

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

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2010 SEP 30 PM 1:36  
SSSE  
STUDENT HEARING OFFICE

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on behalf of  
the Student

Date Issued: September 30, 2010

Petitioner,

Hearing Officer: Wanda I. Resto Torres

v

Case No:

District of Columbia Public Schools,

Respondent.

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**HEARING OFFICER DECISION**

**BACKGROUND**

On August 9, 2010, a due process complaint (Complaint) was filed against the District of Columbia Public Schools (Respondent), pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA) of 2004. The Petitioner alleged the Student a -year old boy in the grade enrolled at a DCPS was denied a Free Appropriate Public Education (FAPE)<sup>1</sup> by *inter alia*, failing to evaluate the Student in all areas of suspected disabilities, failing to determine the Student eligible to receive special education and its related services as a result of his being disabled with an emotional disturbance and other health impairment, by failing to provide the Student an appropriate individualized education program (IEP), and by failing to provide him an appropriate placement. The Petitioner claimed that a psychological evaluation conducted by DCPS' found the Student met the criteria for emotional disturbance (ED) and other health impaired (OHI) as a result of his Attention Deficit Hyperactivity Disorder (ADHD); and that the Student requires a hearing assessment.

As relief the Petitioner requested a ruling that the Respondent denied the Student a FAPE by failing to find him eligible to receive special education. The Petitioner also requested the Respondent fund a hearing assessment; develop an IEP that includes a full time specialized instruction program with related services and include a behavior intervention program, and tutorial services. Additionally, the Petitioner

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<sup>1</sup> 20 U.S.C. §1415(c)(2)(B)(i)(I)

claimed the Student requires a private placement and a compensatory education award funded by the Respondent.

On August 13, 2010, the Respondent asserted a team reviewed all the Student's evaluations, data and had enough information to make a decision. The Respondent further asserted that the Student's DC Testing 2009 scores were basic in both math and reading/written expression; and the Student's action did not adversely affect his academic performance. The Respondent argued that neither a behavior intervention plan nor specialized instruction were appropriate for the Student. The Respondent stated the Student was offered services through a 504 plan<sup>2</sup> and it was rejected by the Education Advocate. As to the request for a hearing screening, DCPS responded that a recommendation in an evaluation is not a mandate to perform an assessment. The Respondent alleged the Student was not denied a FAPE, and objected to all the relief requested.

The undersigned was appointed as the hearing officer on August 11, 2010.

On September 3, 2010, a prehearing conference was held in the above matter. The Petitioner reiterated the issues in the Complaint and asserted that the Student met more than one of the necessary criteria to receive special education. The Respondent reasserted its position. The parties stipulated the Student attends a DCPS, and that the issues to be addressed by the Hearing Officer are whether the Student is eligible for special education, was he denied a FAPE and whether a compensatory education award is warranted. Both Counsels provided a synopsis of their witnesses' testimony.

The Petitioner was reminded that to sustain the request for a compensatory education award the Petitioner must satisfy the standard set out in *Reid v. District of Columbia*, 401 F.3d 516 (2005). The Respondent was instructed on its obligation to submit a compensatory education plan in its disclosure packet for the consideration of the Hearing Officer.

On September 20, 2010, a closed hearing was held the Petitioner was represented by Domiento CR Hill and the Respondent by Blair Matsumoto. The Petitioner presented documents labeled P-1 through 28 and five witnesses testified; Petitioner, Education Advocate, Speech Pathologist, Clinical Psychologist, and the Admission Director of a private school. The Respondent presented documents labeled DCPS 1 through 12; one witness testified; the Special Education Coordinator. The documents were admitted without objections. The hearing was conducted in accordance with the rights established under the IDEIA and the implementing federal and local regulations, and the SOP.<sup>3</sup> No written closing arguments or briefs were submitted.

### ISSUES

The issues to be determined are as follows:

1. Did the Student meet the criteria for emotional disturbance (ED) and other health impaired (OHI)?
2. Does the Student have a right to a hearing assessment?

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<sup>2</sup> 504 is a document identifying a plan with instructional services to assist students that have a disability that impacts a major life activity who are in the general education setting.

<sup>3</sup> IDEIA and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

3. Did the Respondent deny the Student a FAPE by failing to find him eligible for special education and related services?
4. Is the Student entitled to a compensatory education award?

