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OSSE
STUDENT HEARING OFFICE
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Confidential

STUDENT[1], by and through his Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent. * The case number has been designated 2011-0785 A to denote the bifurcation the decision under the 75-day timeline.	HEARING OFFICER'S DETERMINATION Hearing Dates: September 15, 2011 September 22, 2011 Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened September 15, 2011, and concluded on September 22, 2001, at the OSSE Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2007 and Hearing Room 2006 respectively.

BACKGROUND:

Student or "the student" is age fourteen and has been determined eligible as a child with a disability under IDEA with a disability classification of multiple disabilities ("MD") including specific learning disability ("SLD") and other health impairment ("OHI") for the condition of Attention Deficit Hyperactivity Disorder ("ADHD"). During the 2011-2012 school year the student attended a District of Columbia public middle school hereinafter referred to as "School A." During the 2010-2011 school year, the student was in the eighth grade at School A. Prior to attending School A, the student attended grade at the D.C. public elementary school he had attended for several years prior, hereinafter, referred to as "School B." School B had been that year been expanded to include the grade.

On February 8, 2011, the student brought with him to school a bottle containing a liquid suspected by School A staff to be an explosive material and/or fuel for fire or an accelerant and a lighter. These items were taken from the student and he was subjected to disciplinary action including removal to an alternative placement for 45 days. A manifestation determination review ("MDR") was held on February 15, 2011, to determine if the student's conduct was a manifestation of his disability. The DCPS representative determined the conduct was not a manifestation of the student's disability. The parent and her representatives attending the meeting disagreed. The student was given a long-term off-site suspension and was to attend the from February 8, 2011, to April 14, 2011, and return to School A on April 15, 2011.

On March 2, 2011, Petitioner filed the due process complaint asserting DCPS has failed to conduct triennial evaluations and challenging whether among other things the MDR determination. The complaint resulted in an order issued by another Hearing Officer on April 30, 2011. The April 30, 2011, order incorporated the terms of a settlement agreement between the parties and dismissed with prejudice[2] some claims raised in the underlying complaint and dismissed other issues without prejudice.[3] The order also directed that DCPS convene a

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[2] The issues raised in the March 22, 2011, complaint that were specifically dismissed with prejudice by the April 30, 2011, order were: (1) the February 15, 2011, MDT determination, (2) the alleged failure to provide the student services during his suspension from February 8, 2011, and March 28, 2011, (3) failure to conduct triennial evaluations of the student at least once every 3 years between April 2007 and March 2011, and (4) failure to develop and implement the student's May 21, 2010, IEP from August 23, 2010, through the date of the complaint, March 2, 2011.

[3] The issues dismissed without prejudice was whether DCPS denied the student a FAPE because it failed to develop

multidisciplinary team individualized educational program ("MDT/IEP") meeting on May 19, 2011, to *inter alia* review independent evaluations, review and revise the student's EIP if necessary and discuss the student's educational placement.

On July 29, 2011, Petitioner filed the current complaint to assert claims that were not dismissed with prejudice by the April 30, 2011, order, and issues that arose from the May 19, 2011, IEP meeting.[4] Petitioner seeks as relief: (1) revision of the student's IEP to reflect a full time program and placement that includes full-time hours in reading/writing/math, behavioral support services and occupational therapy, and the accommodations such as water in the classroom, mints or gum to assist with his attention span, (2) placement and DCPS funding at the for school year 2011-2012,[5] (3) reimbursement to the parent for the student's graduation fee paid to DCPS, and (4) compensatory education including: a) DCPS to pay for a Lindamood Bell assessment and resulting program, b) DCPS to pay for summer camp for summer of 2012 and 2012 to be chosen by the parent, c) DCPS to pay for musical instruction for 2 years, e) DCPS to provide a laptop for school and home with appropriate software.

DCPS filed a written response on August 11, 2011. DCPS denied the student had been denied a FAPE and asserted the student's IEP for SY 2009-2011 and 2010-2011 were appropriate and the student's educational placement at Schools B, A and C were and are appropriate.

On August 9, 2011, a resolution meeting was held regarding the complaint and the matter was not resolved. A pre-hearing conference was conducted on August 11, 2011, that resulted in a pre-hearing order issued August 16, 2011. A second pre-hearing conference was convened on August 18, 2011, to review issues the parties were directed to brief. A second pre-hearing order was issued on August 23, 2011. On August 30, 2011, the Hearing Officer issued an order determining issues that were briefed by the parties.[6]

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and implement an appropriate IEP for the student from April 2007 through the date of the April 30, 2011, order. However, in the current case the issues were limited to the two year statute of limitations, thus some of the claims dismissed without prejudice were not allowed to be adjudicated.

