

**DC Office of the State Superintendent of Education**

**Office of Compliance & Review**

State Enforcement & Investigation Division

STUDENT HEARING OFFICE

Van Ness Elementary School

1150 5<sup>th</sup> Street, S.E., 1<sup>st</sup> Floor, Washington, D.C. 20003

Phone: (202) 698-3819

Facsimile: (202) 442-5556

**Virginia A. Dietrich, Esq.**  
**Impartial Due Process Hearing Officer**

**CONFIDENTIAL**

OSSE  
STUDENT HEARING OFFICE  
2009 AUG 28 AM 8:30

<u>In Re the Matter of:</u>	)	
Parent on behalf of Student*	)	CASE NO.
Petitioner,	)	
vs.	)	Complaint Date: 06/18/09
The District of Columbia Public Schools	)	Hearing Date: 07/17/09, 08/17/09
<u>Respondent.</u>	)	Hearing Site:
	)	Van Ness Elementary School
	)	1150 5 <sup>th</sup> Street, S.E., 1 <sup>st</sup> Floor
	)	Washington, D.C. 20003

**HEARING OFFICER DETERMINATION**

Petitioner's Attorney:

Joy Freeman-Coulbary, Esq.  
5885 Colorado Avenue, N.W.  
Suite #102  
Washington, D.C. 20011

Respondent's Attorney:

Linda Smalls, Esq.  
Assistant Attorney General  
Office of the Attorney General as Counsel  
for D.C. Public Schools  
825 North Capitol Street, N.E., 9<sup>th</sup> Floor  
Washington, D.C. 20002

\*Personally identifiable information is attached as an Index to this decision and must be removed prior to public distribution.

## Hearing Officer Determination & Order

### JURISDICTION

The Due Process Hearing was convened and this Hearing Officer Determination ("HOD") and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq., the implementing regulations for IDEIA; 34 Code of Federal Regulation ("C.F.R.") Part 300; and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

### INTRODUCTION

On 06/18/09, an Expedited Due Process Complaint Notice ("Complaint") was filed by the Surrogate Parent for Educational Purposes ("Parent" or "Petitioner") on behalf of the year old student ("Student"), alleging that District of Columbia Public Schools ("DCPS") denied Student a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEIA") when DCPS failed to provide an appropriate placement for Student, when DCPS failed to develop and implement an Individualized Education Program ("IEP") that contained the appropriate amount of specialized instruction and related services, when DCPS failed to timely identify and evaluate Student as a student in need of special education services, when DCPS failed to provide Petitioner access to records, and when DCPS failed to have Student's IEP in effect at the beginning of the 2008-2009 school year. Petitioner also asserts that Student is entitled to compensatory education for missed services during the 2008-2009 school year while Student attended

Although the Hearing Officer determined by Interim Order issued on 06/30/09 that the Complaint did not meet the requirements for an expedited hearing pursuant to the District of Columbia Public Schools Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures, Section 1008.B, the due process hearing convened within the due process timeline for expedited hearings for the convenience of parties.

The parties did not engage in mediation or the resolution process prior to the due process hearing.

### THE DUE PROCESS HEARING

The due process hearing convened on 07/17/09 at the Van Ness Elementary School located at 1150 5<sup>th</sup> Street, S.E., 1<sup>st</sup> Floor, Washington, D.C. 20003, but could not be concluded because the hearing required more time than originally requested. The hearing was continued to 08/17/09 at the request of the Petitioner to allow Petitioner time to complete its case in chief and to allow DCPS the opportunity to present its witnesses.

Petitioner was represented by Joy Freeman-Coulbary, Esq. ("Petitioner's Attorney") and DCPS was represented by Linda Smalls, Esq. ("DCPS' Attorney").

### Hearing Officer Determination & Order

On 07/17/09, Petitioner initially participated in the due process hearing by telephone, but due to poor telephone connections, Petitioner subsequently appeared in person. On 08/17/09, Petitioner was unable to participate by telephone or in person due to pressing work obligations.

DCPS elected not to engage in settlement discussions prior to the commencement of the due process hearing.

### Pending Motions

On 06/29/09, DCPS filed a Motion to Dismiss alleging that Petitioner, Student's adult sister, lacked standing as parent pursuant to 34 C.F.R. 300.30 because Student was a Ward of the District of Columbia's Child and Family Services Agency. Petitioner did not formally respond to DCPS' Motion to Dismiss. Based on representations made by Petitioner's Attorney at the pre-hearing conference on 07/06/09, the Pre-Hearing Conference Order issued on 07/09/09 directed Petitioner's Attorney to provide to DCPS and to the Hearing Officer, a copy of the court order appointing Petitioner as Student's Surrogate Parent for Educational Purposes.

