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District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
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Confidential

<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>“DCPS”</p> <p>Respondent.</p> <p>Case</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: June 30, 2010</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Domiento C.R. Hill 1220 L Street NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Daniel Kim, Esq. Assistant Attorney General District of Columbia DC Public Schools 1200 First Street, NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

BACKGROUND:

A Due Process Hearing was convened June 30, 2010, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003, in Hearing Room 7A. The hearing was held pursuant to a due process complaint submitted by counsel for the parent and student filed April 5, 2010, alleging the issue(s) outlined below. A pre-hearing conference in this matter was conducted May 20, 2010, and a pre-hearing order was issued on March 25, 2010.

DCPS, in its response to the complaint and at the prehearing conference acknowledged the occupational therapy and psychiatric evaluations had not been reviewed and alleged the vocational assessment had not been received by DCPS by the time the complaint was filed. DCPS denied the student has been denied a FAPE. DCPS stated that a multidisciplinary team (“MDT”) meeting was tentatively scheduled for May 21, 2009, to review the evaluations, update the student’s IEP, make a determination on placement as well as vocational services and to determine if compensatory education was warranted.

Petitioner’s counsel filed a motion for continuance to allow for a MDT meeting to be held that might resolve the complaint. The motion was granted. The date for a final decision in the matter was extended by twenty (20) calendar days by an interim order dated June 16, 2010.

ISSUE(S):²

The issues adjudicated are: (1) Whether DCPS denied the student a Free and Appropriate Public Education (“FAPE”) by failing provide timely convene a MDT meeting to review the independent evaluations (psychiatric, vocational assessment, occupational therapy) that were authorized by DCPS and provided to DCPS by Petitioner in October 2009, February 25, 2010, and March 11, 2010, respectively? (2) Whether DCPS denied the student a FAPE by failing provide the student a Behavior Intervention Program (“BIP”)? Petitioner alleged DCPS promised to develop a BIP in the September 30, 2009, IEP meeting and again promised at the May 5, 2010, meeting; and (3) Whether DCPS denied the student a FAPE by failing to incorporate the findings of the independent evaluations into the student’s individualized educational program (“IEP”)? Specifically, Petitioner alleges the student’s specialized instruction and behavioral supports are insufficient and as a result the student has experienced academic failure.

² The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

Petitioner stated in the complaint that as relief for the alleged denial(s) of FAPE she sought the following: DCPS convene a MDT meeting to review the student's evaluations, revise of the student's IEP to include the appropriate recommendations of the independent evaluations, develop a BIP, and discuss placement/vocational services and compensatory education services. Petitioner also stated in the complaint that if the student was recommended for a change of placement for the 2010-2011 school year she requested DCPS fund the student's placement at

At hearing Petitioner did not put forth evidence of compensatory education but sought as relief the student's placement and funding at

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 & 29 and DCPS Exhibits 1- 11 and 1A-4A) which were admitted into the record.⁴

FINDINGS OF FACT 5:

1. Student or "the student" is _____ years old and resides in the District of Columbia with his parent(s), (hereinafter "Petitioner" or "Parent"). The student attends School A, a DCPS public high school. The student had an Individual Educational Program ("IEP") developed at School A on May 1, 2009, which identified him as a student with a disability classification of Other Health Impairment ("OHI") based Attention Deficit Hyperactivity Disorder ("ADHD"). The IEP prescribed the student receive 1 hour of specialized instruction per week outside the general education setting⁶ and 1 hour of behavioral support services per week. The IEP included goals in Reading and Adaptive/Daily Living Skills. (Petitioner's Exhibit 17, DCPS)
2. An independent comprehensive psychological evaluation⁷ was conducted of the student on July 21 & 22, 2009, and the evaluation report was prepared on August 10, 2009. The

³ In the complaint Petitioner stated an alternative of placement of

⁴ Both counsel submitted disclosures for the original hearing date of June 10, 2010, and submitted another set of disclosures for the June 30, 2010, hearing date. Petitioner resubmitted all documents from the disclosure for the June 10, 2010, hearing date in the June 23, 2010, disclosure. DCPS did not resubmit all documents it originally disclosed. Consequently, both the DCPS disclosure submitted for the June 10, 2010, hearing date and those disclosed on June 23, 2010, were admitted into the record and are listed in Appendix A. DCPS counsel objected the admission of Petitioner's Exhibit 6 based on the claim it amounted to testimony. The Hearing Officer, over the objection, admitted the document into the record.

