a FAPE.

The jurisdiction for the due process hearing, and for a decision in this matter is conferred by the Individuals with Disabilities Education Improvement Act ("IDEIA" 20 U.S.C. §§1400 et seq.), its implementing regulations, 34 C.F.R § 300 et seq., the District of Columbia Municipal Regulations, Title 5-E, Chapter 30, Education of the Handicapped, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures.

I was appointed as the Hearing Officer on January 13, 2011. The parties held a resolution meeting and did not reach a settlement. On February 3, 2011, a prehearing conference was held. The Pre-Hearing Conference Summary and Order was issued on February 5, 2011.

¹ Personal identification information is provided in Appendix A.

On March 2 and 7, 2011, closed hearings were held. Michael Eig, Esq. represented the Petitioners and Laura George, Esq. represented the Respondent. The Petitioners presented 105 documents; they were admitted into evidence and labeled P-1 through 105.² *Four witnesses* testified on behalf of the Petitioners: the Mother, the Education Consultant,³ the Psychologist and the Head of the Private School.⁴ The Respondent presented twelve documents; they were admitted into evidence and labeled DCPS 1 through 12. One witness testified on behalf of the Respondent: the DCPS School Psychologist. The Petitioners filed Parents' Pre-hearing Memorandum of Law; no written closing arguments or briefs were submitted.

The issues to be determined are as follows:

- a. Did DCPS in December, 2009 have knowledge that the Student required evaluations to determine his eligibility for special education services? Did DCPS fail to determine the Student's eligibility within the required 120-day-timeframe?
- b. Does the Student have multiple disabilities – including a specific learning disability, slow processing and mood disorder – that adversely impact his educational performance such that he needs special education services?
- c. Did the multidisciplinary team that met on November 29, 2010 inappropriately consider the Student's educational progress as a reason to determine he was not eligible for special education services?
- d. Did DCPS deny the Student a FAPE by failing to propose an individualized education program designed to meet his unique needs?
- e. Did DCPS fail during 2009-2010 and 2010-2011 school years to provide an eligible student specialized instruction and related services to meet his unique needs?
- f. Is the _____ in Virginia a proper placement for the Student? Are the Petitioners entitled to reimbursement? If so, for what period of time?

FINDINGS OF FACT

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

1. The parties stipulated:

² The parties agreed to submit documents identified as P. 5, 10, 11, 13-22, 24, 25, 28, 29, 32-42, 45, 46, 50, 51, 54, 55, 57-61, 64-96, 80, 81, 84, 85, 90-93, 98 and 101 as joint documents.

³ The parties stipulate the witness was qualified as an expert on special education.

⁴ The witness was also admitted as an expert witness on special education eligibility determinations.

- a. The Student attends the _____ a private school in the state of Virginia.
 - b. The Student is receiving educational benefit at the private school he is attending.
2. The Student is a twelve-year old boy in the sixth grade. The Student was diagnosed with a hearing problem at pre-kindergarten. He has a hearing impairment and has worn a hearing aid in his left ear since first grade. He also has a mood disorder and is on medication to control his anxieties.⁵
3. In 2008, the Student's fourth grade teachers reported concerns with the Student's processing speed, fine motor coordination, and organization of materials. They further noted that the Student's socialization style was immature for his age. It was recommended that the Student get a Psychoeducational assessment. In April a Psychoeducational evaluation stated the Student profile is complex in that his hearing impairment compromises his functioning in various areas. Diagnostic impressions of the Student revealed a developmental coordination disorder, a hearing impairment and academic stress. It suggested the Student should receive preferential seating, and allotted an additional time and half time for him to respond to quizzes and tests. The Psychologist recommended that the Student receive an occupational therapy evaluation and that consideration be given to providing him with note-taking services. She also suggested tutoring to further his writing and executive functioning skills, and to work on developing his memory strategies.⁶ In June, an Occupational Therapy evaluation revealed the Student was struggling with handwriting, copying, and task completion. The evaluator recommended interventions focused on improving sensory processing abilities, visual motor integration skills, writing mechanics and fluency. She concluded the Student required a structured environment with proper classroom and sensory accommodations.⁷
4. In the fifth grade the Student began vomiting and his mood was negative and depressed when he had to go to school. His teachers reported weaknesses in his handwriting, organizing ideas and spelling. The Student was reading one grade level behind his peers and his spelling skills were at the first grade level. The Student had difficulty organizing, planning, studying effectively and became frustrated with his lack of success. His work load at school was reduced, and he was allowed not to take exams. In December 2008, a Psychiatrist diagnosed the Student with Mood Disorder Not Otherwise Specified and Generalized Anxiety Disorder.⁸ He had an audiological test which indicated a mild sensorineural hearing impairment in his right ear and a mild mixed hearing impairment in his left ear. It was determined that his hearing impairment was of major significance for hearing and understanding speech.⁹

⁵ Testimony of the Mother.

