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

Student Hearing Office  
1150 5<sup>th</sup> Street, S.E.  
Washington, DC 20003

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STUDENT,<sup>1</sup>  
through the Parent,

Petitioner,

v.

District of Columbia Public Schools,

Respondent.

Date Issued: August 4, 2010

Hearing Officer: Virginia A. Dietrich

Case No:

Hearing Dates: 07/26/10 Room: 7a

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**HEARING OFFICER DETERMINATION**

**BACKGROUND**

Petitioner, the mother of Student, filed a due process complaint notice on 06/18/10, alleging that Student had been denied a free appropriate public education ("FAPE") when for the past two years, District of Columbia Public Schools ("DCPS") failed to identify, locate and evaluate Student as a child with a disability based on her poor school attendance, suspensions and failing grades; and when DCPS failed to afford Student the disciplinary protections of a student with a suspected disability during the 2009-2010 school year when Student was suspended from school for more than 10 days. Petitioner also alleged that Student was entitled to compensatory education in the form of individual counseling, group counseling or social skills counseling and academic tutoring as a result of two years of missed special education services.

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEIA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

This Hearing Officer was assigned to the case on 06/21/10. A prehearing conference was held on 07/09/10, and a Prehearing Order that memorialized the substance of the prehearing conference was issued on 07/11/10.

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

## Hearing Officer Determination

The due process hearing was a closed hearing that took place on 07/26/10. Petitioner was represented by Sarah Tomkins, Esq. from the Law Office of Donna L. Wulkun, Esq. and DCPS was represented by Blair Matsumoto, Esq.. Petitioner presented the following four witnesses: Petitioner; Mary Donnelly, Ph.D., who qualified as an expert in clinical psychology;

who qualified as an expert in speech and language pathology; and Jeryl McTootle, Student's probation officer. DCPS did not present any witnesses; it rested its case on the documents it submitted into evidence.

Petitioner's Exhibits P-1 through P-22, and DCPS' Exhibits DCPS-01 through DCPS-06, DCPS-08 and DCPS-09, were all admitted into evidence without objection. DCPS' Exhibit DCPS-07 was admitted into evidence over objection.

Parties were offered the opportunity for settlement discussions, but both sides declined because previous settlement discussions had not been fruitful.

At the time the complaint was filed, Student was a        years old girl who was just completing the        grade for the second time at        a public school located in the District of Columbia. School records indicated that during the 2009-2010 school year, Student incurred numerous suspensions from school due to her behavior and she had an excessive amount of absences from school and class. Student had never been evaluated for special education services by DCPS. It was Petitioner who got the ball rolling by submitting to DCPS on 06/08/10, a copy of an independent psychoeducational evaluation that recently had been completed by the Superior Court of the District of Columbia, with a request to DCPS to review the evaluation immediately to determine Student's eligibility for special education and related services.

DCPS took the position that Student's poor academic performance was due to habitual truancy and Student not availing herself of the educational opportunities presented.

The three issues to be determined in this Hearing Officer Determination are as follows:

Whether DCPS failed to identify, locate and evaluate Student as a child with a disability for the past two years, based on Student's history of poor school attendance and poor academic performance, failing grades and suspensions?

Whether DCPS failed to give Student the disciplinary protections of a student with a suspected disability when DCPS suspended Student from school for more than 10 days during the 2009-2010 school year and did not convene a Manifestation Determination Review ("MDR"), conduct a Functional Behavioral Assessment ("FBA") and develop a Behavior Intervention Plan ("BIP")?

Is compensatory education in the form of individual counseling, group counseling or social skills counseling, and academic tutoring the appropriate relief for Student who has not received any special education services for the past two years?

The parties stipulated to the following facts:

## Hearing Officer Determination

- #1. DCPS has never conducted any evaluations on Student; and
- #2. DCPS has never convened an IEP Team meeting to determine Student's eligibility for special education services.

