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Office of Review and Compliance
Student Hearing Office
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SSSE
STUDENT HEARING OFFICE

Confidential

STUDENT, through the legal guardian¹)	
)	
Petitioner,)	
)	Complaint Filed: March 23, 2009
v.)	
)	Hearing Dates: April 27, 2009
THE DISTRICT OF COLUMBIA)	May 1, 2009
PUBLIC SCHOOLS)	
)	Closing Arguments Submitted: May 6, 2009
Respondent.)	
)	

HEARING OFFICER DETERMINATION

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¹ Personal identification information is provided in Attachment A.

Jurisdiction

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

Introduction

Petitioners are the parents of a -year-old student ("Student") attending a District of Columbia non-public elementary school. Petitioners and the Student reside in the District of Columbia.

On March 31, 2009, Petitioners filed an administrative Due Process Complaint Notice ("Complaint") against the Local Education Agency ("LEA"), which in this case is the District of Columbia Public Schools ("DCPS"), the State Education Agency, which in this case is the Office of State Superintendent of Education ("OSSE"), and Elementary School, which in this case is a subpart of DCPS. The Complaint alleged that the Student has multiple disabilities, i.e., specific learning disabilities and attention deficit hyperactivity disorder ("ADHD"). The Complaint also alleged that the Student suffers from executive functioning, auditory processing, visual motor, and visual perceptual disorders.

The Complaint alleged that the Student attended and was discharged from his nursery and kindergarten school programs because of his "attentional and behavioral" problems stemming from his disabilities. The Complaint further alleged that, at all times, DCPS failed to identify the Student as a child suspected of having a disability despite Petitioners' attempts to have DCPS evaluate and provide specialized education and related services for the Student. Finally, the Complaint alleged that the Student's parents enrolled the Student in a non-public school because they believed that he could not function in a DCPS classroom without extensive supports and accommodations.

The claims raised in the Complaint included that DCPS (1) violated procedural safeguards under the Individuals with Disabilities Education Act ("IDEA"); (2) violated its "child find" obligations; (3) denied the Student of educational opportunity; and (4) denied the Student a free, appropriate, public education ("FAPE") under IDEA and Section 504 of the Rehabilitation Act. The Complaint further alleged that DCPS excluded the Student from and denied him the benefits of DCPS programs and services because of his disability in violation of the Rehabilitation Act.

The remedies Petitioners requested included:

- (1) A determination that is a child with a disability who requires specialized instruction and related services and thus is eligible for special education services;
- (2) Reimbursement of tuition and related services;
- (3) Reimbursement of evaluation costs;
- (4) Compensatory education; and

(5) A FAPE.

On April 13, 2009, Counsel for OSSE filed a Response to the Petitioner's Complaint ("OSSE Response"). The OSSE Response was filed three days after the response deadline established by IDEA. The Response asserted that OSSE is not a proper party in this matter. It asserted that, as the SEA, OSSE is not responsible for providing each student a FAPE. The OSSE Response also asserted that this Hearing Officer lacks jurisdiction to hear claims brought under Section 504 of the Rehabilitation Act. It further asserted that, even if Petitioner could state a claim against OSSE, the Complaint is insufficient because Petitioner makes no allegations of fact regarding any action or inaction by OSSE. The OSSE Response requested that the Complaint be dismissed as a matter of law.

On April 15, 2009, after the Student Hearing Office had closed for the day, counsel for DCPS filed a Response to Parent's Administrative Due Process Complaint ("DCPS Response"). The DCPS Response was five days overdue. Counsel for Petitioner asserted in the prehearing conference that she was not prejudiced by the late filing.

The DCPS Response asserted that, *inter alia*, a DCPS team reviewed the Student's independent evaluations and determined that the Student was not eligible for special education services. The Response also asserted that the Student's current placement, the (" "), is a private, general education school that does not offer a special education placement or serve any special education students. The Response requested a denial of Petitioner's request for relief.