⁵ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer may only one party's exhibit.

⁶ Although the IEP states the student is to receive 1 hour of specialized instruction in out of general education setting, the LRE section of the IEP states "The student will be given consultative services and provided support on the completion of assignments and test taking strategies."

⁷ The evaluation included, among others, the following assessments: WISC-IV, WIAT-II, Bender Gestalt-

evaluation diagnosed the student with ADHD and Dyslexia and a Reading Disorder. The evaluation concluded the student's cognitive abilities, verbal comprehension, perceptual reasoning, general working memory and general processing speed abilities were all in the average range. The educational assessments revealed the student had low to high average academic performance in broad reading⁸, math and oral language. However, the student's written language skills were of concern in that the student has "a specific weakness on tasks that required him to generate words within a category, generate sentences to describe visual cues, combine sentences and compose an organized persuasive essay on a name topic. His problems on the written expression subtest seem to be related to inattention, and also failure to adhere to proper punctuation rules while reading." (Dr. Ballard's testimony, Petitioner's Exhibit 14)

3. The evaluator expressed concern about the student's "inability to focus in the classroom, sustaining attention on academic tasks, not following through on instructions and failing to finish homework or chores, having difficulty organizing tasks and activities, avoiding tasks that require sustained mental effort such as school work and home work..." The evaluator recommended the student be placed in a classroom setting with a very low student to teacher ratio. "In this type of environment he should be able to receive more one-on-one attention and guidance in performing school related activities. His diagnosis of Learning Disorder...(Dyslexia), Disorder of Written Expression, Reading Disorder, and his diagnosis of ADHD, render him incapable of succeeding in a general education classroom for the majority of his school day. His problems with Written Expression and Reading will impact all subjects that require language-based abilities. This should be taken into consideration when the percentage of special education curriculum is devised by the MDT." (Dr. Ballard's testimony⁹, Petitioner's Exhibit 14)
4. An independent Functional Behavioral Assessment ("FBA")¹⁰ was conducted of the student on July 20 & 23, 24, 2009, and the evaluation report was prepared on August 6, 2009. The evaluator determined that the results of the FBA evidence a need for behavior intervention strategies that address the following: 1) verbal and physical class disruptions, 2) distractibility, 3) history of failure to complete assignments, 4) history of frequent absences. The evaluator also recommended a list of strategies including, but not limited to: "sit close to the teacher in class, teachers uses prearranged signals to redirect the student, the student receiving scheduled motor-breaks from tasks to increase sensor stimulation." The evaluator noted according to his records " [the student] is able to understand the material taught in class, but has earned failing grades due to his failure

II, BASC-2, Conner's Rating Scale, Jordan Dyslexia Test, and a classroom observation.)

⁸ The evaluator noted that "while overall it appears that [the student] has no difficulties with reading and comprehending (Reading Comprehension = 108) a qualitative analysis of his reading suggests that he does not read fluently, and will require extra time to comprehend passages due to problems with tracking (Dyslexia) and or inappropriate attention to punctuation when reading."

⁹ This witness was designated as an expert witness in the field of clinical psychology.