At the due process hearing, Petitioner's request for relief was that the Hearing Officer determine that Student had been denied a FAPE with respect to the issues being litigated; that the Hearing Officer determine that Student is eligible for special education services with a disability classification of Multiple Disabilities, Learning Disabled ("LD") and Emotional Disturbance ("ED"); and that DCPS fund or provide compensatory education in the form of 1 hour/week of individual counseling through an independent provider outside of the school day, 1 hour/week of group counseling or social skills counseling to be provided by a DCPS provider during the school day, and 2 hours/week of academic tutoring at \_\_\_\_\_ with all compensatory education services to be provided for the duration of the 2010-2011 school year.

### **FINDINGS OF FACT**

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

#1. At the time the complaint was filed, Student, age \_\_\_\_\_ and a resident of the District of Columbia, was repeating the 9<sup>th</sup> grade at \_\_\_\_\_ a public school in the District of Columbia. (P-16). Student had never been evaluated by DCPS for special education services (Stipulation #1), and despite having been provided with a copy of an independent psychoeducational evaluation on 06/08/10 along with a request for review of the evaluation to determine Student's eligibility for special education services (P-10), DCPS never convened an IEP Team to determine eligibility. (Stipulation #2).

#2. From 08/17/09 through 06/09/10, Student accrued 306 unexcused absences and had been late to school 37 times. (P-12). Student had attendance problems for the past two years. (Testimony of \_\_\_\_\_)

#3. From 09/22/09 through 04/30/10, Student was suspended from school for approximately 36 days, with the 11<sup>th</sup> day of suspension occurring on or about 12/03/09. During this period of time, Student accumulated 30 separate student discipline reports that included six in-school suspensions. The disruptive behaviors that led to suspension included failure to follow directives, walking in and out of class, disrespectful behavior, cutting classes, cursing, cursing out the principal, and use of inappropriate language towards staff. (P-14).

#4. During the 2008-2009 school year, while Student attended the \_\_\_\_\_ grade at \_\_\_\_\_ Student received grades of "F" in Art and Design Foundations, World History and Geography, Algebra IA, and Algebra IB; grades of "D" in English I, Extended Literacy 9, Environmental Science, and Music History/Literature I; and the grade of "A" in Health & Physical Education. (P-16).

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#5. During the 2009-2010 school year, while Student repeated the grade at Student received grades of "F" in Art and Culture, Extended Literacy 10, Geometry Part A, and Biology 1A; and the grade of "D" in Creative Drama. (P-16). Teacher comments surrounding these grades included: excessive absences, does not complete class assignments, poor behavior, needs more study, and lacks initiative. (P-17).

#6. A Psychoeducational Evaluation Report, dated 06/02/10, was completed by an evaluator from the Superior Court of the District of Columbia who, at the due process hearing, qualified as an expert in clinical psychology. The Psychoeducational Evaluation Report was provided to DCPS on 06/08/10. (P-10). It revealed that Student's cognitive functioning was in the borderline range of intelligence, with 97% of her same age peers performing better than she did. Her scores in working memory meant that she had an average ability to accomplish tasks that require attention, concentration and mental control. Student's lowest cognitive performance occurred in the area of Verbal Comprehension, where she scored in the 1 percentile, which meant that 99% of children her age performed better than she did. On vocabulary testing, her score was in the 0.4 percentile, which indicated a severe weakness. (Testimony of Dr. Donnelly; P-18). Student's marked weakness in Reading Vocabulary as evidenced by a grade level equivalent score of 2.9, affected her overall communication skills, both in terms of understanding and also expressing her ideas and feelings, and impacted several areas of academic functioning. Student meets the IDEIA classification of Learning Disabled because of her difficulties in the whole realm of language skills. Her discipline issues are related to her Learning Disorder because her language difficulties affect her ability to navigate situations. Student's low fund of vocabulary possibly contributes to her being withdrawn, unable to verbally reply, losing motivation, misunderstanding, problems with social interactions, and difficulty understanding lectures in the classroom. Student does not have a large vocabulary; her first words in a stressful situation would likely be curse words. (Testimony of Dr. Donnelly; P-18).