In the prehearing conference on April 14, 2009, this Hearing Officer informed counsel that she has no jurisdiction to hear claims brought under section 504 or any other provision of the Rehabilitation Act. This Hearing Officer requested that counsel for Petitioner to clarify exactly what relief she was seeking from OSSE that DCPS could not provide, to which counsel responded "child find." After an extensive conversation, counsel for Petitioner admitted that this Hearing Officer could order the "child find" relief against DCPS and that there was no relief OSSE could provide in terms of "child find" that DCPS could not also provide. This Hearing Officer then allowed Petitioner until close of business on April 20, 2009, to provide this Hearing Officer and opposing counsel legal authority that provides that the State Education Agency, in this case OSSE, is responsible for the provision of FAPE where the state also has set up an LEA(s). Counsel never provided any legal authority to support her claim against OSSE and this Hearing Officer subsequently dismissed OSSE from this action.

The due process hearing was scheduled for May 11, 12, and 13, 2009. A fourth day of hearing was held on June 8, 2009. Counsel for Petitioner and counsel for DCPS submitted their written closing arguments on June 11 and 12, 2009, respectively.

III. RECORD

Due Process Complaint Notice, filed March 31, 2009;
OSSE Response, filed April 13, 2009;

DCPS Response, filed April 17, 2009;
Joint Consent Motion for Continuance, filed April 17, 2009;
Interim Order on Continuance Motion, issued May 8, 2009;
Petitioner's Five-Day Disclosure, filed May 4, 2009 (identifying 10 witnesses and including 28 proposed exhibits);
DCPS Five-Day Disclosure, filed May 4, 2009 (identifying 12 witnesses and including 14 proposed exhibits);
Prehearing Conference Order, issued May 8, 2009;
Interim Order on Continuance, issued May 8, 2009;
Letter Motion for Continuance, filed May 27, 2009;
Interim Order on Continuance Motion, issued May 26, 2009;
Compact Disc of Hearing conducted on May 11, 2009;
Compact Disc of Hearing conducted on May 12, 2009;
Compact Disc of Hearing conducted on May 13, 2009;
Compact Disc of Hearing conducted on June 8, 2009;
Counsel for Petitioner Written Closing Argument and copies of cases cited therein, submitted on June 12, 2009; and
Counsel for DCPS Written Closing Argument, submitted on June 12, 2009.

IV. ISSUE PRESENTED

1. Whether DCPS denied the Student FAPE by failing to identify the Student as a student with a suspected disability and determine whether the Student is eligible for special education pursuant to its "child find" obligations under IDEIA.

V. FINDINGS OF FACT

1. The Student is a -year-old, -grade, general education student who just finished grade at a District of Columbia non-public elementary school.² Both the Student and Petitioner reside in the District of Columbia.³

2. In 2007, the Student was asked to leave his Montessori preschool because of his behavior problems.⁴ The Student also was asked to leave the next school, which was in Guatemala, after he was aggressive toward other students.⁵

3. On April 21 2008, the Student's father attempted to enroll the Student in his neighborhood DCPS School as a non-attending Student.⁶ At that time the Student was still in Guatemala.⁷ The Father met with the school principal.⁸ The principal referred the Father to the

² Testimony of Petitioners.

³ Stipulation of counsel.

⁴ Testimony of Student's mother ("Mother").

⁵ *Id.*

⁶ Testimony of Student's father ("Father"); special education coordinator of DCPS neighborhood school ("SEC").

⁷ *Id.*

Care Center, which is the office that enrolls non-attending Students.⁹ The Father called the Care Center to make an appointment.¹⁰ Someone from the Care Center returned his call and left a message with the date and time of the appointment.¹¹ The Father had a conflicting appointment on that day and left a message with the Care Center requesting to reschedule.¹² The Father never heard back from the Care Center.¹³

4. After the Student was asked to leave his school in Guatemala, the Father returned to the DCPS neighborhood school in May 2008 and attempted to enroll him as an attending student.¹⁴ The school refused to allow him to enroll the Student.¹⁵

5. On May 8, 2008, the Father sent the neighborhood school a letter outlining his son's disabilities and requesting a meeting with the school staff to devise a plan to accommodate the Student's educational needs, initiate evaluations, and determine the Student's eligibility for special education services.¹⁶ The letter listed the Student's evaluations that had already been performed and the diagnoses as a result of those evaluations.¹⁷

6. On June 23, 2008, the school psychologist at the neighborhood school sent a letter to Petitioners requesting all of the Student's evaluations.¹⁸

