

**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

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

Petitioner,

v.

The District of Columbia Public  
Schools ("DCPS"),

Respondent.

Date Issued: April 29, 2011

Hearing Officer: Ramona M. Justice

Case No:

Hearing Room: Room 2004

2011 APR 29 PM 4:43  
STUDENT HEARING OFFICE

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**HEARING OFFICER DETERMINATION**

**I. JURISDICTION**

The due process hearing was held; and the Hearing Officers' decision is written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17; reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), Public Law 108-446 and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; Title 38 of the D.C. Code, Subtitle VII, Chapter 25; and Chapter 30, Title 5-E of the District of Columbia Municipal Regulations ("DCMR").

**II. PROCEDURAL POSTURE**

On March 4, 2011, the parent, through her Attorney, filed with the District of Columbia, Office of the State Superintendent of Education ("OSSE"), Student Hearing Office, an "Administrative Due Process Complaint Notice", on behalf of the student. On March 10, 2011 the Respondent filed "District of Columbia Public School's Response to Petitioner's Due Process Complaint".

On March 8, 2011, the Student Hearing Office assigned the due process complaint to this Hearing Officer. On March 14, 2011, the Hearing Officer issued to the parties a "Notice of Prehearing Conference", scheduling the prehearing conference for March 24, 2011 at 5:00 p.m.; and an Order requiring the parties to notify the Hearing Officer of the date, time, and outcome of the resolution meeting.

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

According to the IDEA, the Respondent must convene a resolution meeting within fifteen (15) calendar days from the date of the complaint, expiring in this matter on March 19, 2011. The thirty (30) day resolution period ended on April 3, 2011.

On March 22, 2011, the Respondent filed the "Resolution Period Disposition Form", notifying the Hearing Officer that the resolution meeting convened on March 16, 2011, without resolution. Therefore, the 45 day timeline for convening a hearing and issuing a decision began on March 17, 2011, the day after the resolution meeting; and expires on April 30, 2011.

The prehearing conference was rescheduled and held on March 30, 2011 at 4:00 p.m., to accommodate the schedules of the parties. On this date, the Hearing Officer issued a prehearing order summarizing matters discussed during the prehearing conference, issues to be decided by the Hearing Officer, and confirming the due process hearing for April 20, 2011, at 9:00 a.m... On April 5, 2011, the Petitioner filed "Petitioner's Voluntary Notice of Withdrawal of Issues 1 & 2 from Pending Due Process Complaint" withdrawing these issues "without" prejudice.

The due process hearing convened on April 20, 2011, at 9:00 a.m., as scheduled, at 810 First Street, N.E., 2<sup>nd</sup> Floor, Washington, D.C... The hearing was closed to the public, pursuant to the parents' request. Each party was represented by an Attorney; and each Attorney provided opening statements. There were no preliminary matters for the Hearing Officer to address, prior to proceeding with a hearing on the merits of the issues in the complaint, however, during a review of the issues in the complaint, the Hearing Officer noted for the record Petitioner's withdrawal of Issues 1 and 2 of the complaint.

During discussion of disclosures, the Petitioner offered into evidence Petitioner's Exhibits 1-26, and the Respondent offered into evidence Respondent's Exhibits 1-10. The Respondent objected to documents in Petitioner's Exhibits on grounds of relevancy, and requested that instead of reviewing each exhibit to determine the relevancy of each exhibit, the Respondent requested that the objection stand through the hearing, and as the documents are introduced, the Respondent may object at that time and request the Hearing Officer rule on the objection. The Petitioner argued that the documents included in the exhibits are not only relevant to the issues in the complaint, however, are relevant in assisting the Hearing Officer in determining appropriate relief. The Hearing Officer admitted Petitioner's Exhibits with the proviso re relevancy. The Petitioner raised no objections to Respondent's exhibits.

The Petitioner requested that Petitioner's Exhibit 4-1 and 4-2 be stricken as the documents do not pertain to this student, and Respondent requested that Respondent's Exhibit 7, page 2, be stricken as it represents a duplicate document. The Hearing Officer admitted into the record as evidence Petitioner's Exhibit 1-26, and Respondent's Exhibits 1-10. The Petitioner also informed the Hearing Officer that the name of the Special Education Coordinator (SEC), as identified in the disclosure witness list is not the Special Education Coordinator (SEC) at the student's school; and requested that the SEC not be allowed to testify.

After hearing arguments from the parties, the Hearing Officer determined that the Petitioner's Attorney had knowledge and notice that the SEC at the student's school would testify at the hearing and its objection is untimely, and that the Respondent's Attorney erred in identifying the name of the SEC at the school; and that the Attorney failed to exercise due diligence by contacting Respondent's Attorney to inquire regarding the identity of the SEC. The Hearing Officer denied the Petitioner's request and allowed the SEC to testify.

Petitioner's witnesses included: the parent, and student's Education Advocate. The Respondent's witnesses included: the Special Education Coordinator at

The due process hearing concluded with the Petitioner and Respondent providing closing statements; and requesting that the Hearing Officer find in each party's favor on all issues in the complaint.

### **III. BACKGROUND**

The student is \_\_\_\_\_ years of age; and a \_\_\_\_\_ grade student at a District of Columbia elementary school, which the student has attended since kindergarten. The student is identified as disabled and eligible to receive special education and related services under the disability classification of Specific Learning Disability (SLD).

On March 4, 2011, the parent, through her Attorney, filed this due process representing that the Respondent failed to complete triennial evaluations; reevaluate the student pursuant to parent's request; and reevaluate the student, prior to initiating a change in the students occupational therapy services.