¹⁰ The assessment included classroom observations on July 20, July 24, Teacher Interviews and Questionnaires, ABCD Chart, Reinforcement Inventory, a parent and a student interview.

to turn in homework or complete assignments on time. Marked disorganization was also noted [the student] may avoid school due to frustration caused by low grades in spite of his understanding of the subject matter. He may become increasingly frustrated when he attempts to complete tasks but has difficulty due to a lack of organization skills.” (Petitioner’s Exhibit 13)

5. On September 30, 2009, an IEP meeting was convened in which team reviewed the student’s FBA and comprehensive psychological evaluation. The parent and her educational advocate participated in the September 30, 2010, IEP meeting. A vocational assessment was still outstanding and DCPS authorized the parent to obtain the assessment independently.¹¹ DCPS also agreed to begin developing a Behavior Intervention Plan (“BIP”) and develop IEP goals both to address the student’s lack of organizational skills. The team agreed to reconvene no later than ten school days after DCPS’ receipt of the last of the independent evaluations. The student’s educational advocate requested that the IEP goals be generated and implemented by October 5, 2010. (Petitioner’s Exhibit 18, DCPS Exhibit 1)
6. At the meeting the parent and her advocate requested that the student’s IEP be amended to include the classification of Learning Disability due to the diagnosis in the psychological evaluation. The parent and advocate requested the student receive additional specialized instruction and support services based on the evaluation and the student’s demonstrated academic and behavioral difficulties. The DCPS staff insisted that the 1 hour of instruction and 1 hour of behavior support were sufficient.
Testimony, Petitioner’s Exhibit 18, DCPS Exhibit 1)
7. An independent Vocational Assessment¹² was conducted of the student on October 8, 2009, and the report generated on October 16, 2009. The assessor noted the student expressed career interest in computer engineering and automobile mechanics. The assessor determined the student needs a combination of stimuli to effectively learn new material or skills and has better than average potential to achieve his career goals in the area of interests. He has academic foundation and skills to pursue post secondary education in the careers in which he has expressed interest. In addition to the transition goals that have been proposed by DCPS for the student the assessor recommended the student have significant career exploration through career exploration classes, internships, summer employment, and prepare for college entrance examinations. The assessor determined the student has far more academic abilities than he is currently demonstrating in school.
testimony, Petitioner’s Exhibit 11)
8. An independent occupational therapy evaluation was conducted on October 23, 2009. The evaluation determined the student has deficits in visual motor integration, visual perception and organizational skills. The evaluator recommended the student receive 30

¹¹ DCPS also agreed at the meeting to fund an independent psychiatric evaluation.

¹² The assessment included the following tests: Skills Assessment Module, Vocational Training Inventory and Exploration Survey, Work Performance Samples, Learning Styles Inventory, Wide Range Achievement Test 4)

minutes per week of direct occupational therapy services and classroom accommodations to address his deficits. (Petitioner's Exhibit 12)

9. Petitioner provided DCPS an independent psychiatric evaluation on October 30, 2009. The psychiatric evaluation diagnosed the student with ADHD, Learning Disorder, Depressive Disorder, and recommended that the student "be strongly considered for starting a lower potency, long-acting, stimulant medication such as _____ to improve his ADHD symptoms. He has experienced adverse side effects in the past. If he and his mother agree to treatment, a psychiatrist should be involved to monitor him for adverse side effects, make medication adjustments and experienced adverse side effects in the past. He does not appear to require any antidepressant medication at this time." The evaluation stated the student "would benefit from placement in a classroom with a lower student to teacher ratio so he can receive more individual attention to complete tasks." (Petitioner's Exhibit 10)
10. Petitioner provided DCPS the independent vocational assessment on February 25, 2010. (Petitioner's Exhibit 11)
11. Petitioner provided DCPS the independent occupational therapy evaluation on March 11, 2010. (Petitioner's Exhibit _____)
12. On April 5, 2010, Petitioner filed the current due process complaint. (Petitioner's Exhibit 2)
13. The parent and her educational advocate attended a resolution meeting for the complaint on May 4, 2010. DCPS, over the parent's objection, insisted on conducting an IEP meeting to review the psychiatric evaluation, the occupational therapy evaluation ("OT"), the vocational assessment rather than conducting the resolution session. The first time that the independent evaluations were reviewed was May 4, 2010.¹³ DCPS agreed to provide the student direct OT services and devise OT goals. _____ testimony, Petitioner's Exhibit 4, DCPS Exhibit 2)
14. The BIP was not available at the May 4, 2010, meeting. The parent and advocate expressed dissatisfaction with the behavior support services DCPS proposed as they were only to be provided to the student on consult basis. The student's special education teacher who was to provide him 1 hour of consult services a week attended the meeting and acknowledged the student often did not report to the teacher's classroom for his services. The parent and the educational advocate reasserted their request that the student's specialized instruction and behavior support services be increased based upon the student's evaluations and academic failure. The meeting concluded without fully revising the student's IEP, addressing the BIP, the student's placement on any issue of compensatory education. DCPS proposed reconvening the meeting and gave proposed dates. _____ testimony, Petitioner's Exhibit 4, DCPS Exhibit 2)