### 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. The parties stipulated that the Student has been attending a public school in the District of Columbia where he completed the \_\_\_\_\_ grade. The Student has been retained twice, once in first grade and once in the second grade.
2. The Student was suspended from school during 6 weeks at the beginning of the 2009/2010 school year. On September 25, 2009, a Student Support Team (SST) met because of problems with the Student in the classroom. During the meeting the mother expressed to the team her concerns about the Student's academic and behavioral problems in school. The SST agreed to provide the Student football team participation as a positive incentive, a daily journal to facilitate home/school communication, a point sheet to track Student progress and recommended for the Petitioner to get counseling services. The Petitioner has not seen improvement in the Student; teachers call daily complaining about the Student's fighting and disruptive behaviors, and he is sent home regularly. The Student's Math, English, and Reading grades are not good, and he has average grades in physical education and video production classes.<sup>4</sup>
3. On December 15, 2009, DCPS administered a psychological evaluation to the Student because he was showing signs of attention problems, irritability and difficulty focusing on his school work. Per the report from the Student's teachers, he continued to struggle to do hard work, was constantly moving, easily distracted, had trouble keeping his mind on school work, excitable, was restless, and overactive. The report indicates the Student's RIAS<sup>5</sup> scores show cognitive abilities below average and his verbal tasks are in the low average range. The Conners3<sup>6</sup> assessments reveals the Student displays very elevated scores for attention deficit hyperactivity disorder; the Student's emotional issues are characterized by poor interpersonal relationships, and inappropriate behaviors and feelings. The evaluator concluded the Student's behaviors are consistent with an emotional disturbance as defined by IDEIA. The evaluator went on to note that the Student is a Student with attention deficit hyperactivity disorder, learning problems, and recommended counseling, and accommodations.<sup>7</sup>
4. On January 27, 2010, DCPS administered an occupational therapy assessment to the Student. According to the evaluator, the Student demonstrates below average visual motor integration and low visual perception skills. The evaluator asserted that the areas assessed and the deficits noted indicate

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<sup>4</sup> Testimony of the Petitioner, and P 13, September 25, 2010, Student Support Team, Initial Meeting Report.

<sup>5</sup> Reynolds Intelligence Assessment Scale, a measure of intellectual functioning in individuals between the ages of 3 and 94 years.

<sup>6</sup> An assessment tool utilized to measure overall behavior and attention deficit hyperactivity disorder in children and adolescents aged 8 to 18.

<sup>7</sup> P 8, DCPS Psychological Evaluation, December 15, 2009.

that there may be an adverse impact upon the delivery of educational services for the Student and recommended that the Student receive, among other things, direct occupational therapy services to assist with developing classroom accommodations and to enhance overall academic and classroom performance with focus on improving visual motor integration, processing skills and handwriting skills; and 1:1 tutorials to improve the Student's level of academic functioning.<sup>8</sup>

5. The Student's comprehensive psychological assessment of March 2010 indicates his cognitive ability score is 76 (below average) range as measured on the Wechsler Intelligence Scale for Children – 4<sup>th</sup> Edition,<sup>9</sup> used to assess the general thinking and reasoning skills of children aged 6 years to 16 years. This test has five main scores: Verbal Comprehension score, Perceptual Reasoning score, Working Memory score, Processing Speed score, and Full Scale score. The Student's Full Scale Intelligence Quotient is 70 (borderline); also within the borderline range are the Student's working memory index of 71, processing speed index of 73, and perceptual reasoning index of 71 all indicating deficits. The Visual Motor Integration 5<sup>th</sup> Edition Assessment yielded a low average standard score of 88. The Behavior Assessment System for Children 2<sup>nd</sup> Edition reveals behaviors within the "clinically significant and at risk" range and the teachers' reports demonstrated numerous behaviors from within the clinically significant range and significant learning problems. The Student's diagnostic is:
- Axis I: Oppositional Defiant Disorder Attention –Deficit/Hyperactivity Disorder Nos;
  - Axis II: Borderline Intellectual Functioning;
  - Axis III: Vision problem;
  - Axis IV- Academic/school problems, behavioral issues, instability within family, parental abandonment;
  - Axis V: Global assessment of functioning 55.

Similarly the Student's composite scores on the Wechsler Individual Test of Achievement in reading his score is 74 (low average), in mathematics the score is 91 (average).