Although a copy of the court order was forwarded to DCPS' Attorney on 07/10/09, a copy was not provided to the Hearing Officer until the commencement of the due process hearing. That court order is now made a part of the record as Hearing Officer Exhibit #1, as it was not admitted into evidence because it favorably resolved the issue of standing for Petitioner. However, the exhibit is necessary to resolve one of the issues in the Complaint. The District of Columbia Superior Court Order dated 06/05/09, nunc pro tunc to 04/07/09, appointed Petitioner as the Surrogate Parent for Educational Purposes for Student as authorized by 34 C.F.R. 300.519(c), and gives Petitioner standing to pursue this Complaint on behalf of Student. As a result, DCPS' Motion to Dismiss based on the lack of standing of Petitioner was denied.

### Disclosures:

Petitioner's Five-Day Disclosure letter dated 07/10/09 contained Petitioner's Exhibits #1-17. Petitioner's Exhibits #1, #3-15, and #17 were admitted into evidence without objection. Petitioner's Exhibit #2 was admitted into evidence over objection. Petitioner's Exhibit #16 was withdrawn by Petitioner.

DCPS' Disclosure Statement dated 07/09/09 contained DCPS' Exhibits #1-12. DCPS' Exhibits #1-12 were admitted into evidence without objection.

### Witnesses:

Witnesses for Petitioner included: (1) Petitioner, (2) Dr. Mercedes Ebanks, who qualified as an expert witness in developmental child psychology and counseling (via telephone and in person,) (3) Charles Dorsey, facility director and case manager at

Hearing Officer Determination & Order

Umbrella Therapeutic Services, and (4)  
(via telephone).

Admissions Coordinator at

Witnesses for DCPS included: (1)  
teacher at  
special educator at

DCPS general education  
and (2) Regina McClure, DCPS

Issues Presented in the Complaint:

All issues presented in the Complaint, as stated in the Introduction section of this HOD, remained active for litigation with no modifications to content.

Relief requested by Petitioner:

(1) A finding of a denial of a FAPE on the issues presented in the Complaint that allege the denial of a FAPE, plus a finding that Student is entitled to compensatory education; (2) Compensatory education for the delay in identifying and evaluating Student as eligible for special education services; (3) DCPS to fund a full time private placement that would represent the least restrictive environment for Student; (4) DCPS to devise and implement an appropriate IEP for Student; (5) DCPS to disclose all of Student's prior special education records; (6) DCPS to fund a compensatory education plan devised by Petitioner and Petitioner's attorney per *Reid*; (7) DCPS to provide Student with a dedicated aide, para-professional, due to Student's attendance, behavior, and problems transitioning from one class to another; (8) DCPS to revise Student's IEP to include appropriate related services, including intensive counseling and occupational therapy services; (9) DCPS to provide Student with an appropriate placement; and (10) DCPS to locate Student's evaluations and IEP from \_\_\_\_\_ and review these records at an IEP team meeting that includes Petitioner.

**FINDINGS OF FACT**

#1. Student has been a Ward of the District of Columbia's Child and Family Services Agency since 05/05/08 pursuant to an Order of the Superior Court of the District of Columbia. (*Petitioner's Exhibit #13, Child and Family Services Agency letter dated 06/12/08*). On 06/05/09, Petitioner was appointed as Surrogate Parent for Educational Purposes for Student as authorized by IDEIA, 34 C.F.R. 300.519(c,) nunc pro tunc to 04/07/09, which gives Petitioner authority to make all educational decisions for Student. (*Hearing Officer Exhibit #1, D.C. Superior Court Order dated 06/05/09*).

#2. Student attended the 8<sup>th</sup> grade at the \_\_\_\_\_ during the 2007-2008 school year while Student lived with Student's aunt (*Petitioner's Exhibit # 10, Report to Parents on Student Progress dated 03/21/08*); *Testimony of Petitioner*).

#3. In June 2008, Student began living at the Umbrella Therapeutic Services group home located at 724 Whittier Street, N.W., Washington, D.C. as a committed Ward of the District of Columbia's Child and Family Services Agency (*Testimony of Charles*

## Hearing Officer Determination &amp; Order

*Dorsey; Petitioner's Exhibit #13, Letter from CFSA dated 06/12/08 and letter from Umbrella Therapeutic Services dated 06/12/08).* Mr. Dorsey, despite having a discharge summary from Boystown that indicated that Student had a diagnosis of Emotional Disturbance "ED"/Learning Disabled "LD," and despite being aware that ED/LD was associated with disability classifications, and despite knowledge and familiarity with the special education coordinator and special education services at [redacted] enrolled Student as a general education Student at [redacted] at the beginning of the 2008-2009 school year and never disclosed to anyone at [redacted] that Student had a diagnoses of ED/LD. (*Testimony of Charles Dorsey*).