¹³ The resolution meeting at which the IEP team reviewed the student's independent evaluations was held either May 4, 2010, and/or May 5, 2010. There are conflicting documents in the record as to the true date of the meeting. The educational advocate's notes from the meeting are dated May 4, 2010, the DCPS notes are dated May 5, 2010.

15. An IEP meeting was reconvened on May 21, 2010. The parent and her educational advocate participated. The team proposed and discussed OT goals and the proposed BIP. The team continued discussion of the student's academic performance, attendance and school behavior, but did not complete the BIP or finalize revision of the student's IEP and agreed to reconvene. The parent and the educational advocated reasserted their request that the student's specialized instruction and behavior support services be increased based upon the student's evaluations and academic failure. The parent requested that the student be placed in a small structured setting and proposed that DCPS place and fund the student at _____ The student has not attended any of the IEP meetings. _____ testimony, DCPS Exhibit 4, Petitioner's Exhibit 5)
16. On June 21, 2010, the IEP team reconvened. The parent and her educational advocate participated. The team agreed to provide direct OT services rather than consult services. The DCPS social worker reviewed the goals in the BIP stated that a weekly behavior sheet would be implemented by the student's case manager and well and progress notes between the parent and school staff. The team discussed the student's transition services and updated the student's transition goals. The DCPS members of the team concluded the student's IEP would not be amended to include additional specialized instruction or behavioral support services and that the student's IEP could be implemented at School A. The parent and the educational advocate reasserted their request that the student's specialized instruction and behavior support services be increased based upon the student's evaluations and academic failure and requested that the student be placed at _____ (DCPS Exhibit 4A)
17. Since the June 21, 2010, meeting Petitioner has not yet received a final draft of the student's IEP or BIP from DCPS. _____ testimony)
18. The student's third advisory report card for the first three advisories reflected the following grades respectively: Spanish II: A (first advisory) C+ (second advisory) D (third advisory), English II: C- (first advisory) C (second advisory) F (third advisory) Algebra II & Trigonometry: D(first advisory) D (second advisory) F (third advisory), World History/Geography: F (first advisory) D (second advisory) C (third advisory) Digital Electronics: F (first advisory) F (second advisory) F (third advisory), Environmental Science: B+ (first advisory) A (second advisory) B (third advisory), Aerospace Engineering: F(first advisory) F (second advisory) F (third advisory), Body Conditioning and Fitness: A-(first advisory) B (second advisory) C (third advisory) The student had a total of 7.5 unexcused homeroom absences in the third advisory and 26 for the entire school year to that point. As of the fourth advisory progress report the student was failing five of his seven classes. (Petitioner's Exhibits 7 & 22)
19. The student has been interviewed by _____ and accepted to _____ is a non-public special education school that serves students with reading based learning disabilities from age 5 through twelfth grade. _____ serves approximately 218 students most of whom are funded by the District of Columbia Public Schools. There are no general education students in the school. There have been students who have come to _____ with less than a full time special education program. _____ can provide the student specialized instruction, behavior support

services and occupational therapy with licensed related service providers. The student was interviewed by the school's admissions team which includes the social worker, school counselor, teachers and the (high school) director and director of admissions. The school reviewed the student's IEP and evaluations. The admissions team was of the opinion that the student exhibited the characteristics of many of the school's students (inattention, moving around behavior, fidgeting) that are specifically addressed by the program and staff and he would benefit from the services the school provides. The student has been accepted into the school's grade class. There are twenty-six graders. There will be ten students in the classroom and a certified special education teacher. has a transition program with for its high school students. The school has an annual cost of testimony, Petitioner's Exhibit 15)