⁶ P 4 April 2008 – Comprehensive Psychoeducational Evaluation.

⁷ P5 June 16, 2008 – Occupational Therapy

⁸ P 8 July 2008 – Student Strengthens and Needs Profile, P 27 April 2010 - Letter from Dr. Lyerly.

⁹ Testimony of the Mother, and P 10 September 2009 -Audiological Evaluation.

5. At the end of the fifth grade, teachers at the private school he was attending advised the Petitioners they could not provide further accommodations for the Student due to the academic demands in the sixth grade and the requirement of letter grades in the sixth grade curriculum. The staff recommended that in addition to the Psychological assistance the Student was receiving, he obtain tutoring services. The Student's Occupational Therapist indicated that the Student required a well structured environment with proper classroom and sensory accommodations and environmental adaptations. The Petitioners as result enrolled the Student in 2009 at the _____ in the state of Virginia, as recommended by his doctors.¹⁰
6. On December 15, 2009, the Student was enrolled as a non-attending student at his DCPS neighborhood cluster middle school. At that time, the Petitioners asked the neighborhood middle school staff to refer the Student for special education evaluations and they provided current assessments, report cards and progress reports of the Student. The Petitioner was erroneously sent to another school by the DCPS staff.¹¹
7. April 12, 2010 was the date of the first meeting to discuss assessments of the Student for special education eligibility. The Petitioners signed consent for evaluations of the Student on the same day.¹²
8. In April 2010 the Student's Psychiatrist updated the information on the Student's mood disorder and psychological profile. The doctor opined that the Student required a small structured classroom environment with written and verbal instructions and additional time to process and complete assignments.¹³
9. During an observation at the _____ in January 2011 conducted by the Education Consultant, the Student appeared anxious and inflexible, and his mood disorder was apparent. The Education Consultant testified that the school atmosphere was quiet, calm, organized and structured, and is thus designed to work with the hearing impairment and executive functioning deficits. The executive functioning strategies being taught allow the Student to stay organized and he can access his cognitive abilities to do class work rather than focusing on being organized. The teachers adapt verbal information into visual techniques to assist the Student in understanding lessons taught. The Student has limited alertness, he is distracted and his attention to tasks is variable. The Student requires prompting from teachers. In the prior school he could not stay focused and had limited alertness with respect to the educational environment and it adversely impacted the Student's academic performance.¹⁴
10. The Student's strengths and weakness are complex and his hearing impairment is woven through all his diagnoses. The Student has working memory deficits, motor coordination, and written

¹⁰ Testimony of the Mother, and P 7 August 200 8- Occupational Therapy Classroom Strategies

¹¹ P 13 – December 6, 2009 - DCPS Student Enrollment Packet, and P14 December 2009 - Letter to SEC.

¹² P 25 April 12, 2010 - Consent for evaluations.

¹³ P 27 April 2010 - Letter from Dr. Lyerly.

¹⁴ Testimony of the Educational Consultant (Expert witness).

expression deficits. The Student has significant executive functioning problems, he has trouble organizing and is impulsive; all major components of his cognitive abilities play out in class in terms of his ability to know what to do next. The Student has a very difficult time organizing around school. He has high cognitive abilities but his executive dysfunction is almost at a neurological level and has a significant impact in the classroom. He also has suffered from a school-based anxiety. His perceptual motor skills have been impacted; it can be seen in his writing. Hearing impairment, mood disorder, sensory, executive function deficits are all present. The Student's perceptual motor problems are seen in his handwriting and in his reaction to the sensory environment. The Student requires environmental accommodations because he uses a hearing aid. The Student's disabilities are best defined under the "other health impaired." His mood disorder and anxiety may be a result of his frustration as a capable Student cognitively not being able to perform up to his potential. He requires significant environmental accommodations to access the auditory environment even with the hearing aide. The Student has received services in the general education and required accommodations. The Student was in a private school where adjustments were made to his program and he could not keep up. The Student is currently doing well in school because he is receiving an abundance of accommodations in a full time special education setting with supports. He would not be able to progress without accommodations. The size of the school, the environment, and the structured accommodations at the _____ has made it possible for the Student to progress. The Student has not been able to perform at the same level as his peers in the general education setting. His disabilities impact many areas and he requires support to navigate and complete assignments in school.¹⁵