#4. From September 2008 through January 2009 of the 2008-2009 school year, Student participated in the general education curriculum at [redacted] in a classroom of approximately 30 students, and performed very poorly both behaviorally and academically. (*Testimony of Rebecca Foster, general education teacher*). At the end of the 1<sup>st</sup> and 2<sup>nd</sup> advisory of the 2008-2009 school year, Student had failed all classes, with teacher comments that included poor test scores, lacks initiative, does not complete class assignments, poor behavior, and excessive absences. (*Petitioner's Exhibit #15, Report to Parents on Student Progress dated 01/16/09; Petitioner's Exhibit #5, Comprehensive Psychological Evaluation dated 01/09/09*). On 09/09/08, Student received a Student Discipline Referral for using profane language, disruptive behavior, inappropriate comments to students and teacher, failure to obey a lawful command of administrator/teacher, being tardy for class, and walking out of class. (*Petitioner's Exhibit #11, Student Discipline Referral dated 09/09/08*). On 09/24/08, Student was suspended from [redacted] for disruptive behavior in class and failure to obey teacher. (*Petitioner's Exhibit #11, DCPS Notice of Student Disciplinary Action dated 09/24/08*). On 11/20/08, Student cheated on a test and then walked out of class. (*Petitioner's Exhibit #11, handwritten notes of Foster*). On 11/20/08, Student was suspended for three days for failure to comply with school/class rules and disruptive behavior. (*Petitioner's Exhibit #11, Notice of Student Disciplinary Action dated 11/20/08*). Additionally, email comments from Student's teachers on 09/05/08 and 12/23/08 referred to Student's many absences from class, verbally disruptive behavior, and missing quizzes and a major exam. (*Petitioner's Exhibit #5, Comprehensive Psychological Evaluation dated 01/09/09; Petitioner's Exhibit #8, various emails from teachers at*

#5. On 12/18/08, DCPS provided to Petitioner's Attorney a letter authorizing funding for an independent comprehensive psychological evaluation (which includes cognitive, educational, and clinical components as well as a social history) and a vocational assessment, at the expense of DCPS. The authorization for funding provided by DCPS was in response to Petitioner's Attorney's request for an independent evaluation on behalf of the parent of Student. (*DCPS' Exhibit #8, DCPS letter dated 12/18/08*).

#6. An independent Comprehensive Psychological Evaluation of Student was conducted on 01/09/09. Student's emotional baggage at that time consisted of dislike with living in a group home and desiring "to live with mom until she dies." Classroom observation of Student by the evaluating psychologist revealed that Student was either

## Hearing Officer Determination & Order

late or unprepared, did not participate in class or complete class assignments, and was mostly quiet and attentive but was distracted at times. Student's teachers reported to the evaluator that Student was unprepared, did not participate and was disruptive during class, as well as attention seeking behaviors in the classroom. Student's general cognitive ability was determined to be within the Average range, with Average scores in Mathematics and Oral Language and Low Average scores in Reading and Written Language. Student's personality and emotional functioning were described as Student having a "persistent and demanding habit of pursuing praise in a manipulative or showy manner to gain attention and approval, the failure of which leads to rejection. Student's major cognitive learning style was described as "learn by reading and...gets more work done by working alone." The evaluator concluded that Student's emotional issues interfere with Student's academic performance in the classroom, and Student was diagnosed with Oppositional Defiant Disorder, Attention Deficit/Hyperactivity Disorder ("ADHD") by history, and Learning Disorder Not Otherwise Specified. With regard to recommendations for education, the evaluator suggested Special Education to address issues with ADHD symptoms and learning issues and assistance around math computation and written expression. (*Petitioner's Exhibit #5, Comprehensive Psychological Evaluation dated 01/09/09*).

#7. On 02/04/09, Student was determined eligible for special education services with a disability classification of Emotional Disturbance ("ED") and an IEP was developed that prescribed 10 hours of specialized instruction in the general education setting and 30 minutes/week of behavioral support services in the general education setting, with services to be provided in the neighborhood school. Student's general education English teacher provided input to the IEP team regarding Student's academic and behavioral performance, and Student's special education teacher from 02/04/09 until the end of the 2008-2009 school year was present at the IEP meeting. (*Petitioner's Exhibit #4, IEP and DCPS Prior Notice Letter dated 02/04/09; Testimony of Rebecca Foster; Testimony of Regina McClure*). The 02/04/09 IEP contained goals in the area of reading, written expression and emotional/social/behavioral development. (*Petitioner's Exhibit #4, IEP and DCPS Prior Notice Letter dated 02/04/09*).