### **IV. ISSUES**

The following issues are before the Hearing Officer:

- (1) Whether the District of Columbia Public Schools denied the student a free appropriate public education, because it failed to evaluate the student at least once every 3 years, in violation of the IDEA, at 34 C.F.R. §300.303(b)(2)?
- (2) Whether the District of Columbia Public Schools denied the student a free appropriate public education, because it failed to reevaluate the student within a reasonable period of time of receiving parent's November 10, 2010 request for reevaluation, in violation of the IDEA, at 34 C.F.R. §§300.303(a)(2) and 300.305(d)(2)?
- (3) Whether the District of Columbia Public Schools denied the student a free appropriate public education, because it failed to reevaluate the student to determine whether the student continued to be a child with a disability, and to determine the student's educational needs, prior to revising the student's February 2, 2010 IEP, excluding direct occupational therapy services from the student's IEP, in violation of the IDEA, at 34 C.F.R. §300.305((d) (1) (ii)?

## V. RELIEF REQUESTED

The Petitioner requests that the Hearing Officer find in its favor on each issue; that the Hearing Officer issue an Order requiring the Respondent to issue to the parent an independent educational evaluation letter within five (5) days of the date of this decision, requiring the Respondent to fund the following independent evaluations: Speech and Language Evaluation, Comprehensive Psychological Evaluation, Functional Behavioral Assessment, and an Occupational Therapy Evaluation.

The Petitioner also requests that within fifteen (15) school days of receipt of the final independent evaluation, the Respondent is ordered to convene a Multidisciplinary Development Team (MDT) meeting, including the parent, to review and revise the student's Individualized Education Program (IEP), consistent with the findings and recommendations in the evaluations; and conduct any other evaluations recommended in the independent evaluations. The Petitioner requests compensatory education services for violations occurring during the 2010/11 school year.

## VI. CREDIBILITY DETERMINATIONS

The testimony of all witnesses at the hearing was credible. The Respondent failed to present witness testimony that contradicted the testimony of Petitioner's witnesses; or countered evidence presented by the Petitioner, on the issues in the complaint.

## VII. STATEMENT OF FACTS

1. The student is \_\_\_\_\_ years of age, and in the \_\_\_\_\_ grade at a District of Columbia public elementary school, which she began attending during the kindergarten.<sup>2</sup>
2. The student is disabled and eligible to receive special education and related services under the Individuals with Disabilities Education Act (IDEA).<sup>3</sup> The student's disability classification is identified as Specific Learning Disability (SLD).<sup>4</sup>
3. According to the student's 4<sup>th</sup> quarter report card for the 2009/10 school year, the student was beginning to develop skills/expectations in reading/English and mathematics<sup>5</sup> The student approached the standard in science and social studies, met the standard in art, music, health and physical education; and was secure in science, social studies, art, music, health and physical education.<sup>6</sup>

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<sup>2</sup> Testimony of parent.

<sup>3</sup> Petitioner's Exhibit 10.

<sup>4</sup> Id.

<sup>5</sup> Petitioner's Exhibit 16-1.

<sup>6</sup> Petitioner's Exhibit 16-1-2.

In the area of work habits, the student required frequent prompting in following directions, completing class work on time, using time wisely, completing and returning homework, and required limited prompting in working well with others, participating in class discussion, making an effort.<sup>7</sup> In personal/social skills the student required limited prompting in all areas, and worked independently in respecting the rights/property of others.<sup>8</sup>

4. The students' 1<sup>st</sup> and 2<sup>nd</sup> quarter report cards for the 2010/11 school year reflect that the student is not showing a basic working knowledge of skills/concepts and seldom produces work of satisfactory quality in mathematics, reading, and social studies.<sup>9</sup> The student is not secure in any academic area.<sup>10</sup> The student approaches the standard in science, and meets the standard in Health & Physical Education, and art.<sup>11</sup> The student struggles with work habits, and experienced some regression during the 2<sup>nd</sup> quarter in following directions, and using time wisely.<sup>12</sup>
5. According to the student's Elementary School Report Card Summary, during the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> grades, the student performed below basic in reading and arithmetic, and the student's attendance was a matter of concern.<sup>13</sup>
6. On **February 27, 2006**, the Respondent completed a **Psycho-educational Evaluation**, and on March 6, 2006 the evaluation report was completed.<sup>14</sup> The purpose of the evaluation was to assess the student's current level of cognitive and academic functioning; and assist the MDT in determining the most appropriate educational program for the student.<sup>15</sup> At the time of the evaluation the student was in the kindergarten.<sup>16</sup>

According to the student's teacher report the student was performing below grade level in reading and mathematics; her cognitive ability was in the low average range when compared to her peers (FSIQ=84); verbal and performance abilities are in the low average range, and academic testing reveals scores ranging from the borderline range to average range, with a related grade equivalency measuring within the pre-kindergarten to kindergarten levels.<sup>17</sup>

7. On **December 1, 2006**, the Respondent completed an **Occupational Therapy (OT) Initial Evaluation**, and on January 19, 2007 the evaluation report was completed.<sup>18</sup> The student was referred for evaluation by the student's general education teacher, to determine whether school based OT services was warranted.<sup>19</sup>

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<sup>7</sup> Petitioner's Exhibit 16.

<sup>8</sup> Petitioner's Exhibit 16-2.

<sup>9</sup> Petitioner's Exhibit 1-1.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Petitioner's Exhibit 2.

<sup>14</sup> Petitioner's Exhibit 25-1.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Petitioner's Exhibit 25-5.

<sup>18</sup> Petitioner's Exhibit 24-1.

<sup>19</sup> Id.