11. The Student's hearing loss has caused him to also feel anxious around his peers. As a result of his mood disorder, the Student routinely suppresses his emotions, and has a harder time relating to others. The Student has multiple conditions that impede his learning; he has difficulty managing time, projects must be broken down and he loses focus with ease. He is 1 year below grade level. He requires close monitoring, written directions and constant refocusing. The Student needs support through use of technology, hands on strategies and role playing to get a concept. He requires an educational program that focuses on visual learning strategies. According to the expert witness, the Student with his symptoms and needs meets the requirements of the "Other Health Impaired" category.¹⁶
12. The Student was registered as nonattending student in DCPS for 2010-2011 academic year in March, 2010.¹⁷
13. In April 2010 letters were sent to DCPS reiterating the Petitioners' consent to evaluate and confirming a student evaluation plan meeting for April 12, 2010. At that time, DCPS did not identify the assessments it proposed to perform on the Student. On April 30, 2010 an update of the Student's mood disorder and accommodations required to secure his understanding of the

¹⁵ P27 April 30, 2010, and testimony of the Educational Consultant.

¹⁶ Testimony of the Head of the School and expert on special education eligibility determinations.

¹⁷ P 55 - March 31, 2010 - Registered as Non Attending Student.

educational material was prepared.¹⁸ On May 6, 2010, the Petitioners provided to DCPS the update and additional information about the Student's anxiety, hearing impairment and report cards.¹⁹ In May 2010 the parents were invited to an eligibility meeting to be convened in June 2010. However because an educational evaluation was not timely sent to the Petitioner for review, the meeting was postponed.²⁰

14. A psychological evaluation was completed by DCPS and faxed over to the Petitioners *on June 28, 2010*. On July 27, 2010, DCPS completed the educational evaluation and the occupational therapy ("OT") evaluation was conducted on that day. At that time, DCPS proposed to wait for OT results and then convene the MDT for the eligibility determination. That same day, Petitioners signed a consent form to release the educational records. The MDT meeting was rescheduled for August 2010 when the educational and OT evaluation results would be available, and that meeting was also canceled because the evaluation process still was incomplete. All evaluations were completed and a meeting was scheduled for September 30, 2010. There were scheduling conflicts of the Petitioners' Counsel and an evaluation that had not been reviewed by the Petitioners required the meeting to be rescheduled for October 14, 2010. That October meeting had to be rescheduled because the Student's mother had to undergo a medical procedure. On November 8, 2010, another MDT meeting was held during which the DCPS requested additional evaluations of the Student in the areas of speech/language and audiology and the meeting was once again rescheduled for November 29, 2010.²¹

15. DCPS Psychologist review of the Student's assessment determined that on the cognitive tests he scored within the average to above average range in some areas. The DCPS Psychologist noted that consistently the Student's profile presents working memory deficits, attention and motor coordination problems, especially in written expression tasks. The Psychologist acknowledged that although various types of interventions to address the Student's deficits have been attempted there has been "marginal change." The Psychologist also noted that reports suggest the Student is awkward in relationships with peers. A July 2010 Psychoeducational Evaluation reported the Student's academic skills and ability to apply those skills within average range. It noted however that the Student's skills were more than one year below chronological age in spelling, passage comprehension, and word attack. According to the reports the Student has obtained "A" and "B" grades. The School Psychologist determined the Student's overall performance does not indicate a specific learning disability.²²

¹⁸ P 22 and 24 - April 2010 - Letters reiterating consent to evaluate and IEP meeting, P 25-April 12, 2010 -Consent to evaluate, P 27 - April 2010 - Letter from Psychiatrist.

¹⁹ P 29 - Letter to SEC with report cards.

²⁰ Testimony of the Petitioner and P 29-31 Letters enclosing supplemental information, and P 38- Letter from SEC.

²¹ P 47 -July 27, 2010 -Resolution Session Notes, P 46 - July 27, 2010 -Occupational Therapy Report, P48- Consent to Release Educational Records , P 51- August 10, 2010, Letter to SEC, and P 58 - September 8, 2010- Letter from SEC, DCPS 3 - September 2010- IEP Meeting Notes, P 61-Letter of Invitation, and P 64 -Letter to DCPS.