7. After Petitioners heard nothing more from the neighborhood school regarding their request for a meeting, the Mother then contacted the DCPS Ombudsman's Office and asked for assistance.¹⁹ After the ombudsman exchanged emails with the DCPS neighborhood school SEC, the meeting was scheduled for August 20, 2008.²⁰

8. The August 20, 2008, meeting included the SEC, school psychologist, a special education teacher, a general education teacher, and Petitioners.²¹ The notice for the meeting did not inform Petitioners that this meeting would be an eligibility meeting, or even that the neighborhood school staff planned to discuss evaluations and eligibility.²² At the meeting, the DCPS neighborhood school staff informed Petitioners that DCPS find the Student eligible for

⁸ *Id.*

⁹ *Id.*

¹⁰ Testimony of Father.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; Petitioner Exhibit S.

¹⁷ Petitioner Exhibit S.

¹⁸ *Id.*; DCPS Exhibit 6.

¹⁹ Petitioner Exhibit S; DCPS Exhibit 9.

²⁰ Petitioner Exhibit S; Testimony of Father.

²¹ Petitioner Exhibit T.

²² Testimony of Petitioners.

special education until the Student has been in the general education classroom for ten school days.²³ The school staff did not address Petitioner's request for evaluations.²⁴

9. Out of concern that placing the Student in a general education classroom for even a short time would be traumatic for the Student, and fearing another behavioral incident, Petitioners enrolled the Student in a non-public school for the 2008-2009 school year.²⁵ One other special education student was placed at the non-public school by DCPS.

10. Petitioners thereafter paid a private occupational therapist to provide occupational therapy for the Student. The total cost for the occupational therapy, excluding insurance reimbursements, was ²⁶ They also paid for tutoring while the Student was at the non-public school.²⁷ They also paid for a neurological evaluation, and for an auditory evaluation.²⁸

11. Petitioner's paid for the Student's tuition at the non-public school for the 2007-2008 school year.²⁹

12. The Student is an intellectually gifted child with a problem with work production due to problems with fine motor control and visual motor integration.³⁰ The Student was diagnosed in 2007 with Attention Deficit/Hyperactivity Disorder ("ADHD") combined type and coordination developmental disorder.³¹ In 2008, the Student was diagnosed with an auditory processing learning disorder,³² and a sensory integration disorder.³³

13. The Student exhibits a significant degree of inconsistency and efficiency in his ability to allocate attention over time.³⁴ His attentional weaknesses likely reflect in part difficulty with a flexible shifting of attention away from his own thoughts and interests to assigned topics or classroom discussions.³⁵ The Student is likely to have particular trouble

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Petitioner Exhibit BB, pp. 30-35; Testimony of Father.

²⁷ Testimony of Father; Petitioner Exhibit BB at pp. 41-45.

²⁸ Petitioner Exhibit BB at pp. 38-40; Testimony of Father.

²⁹ Testimony of Father; Petitioner Exhibit BB at pp. 41-45.

³⁰ Petitioner Exhibit C (December 2007 Neuropsychological Evaluation by Adam J. Sowa, Ph.D.).

³¹ Testimony of Dr. Sowa.

³² Petitioner Exhibit G (June 2008 Auditory Information Processing Assessment by Jay R. Lucker, Ed.D., CCC-A/SLP, FAAA). Dr. Lucker is a certified/licensed audiologist and speech-language pathologist.

³³ Petitioner Exhibit J (Jumpstart Therapy Occupational Therapy Evaluation, conducted on December 13 and 20, 2007, and January 3, 2008, by Kimberly Geary, M.S., OTR/L).

³⁴ Petitioner Exhibit C.

³⁵ *Id.*

shifting attention when he feels stress, as stress compromises all of the executive functions and substantially limits mental, emotional, and behavioral flexibility.³⁶

14. There is a strong overlap neurologically between brain systems that are specialized for motor control and “mental control.”³⁷ As a result, the Student’s weaknesses in attention and executive functioning are also suggested in his immature fine motor coordination.³⁸ His poor fine motor control manifests in his extremely slow output on tasks that require handwriting or other types of “pencil and paper” output.³⁹ He also has substantial difficulty balancing speed and accuracy to accomplish tasks in an efficient manner.⁴⁰ He also has trouble integrating visual information with motor output (“visual-motor integration”).⁴¹ Taken together, the Student’s slow writing speed and fine motor weaknesses interfere with his ability to produce pencil and paper work.⁴²