The evaluation revealed that the student had very low visual-motor control and coordination skills, and below average visual-perceptual skills.<sup>20</sup> The student qualified for occupational therapy intervention.<sup>21</sup> Recommendations included: 30 minutes of occupational therapy services, weekly, to address the student's visual- motor deficits; a pencil grip to assist the student in maintaining a constant and consistent grasp of the pencil while writing, and ongoing consultation with the student's teachers, to ensure that skills learned in Occupational Therapy care transferred to the classroom.<sup>22</sup>

8. On **December 18, 2006**, the Respondent completed an **Educational Evaluation**.<sup>23</sup> When compared to others at her age level, the student's performance was average in broad reading; low average in mathematics; and low in math calculation skills.<sup>24</sup>
9. On **March 9, 2007**, the Respondent completed a **Speech Language Evaluation**; and on **May 21, 2007** the report was completed.<sup>25</sup> The student presented overall weaknesses in language skills.<sup>26</sup> The student continued to qualify for speech and language intervention, and it was recommended that the student receive 30 minutes of speech language services, weekly.<sup>27</sup>
10. On **February 2, 2010**, the Respondent convened an IEP team meeting to discuss triennial evaluations for the student.<sup>28</sup> The team determined that the student remained eligible for special education and related services, under the disability classification of specific learning disability (SLD); and because there was no change in the student's disability classification, formal assessments were not necessary.<sup>29</sup>

The team also determined that the student's specific learning disability impacts the student's participation in the general education curriculum in academic and nonacademic areas, including mathematics, speech and language, reading, motor skills/physical development, and written expression.<sup>30</sup> An IEP was developed for the student prescribing 15 hours of specialized instruction, outside general education, 30 minutes occupational therapy services, and 60 minutes speech language services, per week.<sup>31</sup>

The team also issued to the parent a "Prior Written Notice-Identification" informing the parent of its proposal to identify the student as a student with a disability under the IDEA; that the student satisfies the eligibility criteria for special education and related services; and that no additional information is needed to determine the student's eligibility for special education services.<sup>32</sup>

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<sup>20</sup> Petitioner's Exhibit 24-3.

<sup>21</sup> Petitioner's Exhibit 24-3.

<sup>22</sup> Petitioner's Exhibit 24-4.

<sup>23</sup> Petitioner's Exhibit 23.

<sup>24</sup> Petitioner's Exhibit 23-1.

<sup>25</sup> Petitioner's Exhibit 22.

<sup>26</sup> Petitioner's Exhibit 22, page 22-4.

<sup>27</sup> Petitioner's Exhibit 22, page 22-5.

<sup>28</sup> Petitioner's Exhibit 20-2, and Respondent's Exhibit R-2.

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> Petitioner's Exhibit 18.1.

<sup>32</sup> Petitioner's Exhibit 18-9, and Respondent's Exhibit R-3...

11. On **February 2, 2010**, the Respondent completed an "Analysis of Existing Data" report which provides that according to the student's current progress report the student is working on the below basic level in reading; and according to state and local assessments, the student scored below basic on the DC-CAS and DC-BAS academic tests.<sup>33</sup>

In *mathematics*, the student has difficulty with multiplication, regrouping of large numbers is a concern, and the student has difficulty with division.<sup>34</sup> The use of 1:1, peer tutor, and whole group strategies, reveals minimal student progress.<sup>35</sup>

In *reading*, the student is very limited with vocabulary words, is unable to read 4<sup>th</sup> grade text, requires assistance with grade level work, and the student's decoding skills are poor; and the student has difficulty with long passages/with comprehension.<sup>36</sup> In *written expression*, the student has limited vocabulary, comprehension, and decoding skills which limit the student's ability to write sentences beyond 1<sup>st</sup> grade.<sup>37</sup>

In *communication/speech and language*, the student continued to have difficulty identifying and explaining word classes, answering questions regarding presented information, recalling main ideas and supporting details from a reading.<sup>38</sup>

In *motor skills/physical development*, the student presents with visual perceptual/motor deficits which affects handwriting and classroom work assignments; the student's visual perceptual deficits increases the amount of assistance and time she requires to complete classroom assignments; and in handwriting the student requires maximum verbal and visual cues to copy cursive letters correctly using proper line orientation and letter formation.<sup>39</sup>

12. The student's **April 21, 2010** IEP Progress Report reflects that in mathematics the student was progressing in 3 of 4 goals, and mastered one goal; in reading the student was progressing in all 3 goals, however, had difficulty locating facts from a text book; in written expression, the student progressed in 2 of 3 goals, and mastered one goal, while requiring some assistance from the teacher.<sup>40</sup>

In speech and language the student progressed in 2 of 3 goals, and one goal was not introduced; and in motor skills/physical development, the student made no progress during this period, due to frequent absences.<sup>41</sup>

13. On **November 10, 2010**, the Petitioner, through her Attorney, forwarded a letter to the student's school requesting comprehensive evaluations, including, however, not limited to a Comprehensive Psychological Evaluation, a Functional Behavioral Assessment, and Speech Language Evaluation.<sup>42</sup>

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<sup>33</sup> Petitioner's Exhibit 20-4.

<sup>34</sup> Petitioner's Exhibit 18-6.

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Petitioner's Exhibit 18-7.

<sup>38</sup> Petitioner's Exhibit 18-8.

<sup>39</sup> Id.

<sup>40</sup> Petitioner's Exhibit 17-3.

<sup>41</sup> Petitioner's Exhibit 17-4.

<sup>42</sup> Petitioner's Exhibit 13, page 13-1.