#7. On 06/02/10, Student' age equivalent academic achievement scores, as measured by the Woodcock Johnson-III assessment, were 4.1 in Broad Reading, 4.6 in Broad Math, 3.2 in Reading Comprehension, 3.9 in Letter-Word Identification, 4.7 in Spelling, 3.6 in Writing Fluency, 2.9 in Word Attack, and 2.9 in Reading Vocabulary. (P-18). Student's 3.2 grade level equivalent in reading comprehension makes it difficult for her to keep up in school because most high school texts are written on the 6<sup>th</sup> – 8<sup>th</sup> grade levels; therefore, it is unlikely that she could read the textbooks. Student's Learning Disorder impacts all areas of academic functioning, and in the classroom, she would have difficulty speaking and keeping up, wouldn't understand the homework assignments and probably couldn't do them independently. Student needs specialized instruction due to poor language skills. Student's Learning Disability is likely due to a development disorder, and is not something that recently developed. (Testimony of Dr. Donnelly; P-18).

#8. On the Psychoeducational Evaluation Report dated 06/02/10, Student was also diagnosed with Mood Disorder, NOS, and that diagnosis was based on Student's mood changes manifested by irritability and anger, hospitalization for suicide at age 11 with continued and current treatment at a mental health clinic for a mood disorder, Student receiving social security payments for a disability based on depression, and a self report to the evaluator that she wanted to kill herself. Student's Mood Disorder, NOS, a long-standing disorder, negatively affects her

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performance and behavior in school because she is unable to build successful relationships with teachers, the principal and other school authority figures; therefore, she meets the criteria for the disability classification of Emotional Disturbance under IDEIA. It is also difficult for Student to be reprimanded due to her high level of sensitivity. (Testimony of Dr. Donnelly; P-18).

#9. The Psychoeducational Evaluation Report also revealed that Student had a Coping Deficit that fell in the clinical range; that she has not yet developed the skills to manage stress and frustration; that she tends to be highly reactive in situations; that she lacks social skills, can be aggressive towards others and may react under stress; and that her profile tends to be more characteristic of younger children. (P-18). According to Petitioner, Student's friends were all in the 8-12 year old age range because Student was not on the same level as her same aged peers. (Testimony of Petitioner). Student's Coping Deficit meant that her response to things would likely be an outburst and she would probably come across as angry. Student's emotional problems affect her school performance; she is likely to withdraw from a stressful and overwhelming situation in the form of skipping school and being tardy to class, and school would be a stressful situation for her because of her inability to keep up with the class and complete assignments. (Testimony of Dr. Donnelly; P-18).

#10. A Speech and Language Evaluation Summary dated 07/14/10, completed by an evaluator who qualified as an expert in speech and language pathology at the due process hearing, indicated that Student meets the diagnostic criteria for a receptive-expressive language disorder as a result of significant delays in receptive and expressive language skills. One of Student's major areas of weakness is vocabulary and this weakness impacts all areas of speech and using language. Student is unable to order words to create sentences, unless those sentences are simple and straightforward. Her lack of knowledge of age-level vocabulary affects her ability to understand text, lectures and even converse with peers. Her extremely poor receptive language skills directly impact her ability to understand what is heard. The severity of the impairment suggests that this has been a long standing impairment and not something that has been acquired within the last two years. Student is in need of direct speech and language special education services. (P-22; Testimony of Monica Maines).

### CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

"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. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

The first issue to be addressed is whether DCPS failed to identify, locate and evaluate Student as a child with a disability for the past two years based on Student's history of poor school attendance and academic performance, failing grades and suspensions?

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The overall purpose of IDEIA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1. Special education is defined as specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability. 34 C.F.R. 300.39(a). Specially designed instruction means adapting, as appropriate to the needs of an eligible child under IDEIA, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability and to ensure access of the child to the general education curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. 300.39(1)(b)(3).