15. The Student’s weaknesses in fine-motor coordination and speed and in attention and executive functioning affect his performance in other cognitive domains including language related tasks despite his outstanding verbal intellectual reasoning abilities.⁴³ His difficulty on tasks including remembering story details, following oral directions, formulating grammatically correct complex sentences, efficient retrieval of verbal labels for printed information (rapid naming) reflects in part his variable attention and reluctance to invest the necessary mental energy to complete these relatively demanding tasks.⁴⁴

16. The Student’s spatial reasoning is slightly below average (21st percentile).⁴⁵ He struggled on spatial cluster measures because they required efficient fine motor skills as well as focused attention and effort.⁴⁶

17. The Student’s ability to reason, verbal skills, and vocabulary are in the 99th percentile for his age group.⁴⁷ His intellectual reasoning skills are at or above the 95th percentile.⁴⁸ Thus, the Student possesses a gifted level of verbal intellectual reasoning ability.⁴⁹ He demonstrated outstanding abstract verbal reasoning skills, which implies that he has an

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Petitioner Exhibit C.

⁴⁶ *Id.*

⁴⁷ Testimony of Dr. Sowa; Petitioner Exhibit C. Dr. Sowa also conducted an Intellectual Evaluation of the Student in January 2008.

⁴⁸ Petitioner Exhibit C.

⁴⁹ *Id.*

extremely mature ability to perceive the conceptual relationships between diverse ideas and concepts.⁵⁰ His vocabulary is at least slightly above average.⁵¹

18. The Student also demonstrates strength in the nonverbal/visual domain.⁵² His non-verbal skills are slightly above average (75th percentile).⁵³ He exhibits strong logical thinking, nonverbal reasoning, and pattern recognition skills.⁵⁴ These skills often contribute to strong mathematical ability and capacity for analytical reasoning, which may incline him toward scientific interests.⁵⁵

19. The combination of these issues has made it difficult for the Student to sustain focused attention and effort as well as to regulate his behaviors.⁵⁶ In the educational context, the Student has difficulty regulating emotion, behavior, and focus, all of which are related to his ADHD.⁵⁷ When he is sitting in a classroom and listening to instruction, he becomes frustrated or checks out over time.⁵⁸ He cannot sustain the attention required to integrate and consolidate the necessary skills for learning academic tasks.⁵⁹

20. The Student's general dysregulation and sensitivity to stress place him at risk for developing pervasive emotional challenges.⁶⁰ In addition, his mildly obsessive cognitive style affects his ability to flexibly adapt to change and smoothly shift attention.⁶¹ This reflects a vulnerability to stress and anxiety, which makes it difficult for him to react confidently to change.⁶² His sensitive stress response system, in which relatively minor events can elicit fight/flight responses that have interfered with interpersonal interactions and his ability to comply with classroom expectations.⁶³

21. The Student also has problems processing auditory information primarily due to executive functioning and self-regulation problems.⁶⁴ Specifically, the Student's auditory processing⁶⁵ problems affect his abilities with auditory phonemic,⁶⁶ lexical integration,⁶⁷

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Petitioner Exhibit B (January 13, 2009, Educational Evaluation conducted by Meredith P. Branson, Ph.D., licensed psychologist).

⁵⁷ Testimony of Dr. Sowa.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Petitioner Exhibit C.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Petitioner Exhibit C, Testimony of Dr. Sowa and Mother.

⁶⁴ Petitioner Exhibit G.

⁶⁵ Auditory processing has been described as what a person does in order to obtain meaning from information received through his auditory systems. *Id.*

organization and sequencing,⁶⁸ and auditory memory⁶⁹ recall. The Student also has significant deficits with general auditory attention.⁷⁰ Thus, the Student has auditory-based learning disorder, which is a disorder in understanding spoken language due to an imperfect inability to listen.⁷¹ This disorder is otherwise classified as a listening comprehension disorder.⁷²