²² P 37 - June 2010 - DCPS Psychological Assessment, P 47 - July 27, 2010 -Resolutions Session Notes, and P 45 - July 22, 2010 - DCPS Psychoeducational Evaluation.

16. DCPS' analysis of the existing data suggests that the Student's scores in mathematics are indicative of average ability to process and compute mathematical concepts. In the area of reading, with the exception of spelling, passage comprehension, and word attack which all fell more than one year below his chronological age, there was not any significant discrepancy to warrant specialized instruction. As for the Student's writing skills, these were in the high average range and the only shortfall was that his handwriting is not legible. The summary of concerns for motor skills and physical development indicate that the Student has difficulties with visual perception, motor coordination, graphomotor tasks, and the ability to complete tasks with speed and accuracy. These difficulties contribute to his complications in the classroom setting, increasing his anxiety and add to school related fatigue. According to the DCPS School Psychologist the Student's assessments revealed no significant discrepancy in academic performance and his skills fell within the high average.²³
17. On November 29, 2010, the MDT reviewed all the assessments, observations reports, the audiological reports and information from the Educational Consultant. Three disability classifications were discussed: Hearing Impaired, Specific Learning Disability and Other Health Impaired. DCPS representatives of the IEP/MDT team decided that the Student was not eligible for special education services, concluding that it found no educational impact from his disabilities.²⁴
18. The Student is enrolled at a private special education school in the state of Virginia, . The student-teacher ratio is 10 to 11 students per class, with one general education teacher and one teacher assistant. There, the Student has an individualized instruction plan. He has accommodations that include minimizing copying from board or book, simplified worksheets with less information on a page, and use of graphic organizers to organize thoughts prior to writing. The Student has formatted answer sheets and graphs especially for mathematic problems, he requires close monitoring by all teachers for organizational support, all multi step tasks are broken down into one-step instructions, and with limited auditory distractions. The staff is required to help the Student self advocate, and to have positive peer interaction.²⁵ The Student receives accommodations through small class, monitoring, and social emotional support services from a social worker. The teachers provide differentiated instruction to accommodate varying learning styles, curriculum is grade level or above, and assistive technology is incorporated throughout the day. At the school the Student participates in a remedial writing section that provides extended language and phonics based instruction along with the traditional courses objectives. His teachers noted that several redirecting and strategies are used that contribute to the Student's overall success. In some classes the Student is provided with one-on-one attention to make sure that he has fully understood direction and is able to complete assignments. The Student has also been provided with audio version of books, as well

²³ DCPS 12-December 27, 2010- Analysis of Existing Data.

²⁴ DCPS 6 – November 29, 2010 – MDT/IEP Meeting Notes; DCPS 10 and 11- February 2011- Prior Written Notice-Evaluation, and Prior Written Notice; DCPS 12-December 27, 2010- Prior Written Notice-Identification.

²⁵ P 9 School Year 2009-2010- Individualized Instruction Plan, testimony of the Head of the School in Virginia, and the Mother.

as digital copies of almost all class materials so that he may listen to his material in addition to reading it. The Student has extreme difficulty understanding math concepts, formulas, and procedures. His teacher prepares a reference sheet that breaks down those procedures with step by step instructions which he can use for homework assignment, quizzes and tests. Teachers also allow the Student a 10 seconds pause for responses; if he were not to receive that pause the Student would be not be able to regularly participate in class at an effective level. The Student also receives fill in the blank notes because otherwise he could not write all the necessary notes due in class. His teacher checks his notes at the end of class to ensure that he has properly completed it, and that it is legible. When his notes are not legible he receives a teacher's copy of the notes. The presentation of information is visual and individualized. His grades are now "A" and "B", and has gotten on the Honor Roll. He now likes being in school is participating in class. The cost of tuition is

19. DCPS is offering to place the Student at a middle school where he would not receive specialized instruction. While the school can provide specialized instruction for students who are out of the general education setting, the Student would be put in a general education setting without specialized instruction.²⁷

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:

The IDEA requires that a free appropriate public education must be available to all children between the ages of 3 and 21 who are residing in the District of Columbia.²⁸ Free appropriate public education ("FAPE") means special education and related services that are provided at public expense, under public supervision, and without charge; meets the standards of the State Education Agency, include an appropriate school; and are provided in conformity with an individualized education program ("IEP") that meets the requirements of §§300.320 through 300.324.²⁹

The burden of proof is the responsibility of the party seeking relief, in this case the parent. Based solely upon the evidence presented at the hearing, the hearing officer must 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 FAPE.³⁰ See: Schaffer v. Weast.