[4] The challenge of DCPS' May 19, 2011, MDR determination, which was subject to the expedited hearing provisions of 34 CFR § 300.530, was addressed in an HOD issued September 29, 2011. The current HOD addresses all other issues and claims for relief alleged in the complaint that were adjudicated on the 75-day IDEA timeline.

[5] Petitioner seeks KDS as the student's designated placement.

[6] These issues were: whether Petitioner was prejudiced by DCPS' late written response and the remedy therefore, (2) the applicability of the two-year statute of limitations as to claims regarding the 2006-07 and 2007-08 school years, and (3) the ability of the Hearing Officer to grant declaratory relief only as to the MDR issue.

ISSUES: [7]

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to provide the student appropriate IEPs and appropriate services during SY 2009-2010 and SY 2010-2011? [8]

2. Whether DCPS denied the student at FAPE by failing to implement the student's May 2010, IEP from May 2010 through the end of the 2009-2010 school year and from March 23, 2011, through May 19, 2011? [9]

3. Whether DCPS denied the student at FAPE by failing to provide the student appropriate educational placement during the 2010-2011 and 2011-2012 school years by not providing the student a full-time out of general education placement?

4. Whether DCPS denied the student at FAPE by failing to conduct a FBA and develop a BIP in May 2011, following the May 19, 2011, MDR determination? [10]

5. Whether DCPS denied the student at FAPE by failing to make accommodations to allow the student to participate in his graduation ceremonies at School A in June 2011?

6. Whether DCPS denied the student at FAPE by failing to provide the parent the student's educational records and thereby depriving her of meaningful participation in the student's educational planning? [11]

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-33 and DCPS Exhibit 1-18) that were admitted

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[7] The alleged violations and/or issues listed in the complaint may not directly correspond to the issues outlined here. The Hearing Officer has restated the issue in this a manner based on the facts alleged in the complaint and in light of the relief sought.

[8] Petitioner has alleged is inappropriate about the IEPs for SY 2009-2010 and 2010-2011 is (1) insufficient specialized instruction (not full time services) and (2) no OT services.

[9] Petitioner alleges the student did not receive pull out services (10 hours per week) as his IEP required and did not receive consistent counseling services (30 minutes per week) at School B during SY 2009-2010 and at School B during SY 2010-2011.

[10] Although DCPS authorized an independent FBA at the resolution session, which had not yet been conducted by the dates of the hearing, Petitioner alleged the student was harmed by the absence of an FBA being conducted following the May 19, 2011, MDR determination.

[11] In an email from Petitioner's counsel sent on September 20, 2011, at the direction of the Hearing Officer, Petitioner's counsel stated that that educational records that had not been provided by DCPS and remained outstanding as of the hearing were: (1) the student's IEP progress reports for the school years from 2006 through 2011, (2) the service tracker logs for school year ("SY") 2006-2007, and SY 2007-2008, (3) the services tracker logs from February 2011 through June 2011, and (4) the IEP meeting notes for SY 2009-2010.

into the record and are listed in Appendix A. Any documents not admitted into the record are so noted in Appendix A.[12] Witnesses are listed in Appendix B. Although not evidence the Hearing Officer considered the written closing arguments presented by both counsel on September 28, 2011.

FINDINGS OF FACT: [13]

1. The student is age and has been determined eligible as a child with a disability under IDEA with a disability classification of multiple disabilities ("MD") including specific learning disability ("SLD") and other health impairment ("OHI") for the condition of Attention Deficit Hyperactivity Disorder ("ADHD"). (DCPS Exhibit 4-1, 5)

2. During the 2011-2012 school year the student attended a District of Columbia public middle school, School A. During the 2010-2011 school year, the student was in the eighth grade at School A. Prior to attending School A, the student attended the D.C. public elementary school he had attended for several year prior, School B for seventh grade. School B had been that year been expanded to include the seventh grade. Prior to the student's seventh grade year at School B the parent was pleased with the special education services the student received at School B. (Parent's testimony)

3. While in the 6th grade attending school B the student had an IEP developed on April 9, 2009. The IEP prescribed the student receive 10 hours per week of specialized instruction out of the general education setting and 30 minutes per week of behavioral support services. This is the IEP under which the student received services during the 2009-2010 school year at School B. (Petitioner's Exhibit 6-5)