22. Background noise in a classroom becomes part of the lesson for the Student as a result of his auditory processing problems.⁷³ He must expend energy filtering out the background noise. In order for the Student to access his education, an appropriate signal to noise ratio in the Student's classroom should 10 dB or lower.⁷⁴ In other words, due to the Student's sensory processing issues, the level of the background noise in his learning environment compared to the oral instruction being provided by the teacher should not have a signal to noise ratio higher than 10 dB.⁷⁵

23. The Student's classroom at the non-public school was small, and very quiet with a low student-teacher ratio.⁷⁶ The signal to noise ratio in the noisiest places in the non-public school was 5 decibels (dB).⁷⁷ This was an appropriate learning environment for the Student.⁷⁸

24. At the DCPS elementary school that is the Student's home school, the background signal to noise ratio was 70 dB, and even an empty room had a high level of

⁶⁶ Integration at the speech sound or phonemic level involves the "mental manipulation of phonemes needed in the decoding tasks for reading and spelling, as well as for the encoding tasks involved with spelling." *Id.*

⁶⁷ Lexical integration relates to taking the pieces of the auditory message heard and forming the complete, appropriate, comprehensive mental "whole" or mental images representing the verbal information. *Id.* In this instance, a lexical integration deficit would affect the Student's reading and language, making it difficult for him to make mental images of a story. Testimony of Dr. Lucker.

⁶⁸ The Student's organization and sequencing problems means, for example, that he would have difficulty following a sequence of events or being able to organize information required to follow directions. Testimony of Dr. Lucker.

⁶⁹ Auditory memory is a process beyond pure auditory processing and refers to how well a listener demonstrates responses relating to getting auditory information into working memory and how well the person retrieves this information from his working memory. Petitioner Exhibit G.

⁷⁰ Auditory attention refers to a person's ability to focus attention to the relevant parts of auditory messages while filtering out the irrelevant pieces. *Id.* It also refers to one's ability to divide attention between two messages and either process both messages or only one relevant message. *Id.*

⁷¹ Testimony of Dr. Lucker.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

reverberation and a loud level of noise.⁷⁹ Because the normal conversational level is 70 dB, with a background noise level of 70 dB the Student would have to expend too much energy to filter out the background noise to comprehend his classroom lessons.⁸⁰ In addition, because of his sensory processing problems, the Student will be irritated by this level of noise.⁸¹ Thus, the Student requires a structured, quiet environment in which to learn.⁸²

25. The Student's sensory integration disorder impacts his neurological process by which sensations, such as those received from skin, eyes, joints, gravity, and movement sensory receptors, are registered, perceived, and organized for use.⁸³ How one processes sensory information coming from outside and from inside of the body has a direct impact on social, emotional, regulatory, motor, and academic development.⁸⁴

26. The Student demonstrates hypotonia (low muscle tone) and weak core strength.⁸⁵ His gross motor skills are uneven and his basic balance and quality of movement skills are in the low average range.⁸⁶ His motor control is very weak.⁸⁷ His body awareness, bilateral integration, and motor planning skills are not fully developed and this impacts his ability to control his body and coordinate the two sides of his body simultaneously.⁸⁸ He also exhibits difficulties in the planning, sequencing, and use of feedback areas of motor planning.⁸⁹

27. These weaknesses contribute to his need for control, his testing of limits, his low frustration tolerance, and his sensitivity to failing.⁹⁰ His deficits in sensory processing and gaps in his motor development are in part contributing to his difficulties in social situations and school.⁹¹ He also exhibits significant behavioral difficulties as a result of these deficits.⁹² He requires twice weekly occupational therapy to address these issues.⁹³

28. The Student has exhibited behavioral issues in the classroom, including manifest in aggression, non-compliance, inability to accept any criticism even constructive criticism, and difficulty socializing.⁹⁴ Socially, he had a lot of ups and downs during the 2008-2009 school

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Petitioner Exhibit J.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Testimony of Suzanne Keith Blattner, M.S., Ed.S.

year.⁹⁵ The staff at the non-public school worked very closely with him and tried to provide rules and boundaries but it was still a struggle.⁹⁶

29. If the Student does not receive instruction geared to assisting him to overcome his learning disorder, he will be set up to fail.⁹⁷ He will become frustrated and disengage to point where he gets no benefit from instruction.⁹⁸