#8. At the IEP meeting on 02/04/09, no mention was made of Student's poor handwriting and there was no indication in the data or discussion that Student needed an occupational therapy ("OT") evaluation. (*Testimony of Regina McClure; Petitioner's Exhibit #4, IEP dated 02/04/09*). The vocational assessment dated 01/26/09 indicated that Student had below average fine motor coordination, visual motor coordination, and manual dexterity; however, this information was used to rule out particular career paths for Student. The Vocational Assessment made no specific references to Student's need for occupational therapy services due to poor handwriting. (*Petitioner's Exhibit #6, Vocational Assessment dated 01/26/09*). Student's handwriting was sloppy when Student rushed through the class work and became neater when a teacher gave Student individualized attention, but Student's handwriting was legible and the special education teacher never had any difficulty understanding it. (*Testimony of Regina McClure*). Moreover, Student's handwriting samples that were entered into evidence, were legible and could be read without any difficulty. (*Petitioner's Exhibit #7, Work Samples of*

## Hearing Officer Determination &amp; Order

*Student*). The social information contained in the Vocational Assessment was self reported by Student. ((*Petitioner's Exhibit #6, Vocational Assessment dated 01/26/09*).

#9. From February – March 2009, Student attended school fairly regularly and participated in an English class with 7 students, 1 regular education teacher and one special education teacher. During that time, Student was better behaved, made much less inappropriate comments, and if Student was off task, the teachers could work with Student. During this class of 85 minutes/day for 5 days per week, Student was off task for approximately one hour in total time. When Student was off task, Student was looking out of the window, shutting down or simply refusing to complete the class work, but Student was never disruptive or disrespectful to others. Student was quiet and looking out of the window. Sometimes Student could be redirected with the assistance of the special education teacher; however, there were times when Student would shut down and refuse to access learning and no amount of personal attention could redirect Student. When Student could not be engaged in the learning process, Student expressed the reasons as dissatisfaction with living in a group home due to the lack of a family environment and concerns about Student living with Student's mother until Student's mother dies. (*Testimony of Regina McClure; Testimony of Rebecca Foster*).

#10. After Student' 02/04/09 IEP was developed and while Student participated in the general education English class where a special educator was present, Student worked independently 70% of the time and required redirection 30% of the time. The redirection did not require one to one assistance 100% of the time; it consisted more of the special education giving Student visuals aids to give Student something different to do. (*Testimony of Regina McClure; Testimony of Rebecca Foster*).

#11. In Student's English class, after 02/04/09, Student was fully capable of doing the academic work. When Student attended regularly, Student's grade was a "C," but Student failed the course due to excessive absences. Student attended regularly from February – March, 2009. Student's attendance declined in March 2009, and then Student stopped coming to school altogether except for one day, after weeks of absence, Student attended school. On that one day, with the assistance of the special education teacher, Student was able to catch up on all academic work that had been missed. (*Testimony of Regina McClure*).

#12. While Student lived at a group home from 06/12/08-06/01/09, Student was provided with counseling and tutoring supports at the group home, but Student failed to participate in either service. (*Testimony of Charles Dorsey*).

#13. Student's special education program at \_\_\_\_\_ was specifically tailored to meet Student's needs, and not geared towards a student with a specific disability classification. (*Testimony of Regina McClure*). The specialized instruction given to Student was based on Student's IEP. Every Sunday, the special education teacher and the general education collaborated in the formulation of the upcoming week's lesson plan to ensure that the specialized instruction needs of Student was incorporated into the general education curriculum that was presented to the class by either the general

## Hearing Officer Determination &amp; Order

education teacher or the special education teacher. (*Testimony of Rebecca Foster; Testimony of Regina McClure*).

#14. At the 02/04/09 IEP team meeting, Student's social worker requested a copy of Student's academic records from the \_\_\_\_\_ (*Testimony of Charles Dorsey*).

#15. The Petitioner had not attended any meetings at school regarding Student for the six months preceding the due process hearing, and all of the information that Petitioner had regarding Student's educational needs or progress was provided to Petitioner by Student's social worker or Student's group home case manager (*Testimony of Petitioner*).

### DISCUSSION AND CONCLUSIONS OF LAW

"The burden of proof in an administrative hearing...is properly placed upon the party seeking relief." *Schaffer v. Weast, 44 IDELR 150 (2005)*. "Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." *5 D.C.M.R. 3030.3*.

**Issue #1 – Whether DCPS failed to provide an appropriate placement for Student, thereby denying Student a FAPE?** Petitioner alleges that (a) on or about 04/02/09, the DCPS Resolution Team ordered that Student be placed appropriately, and to date, no placement has occurred; and (b) Student's placement at \_\_\_\_\_ is inappropriate because Student's IEP is inadequate to address Student's academic needs because Student requires a full time ED and Specific Learning Disability ("SLD") program, which is not available at \_\_\_\_\_

(a) In the record was an email dated 04/02/09 from the DCPS Special Education Resolution Team to another DCPS employee indicating that Student was attending \_\_\_\_\_ and should be appropriately placed immediately. This email was generated in response to an email dated 04/01/09 indicating that Student did not have an open Hearing Officer Determination or Settlement Agreement. (*Petitioner's Exhibit #2, emails to and from the DCPS Special Education Resolution Team dated 04/02/09*). There is no other evidence in the record that indicates that \_\_\_\_\_ was an inappropriate placement for Student. In fact, the evidence strongly suggests that \_\_\_\_\_ was an appropriate placement. There was only one IEP in the record, dated 02/04/09, and that IEP determined that services could be provided at Student's neighborhood school. (*Finding of Fact #7*). There were no Multidisciplinary Team notes or IEP team notes after 02/04/09 in the record to corroborate the emails or support a conclusion that \_\_\_\_\_ was an inappropriate placement. The Hearing Officer concludes that the emails were not reliable evidence of an inappropriate placement at \_\_\_\_\_. Rather, the content of the emails suggests a mistake by DCPS with regard to the name of the student.