14. The student's *November 11, 2010* IEP Progress Report reflects that in mathematics the student was progressing in 2 of 4 goals, and 2 goals were not introduced; in reading the student progressed in 1 of 3 goals, and 2 goals were not introduced; in written expression the student was progressing in 2 of 3 goals, and one goal was not introduced; in speech and language the student progressed in one goal and 2 goals were not introduced; and in motor skills/physical development, the student progressed in 2 of 4 goals, one goal was introduced, and one goal was not introduced.<sup>43</sup>
15. On *January 7, 2011*, an Individualized Education Program (IEP) was developed for the student prescribing 15 hours of specialized instruction, outside general education, per week; 30 minutes per month occupational therapy services; 60 minutes per week, speech language services.<sup>44</sup>

In developing the student's IEP, the team determined that although triennial evaluations were due, and Petitioner through her Attorney, requested reevaluation of the student, additional assessments were not necessary, and the student's IEP would be based on input from the speech language therapist, occupational therapist, student's teachers, and assessments available at that time which were the assessments conducted in the year 2006/07.<sup>45</sup>

The team also decided to modify the frequency of the student's occupational therapy services, due to the student's progress with fine motor, visual perception, and upper coordination skills; and increased the student's DC-CAS testing modifications and accommodations.<sup>46</sup>

16. The student's *February 3, 2011* IEP Progress Report reflects that in mathematics 2 of 4 goals were not introduced, the student made no progress in 2 goals, the student performs inconsistently and continues to require significant teacher prompting and support, and the student has difficulty staying focused and on task.<sup>47</sup> In mathematics, the student does not consistently complete in class assignments and often does not turn in homework.<sup>48</sup>

In reading, the student progressed in 2 of 4 goals, 1 goal was not introduced and 1 goal was just introduced; in written expression the student is progressing in 3 of 4 goals and 1 goal was not introduced; in speech and language the student progressed in 1 of 3 goals, 1 goal was just introduced, and 1 goal not introduced.<sup>49</sup> In motor skills/physical development the student is progressing, however, would benefit from consultative services with the special education team (SET), to enhance the student's handwriting tasks.<sup>50</sup>

17. During the 2009/10 school year, from February 16, 2010 through June 22, 2010, the Occupational Therapy Service Tracker reports reflect that the student was unavailable or absent for most sessions, and on April 21, 2010 began refusing physical therapy services.<sup>51</sup>

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<sup>43</sup> Petitioner's Exhibit 12.

<sup>44</sup> Petitioner's Exhibit 10-7.

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

<sup>46</sup> Id.

<sup>47</sup> Petitioner's Exhibit 9-2.

<sup>48</sup> Id.

<sup>49</sup> Petitioner's Exhibit 9-4-5.

<sup>50</sup> Petitioner's Exhibit 9-5.

<sup>51</sup> Petitioner's Exhibit 5-15.

On June 16, 2010, the Occupational Therapist discussed the student's progress report with the Special Education Coordinator, and multiple absences from therapy sessions, and that the student showed no progress with the occupational therapy goals because of her refusal to avail herself of the services.<sup>52</sup>

At the beginning of the 2010/11 school year, from September 1, 2010 through February 28, 2011, the student resumed occupational therapy sessions with only 5 absences.<sup>53</sup> During this period, the student consistently required verbal cues and prompts for letter/line alignment, letter formations, spacing between words, and although the student improved with writing speed, the student continued to require verbal prompts for precision and accuracy.<sup>54</sup>

18. According to the February 12, 2010 through February 16, 2011 Speech Language Service Tracker reports the student progressed, was maintaining, and was unavailable for therapy on many occasions.<sup>55</sup> During the February 16, 2011 reporting period it is noted that the student required maximum verbal prompts and on 4 out of 13 sessions, the student's reading skills are very poor.<sup>56</sup>

## IIX. 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:

### 19. Triennial Evaluations

The Respondent convened annual IEP team meetings for the student on January 27, 2009, February 2, 2010, and January 7, 2011; and determined that additional data was not needed to determine whether the student continued to meet the eligibility requirements for special education and related services; and the student's educational needs.

Once these determinations were made, the Respondent failed to ensure that the parent received notice of: (i) that determination, and the reasons for the determination; and (ii) the right of the parent to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.<sup>57</sup>

For instance, at the February 2, 2010 IEP team meeting, the Respondent reviewed the student's 2006/07 evaluations, DC-CAS and DC-BAS test results, students' attendance records and progress reports, diagnostic math Star Report, class work, occupational and speech language service tracker reports.<sup>58</sup>

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<sup>52</sup> Petitioner's Exhibit 5-13-19.

<sup>53</sup> Petitioner's Exhibit 5-12.

<sup>54</sup> Petitioner's Exhibit 5-1 through 5-12.

<sup>55</sup> Petitioner's Exhibit 4, pages 1-2.

<sup>56</sup> Id.

<sup>57</sup> Petitioner's Exhibit 10, 19, and Respondents Exhibits 3,4, 5, and 6.

<sup>58</sup> Respondent's Exhibit 3 and testimony of SEC.

Based on that review, the Respondent determined that additional data was not necessary, that the information available to the team was sufficient to determine the student's educational needs, and whether the student continued to satisfy the eligibility criteria for special education and related services, because there was no change in the student's disability classification of specific learning disability.<sup>59</sup>

The Respondent also issued to the parent a Prior Written Notice-Evaluation indicating that the information available to the team was sufficient and no additional data or assessments were needed to make decisions regarding the student's educational needs, and to determine whether the student continued to meet the criteria for special education and related services.<sup>60</sup>

The Hearing Officer finds that the Respondent erred in its determination that additional data and formal assessments were not necessary; and in notifying the parent of the determination, for the following reasons:

**First**, as part of the reevaluation process, for more than four (4) years, the Respondent reviewed existing evaluation data, however, failed to complete the reevaluation process by ensuring that on the basis of each review and input from the child's parent, the IEP team determined what additional data if any, was necessary to determine the educational needs of the student; and whether any additions or modifications to the special education and related services was needed to enable the student to meet the measurable annual goals set out in the IEP of the student, and to participate, as appropriate, in the general education curriculum.<sup>61</sup>

**Second**, once the IEP teams determined that no additional data was needed at the January 27, 2009, February 2, 2010, and January 7, 2011 IEP team meetings, it failed to properly notify the parent of those determinations and reasons for the determinations; and failed to notify the parent of her right to request an assessment. As a result, the review of existing data at the January 27, 2009, February 2, 2010, and January 7, 2011 IEP team meetings is insufficient to constitute reevaluation of the student.