It's the evaluator's opinion the Student is in the borderline range of intellectual functioning in most academic areas, suffers from oppositional defiant disorder, attention deficit hyperactivity disorder, academic/school difficulties, behavioral issues, and meets the criteria to receive special education as a result of his being emotionally disturbed and other health impaired. The evaluator concluded that the Student's current placement is not appropriate and he requires placement in a small, structured setting and at the hearing she recommended , a full time special education private school. The evaluator also recommended the Student receive a functional behavioral assessment and behavior intervention plan, a hearing screening, a speech and language screening, a psychiatric evaluation, school based therapy, and counseling services. The evaluator testified that the Student needs a hearing assessment because he requested during the evaluation for questions or instructions to be repeated various occasions.<sup>10</sup>

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<sup>8</sup> P 9, January 27, 2010, Occupational Therapy Evaluation.

<sup>9</sup> Wechsler Intelligence Scale for Children - Fourth Edition -identifies key cognitive strengths and weaknesses related to learning disabilities, executive function, attention disorders, intellectual disability, and giftedness in children.

<sup>10</sup> P 11, March 17, 2010, Comprehensive Psychological Assessment, and testimony of the Psychologist

6. A March 2010 Speech/Language Evaluation of the Student shows his receptive and expressive vocabulary skills score is 2 years and 7 months below his chronological age and his core language recalling score of 81 places him in the borderline of functioning. He also showed, scattered receptive and expressive language skills with most subtest scores falling more than 1.5 standard deviations below the mean on the Clinical Evaluation of Language Fundamentals-4 Assessment. The Student's scores indicate deficits in his ability to gather information, processing and responding to a teachers' instruction. The evaluator recommended that the Student receive 30 minutes weekly of receptive and 30 minutes a week of expressive skills building services.<sup>11</sup>
  
7. On April 15, 2010 the Student's functional behavioral assessment was conducted. According to the evaluator, the Student in Math class required assistance, he was provided a math coach within the classroom, and that service was discontinued. According to his teachers the Student is distractible, has disruptive behaviors in the classroom, acts immature and impedes the learning of other Student. Causing him significant problems in regular education setting. The Student was suspended four times as of September 2009. It the opinion of the evaluator that the student needs special education service to include behavioral support through a behavior intervention plan to reduce problematic behavior. The evaluator suggests that a smaller more individualized program to assist with both academic and behavioral deficits would diminish the risk of the Student dropping out of school. The evaluator recommended sitting accommodations to reduce distractions, regular guidance and supervision by the teacher, extra time to respond to test and classroom assignment, and limited distractions, among other things. The evaluator's assessment of the current school was it is extremely structured and organized. The students are consistently monitored in the classroom and in the hallway during transitioning. The teacher or a school administrator escorts the students to each class as a group. As a rule, the students are rewarded with positive points for on task and focused behavior in the classroom. Students with off task behaviors are verbally redirected back to task. A student who noncompliant with redirection an administrator escorts the student out of the classroom. Although the student's environment is structured, organized and clearly communicates its expectations of its students, he continues to have difficulty with focus and impulsivity.<sup>12</sup>
  
8. On June 24, 2010, the Student's MDT meeting was convened, evaluations were reviewed and an eligibility determination report was drafted. The report indicates the Student met more than one of the necessary criteria to receive special education as a result of his being emotionally disturbed. The report indicates that the Student's academic progress, social relationships and classroom adjustment have been adversely impacted by severe, chronic and frequent inappropriate behavior or feelings under normal circumstances; pervasive unhappiness depression or anxiety. It also noted that the behaviors occurred at school and at least one other setting over a long period of time and to a marked degree. The eligibility criteria checked as applying to the Student were the following: inappropriate types of behavior or feelings under normal circumstances; and a general pervasive mood of unhappiness or depression. There was discrepancy between the DCPS MDT members about the criteria necessary to be eligible. The parent and her educational advocate disagreed with the determination, and stressed that the DCPS' own psychological evaluation conducted found the Student met the criteria for emotional disturbance and

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<sup>11</sup> P12, March 19, 2010, Speech/Language Evaluation, and testimony of the Speech Pathologist.

<sup>12</sup>P 10, April 15, 2010, Functional Behavioral Assessment.