Timeliness of evaluation of eligibility for special education services

The Petitioner is requesting a determination that the DCPS failed to timely determine the Student qualified for special education services. DCPS has an obligation to locate and identify children in the

²⁶ Testimony of the Head of the School in Virginia and the Mother, and P 101 - February 2011- School Notes.

²⁷ Testimony of the School Psychologist.

²⁸ 34 C.F.R. § 300.101(a) and DCMR. 5§3002.1

²⁹ 20 U.S.C. §1400(d)(1)(A), §1401(9), 34 C.F.R. §300.17, and 30 DCMR §3001.1.

³⁰ 5 D.C.M.R. § 3030.14 and 546 U.S. 49, 51 (2005)

District of Columbia who have disabilities that place them in need of special education and related services. It generally must conduct evaluations before the initial provision of services. A parent's request for the initial evaluation triggers a requirement that the evaluation be conducted, and that it be completed within 120 days. A discussion of the relevant statutory and regulatory sections follows.

The IDEIA regulations at 34 C.F.R. §300.111(a) (i) require DCPS to have in effect policies and procedures to ensure that—

- (i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated;

In addition, 34 C.F.R. §300.111(c) (1) demands that DCPS also identify - (1) Children who are suspected of being a child with a disability under § 300.8 and in need of special education, even though they are advancing from grade to grade.³¹

DCPS must conduct a full and individual *initial* evaluation, in accordance with §§300.305 and 300.306, before the initial provision of special education and related services to a child with a disability.³² Likewise 34 C.F.R. § 300.301(b) provides in pertinent part:

(b) Consistent with the consent requirements in §300.300, *either a parent of a child or a public agency may initiate a request for an initial evaluation* (emphasis supplied) to determine if the child is a child with a disability.³³

DCMR 5 § 3005.2 indicates: "The IEP team shall conduct an initial evaluation of a child within a reasonable time of receiving a written referral and parental consent to proceed and within timelines consistent with Federal law and DC Code Section 38-2501(a)."³⁴

According to the successor provision, Section 38-2561.02 of the D.C. Code, the District of Columbia must "assess or evaluate a student who may have a disability and who may require special education services within 120 days from the date that the Student was referred for an evaluation or assessment."

DCPS has obligation to act within a specific timeframe under the IDEIA and under local law. It explains that obligation in the public information literature it gives to parents. "Under District of Columbia law, the LEA has no more than 120 calendar days after the date a child is referred for

³¹ 20 U.S.C. 1401(3); 1412(a)(3); 34 C.F.R. § 300.111(c).

³² 34 C.F.R. § 300.301(a).

³³ 20 U.S.C. 1414 (a).

³⁴ DC Code Section 38-2501(a) was repealed in 2007 and D.C. Code Section 38-2561.02 now addresses timeliness of evaluations. See 2006 D.C. Legis. Serv. 16-269 (West). D.C. Code § 38-2561.02(a).

evaluation to determine his/her eligibility for special education services, develop the individualized education program (IEP) and begin delivery of appropriate special education and related services.”³⁵

The Petitioners argue that the Student should have been evaluated as a result of having multiple disabilities including a specific learning disability, slow processing and mood disorder and a hearing impairment is eligible for special education under the *multiple disabilities or other health impaired* categories. The Hearing Officer agrees, and finds that DCPS was on notice that the Student may have qualified for special education in 2009 such that he should have been evaluated.

In the present case the eligibility process started December 15, 2009 when the Petitioners provided DCPS an abundance of information on the Student’s disabilities and asked that he be evaluated. The eligibility process should have been finalized by April 13, 2010 – 120 days later. Yet, the MDT eligibility decision was rendered on November 29, 2010, more than seven months after DCPS was obligated to make its eligibility determination.

Classification of the Student as a child with a disability

The IDEA defines “child with a disability” as a child evaluated and found having a hearing impairment, multiple disabilities, other health impairment, a specific learning disability..., and who, by reason thereof, needs special education and related services.³⁶ In this case, the evidence indicates that the Student has a hearing impairment and either “multiple disabilities” or is “other health impaired.”

According to 34 C.F.R. § 300.8(c)(5), “Hearing impairment” means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child’s educational performance but that is not included under the definition of deafness in this section.”

“Multiple Disabilities” in accordance with 34 C.F.R. § 300.8(c)(7) “...means concomitant impairments (such as mental retardation-blindness, mental retardation-orthopedic impairment, etc.), the combination of which causes such severe educational needs that they cannot be accommodated in a special education program solely for one of the impairments. The term does not include deaf-blindness.”