**Third**, the Prior Written Notice issued by the Respondent to the parent, failed to state reasons for the determination that additional data and assessments were not necessary.<sup>62</sup> According to the SEC, the reason the IEP team determined that additional data and formal assessments was not necessary is because there was no change in the student's disability classification, however, this is not the reason indicated in the Prior Written Notice; and is not a basis for determining a student's educational needs.<sup>63</sup> There is also no evidence that the reason for the team's decision as articulated by the SEC, was ever communicated to the parent.<sup>64</sup>

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<sup>59</sup> Testimony of SEC.

<sup>60</sup> Respondent's Exhibit 3, and testimony of SEC.

<sup>61</sup> Id.

<sup>62</sup> Respondent's Exhibit 3.

<sup>63</sup> Testimony of SEC.

<sup>64</sup> Testimony of SEC and parent.

The Prior Written Notice also failed to include notice of the parent's right to request an assessment to determine the educational needs of the student.<sup>65</sup> Instead the notice includes a generic statement that parents of a child with a disability have additional rights under Part B regarding the proposal or refusal, which is outlined in the Procedural Safeguards Notice, and that the parent should contact a person identified within the notice, to obtain a copy of the procedural safeguards.

**Fourth**, based on the SEC's testimony, it is evident that the Respondent failed to ensure that as part of its decision, consideration was given to the student academic and developmental needs, lack of academic progress, and whether any additions or modifications to the student's educational program were needed.

**Fifth**, according to the parent, although she attended the student's IEP team meetings and received the students report cards, she did not understand the information discussed at the meetings, the students' report cards, the student's IEPs, has no knowledge regarding the frequency in which the Respondent must evaluate the student, and the Respondent failed to explain the evaluation requirements or how the student is performing in school.

The parent testified that prior to retaining counsel, she had not requested reevaluation of the student, and at the February 2, 2010 IEP team meeting, the Respondent informed her of the services the school would provide the student, that assessments would be completed, and requested that she sign a document, which she complied with because she "wanted the student to learn how to read".

**Sixth**, during the parent's brief testimony, it became apparent to the Hearing Officer that although a member of the IEP teams, the parent lacked basic understanding of information communicated at the IEP team meetings, and information regarding the student's education, and is unable to comprehend, render decisions, or provide 'meaningful' input in decisions regarding the student's education and the provision of a FAPE, without assistance or information communicated in a manner in which she can understand it; which apparently failed to occur in the student's IEP team meetings. As a result, the parent was unable to provide 'meaningful' input in decisions regarding reevaluation of the student.

**Seventh**, the Respondent was aware that the student had not been assessed since the years 2006 and 2007, and according to the student's report card summary during the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> grades, the student performed below basic in reading and mathematics, failed to progress academically; the student remains 2 or more grade levels below peers<sup>66</sup>; during the 2010/11 school year, on the DC-CAS, and DC-BAS tests, the student performed below basic in reading/language arts; and according to the student's progress reports, report card summary, work samples, the student and the student failed to progress towards the goals in her IEPs.<sup>67</sup> However, the IEP team consistently determined that additional data and assessments were not necessary to determine the educational needs of the student.

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<sup>65</sup> Id.

<sup>66</sup> Testimony of SEC.

<sup>67</sup> Petitioner's Exhibits 14, 2, 3, 9, 12, 17, and 7.

*Eighth*, there is no agreement that the parent and Respondent agreed that reevaluation of the student was unnecessary, and because the Respondent failed to provide the parent notice of her right to request an assessment, the Respondent was obligated to conduct triennial evaluations.

*Finally*, for these reasons, the Hearing Officer finds that the Respondent failed to reevaluate the student, at least once every three (3) years, to determine the student's educational needs, and whether the student continues to meet the criteria for special education and related services.

## **20. Timely Reevaluation of the Student Pursuant to Parent's Request**

On *November 10, 2010*, the Petitioner, through her Attorney, forwarded a letter to the student's school requesting comprehensive evaluations, including, however, not limited to a Comprehensive Psychological Evaluation, a Functional Behavioral Assessment, and Speech Language Evaluation.<sup>68</sup> As of March 4, 2011, the date of the complaint, the Respondent had not obtained parent's informed consent to reevaluate the student, or reevaluated the student.

On *March 14, 2011*, after filing of the complaint, the Respondent obtained parent's informed written consent to reevaluate the student.<sup>69</sup> Approximately four (4) months lapsed from the date of parent's request to reevaluate the student, and the Respondent obtaining parent's informed written consent to evaluate the student; and as of that date reevaluations were not complete.

The Hearing Officer finds that the District of Columbia Public Schools failed to reevaluate the student within a reasonable period of time of receiving parent's November 10, 2010 request for reevaluation.

## **21. Reevaluation of Student Prior to Change in Student's Educational Program**

On *February 2, 2010*, an IEP was developed for the student prescribing 15 hours of specialized instruction, outside general education, 30 minutes occupational therapy services, and 60 minutes speech language services, *per week*.<sup>70</sup>

On *January 7, 2011*, an Individualized Education Program (IEP) was developed for the student prescribing 15 hours of specialized instruction, outside general education, per week; 30 minutes *per month* occupational therapy services; 60 minutes per week, speech language services.<sup>71</sup> The IEP reflects modification of the frequency in which the student receives occupational therapy services, from 30 minutes a week to 30 minutes a month.<sup>72</sup>

During reevaluation of the student on January 7, 2011, although aware that the student's prior Occupational Therapy Evaluation was completed on December 1, 2006, more than 4 years previous, the student continued to exhibit a need for occupational therapy services, and there is no current data regarding the student's occupational therapy needs.

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<sup>68</sup> Petitioner's Exhibit 13. The parties stipulated that the Respondent received Petitioner's November 10, 2010 request for reevaluation.

<sup>69</sup> Respondent's Exhibit 7.

<sup>70</sup> Petitioner's Exhibit 19.

<sup>71</sup> Petitioner's Exhibit 10.