30. The Student requires an educational setting with small class size, minimal distractions, and teachers who continually work with him to address his difficulties focusing.⁹⁹ The Student also needs intensive work in chronological awareness and reading fluency.¹⁰⁰ His instruction should be flexible and allow him alternative ways to produce work so that he is not dependent on handwriting.¹⁰¹ The instruction also should address his strengths and allow him to engage in the lessons verbally.¹⁰²

31. Without specialized instruction, the Student will have tremendous difficulty benefiting from classroom instruction.¹⁰³ He will have difficulty making any educational progress, much less the progress consistent with his intellectual ability.¹⁰⁴

32. The Student needs a structured educational setting that provides specific supports for reading development to access his education.¹⁰⁵ The Student also needs a program that allows for flexible output so that he is not hampered in his educational progress by his fine motor skill deficits.¹⁰⁶ He also needs to be in a setting where personnel are trained to manage his behavioral challenges and able provide him ample behavioral support.¹⁰⁷ He requires full-time special education in a special education day school that can provide the integrated related services, OT and psychological supports.¹⁰⁸

33. The Student's high intellectual functioning leads to boredom with the typical curriculum.¹⁰⁹ When he is required to produce work or slow himself down to do basic or rote tasks required at his age to master basic reading and writing skills, he has difficulty slowing himself down.¹¹⁰ Thus he should be placed in a gifted and talented program that is intellectually

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Testimony of Dr. Sowa.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

stimulating.¹¹¹ However, the Student would get lost in a typical enriched curriculum without any support.¹¹² He needs assistance to focus his attention consistently. He also must be in a setting that allows for modifications in the ways in which he can demonstrate his knowledge.¹¹³ For example, instead of writing a paper, the Student should be allowed to orally discuss or act out a concept or instead of requiring him to complete tests and assignments that require short answers, he should be allowed to demonstrate his knowledge in a multiple choice format.¹¹⁴

34. The Student also needs a self-contained classroom where he will spend the entire day.¹¹⁵ With his intellectual profile, difficulty reading social cues, sensory issues, and auditory processing issues, it would be difficult for the Student to make transitions from one classroom to another.¹¹⁶

35. would struggle in a typical school environment.¹¹⁷ In order to access the classroom instruction, the Student requires a quieter and smaller classroom than any DCPS school would provide.¹¹⁸ The Student also will not function well in the school environment unless school staff institute and enforce disciplinary rules and procedures and ensures that students are orderly and well behaved.¹¹⁹ He needs adult one-on-one instruction due to his executive functioning and auditory processing difficulties as well as his impaired body awareness.¹²⁰

36. The demands of the physical environment at the Student's DCPS home school would have been overwhelming.¹²¹ The first grade classroom has a lot of auditory distraction, including audible instruction from other classes.¹²² The classroom had 23-25 students. It was a physically chaotic setting, and was not organized, which would be difficult for the Student considering his lack of motor planning skills and other challenges.¹²³ The Student also would not have received individualized educational support in that setting due to the number of students.¹²⁴

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Testimony of Jack Huntington, Psy.D. Dr. Huntington is a cognitive behavioral therapist. He observed the Student at the non-public school the Student attended for the 2008-2009 school year.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Testimony of

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

37. The Student thrived in the non-public school her attended for the 2008-2009 school year.¹²⁵ The Student received individualized instruction in reading and math in a group that included two other students.¹²⁶ He made educational progress at the non-public school.¹²⁷

38. When the Student entered the non-public school, he was about two years below grade level in math.¹²⁸ He made progress in math during the 2008-2009 school year, and when he is focused and motivated, he is able to manipulate numbers at a much more advanced level than when he entered the non-public school.¹²⁹ However, he is not yet at grade level in math.¹³⁰

39. When he entered the non-public school, the Student was about one year delayed in his reading skills.¹³¹ He progressed significantly during his one year at the non-public school and is now reading at an age-appropriate level.¹³²

40. The Student was in a classroom of ___ students at the nonpublic school.¹³³ The classroom had both a general education and a special education teacher. A teaching assistant also helped teach the Students.¹³⁴

41. At the non-public school, the students worked in groups of no more than six students.¹³⁵ However, the Student was rarely able to work independently and his classroom teacher worked one-on-one with him much of the time.¹³⁶ The classroom teacher also provided the Student private individualized tutoring twice a week.¹³⁷ Petitioners paid the teacher for this tutoring.¹³⁸

42. The Student's behavior improved while he was at the non-public school.¹³⁹ The students at the non-public school were required to be orderly and quiet, and this benefited the Student in accessing his education.¹⁴⁰

43. _____ provides a gifted and talented class for learning disabled children.¹⁴¹ It also allows students to use assistive technology, including laptops and adaptive

¹²⁵ Testimony of Dr. Huntington.