DCPS has an affirmative duty to identify, locate and evaluate all children with disabilities who reside in the District of Columbia, regardless of the severity of their disability, and who are in need of special education and related services. 34 C.F.R. 300.111, 5 D.C.M.R. 3002.1.

The evidence presented in this case can be summarized as follows:

At the end of the 2009-2010 school year, Student, age        and a resident of the District of Columbia, had just completed 9<sup>th</sup> grade at        for the second time, and was failing most of her classes for the second consecutive academic year. (Findings #1, #4, #5). Student also had attendance problems for the past two years (Finding #2), and when she was in school, her behavior was marked by her inability to comply with directives and disrespect to staff, and this behavior generally led to suspensions from school or in-school suspensions. (Finding #3).

A recently completed independent Psychoeducational Evaluation Report diagnosed Student with a Learning Disorder and an Emotional Disturbance that met the criterion for disability classifications under IDEIA because the Learning Disorder negatively impacted all areas of academic functioning and interfered with learning as evidenced by Student's 0.4 percentile score in vocabulary testing, her 3<sup>rd</sup> and 4<sup>th</sup> grade academic achievement levels in reading, writing and mathematics, and her need for special education due to her poor language skills. (Findings #6, #7). Student's Emotional Disturbance affected her ability to learn because Student was unable to form relationships with school personnel and due to her limited vocabulary, she would likely avoid the stressful situation of going to school and class because she was unable to understand what was going on and unable to complete class assignments. (Findings #6, #8, #9). This profile of Student, proffered by the expert clinical psychologist, was amply supported by Student's record of 306 unexcused absences from August 2009 through June 2010 (Finding #2), and 36 days of suspension and 30 incidences of student discipline reports from September 2009 through April 2010. (Finding #3). The evidence was clear that Student's Learning Disorder was developmental in nature, and thus not likely to have been recently acquired. (Finding #7). Student's Mood Disorder, NOS, a diagnosis based on factors that predated 2008, such as hospitalization at age 11 for suicide and continued mental health treatment since that time, combined with Student's current expressed desire to kill herself, all indicated that the Mood Disorder, NOS had been an ongoing disorder and not something that had

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just occurred within the past two years. (Finding #8). The fact that at the end of the 2008-2009 school year, Student had received grades of "F" and "D" in all classes except one (Finding #4), was the first obvious alert for DCPS to begin evaluating Student for special education services. The fact that at the end of the 2009-2010 school year, Student had just completed the 9<sup>th</sup> grade for the second time with failing and very poor grades (Finding #5), was the smoking gun that Student should have been evaluated for special education services.

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The Hearing Officer concludes that Petitioner met her burden of proof by a preponderance of the evidence, that based on Student's behavior and extremely poor academic performance, DCPS should have taken steps during the last two years to evaluate Student. When Student received mostly failing grades at the end of the 2008-2009 school year and then had to repeat the 9<sup>th</sup> grade during the 2009-2010 school year, it was obvious that something was wrong. Petitioner's argument that Student's poor attendance was tied to her disabilities and DCPS' failure to provide special education services, is well founded by the facts. The lack of services resulted in Student having avoidant behaviors about school due to coping deficits that resulted in Student being overwhelmed with the stressful situation of being in school and not being able to understand things and keep up with the class. (Finding #9). The evidence supports the Hearing Officer's conclusion that these impairments were developmental in nature and existed for longer than the past two years. The right to receive special education services if a child is determined to have a disability that interferes with learning, is a fundamental right under IDEIA. 34 C.F.R. 300.1. The evidence was clear that Student was eligible for and should have received special education services for the past two years, and didn't. As a result, Student was denied a FAPE.

Petitioner seeks a hearing officer determination that Student is eligible for special education and related services as a student with Multiple Disabilities, a Learning Disability and an Emotional Disturbance.

Under IDEIA, a child with a disability means a child who has been evaluated as having ...a speech and language impairment...a serious emotional disturbance... a specific learning disability, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 C.F.R. 300.8(a)(1).