20. The student has the desire to perform well academically but has lacked sufficient academic supports to address his academic and behavior deficits that result from his disability. He has significant difficulty focusing and following through on assignments and needs significant direction, redirection and continual monitoring of his activities to ensure that he shows up for class and performs consistent with his abilities. The student needs far more specialized instruction and behavioral supports that he has been provided at School A in order to be successful. He does not appear to be able to function at this juncture in a large general education setting. (Parent's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to 34 C.F.R. 300.17 a free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge;(b) Meet the standards of the SEA, including the requirements of this part;(c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. Sec. 300.320 through 300.324. (Authority: 20 U.S.C. 1401(9))

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a 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.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief. ¹⁴ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the

¹⁴ Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the

student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Issue: 1) Whether DCPS denied the student a FAPE by failing provide timely convene a MDT meeting to review the independent evaluations (psychiatric, vocational assessment, occupational therapy) that were authorized by DCPS and provided to DCPS by Petitioner in October 2009, February 25, 2010, and March 11, 2010, respectively? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

Pursuant to 34 C.F.R. 300.502 (c) If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation (1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child, and (2) may be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.

Under the law of the D.C. Circuit, a procedural violation of the IDEA is actionable only if it "affected the student's *substantive* rights" -- that is, only if the procedural violation led to a substantive violation. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original); *see also Kingsmore ex rel. Lutz v. District of Columbia*, 466 F.3d 118, 120 (D.C. Cir. 2006).

As a result, regardless of whether the failure to timely review evaluations is denominated substantive or procedural, Petitioner must prove to that the District's actions did or will deny the student a FAPE by depriving him of educational benefits to which he is entitled.

The evidence clearly demonstrates DCPS agreed to fund independent evaluations and agreed to reconvene the student's IEP team to review the evaluations within ten (10) school days of its receipt of the last independent evaluation. Although DCPS received the psychiatric evaluation in October 2009, and the vocational assessment on February 25, 2010, that last independent evaluation authorized was not received until March 11, 2010. Based upon DCPS' promise the IEP team should have convened to review the evaluations at least by the first of April 2010.

No meeting was convened prior to Petitioner filing the due process complaint April 5, 2010. There was insufficient evidence, presented, however, that the failure to review the psychiatric evaluation or the vocational evaluation created any harm to the student. The psychiatric evaluation strongly recommends the student received medication for his ADHD. The provision of medication is not the purview of the local education agency but solely the parent; and after the evaluation was finally reviewed no action in this regard seemed to have been taken by the parent. Although the evaluation does recommend the student have a lower student to teacher ratio, a similar recommendation was already considered and reviewed by the team at the September 30, 2009, IEP meeting when the psychological evaluation was reviewed. Consequently, the

party seeking relief presented sufficient evidence to meet the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Hearing Officer does not find sufficient evidence that the untimely review of the psychiatric created any harm to the student.

Similarly, although DCPS received the vocational assessment on February 25, 2010, there was insufficient evidence presented that the student was harmed by the delay in reviewing this assessment and revising his transition goals. There was testimony by the assessor that the student would benefit from career exploration, internships, and summer employment. There was insufficient evidence, however, that an earlier review of this assessment by the team would have resulted in any additional services that the student would have received. Consequently, the Hearing Officer does not find sufficient evidence that the untimely review of the vocational assessment created any harm to the student.

On the other hand, the occupational therapy evaluation clearly diagnoses the student with deficits and recommends the student received direct occupational therapy services, some of them directly addressing the student's organizational and executive functioning difficulties that have clearly impacted his educational performance. The student's evaluations and educational records clearly reflect that has progressively worsened in academic performance during the 2009-10 school year.

The IEP team when it met reviewed the evaluation and concluded the student's IEP would be amended to include 30 minutes of direct occupational therapy services per week. Had this evaluation been reviewed earlier the student would presumably have begun receiving the services in April 2010. The IEP was not amended to include the services until the school year had ended and there is no indication that services have yet been provided. The Hearing Officer concludes that the failure to timely review the occupational therapy evaluation and thus implement the recommended the services caused the child a deprivation of educational benefits and amounts to a denial of a FAPE.