## Hearing Officer Determination &amp; Order

Petitioner failed to meet its burden of proof on Issue #1(a).

(b) Petitioner's allegation that Student's placement at \_\_\_\_\_ is inappropriate because Student's IEP is inadequate to address Student's academic needs because Student requires a full time ED and SLD program, which is not available at \_\_\_\_\_ falls flat on its face.

The "basic floor of opportunity" ... consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982).

The extensive evidence in the record leads the Hearing Officer to conclude that Student's 02/04/09 IEP was appropriate, that the 02/04/09 IEP provided Student with educational benefit when Student attended class, that the 02/04/09 IEP could adequately address Student's academic needs, and the 02/04/09 IEP was more than sufficient to grant Student the "floor of opportunity" required by *Rowley*," and that \_\_\_\_\_ could and did implement Student's 02/04/09 IEP, that the provision of special education services to Student was specifically tailored to meet Student's unique educational needs; therefore, Student's placement at \_\_\_\_\_ after the development of the IEP on 02/04/09 was an appropriate placement.

Student had Average cognitive ability with weaknesses in Reading and Written Language. The 01/09/09 Comprehensive Psychological Evaluation did not contain a finding that Student had a specific learning disability, rather, the evaluation concluded that Student's behavior interfered with learning. (*Finding of Fact #6*). Student's 02/04/09 IEP was developed with the input of Student's general education English teacher and Student's subsequent special education teacher who both co-taught English to Student in an inclusive setting, i.e., a setting that provides special education within the general education curriculum. Student's special education teacher, who testified credibly, was well acquainted with Student's academic and emotional difficulties and their impact on Student's performance in school. The Hearing Officer concludes that Student did not and does not need a SLD program. After weeks of absence from class, Student caught up with the class in just one day with the assistance of the special education teacher. (*Finding of Fact #11*). The Hearing Officer also does not conclude that Student needed or needs a full time ED educational placement. The evidence in the record was that Student was not disruptive in class after special education services began. In the smaller class with special education services, Student would become inattentive and look out of the window or just shut down completely and no amount of effort from teachers could redirect Student. However, Student was only inattentive approximately 30% of the time (*Finding of Fact #10*), and generally could be redirected. Additionally, Student worked independently 70% of the time, and during the 30% of the time that Student required redirection, the individual attention was not constant one on one attention. (*Finding of Fact #10*). Student's failing grades after the implementation of special education services were attributed to Student's total lack of attendance at school after March 2009; however, when Student attended, Student earned a grade of "C."

## Hearing Officer Determination &amp; Order

(*Finding of Fact #11*). The Hearing Officer concludes that when Student attended school, Student was able to receive educational benefit.

The Hearing Officer cannot conclude from the evidence presented that Student's program or placement after 02/04/09 was inappropriate due to the type or amount of special education services provided by DCPS. In fact, the testimony of the special education teacher leads the Hearing Officer to conclude just the opposite; i.e., that Student received special education services *uniquely* designed to meet Student's needs. The special education teacher pointed out in her testimony that it was not the disability classification that drove the supports and services that Student needed and received, it was Student's specific needs that dictated the program that Student received. (*Finding of Fact #13*). This is the best possible example of Student being provided a FAPE by DCPS complying with the dictates of IDEIA in providing Student with specially designed instruction...to meet the unique needs of a child with a disability, pursuant to 34 C.F.R. 300.39(a). Moreover, there was evidence in the record that Student failed to participate in all services provided outside of the school environment; i.e., group home directives, counseling and tutoring services in the community. (*Finding of Fact #12*). The Hearing Officer concludes that Student was simply in a shut down mode that did not reflect inadequacies of the school system in providing Student with the educational services that Student needed. Student's emotional baggage of dislike for the group home and not being able to live with mother (*Finding of Fact #9*) were the sources of Student's general dysfunction that carried over into the educational environment. Student's dysfunction in the educational environment was being appropriately addressed by the contents of Student's 02/04/09 IEP and by DCPS' implementation of services specified in the 02/04/09 IEP. The Hearing Officer concludes that the 02/04/09 IEP was sufficient to meet Student's academic needs.

Petitioner failed to meet its burden of proof on Issue #1(b).