<sup>72</sup> *Id.*

The Respondent determined that additional data and assessments were not necessary to determine the educational needs of the student or whether the student continued to meet the eligibility requirements for special education and related services, because of the student's progress, however, there the Respondent failed to present evidence of the student's progress, that would support a reduction in the frequency in which the student receives occupational therapy services.

In 2006, the student demonstrated very low visual-motor control and coordination skills, and below average visual-perceptual skills, impacting the student's ability to complete written tasks effectively and efficiently in the classroom, thereby, affecting the student academically.<sup>73</sup>

According to the Occupational Therapy Service Tracker reports, as of February, 2011, the student continued to require verbal prompts for letter/line alignment, letter formation, writing speed, and spacing between words with 65% accuracy; and although the student made improvement with writing speed, she continued to required prompts for precision and accuracy.<sup>74</sup>

The Respondent also failed to provide the parent notice of: (i) that determination, and the reasons for the determination; and (ii) the right of the parent to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs. As a result, the parent did not request assessment of the student.

The Hearing Officer finds that the District of Columbia Public Schools failed to reevaluate the student to determine whether the student continued to be a child with a disability, and the educational needs of the student, prior to initiating a change in the student's February 2, 2010 IEP. The Hearing Officer also finds that the District of Columbia Public Schools failed to provide the parent written notice of the proposed change in the frequency in which the student receives occupational therapy services student's educational program, within a reasonable period of time, before initiating a change in the student's educational program.

## IX. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as the Hearing Officer's review of governing legal authority and case law, the Conclusions of Law of this Hearing Officer are as follows:

1. The burden of proof is properly placed on the Petitioner, the party seeking relief in this matter.<sup>75</sup> Under the IDEA, the Petitioner must prove the allegations in the due process complaint, by a preponderance of the evidence.<sup>76</sup>

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<sup>73</sup> Petitioner's Exhibit 24-3.

<sup>74</sup> Petitioner's Exhibit 5-1 through 5-3.

<sup>75</sup> *Shaffer v. I Weast*, 546 U.S. 49, 56-057 (2005) and 5 D.C.M.R. §3030.3.

<sup>76</sup> 20 U.S.C. §14115(i) (2) (c). See also *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir.2005) (standard of review)

2. The Individuals with Disabilities Education Act (“IDEA”)<sup>77</sup> is the federal statute governing the education of students with disabilities.<sup>78</sup> The IDEA ensures that all children with disabilities have available to them a free appropriate public education (“FAPE”), that emphasizes special education and related services specifically designed to meet their unique needs and prepare them for further education, employment, and independent living. See, 20 U.S.C. §1400(d)(1)(A).
3. The IDEA defines a free appropriate public education (FAPE) as special education and related services provided at public expense, under public supervision and direction, and without charge; meet the school standards of the State educational agency; includes an appropriate preschool, elementary school, or secondary school education in the State involved; and the special education and related services must be provided in conformity with an Individualized Education Program (IEP) that meets the requirements of §§300.321 through 300.324.<sup>79</sup>

In the District of Columbia, the local education agency (LEA) must ensure that all children with disabilities, between the ages of 3 and 21, have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. This student is a child with disabilities entitled to receive special education and related services, pursuant to the IDEA.

#### 4. Triennial Evaluations

The IDEA defines evaluations 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 child’s special education and related service needs”.<sup>80</sup> Reevaluation *must* occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary;<sup>81</sup> and the opportunity for a public agency and the parent to agree that a reevaluation is unnecessary occurs before the review of existing evaluation data.<sup>82</sup>

School districts are not required to obtain parental consent before reviewing existing data because the review of existing data is part of the general reevaluation process, which provides that as part of any reevaluation, the IEP team (including the parent), and other qualified professionals, as appropriate, must review existing evaluation data.<sup>83</sup> Reevaluation of a student commences with the review of existing data in accordance with 34 C.F.R. 300.305(a); and assessments are often part of the evaluation process.<sup>84</sup> Additionally, the IEP team and other qualified professionals, as appropriate, may conduct its review of existing data, without a meeting.<sup>85</sup>

<sup>77</sup> The IDEA is reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) Public Law 108-446 and 20 U.S.C. §1400 et seq...

<sup>78</sup> The Federal regulations promulgated under the IDEA, are codified at 34 C.F.R. Part 300.

<sup>79</sup> IDEA, 34 C.F.R. §300.17(d).

<sup>80</sup> IDEA, 34 C.F.R. §300.15.

<sup>81</sup> IDEA, 34 C.F.R. §300.303 (b) (2).

<sup>82</sup> Letter to Anonymous, 48 IDELR 136 (2007).

<sup>83</sup> Id.

<sup>84</sup> IDEA, 34 C.F.R. §300.304.

<sup>85</sup> Id.

As part of the reevaluation process the Respondent must ensure that the parent is not merely a member of the team, however, that the parent understands the reevaluation process and information communicated at IEP team meetings, her right as a parent to request an assessment, and that she has the opportunity to provide 'meaningful' input in all decisions regarding the student's education and the provision of a FAPE to the student, which failed to occur in this instance.

Based on the review of existing data, and input from the child's parents, the IEP team and other qualified professionals, as appropriate, must determine whether additional data are needed to determine whether the child continues to be a child with a disability, and the educational needs of the child; the present levels of academic achievement and related developmental needs of the child; whether the child continues to need special education; and whether any additions or modifications to the student's special education and related services are needed to enable the student to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.<sup>86</sup> In reviewing existing data and determining whether additional data and formal assessments were needed, the IEP teams failed to consider these factors, in determining the educational needs of the student.