Issue: (2) Whether DCPS denied the student a FAPE by failing provide the student a Behavior Intervention Program ("BIP")? Petitioner alleged DCPS promised to develop a BIP in the September 30, 2009, IEP meeting and again promised at the May 5, 2010, meeting. Conclusion: Petitioner sustained the burden proof by a preponderance of the evidence.

Pursuant to 34 C.F.R. 324(a)(2) the IEP team must consider in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

The evidence clearly demonstrates that as early as the September 30, 2009, IEP meeting the DCPS recognized that the student was in need of behavior intervention strategies to address his inattention, distractibility, disorganization and executive functioning deficits that were impacting his educational performance and classroom behaviors. The IEP team acknowledged and DCPS agreed to develop a BIP.

Nonetheless, a BIP was not developed until at earliest the May 4, 2009, IEP meeting. This was nearly seven months after the IEP team had agreed that a BIP would be developed. There is evidence that the student's academic performance deteriorated as the school year progressed and the student's progress report in the fourth advisory reflect that he is failing the majority of classes and that his inattention, distractibility, disorganization and executive functioning deficits, and

tendency to avoid what he finds difficult including classes he finds difficult has resulted in academic failure. Consequently, the Hearing Officer concludes the student has been harmed by the inordinate delay in developing and implementing behavior interventions and caused the child a deprivation of educational benefits and amounts to a denial of a FAPE.

Issue: (3) Whether DCPS denied the student a FAPE by failing to incorporate the findings of the independent evaluations into the student's individualized educational program ("IEP")? Specifically, Petitioner alleges the student's specialized instruction and behavioral supports are insufficient and as a result the student has experienced academic failure. Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

Pursuant to 34 C.F.R. 300.39 special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.

Pursuant to 34 C.F.R. 300.502 (c) If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation (1) must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child, and (2) may be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.

The evidence in this instance clearly demonstrates that the student's evaluations have clearly and repeatedly recommended that the student receive services in a small structured environment to address his disabilities and tendencies of inattention and distractibility and well as address his learning disabilities. Although the student clearly has average cognitive abilities and potential to perform average to above average academically, he has failed to thrive educationally under the IEP and in the special education program that has been provided to him during the 2009-10 school year. The student's report cards clearly reflect that he is failing the vast majority of classes. Despite the repeated prompting of the recommendations in the student's evaluations and parental requests and despite the student's deteriorating academic performance as the year progressed, instead of promptly reviewing the student's evaluations and implementing behavior interventions, DCPS simply allowed the student to languish and fend for himself. As a result he appears to have had a miserably failing academic year at School A.

In *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) the Court stated that "courts and hearing officers may award 'educational services . . . to be provided prospectively to compensate for a past deficient program.'" Id. citing *G. ex. Rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003). Compensatory education is an equitable remedy crafted to remedy educational deficit created by "an educational agency's failure over a given period of time to provide FAPE to a student" Id. "Appropriate compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place." Id.

In *Mary McLeod Bethune Day Academy Public Charter School v. Bland*, Civil Action No. 07-1223, the U.S. District Court for the District of Columbia found that, "if a parent presents

evidence that her child has been denied FAPE, she has met her burden of proving that he is entitled to compensatory education.”

Based on the student’s evaluations the student clearly has the cognitive abilities and academic skills to be successful academically with the proper supports. The student’s IEP has up to this point only provided the student with what appears to be minimal and inadequate special education services that clearly do not meet his unique needs. The Hearing Officer concludes that can provide the student specialized instruction, behavioral supports and related services that will allow him to gain the educational benefit and the appropriate educational services that he has clearly not been provided in the past school year. The Hearing Officer concludes that the Petitioner is entitled to, as a result of the denials of FAPE to student, funding and placement for the 2010-11 school year at

ORDER:

DCPS shall place and fund student at _____ for the 2010-11 school year and provide transportation services.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: July 10, 2010