¹²⁶ Testimony of _____ the Student's special education teacher at non-public school.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Testimony of _____, the Student's classroom at the non-public school.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

software.¹⁴² has speech language specialists and occupational therapists on staff.¹⁴³ classes have a low student-teacher ratio.¹⁴⁴

VI. CREDIBILITY DETERMINATIONS

This Hearing Officer found the testimony of all of the witnesses credible.

VII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.¹⁴⁵ Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.¹⁴⁶

IDEIA requires DCPS to assure a "free appropriate public education" ("FAPE") for all disabled children.¹⁴⁷ A free, appropriate public education "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction."¹⁴⁸ DCPS is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."¹⁴⁹

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.¹⁵⁰ In other words, an IDEA claim is viable only if those procedural violations affected the student's substantive rights. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Krivant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error").¹⁵¹

¹⁴² *Id.*

¹⁴³ Testimony of Mother.

¹⁴⁴ *Id.*

¹⁴⁵ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

¹⁴⁶ 20 U.S.C. § 1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

¹⁴⁷ 20 U.S.C. § 1412(1).

¹⁴⁸ *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

¹⁴⁹ 34 C.F.R. § 300.101.

¹⁵⁰ 20 U.S.C. § 1415 (f)(3)(E)(ii).

¹⁵¹ *See also, C.M. v. Bd. of Educ.*, 128 Fed. Appx. 876, 881 (3d Cir. 2005) (per curiam) ("[O]nly those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable."); *M.M. ex rel. D.M. v. Sch.*

VIII. DECISION

A. Petitioner Established by a Preponderance of the Evidence that DCPS Violated Its Child Find Obligations Under IDEA .

IDEIA requires DCPS to assure a "free appropriate public education" ("FAPE") for all disabled children. 20 U.S.C. § 1412(1). A free, appropriate public education "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982) (citation omitted).

Among the specific conditions a state must satisfy is the requirement that it demonstrate that "all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated." 20 U.S.C. § 1412(2)(C). *See also* 20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. §§ 300.128(a)(1) and note 1, 300.220 and note, 300.300 note 3. This is known as the "child find" duty.

DCPS must conduct child find to parentally placed students in non-public schools in the District of Columbia without regard to where the students reside. 34 C.F.R. § 300.131. DCPS must develop and implement a service plan for each child with a disability who was parentally placed in a non-public school in the District of Columbia. 34 C.F.R. § 132 (b). DCPS also must provide special education and related services to each student parentally placed in a non-public school in the District of Columbia. *Id.*

As soon as a student is identified as a potential candidate for special education services, DCPS has a duty to locate him and complete the evaluation process. *See District of Columbia v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007) (explaining that once a child is identified the local educational agency "is then obligated to move forward with the requirement of [IDEA] §

Dist., 303 F.3d 523, 533-34 (4th Cir. 2002) ("If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations."); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc) ("[P]rocedural flaws do not automatically render an IEP legally defective") (citations omitted); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) (rejecting the proposition that procedural flaws "automatically require a finding of a denial of a FAPE"); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) (rejecting an IDEA claim for technical noncompliance with procedural requirements because the alleged violations did not result in a "substantive deprivation" of student's rights); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education because procedural faults committed by Board did not cause the child to lose any educational opportunity).

1414(a)(1) and determine whether the student is in fact a child with a disability"). *See also Hawkins v. District of Columbia*, 539 F. Supp. 2d 108, 114 (D.D.C. 2008).