OHI as a result of his ADHD. The Petitioner asserted that the Student's numerous testing, the six weeks of in school suspension, and multiple out of school suspensions, as well as the Student's lack of academic growth warranted special education services. The DCPS representatives of the MDT proceeded to determine the Student ineligible for special education and its related services. The Respondent offered a 504 plan for the Student and it was rejected by the Petitioner because prior accommodations did not improve his social emotional or academic needs. The Education Advocate recommended a full time special education because the Student has lost instruction as a result of the many class suspensions, being retained twice and because his reading decoding skills are approximately 5 years behind his peers.<sup>13</sup>

9. It's the SEC position that at the June 2010 MDT meeting the Student's current grades and behavior were discussed. Both the general and special educations teachers indicated that the Student could perform on tasks with his peers when given direction. The eligibility criteria checklist was developed and it was determined that the Student did not meet the criteria of ED because his behavior was not severely impacting his academic. Although the Student should be in \_\_\_\_\_ grade and he performed at an 8<sup>th</sup> grade level in standardized tests, the team decided he could access the curriculum. At the meeting the DCPS Psychologist determined that the Student did not meet the criteria for emotional disturbance but did fit the other health impairment considering the ADHD. However the witness could not explain why the Psychologist statement at the MDT appeared to be inconsistent with his March evaluation where he determined the Student eligible under the IDEIA category of ED; nor why the teacher also in March reported the Student showed unusually high numbers of behaviors that are disruptive, lack of self control, is argumentative, defiant and threatening. The MDT meeting notes indicate the reading and language arts teacher stated a smaller classroom setting with fewer students would benefit the Student's efforts on staying focused. The Functional Behavior Assessment declared the Student's actions impede his academic progress, and that the staff should utilize intervention that focus on his behaviors, provide extra time for assignments and that he should attend a tutor lab after school. According to the SEC the Team felt that other interventions could be put in place to address the Student's problems, however none were discussed at the meeting because the EA did not want to discuss that option. During the meeting the Petitioner did not want to discuss family counseling and the Advocate did not want to discuss a 504 plan with counseling and a focus on ADHD because it would not provide the Student modification and accommodations. It was determined by the DCPS representatives of the MDT that the current DCPS was a very structured environment and that it could meet the Student's needs.<sup>14</sup>
10. The June 2010 Analysis of Existing Data document created by the MDT contains the summary for academic reading, written expression and emotional/social and behavioral development skills; and it reveals that there have been previous interventions attempted with the Student and his behavior continues to hinder his academic success. It also indicates that the Student has deficits in interpersonal relationships and manifests inappropriate behavior. The summary information for Academic Mathematics shows that verbal redirection, preferred seating, referral to behavior specialist to control

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<sup>13</sup> Testimony of the Education Advocate; P 17, June 24, 2010, Eligibility Determination Report; and DCPS 2, June 24, 2010, Eligibility Worksheet.

<sup>14</sup> Testimony of the Special Education Coordinator; DCPS 9, June 15, 2009; DCPS 10, January 22, 2010, Report Cards; and P 8, January 15, 2009, DCPS Psychological Evaluation; and DCPS 11, April 28, 2009, DC CAS Scores, and DCPS 4, June 24, 2010, MDT meeting notes.

behavior concerns, and the behavior contract were previously used interventions that were not successful and the Student continued to be a disruption in class.<sup>15</sup>

11. *is* a private full time therapeutic day school in Springfield, Virginia serving students who range in age from five to twenty-one. The Student was accepted without an IEP based on an analysis of his evaluations and interview. The school places a strong emphasis upon social-emotional development. The Student-to-teacher ratio is small and intensive, affording students a great deal of individualized attention. The class selected for the Student has a total of seven students who have variety of disabilities; there is one teacher, and a teacher assistant. Students have a behavior management program directed on assisting them to learn to follow rules, respect and learn behavior control techniques. The Student will not be able to leave the classroom because there are behavior specialists at the school's hallways that will re-direct the Student. There are seven behavior counselors, and Language and Speech, Occupational Therapy, Physical Therapy and Psychological Counseling services can be provided. The teachers are certified in the state of Virginia. The cost is approximately per day without related services.<sup>16</sup>

### **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:

#### **FAPE Determination**

The IDEIA and local law requires the Respondent to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia; ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement.<sup>17</sup>

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.<sup>18</sup>

Free Appropriate Public Education (FAPE) is defined as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."<sup>19</sup>

#### **Burden of Proof**

The burden of proof is the responsibility of the party seeking relief, in this case, the parent. It requires that based solely upon the evidence presented at the hearing, an impartial hearing officer

<sup>15</sup> DCPS 3, June 24, 2010, Analysis of Existing Data.