**Issue #2 – Whether DCPS failed to develop and implement an IEP that contains the appropriate amount of specialized instruction and related services, thereby denying Student a FAPE?** Petitioner alleges that (a) Student's IEP, developed on or about 02/05/09, specifies 10 hours/week of specialized instruction and .5 hours/week of counseling services and these special education services are inadequate to address Student's needs for a full time ED and SLD IEP and placement; (b) the IEP developed on or about 02/05/09 did not accurately reflect the necessary services identified in recent evaluations; (c) Student's 02/05/09 IEP could not be implemented during the 2008-2009 school year due to Student's chronic absenteeism from class due to hall walking and avoiding class participation; (d) Student's IEP does not contain Occupational Therapy ("OT") services despite evaluations and handwriting exemplars indicating the need for such services; (e) Student's IEP does not contain a reading goal even though evaluations indicate that Student has difficulty in reading; and (f) the IEP in existence while Student attended the school year was not implemented when Student attended during the 2007-2008 during the 2008-2009 school year.

## Hearing Officer Determination &amp; Order

(a) The Hearing Officer concludes that Student's 02/04/09 IEP *was* adequate to meet Student's educational needs, and that Student did not require a full time ED and SLD IEP. This issue was addressed in the discussion of Issue #1(b) where Petitioner failed to meet its burden of proof.

Petitioner failed to meet its burden of proof on Issue #2(a).

(b) The Hearing Officer concludes that the IEP developed on 02/04/09 did accurately reflect the necessary services identified in recent evaluations. The 01/09/09 Comprehensive Psychological Evaluation indicated weaknesses in the areas of Reading and Written Expression. Student's 02/04/09 IEP contained goals and services to address Student's weaknesses in these areas. (*Finding of Fact #7*). The adequacy of these services was clearly demonstrated by the evidence in the record that after weeks of missing class, Student was able to catch up with the class after only one day of instruction with the assistance of the special education teacher. (*Finding of Fact #11*).

Petitioner failed to meet its burden of proof on Issue #2(b).

(c) Petitioner did not meet its burden of proof on the allegation that Student's 02/04/09 IEP could not be implemented during the 2008-2009 school year due to Student's chronic absenteeism from class due to hall walking and avoiding class participation. First of all, there was no evidence in the record that Student was chronically absent from class due to hall walking. Secondly, there was no evidence in the record that Student's IEP could not be implemented due to Student avoiding class participation. The evidence in the record revealed that the general education plan incorporated the necessary elements of Student's IEP (*Finding of Fact #13*), and the specialized instruction as required was provided by the special education teacher in conjunction with the general education teacher in a class size of 7 (*Finding of Fact #9*). When Student shut down in class and avoided class participation, it was not due to the failure of DCPS to implement Student's IEP. In fact, Student's teachers made a special effort to redirect Student or to talk with Student concerning the reasons for shutting down, and the teachers could do this quickly because there were only 7 students in the class. When Student did shut down, it was due to Student's unhappiness with Student's home life and family issues. (*Finding of Fact #9*). Shutting down had nothing to do with inadequacies in the educational services provided to Student.

Petitioner failed to meet its burden of proof on Issue #2(c).

(d) The Hearing Officer cannot conclude that the failure of Student's IEP to contain Occupational Therapy ("OT") services despite evaluations and handwriting exemplars indicating the need for such services was the denial of a FAPE. There was no evidence in the record, either through evaluations or by testimony, that Student needed OT services. The vocational assessment dated 01/26/09, indicated only that Student's below average scores meant that Student should not pursue a particular career; it did not make a recommendation that Student receive occupational therapy services. Student's handwriting exemplars, found at Petitioner's Exhibit #7, provide examples of Student's

## Hearing Officer Determination &amp; Order

handwriting that is fairly neat and clearly legible. Additionally, the evidence in the record by way of testimony of the special education teacher was that Student's handwriting was never noted to be deficient, either at the 02/05/09 IEP team meeting or through the special education teacher's personal observations of Student's handwriting that occurred on a daily basis of interacting with Student. Although Student's handwriting was at times sloppy, when redirected, Student would tender neat handwriting samples. (*Finding of Fact #8*). The Hearing Officer concludes that when Student's handwriting was sloppy, it was because Student chose to complete class work in a hurried manner. The sloppy penmanship was a matter of choice, and not a matter of inability to write legibly that required OT services.

Petitioner failed to meet its burden of proof on Issue #2(d).

(e) Petitioner's allegation that Student's IEP did not contain a reading goal despite Student's difficulty in reading was without merit or adequate investigation of the allegation, as Student's 02/04/09 clearly contained a reading goal. (*Finding of Fact #7*).

Petitioner failed to meet its burden of proof on Issue #2(e).