4. On March 25, 2010, while the student was in seventh grade at School B, DCPS convened another IEP meeting. The parent was in attendance and signed the IEP and indicated her participation in its development and her consent to its implementation. The IEP noted the student's progress in Math and that he scored "Basic" on the DCBAS Distict-wide standardized assessment. The IEP noted the student had been given a Bregance Reading Assessment in September 2009 which indicated he was performing at the sixth grade reading comprehension level. On the DCBAS the student scored Basic in most areas of Reading. However, the IEP noted the student's had weaknesses in both Math, Reading and Written Expression needed to be addressed with specialized instruction. The IEP prescribed the student be provided 30 minutes per day of specialized instruction in each

[12] DCPS Counsel objected to the following documents presented by Petitioner: P-6, 7, 8, 9, 10, 11, 12, 20, 32. The Hearing Officer only disallowed P-32 as hearsay. The remaining documents objected to by DCPS Counsel were admitted because DCPS counsel did not raise the objections prior to the day of the hearing as the pre-hearing order required. There were no objections by Petitioner to DCPS documents.

[13] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

of these three areas for a total 7.5 hours of specialized instruction per week in an out of general education setting and 30 minutes per week of behavioral support services. (Petitioner's Exhibit 5-1, 5-3, 5-4, 5-9)

5. On May 21, 2010, DCPS convened another IEP meeting for the student. The IEP did not cite any new evaluations or assessments. However, the student's specialized instruction in Written Expression was increased from 30 minutes per day to 60 minutes per day in an out of general education setting. Otherwise the student's IEP remained the same. This IEP was the IEP the student brought with him when be began attending School A in the eighth grade at the start of the 2010-2011 school year. (Petitioner's Exhibit 4-9)

6. During the time the student attended School B the student's parent repeatedly requested that the student received occupational therapy ("OT") services. In November 2005, May 2007 and May 2008, DCPS conducted OT evaluations of the student. Each evaluation based on the assessments provided to the student determined the student was not have visual perception or motor skill difficulties that would warrant occupation therapy services. However, the evaluation reports noted that school staff should continue to assist the student in working on his handwriting. (Parent's testimony, Petitioner's Exhibit 9, 10, 11)

7. During the student's seventh grade year during SY 2009-2011 at School A the student did not receive all of his pull-out specialized instruction. During this school year the student grades began to fall. Because of the student's poor performance the parent chose to move the student to School A for SY 2010-2011 for eighth grade. The parent applied for the student to attend School A. The School A principal changed the student's failing grades and the school staff made recommendations so that the student could be accepted to attend School A. The student began attending there in August 2010. (Parent's testimony)

8. On February 8, 2011, the student brought with him to school (School A) a bottle containing a liquid suspected by School A staff to be an explosive material and/or an accelerant and a lighter. These items were taken from the student and he was subjected to disciplinary action including removal to an alternative placement for 45 days. (Parent's testimony)

9. A manifestation determination review ("MDR") was held on February 15, 2011, to determine of the student's February 8, 2011, conduct was a manifestation of his disability. The DCPS representative determined the conduct was not a manifestation of the student's disability. The parent and her representatives attending the meeting disagreed. The student was given a long-term off-site suspension and was to attend the Choice Academy from February 8, 2011, to April 14, 2011, and return to School A on April 15, 2011. (Petitioner's Exhibits 19-1, 21-1)

10. Petitioner filed the due process complaint challenging among other things the February 12, 2011, MDR determination. The complaint resulted in an order issued by another Hearing Officer on April 30, 2011. The April 30, 2011, order incorporated the terms of a settlement agreement between the parties and dismissed with prejudice some claims

raised in the underlying complaint and dismissed other issues without prejudice. The order also directed that DCPS convene a multidisciplinary team individualized educational program ("MDT/IEP") meeting on May 19, 2011, to *inter alia* review independent evaluations, reconsider the February 15, 2011, MDR in light of the independent evaluations and review and revise the student's EIP if necessary and discuss the student's educational placement. (Petitioner's Exhibit 33)

11. On May 19, 2011, DCPS convened a MDT/IEP meeting for the student at School A and reviewed two independent evaluations including a psychological and psycho-educational evaluation. After a review of the independent psychological evaluation at the May 19, 2011, IEP meeting the student's disability was amended to also include OHI for ADHD. (DCPS Exhibits 3, 4-1, 5, Petitioner's Exhibit 1, 2)