If the IEP team and other qualified professionals, as appropriate, determined that no additional data is needed, the public agency must notify the child's parents of: (i) that determination and the reasons for the determination; and (ii) the right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.<sup>87</sup> Under these circumstances, the public agency is not required to conduct an assessment unless requested to do so by the child's parents.<sup>88</sup> If the parents do not request an assessment, then the review of existing data may constitute the reevaluation.<sup>89</sup>

In this instance, the Respondent failed to ensure that the parent received notice of reasons for the Respondent's determination, notice of her right to request an assessment, and that the parent understood the reevaluation process and information communicated at the IEP team meetings. It is the responsibility of the local education agency to ensure that the information communicated to the parent at IEP team meetings is communicated in a manner in which the parent can understand, which apparently failed to occur in the IEP team meetings held for this student.

As a result of the Respondent's failure in this regard, the parent was denied the opportunity to provide 'meaningful' input in decisions regarding the student's education and the provision of a FAPE to the student, and the need for additional data and assessments; and was unable to exercise her right to request additional assessments.

It is the Hearing Officer's Decision that the Petitioner satisfied its burden by proving that in reevaluating the student, the District of Columbia Public Schools failed to comply with the procedural requirements of the IDEA, as set forth herein, by ensuring that the student was reevaluated at least once every three (3) years, in violation of the IDEA, 34 C.F.R. §300.303 (b)(2).

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<sup>86</sup> IDEA, 34 C.F.R. §300.305(a)(2).

<sup>87</sup> IDEA, 34 C.F.R. §300.305(d)(1).

<sup>88</sup> IDEA, 34 C.F.R. §300.305(d)(2).

<sup>89</sup> Letter to Anonymous, 48 IDELR 136 (2007).

## 5. Timely Reevaluation of the Student Pursuant to Parent's Request

A public agency *must* ensure *reevaluation* of each child with a disability is conducted in accordance with Sections 300.304 through 300.311—

- (1) If the *public agency* determines that educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; *or*
- (2) If the child's *parent* or teacher requests a reevaluation.<sup>90</sup>

The IDEA is replete with provisions emphasizing the necessity of monitoring a student's IEP for revision purposes; e.g., 20 U.S.C. §1414 (stating reevaluations *shall* occur at the *request of parents provided they do not total more than one per year*). Furthermore, the Supreme Court forcefully declared that continual evaluations are necessary, and parents must have the ability to seek redress for a school's failure to sufficiently monitor a child's progress under the IEP.

However, neither the IDEA, nor the D.C. Code of Municipal Regulations, establishes a timeframe in which an LEA must reevaluate a student. Thus, absent an established timeframe to reevaluate the student, the Hearing Officer applies the "reasonableness" standard. Applying the "reasonableness" standard, DCPS must reevaluate a student within a reasonable period of time after receiving Petitioner's request for reevaluation.

In this matter, the Respondent determined that additional assessments were not necessary. However, even if the school system believes that certain assessments are not necessary, the school system must still do them if requested to do so by the parents. 20 U.S.C. § 1414 (c) (4) (B) ("if local education agency determines that assessments are not needed, the local education agency "shall not be required to conduct such an assessment unless requested to by the child's parents."); 34 C.F.R. § 300.305 (d) (2); ("The public agency is not required to conduct the assessment [ . . . ] unless requested to do so by the child's parents"). See also Cartwright v. District of Columbia, 267 F. Supp.2d 83, 87 (D.D.C. 2003) (holding that public agency must conduct reevaluations upon parental request and parent is not required to show justification for reevaluations and condition precedent); and Herbin vs. District of Columbia, 362 F. Supp2d. 254 (D. D.C. 2005) (finding that DCPS plain reading of IDEA regulation requires that DCPS conduct reevaluations upon parental request).

In this matter, on November 10, 2010, the parent requested comprehensive evaluation of the student, to include however not limited to, a Comprehensive Psychological Evaluation, a Functional Behavioral Assessment, and a Speech Language Evaluation. There is no evidence that these evaluations were previously conducted, within one year of parents' November 10, 2010 request for reevaluation, therefore, the DCPS *must* reevaluate the student within a reasonable period of time of receiving parent's November 10, 2010 request a reevaluation.

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<sup>90</sup> IDEA, at 34 C.F.R. §300.303 (a) (2).

Nearly four (4) months lapsed since parent's November 20, 2010 request for reevaluation, which is more than a reasonable period of time for the Respondent to reevaluate the student. However, as of March 4, 2011, the date of the complaint, the Respondent had not reevaluated the student.

It is the Hearing Officer's Decision that the Petitioner satisfied its burden by proving that the District of Columbia Public Schools failed to reevaluate the student within a reasonable period of time of receiving parent's November 10, 2010 request for reevaluation, in violation of the IDEA, at 34 C.F.R. §§300.303(a)(2) and 300.305(d)(2).

## **6. Reevaluation of Student Prior to Change in Student's Educational Program**

As part of an initial evaluation or reevaluation, an IEP team and other qualified professionals, as appropriate, must review existing evaluation data on a child, and on the basis of that review, and input from the child's parents, determine what additional data if any, are necessary to determine the educational needs of a child; and whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.<sup>91</sup>

If the IEP team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of—

- (i) That determination and the reasons for the determination; and
- (ii) The right of the parents to request an assessment to determine whether the child continues to be a child with a disability and to determine the child's educational needs.<sup>92</sup>

The record reflects that in reevaluating the student on January 7, 2011, the Respondent determined that no additional data was needed to determine the educational needs of the student and whether the student continued to be a child with a disability. However, based on that review, the Respondent failed to comply with the procedural requirements of the IDEA, by providing the parent notice of that determination and reasons for the determination; and the right of the parent to request an assessment to determine whether the child continues to be a child with a disability and the child's educational needs.

In addition, according to the IDEA, at 34 C.F.R. Section 300.503(a) (1), whenever the public agency proposes to initiate or change, or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; written notice that meets the requirements of paragraph (b) of this section must be given by the public agency to the parents of a child with a disability within a reasonable time before the proposed action.

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<sup>91</sup> IDEA, 34 C.F.R. §300.305(a)(1)(2)(iv).