<sup>16</sup> Testimony of the Admission Director, Academy.

<sup>17</sup> 20 U.S.C. § 1400 et seq., and 5 D.C.M.R. § 3005.1 (2006)

<sup>18</sup> 5 D.C.M.R. § 3002.1 (2006)

<sup>19</sup> 34 C.F.R. § 300.17

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 a Free Appropriate Public Education (FAPE).<sup>20</sup>  
3030.14

The Respondent did not meet its legal obligation under the IDEIA to provide a FAPE.

### **Eligibility for special education services**

The Respondent is required as the local education agency to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living.<sup>21</sup>

3005.1 The LEA shall ensure that a full and individual evaluation is conducted for each child being considered for special education and related services in order to determine:

- (a) if the child is a "child with a disability" under this Chapter; and
- (b) the educational needs of the child.

To be eligible for special education services the child be evaluated and the child must be designated as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), an emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, other health impairment, a specific learning disability, deaf blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.<sup>22</sup>

Once a child has been referred to an IEP team for an eligibility determination, to determine the educational needs of such child. The IDEIA requires the local educational agency to:

- use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parents, that may assist in determining -- whether the child is a child with a disability . . . ;
- not use any single procedure as the sole criterion for determining whether a child is a child with a disability . . . ; and
- use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.<sup>23</sup>

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<sup>20</sup> 5 D.C.M.R. § 3030.14 (2006)

<sup>21</sup> 20 U.S.C. § 1400(d)(1)(A), and 5 D.C.M.R. § 3002.1 (2006)

<sup>22</sup> 34 C.F.R. 300 §§ 308, 306(2)(b), and 5 D.C.M.R. §§ 3005.1, 3005.9(g), and 9(h).

<sup>23</sup> 20 U.S.C. § 1414(a)(1)(C)(i).

A January 2010, DCPS administered an occupational therapy assessment that showed the Student to be below average in visual motor integration and low visual perception skills. The evaluator asserted that the areas assessed and the deficits noted indicate that there may be an recommended that the Student receive, among other things, direct occupational therapy services focus on improving visual motor integration, processing skills and handwriting skills.

The results of the evaluations must be given considerable weight in determining the child's eligibility for services and in the development of the child's IEP.<sup>24</sup> Here there was evidence that the team had various evaluations including an evaluation administered by the Respondent which declared the Student eligible. Yet, the team failed to explain the discrepancies between the evaluations, and their reasoning for the Student's ineligibility for specialized instruction.

### **Emotional disturbance**

The Petitioner alleged there was sufficient information in December 2009 to determine the Student eligible for special education services as a student with an emotional disturbance.

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:

- An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- Inappropriate types of behavior or feelings under normal circumstances.
- A general pervasive mood of unhappiness or depression.
- A tendency to develop physical symptoms or fears associated with personal or school problems.<sup>25</sup>

The uncontested evidence is that the Respondent had an evaluation in December 2009 identifying the Student as ED. The MDT had available in June 2010 two psychological evaluations of the Student suggesting a diagnosis of ED and the Student's behavior and assessment implied there were concerns of ADHD. The MDT failed to discussed whether the Student exhibited any of the listed characteristics "over a long period of time," "to a marked degree," or whether any of such characteristics had adversely affected his educational performance. The SEC could not articulate whether the Student suspension and other interfering factors were discussed to complete a picture of the Student's academic performance. The report from the only Psychologist to testify also found the Student's emotional issues are characterized by poor interpersonal relationships, and inappropriate behaviors/feelings consistent with emotional disturbance. The Respondent presented no evidence to contradict that conclusion beyond testimony from the SEC who left many inconsistencies unexplained. The evidence was that the MDT focused on the

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<sup>24</sup> 34 C.F.R. §300.305(a).

<sup>25</sup> 34 C.F.R. § 300.8(c)(4), and 5 D.C.M.R. 3001.1.

Student's standardized tests and not the totality of his academic history when it determined the Student not eligible for special education services.

The achievement of passing marks and regular advancement from grade to grade will be "one important factor in determining educational benefit".<sup>26</sup>

### **Other Health Impairment**

The IDEIA defines Other Health Impairment as having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that --

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia; and
- (ii) Adversely affects a child's educational performance.<sup>27</sup>

While the Respondent alleged the Student's grades were average and he could access the curriculum. It has been proven that the Student's assessments scores and cognitive abilities are below average, and his verbal tasks are in the low average range. The evaluations and evidence demonstrated the Student is in the borderline range of intellectual functioning in most academic areas, suffers from oppositional defiant disorder, attention deficit hyperactivity disorder, academic/school difficulties, behavioral issues, and meets the criteria to receive special education as a result of his being emotionally disturbed and other health impaired.