“Other Health Impairment” in accordance with 34 C.F.R. § 300.8(c)(9)(i) “... 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, ...; and [that] (ii) ...adversely affects a child’s educational performance.”

The IDEA regulations at 34 C.F.R. § 300.306 (c) (1)(i) provide that in the determination of eligibility and educational need, the District must—

³⁵ “*Caring for our Student with Disabilities*” a Procedural Manual for Parents- District of Columbia Public Schools and Charter Schools (as revised July 2005).

³⁶ 20 U.S.C. §1401(3)(A) and 34 C.F.R. §300.8 (a)(1).

- (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
- (ii) Ensure that information obtained from all of these sources is documented and carefully considered.

DCPS convened a MDT meeting on November 29, 2010 at which it reviewed the Student's assessments, reports, evaluations and information from the Education Consultant. It discussed the disability categories of Hearing Impaired, Specific Learning Disability and Other Health Impaired. While the evidence before the MDT indicated that the Student has disabilities, the DCPS members of the MDT determined that the assessments revealed no significant discrepancy in academic performance and the Student's skills fell within the high average. The MDT however, failed to discuss the factors that have resulted in the Student showing academic progress. The assessments and testimony indicate the Student has various disabilities that together require accommodations that the Student is receiving. The MDT failed to show that there was any discussion about the modifications and individualized services the Student is receiving and how he would be impacted should he not have access to the current classroom environment and accommodation. While one expert believes he qualifies under the other health impaired category, the other suggests that the Student should be identified under the multiple disabilities category. Both experts agree the Student requires close monitoring by all teachers for organizational support; instructions and tasks that are simplified, and with limited auditory distractions in his educational environment.

The Student has a history of not functioning at the level of his peers in a general education setting at least since the fourth grade, when he received accommodations allowing him not to be tested. The Student requires accommodations through small classroom size, monitoring, and social emotional support services. The Hearing Officer concludes the Student is a student with a disability which could be categorized as either OHI or multiple disabilities who warrants special education and related services.

Eligibility for special education services and educational progress.

A child with a disability is eligible for special educational services only if the disability interferes with the child's educational progress. Because the Student is making academic progress, DCPS argues that the Student's disabilities are not interfering with his educational progress. In support of this position, it points to the determination by the DCPS members of the MDT that there was no significant discrepancy in the Student's academic performance. But, a wider view must be taken. The group determining the eligibility of a child for special education and related services must make an individual determination as to whether, notwithstanding the child's progress in a course or grade, he or she needs or continues to need special education and related services. a child suspected of having a disability but who has not failed, is making academic progress, and is passing from grade to grade must be considered in the child find process as any other child suspected of having a disability. Analysis of Comments and Changes in the regulations implementing Part B of the IDEA, 71 Fed. Register 156 at 46584 (August 14, 2006).

The Office of Special Education Programs in the U.S. Department of Education (OSEP) has issued an opinion letter regarding adverse affects on education. Although such letters are not binding legal precedent, they do provide guidance. The letter states that even students who are making progress within the regular educational environment, as well as students with physical impairments who perform well in school, may require special education services. Moreover, OSEP has repeatedly stated that the meaning of the terms *educational performance* and *adversely affects* must be established on a case-by-case basis in light of particular facts and circumstances.³⁷

DCPS as the LEA must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade.

The focus of the IDEIA is to address the unique needs of each student. The evidence used by the MDT to support its decision of non-eligibility was that the Student's skills are in the high-average range and the assessments did not reveal discrepancy in his academic performance. The testimony from the Special Education Expert substantiates the claims that the Student is other health impaired as a result of deficits with executive functioning and because of this hearing impairment and mood disorder. The Special Education Eligibility Expert said because of the confluence of disabilities, multiple disabilities is an appropriate classification. The information in the record is that the Student's hearing impairment and mood disorder have contributed to his requiring adjustments since fourth grade. The Student has received interventions and accommodations that have escalated in intensity and ultimately has require a private school placement where he receives specialized instruction and one-one attention with a cadre of accommodations and appropriate sensory environment that has allowed him to progress. Simply put, the Student is making academic progress because accommodations to his disabilities are being made. This progress cannot be cited as a reason to remove the very accommodations that make the progress possible in the first place.

The Respondent failed its legal obligations under the IDEIA when it did not determine the Student eligible for special education and related services, as a student with OHI or multiple disabilities.