(f) There were three references in the record regarding the allegation that Student had received special education services while Student attended Center. The Vocational Assessment stated that Student received special education services since the 5<sup>th</sup> grade, but there is no indication in the record that Student had an IEP in effect at the end of the 2007-2008 school year, and the possibility exists that Student may have been exited from special education prior to that time particularly in view of Student's average cognitive abilities and the fact that at that time Student was living with Student's aunt and not in a group home. (*Findings of Fact #2, #6*). Moreover, the vocational assessment is based on self reported information from Student (*Finding of Fact #8*), which is not necessarily unreliable; however, the vocational assessment does not indicate that special education services were in effect continuously from 5<sup>th</sup> grade. Petitioner, biological sister and court appointed educational surrogate for Student, testified that Petitioner *believed* that Student had been receiving special education services at based on prior family discussion; however, Petitioner was not sure how long Student received special education classes at Moreover, Petitioner's knowledge of Student's educational affairs was not only extremely limited, it was erroneous. Petitioner, who had not attended any meetings at Student's school within the past 6 months, had no direct knowledge of Student's academic affairs and all information acquired by Petitioner had been provided to Petitioner by Student's social worker and group home case manager. (*Finding of Fact #15*). And, Petitioner's reservoir of knowledge was clearly erroneous as Petitioner testified that Student began attending in March or April of 2009, and prior to that time Student attended School. The documentation in the record clearly attests to the fact that Student never attended School at any time. Thus, Petitioner was not considered a credible and reliable witness. Moreover, Petitioner did not testify regarding any direct knowledge that an IEP was in effect at the end of 2007-2008 school year. Thirdly, Mr. Dorsey testified that Student's discharge

## Hearing Officer Determination &amp; Order

documents from Boystown contained a diagnosis of ED/LD; however, it is not known whether these diagnoses were by history or by a current diagnosis or what the source of the information was. Therefore, the Hearing Officer cannot conclude by a preponderance of the evidence that at the end of the 2007-2008 school year, an IEP for Student was in existence at [redacted]. The evidence presented was too tenuous. Therefore, Petitioner failed to meet its burden of proof that at the beginning of the 2008-2009 school year, DCPS failed to implement the IEP that was in existence at [redacted].

Petitioner failed to meet its burden of proof on Issue #2(f).

**Issue #3 – Whether DCPS failed to timely identify and evaluate Student as a student in need of special education services, thereby denying Student a FAPE?**

Petitioner alleges that: (a) Prior to the 2008-2009 school year, Student attended [redacted] where Student received special education services. And, when Student transferred to [redacted] Student's academic records that indicated the need for special education services were not forwarded from [redacted] and as a result Student was placed in the general education curriculum. Student's behavior and drop in grades indicated the need for evaluation for special education services. Therefore, DCPS failed to identify Student as a special education student from the beginning of the 2008-2009 school year until an IEP was developed on 02/05/09, and during this time, Student was without appropriate special education services; (b) Student's behavior during the 2008-2009 school year, consisting of absenteeism, academic failure, and negative behaviors in the academic environment, were clear indicators that Student was in need of special education services or in need of evaluation for special education services; and (c) DCPS failed to appropriately classify Student as an ED and SLD student who requires a full time ED and SLD educational program.

(a) The Hearing Officer cannot conclude by a preponderance of the evidence that DCPS denied Student a FAPE because DCPS failed to continue existing special education services at [redacted] after Student transferred from [redacted] Center. As discussed under Issue #2(f), the evidence in the record was insufficient to conclude that an IEP was in effect at the end of the 2007-2008 school year. Here too, Petitioner failed to meet its burden of proof.

(b) On the other hand, Student's behaviors during the first half of the 2008-2009 school year, consisting of absenteeism, academic failure, and negative behaviors in the academic environment (*Findings of Fact #4*) were clear indicators that Student was in need of evaluation for special education services. Although the group home case manager was severely remiss in his duties by failing to speak with the special education coordinator at [redacted] regarding the possibility of the need for special education services (*Finding of Fact #3*), it is still DCPS' responsibility to locate, identify and evaluate Student. In this case, Student's maladaptive school behaviors consisting of disrespect, unwillingness to complete assignments, suspensions, and poor school academic performance began in September 2008. (*Finding of Fact #4*).

## Hearing Officer Determination &amp; Order

34 C.F.R. 300.111 puts the onus on DCPS to identify, locate and evaluate students residing in the District of Columbia who are in need of special education services, and D.C. Code Section 38-2561.02 gives DCPS 120 days to evaluate Student. In this case, Student was enrolled in the general education curriculum at the beginning of the 2008-2009 school year (*Finding of Fact #4*). never had any knowledge that Student might have been a special education student because Mr. Dorsey never mentioned to school staff that Student came to the group home with a diagnosis of ED/LD. (*Finding of Fact #3*).