"Emotional Disturbance" means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors, (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) Inappropriate types of behavior or feelings under normal circumstances; (D) A general pervasive mood of unhappiness or depression. 34 C.F.R. 300.8(c)(4)(i), 5 D.C.M.R. 3003.2.

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The testimony of Dr. Donnelly, an expert in clinical psychology, was that Student's Mood Disorder, NOS interfered with her ability to maintain satisfactory interpersonal relationships with the staff at \_\_\_\_\_ therefore, Student qualified as a student with an Emotional Disturbance under IDEIA. (Finding #8). Student's record of incident reports that repeatedly cited disrespect to teachers and disruptive behavior that led to suspensions from school as well as in-school suspensions was proof enough of that. (Finding #3). The Hearing Officer concludes that Student is a disabled child with an Emotional Disturbance under IDEIA.

Under IDEIA, a Specific Learning Disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations...34 C.F.R. 300.8(c)(10).

Dr. Donnelly concluded in her Psychoeducational Evaluation Report and through testimony, that Student met the criteria for a Learning Disability under IDEIA due to her extremely low percentile ranking in vocabulary testing which translated to a 2.9 grade level equivalent performance. Dr. Donnelly's findings were that Student's severe learning impairment affected all areas of functioning, including the academic areas of reading, mathematics and writing, and that Student required special education to address her deficiencies. (Findings #6, #7). Therefore, the Hearing Officer concludes that Student is a disabled child under IDEIA with a disability classification of Learning Disabled.

Student had severe receptive-expressive language delays that affected her ability to learn, as determined by an expert in speech and language pathology. (Finding #10). The expert concluded that Student's speech and language deficits met the criteria for a Speech and Language Impairment under IDEIA, and that Student needed direct speech and language services to remedy the deficits. Student's significant delays in receptive and expressive language skills affected Student's academic ability to understand text, lectures, converse with peers, and even her ability to understand what was heard. The testimony of the expert revealed that this speech and language impairment was a long-standing impairment and due its nature and severity, existed well before two years ago. (Testimony of \_\_\_\_\_ Finding #19). "Speech or language impairment" under IDEIA means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance. 34 C.F.R. 300.8(c)(11). The Hearing Officer concludes that Student is a disabled child under IDEIA with a disability classification of Speech and Language Impaired.

Multiple Disabilities, pursuant to 34 C.F.R. 300.8(c)(7) and 5 D.C.M.R. 3003.12, means concomitant impairments, the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. Student's Learning Disorder impacted all areas of academic functioning (Finding #7), causing her great difficulty in understanding what was going on in class and completing the class assignments. Student's discipline issues were related to her Learning Disorder because her language difficulties affected her ability to navigate situations. (Finding #6). Student's Emotional Disturbance affected her ability to handle stressful situations and contributed to her

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avoidance of school and class. (Finding #9). The Hearing Officer concludes that Student's Emotional Disability, Learning Disorder and Speech and Language Impairment were separate entities that needed to be addressed with separate services; therefore, Student qualifies as a student with Multiple Disabilities under IDEIA. Student required specialized instruction for her Learning Disorder, speech and language services to address her receptive-expressive language deficits, and behavioral support services for her Emotional Disturbance.

Petitioner met her burden of proof by a preponderance of the evidence that Student meets the definition of a child with a disability pursuant to 5 D.C.M.R. 3003.2, i.e., a child who satisfies District residency registration and residency requirements and who has been evaluated...as having...emotional disturbance, multiple disabilities...learning disability...speech or language impairment...and who, as a result of the impairment, needs special education and related services. Petitioner also met her burden of proof that Student's disabilities existed for the past two years and that DCPS should have identified and evaluated Student as a child who might need special education services due to her poor attendance, poor behavior, failing grades and repeating the 9<sup>th</sup> grade. DCPS' failure to identify, locate and evaluate Student for special education services for the past two years resulted in the denial of a FAPE.