Regardless of the category of eligibility, each child with a disability is entitled to individually designed special education and related services. DB by LB v. Houston Independent School District, 48 IDELR 246 (D.Tex. 2007). The child's identified needs, not the child's disability category, determine the services that must be provided to the child. *Letters to Anonymous*, 48 IDELR 16 (2006). See also, *Analysis of Comments*, 71 Fed. Register 156 at pp. 46586, 46588 (August 14, 2006).

Private School Placement

The Petitioners request the Respondent fund the cost of tuition for the 2009-2010 and 2010-2011 academic years in a private full time special education program at the _____ in Virginia.

³⁷ Letter to Pawlisch, 24 IDELR 959 (OSEP 1995).

The IDEIA 20 U.S.C. 1412(a)(5) and its regulations at Sections 300.114 through 300.118, indicate the Act's strong preference for educating children with disabilities in regular classes with appropriate aids and supports.

Specifically, Section 300.114, requires each public agency to ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. The placement should be as close as possible to the child's home and made in conformity with the least restrictive environment ("LRE") provisions. A student or parent must have an opportunity to demonstrate that a disability requires some other arrangement, the child is educated in the school that he or she would attend if non-disabled; and in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that the students needs.

This requires an individualized inquiry into the unique educational needs of each disabled student in determining the possible range of aids and supports that are needed to facilitate the student's placement in the regular educational environment before a restrictive placement is considered. In the present case, finding an appropriate balance between addressing a Student's specific needs and the least restrictive environment is a matter that was dealt with by the expert witnesses testimony and their explanation of the Student's need for a closely monitored, small structured environment with limited auditory distractions.

The Petitioner received recommendations from the Student's doctors and because there was no other appropriate option available through DCPS, the parents enrolled him at the in Virginia for the 2009-2010 school year. The evidence was that the least restrictive environment for the Student for the school year 2009 to 2010 and in 2010 to 2011 requires a full-time program with appropriate related services and counseling. This setting is available at

In Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982) a two-part test to determine whether an LEA has fulfilled its duty to provide a FAPE was established: (1) has the school district complied with the procedures provided by the IDEA; and (2) is the student's IEP reasonably calculated to provide educational benefits. If the school district fails either part of the Rowley test, the student's right to a FAPE has been denied. When there is no IEP because eligibility is at issue, the second step in the Rowley test becomes whether the ineligibility determination was proper under the Act.

Recently the U.S. District Court, District of Columbia decided a case with similar issues as the ones in this Complaint and stated "This case involves an ineligibility determination, and thus there is no IEP. Therefore, the Court must adapt the second step of the *Rowley* inquiry and inquire whether the ineligibility determination was proper under the Act." N.G. V District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008).

In the current case the circumstances are similar to those of the student in N.G.. In that case, the Respondent failed procedurally when it delayed almost a year prior to making the eligibility

determination and incorrectly it decided the Student was not eligible for special education services. It based its eligibility determination in part on the fact that the student was making academic progress.

In the N.G. case the Hearing Officer concluded that because N.G. was performing well at the private school, and it is not a special education school, any disabilities she may have did not adversely impact her educational performance. The plaintiffs argued that N.G.'s success at private school could not be viewed in a vacuum, and that her ability to perform in a "general education" program at the private school is the direct result of the accommodations she is receiving there, along with her continued psychological therapy and medication.

The Plaintiffs argued that DCPS should not be able to benefit from its initial default in 2003 by basing N.G.'s ineligibility on the success of the program N.G.'s parents were forced to find for her.

The Court agreed and indicated that, "Were the Court to find otherwise, this would lead to the incongruous result whereby the District could avoid its obligations by improperly failing to evaluate a student and then, once the parents have taken on the burden that belongs to the school system, rely on the student's improved situation to avoid any further obligation to that student," *citing, Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994). In this case, accepting the DCPS position would have a similar result: DCPS failed to provide services that it should have, the Petitioners took on the burden of doing so, and DCPS argues that the resulting improved situation of the Student relieves it of further obligation to the student.

The Student in this case has various disabilities that concurrently contribute to negatively impact his educational progress. He requires an educational setting that provides close monitoring by all teachers for organizational support, information simplified in one-step instructions, and with limited auditory distractions. I find the Student needs a small setting in a full time special education program with individualized attention. DCPS has failed to identify the Student as a student with unique need that requires special education services and offered an educational placement in the general education setting without specialized instruction. For the reasons set forth above, because of the Student's hearing impairment, mood disorder, executive dysfunction, social skills problems, and because of the recommendations of the evaluations and the experts; the Student needs require a full time specialized instruction program.