<sup>92</sup> IDEA, 34 C.F.R. §300.305(d)(1)(ii).

Subparagraph (b) provides that the notice required under paragraph (a) of this section must include—

- (1) *A description of the action proposed or refused* by the agency;
- (2) An explanation of *why the agency proposes or refuses to take the action*;
- (3) *A description of each evaluation procedure, assessment, record, or report the agency used as a basis* for the proposed or refused action;
- (4) A statement that the parents of a child with a disability have protection under the *procedural safeguards* of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (5) *Sources for parents to contact to obtain assistance* in understanding the provisions of this part;
- (6) *A description of other options that the IEP Team considered and the reasons* why those options were rejected; and
- (7) *A description of other factors that is relevant to the agency's proposal* or refusal.

The Respondent failed to comply with the procedural requirements of the IDEA, because on January 7, 2011, it initiated a change in the student's educational program by reducing the frequency in which the student received occupational therapy services, without providing the parent written notice of the proposed change within a reasonable time prior to the proposed change, and consistent with the notice requirements of subparagraph (b) of Section 300.503.

It is the Hearing Officer's decision that the Petitioner satisfied its burden by proving that in reevaluating the student on January 7, 2011, the Respondent failed to comply with the procedural requirements of the IDEA, because it failed to reevaluate the student, and failed to provide the parent written notice, prior to initiating a change in the student's educational program; in violation of the IDEA, at 34 C.F.R. §300.305 (a)(1)(2)(i)(B)(iv) and (d)(1)(i) and (ii).

### **X. Free Appropriate Public Education**

It is the Hearing Officer's decision that the procedural violations in this matter, occurred over such an extended period of time, and are to such an extent that the violations seriously impede upon the student's right to a FAPE; significantly impede the parent's opportunity to participate in the decision making process regarding the student's education, and the provision of a FAPE to the student; and caused the student a deprivation of educational benefit.

It is also the Hearing Officer's decision that the procedural violations in this matter seriously infringe upon the parent's opportunity to provide "meaningful" input in all decisions regarding the student's education, and the provision of a FAPE to the student.<sup>93</sup> For these reasons, it is the decision of the Hearing Officer that the student was denied a FAPE; and is entitled to compensatory education services for violations occurring during the 2010/11 school year.

## XI. COMPENSATORY EDUCATION SERVICES

According to Stanton v. District of Columbia, 680 F. Supp. 2d 201 (D.C. Cir. 2010), once a Hearing Officer finds that there was a denial of a FAPE, the Hearing Officer is obligated to craft an appropriate compensatory education award. However, the information necessary for this Hearing Officer to craft an appropriate award for this student is insufficient. The March 30, 2011 prehearing order required the Petitioner to include a compensatory education plan in its disclosures and present evidence of compensatory education at the hearing, however, this information is not available.

The record reflects that on March 22, 2011, after the complaint was filed, the Respondent completed an Educational Evaluation; however, there are no other assessments. Absent current comprehensive assessments, any determination regarding compensatory education services would be premature.

The Hearing Officer is precluded from referring the decision regarding compensatory education services, to an IEP team. Therefore, the Hearing Officer must craft an appropriate compensatory education award for the student, and finds that the following remedy is appropriate:

If the Respondent has not conducted, completed, and provided Petitioner a copy of assessments requested by the Petitioner on November 10, 2010, as of the date of this decision, the Respondent shall fund independent comprehensive evaluations, and upon receipt of the assessments, review and revise the student's IEP, as appropriate. Once the student's evaluations are reviewed and a determination made regarding the student's special education and related service needs, the Petitioner may request a due process hearing before this Hearing Officer, for the sole purpose of determining the nature and amount of compensatory education services the student is entitled to receive for violations occurring during the 2010/11 school year, and as identified herein.

The Petitioner must file an administrative due process complaint notice, within sixty (60) calendar days of the eligibility determination. Petitioner's failure to file a timely request for a hearing will result in this decision serving as the final agency decision in this matter. Should the Petitioner request a due process hearing for this purpose, both parties shall attend the hearing prepared to present evidence of the nature and amount of compensatory education services to student is entitled to receive, consistent with the standard established in Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005).

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<sup>93</sup> See, Babb v. Knox County Sch. Sys., 965 F.2d 104, 109 (6th Cir. 1992); W.G., 960 F.2d at 1484.

The complaint shall include a proposed compensatory education plan, and such failure to include a compensatory education plan with the complaint, will result in automatic dismissal of this compensatory education claim "with" prejudice.

## XII. ORDER

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

1. **ORDERED**, that Issues 1 and 2 of the due process complaint filed in this matter are dismissed "without" prejudice; and it is further
2. **ORDERED**, that if the Respondent has not conducted, completed, and provided the Petitioner a copy of assessments requested by the Petitioner on November 10, 2010, as of the date of this decision, within five (5) school days of the date of this decision, the Respondent shall issue to the parent an Independent Educational Evaluation (IEE) letter authorizing the parent to obtain an independent Comprehensive Psychological Evaluation, to assess the student's academic, developmental, and functional needs and assist in determining the educational needs of the student; a Functional Behavioral Assessment to assess the student's social/emotional needs; a Speech Language Evaluation; and an Occupational Therapy Evaluation, and it is further
3. **ORDERED**, that within fifteen (15) school days of receipt of the final independent evaluation, the Respondent shall convene a MDT/IEP team meeting with the parent, to review the student's independent evaluations, and revise the student's January 7, 2011 IEP, based on findings and recommendations in the independent evaluations; order any additional evaluations recommended in the independent evaluations; and develop a Behavioral Intervention Plan (BIP) for the student, based on findings and recommendations in the FBA.

## XIII. 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 U.S.C. §1415(i).

Date: April 29, 2011

Ramona M. Justice

Attorney Ramona M. Justice, Hearing Officer