The second issue to be addressed is whether DCPS failed to give Student the disciplinary protections of a student with a suspected disability when DCPS suspended Student from school for more than 10 days during the 2009-2010 school year and did not convene a Manifestation Determination Review ("MDR"), conduct a Functional Behavioral Assessment ("FBA") and develop a Behavior Intervention Plan ("BIP")?

A child who has not been determined to be eligible for special education and related services under IDEIA and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in IDEIA if the public agency had knowledge, as determined in accordance with 34 C.F.R. 300.534(b), that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. 34 C.F.R. 300.534(a). 34 C.F.R. 300.534(b) provides that a public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred (1) the parent of the child expressed concern in writing to supervisory or administration personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services; (2) the parent of the child requested an evaluation pursuant to 300.300 through 300.311; or (3) the teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency. More specifically, 5 D.C.M.R. 2510.21(b) states that DCPS is deemed to have knowledge that a child is a child with a disability if: (a) the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to appropriate DCPS personnel that the child is in need of special education and related services; or (b) the behavior or performance of the child demonstrates the need for such services.

In this case, Student's attendance, behavior and academic performance were sufficiently adverse and persistent from the beginning of the 2009-2010 school year (Findings #2, #3, #4,

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#5), for DCPS to have been deemed to have knowledge that Student was a student with a suspected disability. It cannot be underscored enough that Student was repeating the grade at the same school due to failing grades. She accumulated 30 separate student discipline reports that began on 09/22/09 and continued steadily throughout the 2009-2010 school year, and experienced both out of school and in school suspensions for behavior problems.

As of 12/03/09, Student had been suspended for more than 10 days during the 2009-2010 school year. As a result, Student was entitled to a MDR, and if her conduct was determined to be a manifestation of her suspected disability, she was entitled to have a Functional Behavioral Assessment completed and a Behavior Intervention Plan developed to address her specific behavioral needs. 34 C.F.R. 300.530(f). Unfortunately, Petitioner failed to place any reliable evidence in the record that DCPS failed to convene a MDR. The only reference in the record about DCPS' failure to convene a MDR, is an allegation in the complaint that DCPS never convened a MDR. None of the exhibits admitted into evidence that reflect a record of contemporaneous events, refers to a MDR meeting, and no information concerning a MDR was elicited from any of the witnesses. Petitioner failed to meet her burden of proof on this issue.

The third issue to be addressed is whether compensatory education in the form of individual counseling, group counseling or social skills counseling, and academic tutoring are the appropriate relief for Student who was denied a FAPE by not receiving any special education services for the past two years?

IDEIA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs. 20 U.S.C. Sections 1400 (d)(1)(A), 1412(a)(1). Where a school system fails to provide special education or related services to a disabled student, the student is entitled to compensatory education. *Walker v. D.C.*, 157 F. Supp. 2d 11, 30 (D.D.C. 2001). Petitioner must prove by a preponderance of the evidence that the educational program requested is reasonably calculated to confer the remedial and contemporary educational benefits by IDEIA. *Diatta v. District of Columbia*, 41 IDELR 124 (D.C.C. 2004).

In every case, however, the inquiry must be fact-specific and, to accomplish IDEIA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. The court must conduct a "qualitative inquiry" to determine whether the proposed compensatory placement and tutoring remedy are appropriate. *Reid v. District of Columbia*, 43 IDELR 32 (2005). In *Bethune v. District of Columbia*, 50 IDELR 134 (D.C.C. 2008), the court observed that the independent hearing officer (IHO) had sufficient information about the student's needs to craft an award that was reasonably calculated to compensate student for the school's FAPE violation. The IHO had the benefit of an evaluation report showing Student's reading level, a report card and progress report that showed that Student was not reading at grade level, and an estimate from a private tutoring service of the number of hours of tutoring that Student required. On review, the court determined that the IHO had conducted a fact-specific inquiry and tailored the award to the student's individual needs, and the award was determined to be appropriate.