The IDEIA provides that a child is eligible to receive special education and related services even though the child is advancing from grade to grade. A public agency must provide a child with a disability special education and related services to enable him or her to progress in the general curriculum, thus making clear that a child is not ineligible to receive special education and related services just because the child is, with the support of individually designed services, progressing in the general curriculum from grade-to-grade or failing a course or grade. The group determining the eligibility of a child for special education and related services must make an individual determination as to whether, notwithstanding the child's progress in a course or grade, he or she needs or continues to need special education and related services.<sup>28</sup>

The Hearing Officer determines the Respondent should have identified the Student as a Student in need of special education services by December 2009.

### **Hearing Assessment**

D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services."<sup>29</sup> All areas "related to the suspected disability"

<sup>26</sup> Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982); Sherman v. Mamaroneck, 340 F.3d 87, 93-94 (2d Cir. 2003).

<sup>27</sup> 34 C.F.R. 300.7(c)(9) (2004)

<sup>28</sup> 34 C.F.R. 300.101(c)

<sup>29</sup> 5 D.C.M.R. § 3005.1

should be assessed, including: academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability *and adaptive behavior*), communicative status, and motor abilities. The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs."<sup>30</sup>

In the present case, there was a recommendation made for a hearing assessment for the Student that was not addressed by the MDT, nor did the Respondent file a Complaint challenging the appropriateness of the recommended and requested evaluation. The Respondent must fund an independent hearing assessment.

### **Placement for the Student**

The child's placement must be determined at least annually, be based on the student's IEP, and be as close as possible to the student's home. Unless the IEP requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. In selecting the least restrictive environment (LRE), requires each public agency to ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. The removal of children with disabilities from the regular educational environment must occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>31</sup>

Placement decisions must be made based on the student's IEP and the unique needs of each child, by a group of persons, including the parents, and other persons knowledgeable about the Student, the meaning of the evaluation data, and the placement options.<sup>32</sup> The Student in this case does not have an IEP. The evidence was that redirection, preferred seating, referral to behavior specialist to control behavior concerns, and the behavior contract all were strategies and intervention outside an IEP that were not successful with the Student. However, the evidence which Petitioner relied upon at the Hearing does not support a claim that full time special education is recommended. One evaluator suggests that a smaller more individualized program to assist with both academic and behavioral deficits would diminish the risk of the Student dropping out of school. Another evaluator at the Hearing stated that the Student requires placement in a small, structured setting and recommended Accotink a full time special education private school. The additional evidence was that the Education Advocate believes the Student requires a full time placement.

Based on the evidence presented at the Hearing, the Hearing Officer concludes the record shows the Student has been denied a FAPE, he requires specialized instruction; and an IEP. The record does not support a full-time specialized instruction placement for the Student at this time. The MDT will reconvene to develop an IEP to provide specialized instruction in a small setting with no less than 10 hours per week of specialized instruction in reading, written language and spelling, as well as thirty minutes a week of individual counseling, 30 minutes a week of group counseling, 30 minutes a week of speech and language

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<sup>30</sup> 34 C.F.R. § 300.304(c)(4), and 5 D.C.M.R. §§ 3005.9(g) and(h) (2006)

<sup>31</sup> 20 U.S.C. § 1412(a)(5) and 34 C.F.R. § 300.114-300.118.

<sup>32</sup> 34 CFR §300.116(a)(1).

services, one hour a week of direct occupational therapy services and it must include behavior intervention and transition plans.