The Hearing Officer finds that the Student's disabilities did adversely impact his educational performance such that he needs special education. The Petitioners met their burden; the evidence was that the ineligibility determination was not proper under the IDEIA. The Student was not provided a FAPE. DCPS failed to during the second part of the 2009-2010 and the 2010-2011 school year to provide an eligible student specialized instruction and related services to meet his unique need and comply with 20 USC §1412(a)(5) and (10)(B); 34 CFR § 300.116; and DCMR 5§ 3013.1.

Where the public agency has failed to identify a suitable and appropriate placement that can address and/or provide for this student's unique needs the funding of a private placement would be an appropriate remedy. See: Burlington v. Dept of Educ. 472 U.S. 359, 105 S Ct. 1996. Florence County

School District v. Carter 510 U.S. 7,114 S. Ct. 361; Roca v. District of Columbia 43 IDELR 58, (March 14, 2005).

The private school placement chosen by the Petitioners can provide the services the Student needs. At the he can receive specialized instruction in accordance with a fulltime program with a low student/teacher ratio, with support through use of technology, hands on strategies and focuses on visual learning strategies. Furthermore, the parties stipulated that he is receiving educational benefit. The Hearing Officer concludes that the Student's current private school is an appropriate program and the Respondent will fund the tuition for the remainder of academic year 2010-2011.

Reimbursement for Unilateral Placements –

The Petitioners asks for reimbursement for the cost of tuition and transportation at the in Virginia with transportation for the Student during the 2009-2010 academic year.

There were delays in the present case caused by both the Petitioner and by DCPS. However it took DCPS almost a year from December 2009 to November 2010, to make a decision on the Student's eligibility. The Petitioners cannot be penalized for securing an appropriate educational program for the Student. The delay in the determination of eligibility was unacceptable.

The Supreme Court has held that courts may order school districts to reimburse parents for expenses incurred by the unilateral placement of their child at a private school if: 1) the student's public school IEP was inappropriate, thereby denying the child FAPE; and 2) the private placement desired by the parents is proper. Sch. Comm. of the Town of Burlington, Mass. v. Dep't of Educ., 471 U.S. 359, 369, 85 L. Ed. 2d 385 (1985); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 10-11, 126 L. Ed. 2d 284 (1993).

"Though Courts most often award tuition reimbursement when schools fail to provide an appropriate IEP, this Court has repeatedly found that reimbursement is also an appropriate remedy for Child Find violations." N.G. v. District Of Columbia, Id.

As indicated above, the Student had no IEP because the ineligibility determination was improper, and the private placement is appropriate. There was no evidence to suggest that the cost of the private school was not reasonable.

On the other hand, the Petitioners request for reimbursement for tuition cost for the first semester of academic year 2009-2010 is not proper. DCPS will be held responsible for noncompliance from the time period when it knew or should have known the Student required evaluations back in December 2009. Although, DCPS had until April 13, to make an eligibility determination because of the length of the delay and because the second semester was still in session, DCPS will reimburse tuition as of January 2010.

Accordingly, Respondent must reimburse Petitioners for costs incurred for the Student's tuition and related service costs for the second semester of SY 2009-10 January 2010- end of the second semester, for SY 2010-11 paid to date by the parents and for the remainder of the academic year at the

ORDER

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

ORDERED DCPS shall by April 30, 2011 provide three dates to the Petitioner to schedule and convene an MDT/IEP team with the appropriate personnel to review the evaluations, and develop an IEP identifying the Student as a student eligible to receive special education and related services. The IEP shall provide the Student with a full time specialized instruction outside the general education setting to address his hearing impairment, mood disorder, sensory, executive function deficits and perceptual motor skills, and other needs the MDT/IEP identifies, and the IEP must also include 1 hour a week of psychological counseling, **it is further;**

ORDERED, the Respondent shall reimburse the parents for the cost incurred for the Student's tuition and related service for the second semester of SY 2009-10 at _____ and for SY 2010-11 paid to date by the parents, **it is further;**

ORDERED, DCPS shall place and fund the Student at _____ in Virginia for SY 2010-11, **it is further;**

ORDERED, the Respondent will schedule all meetings at a mutually agreeable time through the parent, **it is further;**

This order resolves all issues presented in the Petitioner's January 12, 2011 due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1415(i)(2)(B).

Dated: March 25, 2011



Wanda I. Resto Torres -Hearing Officer