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In this case, Petitioner requests compensatory education in the form of 1 hour/week of individual counseling through an independent provider outside of the school day, 1 hour/week of group counseling or social skills counseling to be provided by a DCPS provider during the school day, and 2 hours/week of academic tutoring at \_\_\_\_\_ with all compensatory education services to be provided for the duration of the 2010-2011 school year.

There was reliable testimony from an expert in clinical psychology and an expert in speech and language pathology that Student required special education services prospectively; however, the clinical psychologist could only offer an opinion that Student needed additional help in someone showing her how to do things, but she wasn't sure of how much additional help Student needed. The speech and language expert made no recommendation for compensatory education. Student's test scores in working memory meant that she had an average ability to accomplish tasks that require attention, concentration and mental control (Finding #6), and when Student underwent testing for the Psychoeducational Evaluation Report, she was eager to begin testing, did not take many breaks, attempted each test with concentration and determination, and did not give up on any part. (P-18). These factors lead the Hearing Officer to conclude that Student would not only eagerly participate in academic tutoring, but that she would persevere and do her best, and would ultimately benefit from it. Although there was no evidence in the record concerning the specific amount of tutoring that Student would need to bring her up to where she would have been but for the missed services, Petitioner's request for 2 hours/week of independent tutoring at \_\_\_\_\_ (a private provider) for one academic year is not unreasonable for Student who was not provided with any specialized instruction for the past two years and who now achieves academically at the 3<sup>rd</sup> and 4<sup>th</sup> grade level in all academic subjects. Any extra help that Student could receive to help her with her vocabulary skills would go a long way towards remedying Student's language deficiencies, which would in turn improve her academic performance. The Hearing Officer concurs with the testimonial conclusion of Dr. Donnelly that Student would benefit from someone showing her how to do things.

The clinical psychologist, Dr. Donnelly, opined that social skills counseling would be appropriate for Student, but that group therapy would only be appropriate upon the recommendation of Student's individual therapist. 1 hour/week of social skills counseling, to be provided in school by a DCPS provider, is not an unreasonable request because Student does need help with learning to build appropriate relationships with people, both verbally and by conduct. And, after all, she has been denied services for the past two years.

Additionally, Dr. Donnelly opined that individual therapy was certainly appropriate to address Student's behavior in school, especially for Student who indicated that she wanted to kill herself. (Testimony of Dr. Donnelly). 1 hour/week of counseling services by an independent provider for the upcoming academic year appears to be critical in addressing Student's precarious emotional needs and behaviors.

## **ORDER**

Based upon the above Findings of Fact and Conclusions of Law, this Hearing Officer orders:

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(1) Student is determined eligible under IDEIA as a student with a disability classification of Multiply Disabled, Emotional Disturbance, Learning Disorder, and Speech and Language Impairment;

(2) Petitioner is to provide the completed full independent Speech and Language Evaluation to be completed by \_\_\_\_\_ to DCPS within 5 days of its receipt by Petitioner;

(3) The IEP Team shall convene within 30 calendar days to review evaluations and develop an IEP and set up a Student Evaluation Plan for the conduct of a Functional Behavior Assessment and development of a BIP; and

(4) DCPS shall provide Student with 1 hour/week of social skills training by a DCPS provider during the school day, for the duration of the 2010-2011 school year; DCPS shall fund 2 hours/week of academic tutoring at \_\_\_\_\_ with transportation, for the duration of the 2010-2011 school year, with funding to be provided no later than August 18, 2010; and DCPS shall fund individual counseling for 1 hour/week with an independent provider for the duration of the 2010-2011 school year, with funding to be provided no later than August 18, 2010.

### **NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: August 4, 2010

*/s/ Virginia A. Dietrich*  
Hearing Officer

Copies to:

Petitioner (via U.S. mail)  
Petitioner's Attorney: Sarah Tomkins, Esq. (electronically)  
DCPS' Attorney: Blair Matsumoto, Esq. (electronically)  
DCPS (electronically)  
SHO (electronically)