### **Compensatory Education**

The Respondent has denied the Student a FAPE. The Respondent's violation entitles the Petitioner to a compensatory education award determination to be made by the Hearing Officer. When there is a denial of FAPE a compensatory award should be granted.<sup>33</sup>

Whichever path the court chooses, the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits. It rejected arbitrary approaches to the award of compensatory education.<sup>34</sup>

A Hearing Officer cannot determine the amount of compensatory education that a student requires unless the record provides him with "insight about the precise types of education services [the student] needs to progress."<sup>35</sup>

The Petitioner presented a compensatory education plan based on the Respondent failures to put in place strategies to manage the Student's behavior, or to address his lack of academic achievement for approximately 2 years. The plan estimates the Student missed approximately twenty-two weeks of services of a full time specialized instruction program; and calculates the date the services should have commenced on December 16, 2009 through June 24, 2010 when the MDT convened. The Petitioner's plan calculated that 2 hours a week of additional support is the amount of time the Student can accommodate and it should be for 22 weeks. The plan recommends the Student be provided 44 hours of tutoring in reading, written expression, and spelling for services from the Huntington or Sylvan Learning Center. The plan proposed that the Student also be given 22 hours from a male mentorship program, a laptop computer to assist the Student in his reading disorder and a Lindamood Bell Diagnostic Assessment to determine his academic deficits.

The plan proposed by the Petitioner suggests 2 hours a week of specialized instruction in reading, written expression and spelling for individual tutoring service and justified the request based on the Student's schedule and need. The Hearing Officer requested twice from the Respondent to propose a compensatory education plan and the Respondent ignored the request.

The Petitioner requested a diagnostic evaluation to determine if the Student would benefit from supplemental academic services. However the Student as recent as March 2010 was assessed in his Oral Vocabulary, Oral Language Comprehension, Visual Memory, Word Recognition, Reading Comprehension, Spelling and Math skills.

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<sup>33</sup> *Mary McLeod Bethune Day Academy Public Charter School v. Bland Civil* 534 F. Supp. 2d 109 (D.D.C. February 20, 2008)

<sup>34</sup> *Reid v. District of Columbia*, 401 F.3d 516 (2005)

<sup>35</sup> *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005).

In December 2009, a DCPS Psychologist diagnosed the Student's behaviors consistent with an emotional disturbance, the Student's cognitive abilities are below average, his verbal tasks are in the low average range and he has ADHD. Considering the Student's academic history, he has two prior grade retentions and is 2-6 years behind his peers academically. The various assessments, the testimony of witnesses, along with the plan, delivered the insight necessary to determine the Student needs additional supplemental services to progress.

The Hearing Officer finds that an appropriate compensatory education award based on the Student scores, behaviors, and the delays in determining the Student eligible albeit the evaluations and his academic history warrant a compensatory education award. A reasonable plan for the academic tutoring services based on the Student's core subject weaknesses and the time he has available during the day; is 2 hours per week of supplemental individualized tutoring during the 2010-2011 school year. The Student will also be provided with a laptop computer with reading software integrated.

The male mentoring program requested by the Petitioner is a service that the Petitioner can seek through community based initiatives.

### **ORDER**

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

**ORDERED**, the Respondent will convene an MDT/IEP meeting by October 29, 2010 to develop an IEP providing the Student specialized instruction in a small setting with no less than ten hours per week of specialized instruction in reading, written language and spelling, as well as thirty minutes a week of individual counseling, 30 minutes a week of group counseling, 30 minutes a week of speech and language services, one hour a week of direct occupational therapy services and it must include behavior intervention and transition plans. The MDT/IEP team with the Petitioner will determine the strategies the Student's behavior intervention plan should include. At that meeting the team must discuss and determine placement consistent with the Student's unique needs and his IEP. The MDT/IEP will document in writing the pros and cons of all locations of services, **it is further;**

**ORDERED**, the Respondent shall discuss the which reading deficits are to be addressed and which reading improvement software is appropriate, **and** provide the Student with a laptop computer by October 29, 2010, **it is further;**

**ORDERED**, Respondent shall provide 2 hours per week of supplemental individualized tutoring in reading, written expression, and spelling, through the academic year 2010-2011. The Student will also be provided with a laptop computer with reading software integrated, **it is further;**

**ORDERED**, following the MDT meeting, the Respondent shall have five school days to issue a prior notice of placement to a DCPS, and 20 school days to issue a prior notice of placement to a non public or private school, **it is further;**

**ORDERED**, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. The Respondent shall document with affidavits and proofs of service any delays caused by Petitioner or Petitioner's representatives, **it is further**;

**ORDERED**, the Respondent shall send all notices to the Petitioner with copies of such to the attorney, **it is further**;

This order resolves all matters presented in the Petitioner's August 9, 2010 due process hearing complaint; and the hearing officer makes no additional findings.

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B) ) and 34 C.F.R. §300.516.

Dated: September 30, 2010



Wanda I. Resto Torres -Hearing Officer