The first evidence in the record of DCPS' effort to evaluate Student as a student possibly in need of special education services was a letter dated 12/18/08 to Petitioner's Attorney authorizing funding for an independent comprehensive psychological evaluation and vocational assessment, and that letter was in response to a request by Petitioner's Attorney for funding for an independent evaluation. (*Finding of Fact #5*). According to the group home case manager, there was no discussion between himself and the school regarding possible special education services for Student. (*Finding of Fact #3*). Additionally, there was no evidence, either documentary or testimonial, that special education services were discussed prior to the request by Petitioner's Attorney for authorization for independent evaluations.

Student's maladaptive behaviors and poor school performance began in September 2008. (*Finding of Fact #4*). It wasn't until 12/18/08 that a means for evaluating Student was provided by DCPS. (*Finding of Fact #5*). The indicators of the need for evaluation for special education services was overwhelming (*Finding of Fact #4*), and in fact Student was deemed eligible for special education services on 02/04/09 due to an emotional disturbance. (*Finding of Fact #7*). However, there is no evidence in the record regarding the date of Petitioner's Attorney's request to DCPS to evaluate Student. Pursuant to DC Code Section 38-2561.02, DCPS has 120 days to evaluate Student. There is evidence in the record that at the end of September 2008, Student had exhibited behavior problems and had been suspended. (*Finding of Fact #4*). Although there is evidence in the record that Student failed all classes during the 1<sup>st</sup> advisory, there is no evidence in the record as to when the 1<sup>st</sup> advisory ended. Even if we were to hypothetically take the last day of September 2008 as the beginning date that DCPS should have initiated procedures to evaluate Student, DCPS still would have 120 days, i.e., until 01/30/09 to complete the evaluations. On 12/18/08, DCPS authorized funding for an independent comprehensive psychological evaluation, and on 01/09/09, Student was independently evaluated pursuant to DCPS' funding authorization. (*Finding of Fact #6*). Student was therefore evaluated within 120 days of the time that DCPS could reasonably be expected to suspect that Student might have an educational disability. Therefore, the Hearing Officer cannot conclude by a preponderance of the evidence that DCPS failed to identify, locate, and evaluate Student.

Petitioner failed to meet its burden of proof on issue #3(b).

**Issue #4 – Whether DCPS failed to provide Petitioner access to records, thereby denying Student a FAPE?** Petitioner alleges that Petitioner was not provided

## Hearing Officer Determination &amp; Order

with records upon verbal request in February 2009 because Student's evaluations and cumulative file from \_\_\_\_\_ were lost, and that this interfered with Petitioner's educational advocacy efforts on behalf of Student to determine appropriate services.

Pursuant to 34 C.F.R. 300.613, DCPS must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency. The evidence in the record was that at the 02/04/09 IEP team meeting, Student's social worker requested a copy of Student's cumulative file from \_\_\_\_\_

On 02/04/09, it was not the Petitioner who requested Student's records from DCPS, it was another person altogether. The date of 02/04/09 preceded Petitioner's appointment as Surrogate Parent for Educational Purposes. Therefore, Petitioner failed to meet its burden of proof that *this* Petitioner made a records request to DCPS and did not receive the records requested. (*Finding of Fact #1*).

Petitioner failed to meet its burden of proof on Issue #4.

**Issue #5 – Whether DCPS failed to have Student's IEP in effect at the beginning of the 2008-2009 school year?** Petitioner alleges that although Student had an IEP and received special education services at \_\_\_\_\_ during the 2007-2008 school year, Student's IEP was not in effect when Student attended \_\_\_\_\_ from the beginning of the 2008-2009 school year until a new IEP was developed on or about 02/05/09.

This issue was addressed previously under Issue 2(f), where Petitioner failed to meet its burden of proof.

Petitioner failed to meet its burden of proof on Issue #5.

**Issue #6 – Whether Student is entitled to compensatory education?** Petitioner asserts that Student is entitled to compensatory education for: (a) Missed special education services from the beginning of the 2008-2009 school year until a new IEP was developed on or about 02/05/09 due to DCPS not have Student's current IEP in effect at that time; and (b) Missed special education services from the date of development of the 02/05/09 IEP until the time DCPS provides an appropriate full time ED and SLD placement.

“When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning “appropriate” relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.” *Reid v. District of Columbia*, 43 IDELR 32 (2005).

Petitioner failed to meet its burden of proof that Student was denied a FAPE on any of the issues identified in the Complaint. Therefore, Student is not entitled to compensatory education.

Hearing Officer Determination & Order

**ORDER**

**WHEREFORE**, this Complaint having been fully litigated and there being no basis in fact and law to support Petitioner's allegations that Student was denied a FAPE, it is

**ORDERED** that this Complaint be and hereby is **DISMISSED** with prejudice.

**IT IS SO ORDERED.**

**This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).**

*Virginia A. Dietrich /s/*

Virginia A. Dietrich, Esq.  
Impartial Due Process Hearing Officer

08/27/09

Date

Issued: August 27, 2009