Once a child has been referred to an IEP team for an eligibility determination, the IEP team must conduct an "initial evaluation" which "shall consist of procedures (I) to determine whether a child is a child with a disability . . . within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe; and (II) to determine the educational needs of such child." 20 U.S.C. § 1414(a)(1)(C)(i). In the District of Columbia, DCPS shall evaluate a child suspected of having a disability within 120 days from the date the student was referred for an evaluation. D.C. Code § 38-2561.02

As part of an initial evaluation, the IEP team and other qualified professionals, as appropriate, must (1) review existing evaluation data on the child, including evaluations and information provided by the parents of the child. 34 C.F.R. § 300.305. On the basis of that review, and input from the child's parents, the IEP team must identify what additional data, if any, are needed to determine whether the child is a child with a disability and the educational needs of the child. *Id.*

Before a State or local educational agency may commence the initial provision of special education services, it must first determine whether a student is a "child with a disability." A "child with a disability" is a child with a listed disorder or "specific learning disabilities" who, "by reason thereof, needs special education and related services." 34 C.F.R. § 300.8.

Here, the testimony overwhelmingly established that this Student is eligible for special education as a student with multiple disabilities. Yet, DCPS ignored Petitioner's repeated requests for an eligibility meeting. When finally forced to hold the meeting by the DCPS Ombudsman's Office, DCPS failed to provide Petitioners adequate notice that they would discuss the Student's eligibility for special education at the meeting. Then, after discussing the Student's disabilities and need for specialized instruction, the team failed to make an eligibility determination or decision about the request for evaluations. Instead, the DCPS team decided to throw the Student into a general education classroom to see if he "would sink or swim."¹⁵²

Petitioners were left with no option but to enroll their child in a non-public school. That the Student was not enrolled in a DCPS school does not relieve DCPS of its child find obligations because the Student's non-public school is located in the District of Columbia. *See Hawkins*, 539 F. Supp. at 115.

DCPS violated the IDEA because it "failed to take any steps to evaluate [the student] after he was identified as potentially in need of special education services" during the parent's first visit to the school. *See Nesbit v. D.C.*, 2003 U.S. Dist. LEXIS 26306, 24-25 (D.D.C. Mar. 31, 2003). DCPS made no attempt to locate him or evaluate him after he was identified. *See id.*

¹⁵² Testimony of Father.

Thus, Petitioner's proved by a preponderance of the evidence that DCPS violated its child find obligations pursuant to IDEIA. DCPS denied the Student a free, appropriate, public education in failing to find the Student eligible for special education, failing to develop an IEP for the Student, and failing to provide the Student an appropriate educational placement. These are the basic requirements of a free, appropriate, public education, and in this case, Petitioners were forced to fund a private placement for their son after DCPS refused to fulfill its obligations pursuant to IDEIA.

Parents who place their children in private schools without the consent of local school officials are entitled to reimbursement only if the public agency "violated the IDEA, [] the private school placement was an appropriate placement, and [the] cost of the private education was reasonable[.]" *Holland v. District of Columbia*, 71 F.3d 417, 425 (D.C. Cir. 1995) (citing *Florence County School District Four v. Carter*, 510 U.S. 7, 15 (1993)). Here, DCPS routinely places Students at _____ and placed one other special education student at the Student's non-public placement. Thus, the cost of these two schools is reasonable. Moreover, the testimony clearly established that the Student educationally benefited at the on-public school during the 2008-2009 school year and that _____ would be an appropriate placement for the Student.

ORDER

Upon consideration of Petitioner's request for a due process hearing, the response thereto, and the testimony and exhibits presented at the due process hearing, this 16th day of May 2009, it is hereby

ORDERED that DCPS shall reimburse Petitioners for the full costs of tuition and related services at the Student's non-public school for the 2008-2009 school year;

IT IS FURTHER ORDERED that DCPS shall reimburse Petitioners for the cost of tutoring services during the 2008-2009 school year, all evaluations conducted after August 20, 2008, and all related services funded by Petitioners for the Student after August 20 2008, including but not limited to \$7110.00 for Petitioner's expenditures on evaluations, tutoring, and services as outlined above;

IT IS FURTHER ORDERED that DCPS shall fund the Student's placement at _____ including all related services provided by _____ for the 2009-2010 and 2010 and 2011 school years; and

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

/s/
Frances Raskin
Hearing Officer

Notice of Right to Appeal Hearing Officer's Decision and Order

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 of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

Copies to:

Karen Alvarez, counsel for Petitioner

Tanya Chor, counsel for Respondent

Petitioners

Student Hearing Office