12. The clinical psychologist who conducted the independent psychological evaluation of the student reviewed at the May 19, 2011, meeting concluded the student had average cognitive abilities. However, the evaluation reveled the student was operating in Reading, Math, and Written Expression at the at approximately the 4th grade level – four grade level below his current grade at School A. The evaluator confirmed the student diagnosis of ADHD and a learning disability in Reading, Math a Written Expression. The evaluator recommended the student not move to a regular high school with pull out services. Rather, the evaluator recommended the student be in a school with a low student to teacher ratio with no more than 5 to 1 and a classroom with no more that 10 to 12 students to address his very low academic functioning and attention deficits. (Dr. Missar's testimony, Petitioner's Exhibit 1-5, 1-7, 1-8, 1-12,1-13)[14]

13. A DCPS psychologist reviewed the independent psychological evaluation and observed the student and participated in the student's May 19, 2011, IEP meeting. The DCPS psychologist agreed with most of the conclusions and recommendations of the independent evaluation but did not agree the student was in need of a full time out of general education placement because the student's showed little difficulties in his social emotional development the general education setting and the evaluator believed the student would be assisted by being with non-disabled peers. (Dr. Mill's testimony, DCPS Exhibit 11)

14. The student was provided specialized instruction in pull-out and in the regular education classroom in Math during his time at School A during SY 2010-2011. The student was provided the accommodations in the classroom that are in his most recent IEP developed May 19, 2011. Some of the student's IEP goals were addressed and the student made some progress. Some of the goals were not addressed because the student had not had made sufficient progress in all goal areas during the year. The student got along well with his peers and was competitive in academics. The student received other specialized instruction in other areas from other special education teachers.
testimony)

[14] This witness was qualified as an expert in clinical psychology.

15. The student was provided behavioral support services at School A during SY 2010-2011 as prescribed by his IEP. The student showed minimal progress toward his IEP social/emotional/behavioral goals but did not master many of them. testimony)

16. On April 21, 2011, an independent occupational therapy evaluation was conducted of the student. The evaluator determined the student's fine motor integration and visual motor integration were below average and the student had difficulty with fluency, legibility, reversals, writing sentences and completing assignments. The evaluator recommended the student received direct OT services. (Petitioner's Exhibit 2-9, 2-10)

17. At the May 19, 2011, IEP meeting , which the parent attended along with her education representatives, the IEP team reviewed the clinical psychological and OT evaluations. The IEP team increased the students specialized instruction in the out of general education setting to 5 hours per week in Reading, Written Expression and Math for a total of 15 hours of specialized instruction. The student's weekly behavioral support services were increased to 45 minutes per week. The IEP also added OT services of 45 minutes per week. The parent did not agree with the IEP and asserted the student should be provided a full time out of general education IEP and services based on the recommendation of the evaluations reviewed and the student's continued poor academic performance. Following the meeting DCPS issued a prior notice for the student to attend School C, a DCPS public high school at the start of the 2011-2012 school year. (Parent's testimony, Petitioner's Exhibit 3-14, 24)

18. During the 2011-2012 school year at School A, the student earned many below average grades on his report card. In the second advisor he earned an "F" in Reading, in the third advisory he earned an "F" in Pre-Algebra and Hearth/P.E. However he did earn a "C" in the first and second advisory in English and "C" and "B" in the first and second advisory in Pre-Algebra. (Petitioner's Exhibit 23-5)

19. The student's IEP progress reports for SY 2009-2010 and 2010-2011 show missed results as to his progress relative to his IEP goals. He had mastered a small number of the goals, was progressing in some and the goals was not introduced in others. The student final report card for the SY 2010-2011 reflected that he earned a "B" in History, a "C" in Pre-Algebra, and Heath/PE, and a grade of "D" in English, Science and another Math class. (DCPS Exhibit 13, 14, 15)

20. During the student's eighth grade year at School A, the student did not receive pull-out specialized instruction. The specialized instruction was provided in the general education classroom. The School A staff told the parent that the school did not have adequate staff to provide the student the pull-out services in his IEP. After the disciplinary incident that occurred in February 2011, the student's time at School A became increasingly challenging. During an end of year award ceremony the student responded to some taunting from other students by using a profane gesture. As result of his behavior the student was not allowed to participate in the end of year commencement ceremonies. The student was not provided any supports by the school so that he could attend the

graduation ceremony. The student's parent had paid to School A for the student to participate in the commencement exercises. When the student was not allowed to participate because of the incident the parent's was not refunded. (Parent's testimony)

21. The student began attended School C at the start of the 2011-2012 school year. At School C the student is being provided the services prescribed by his current IEP. The specialized instruction is being provided in the out of general education setting and this related services are being consistently provided by certified related service providers. The student is also receiving support from a special education teacher in some of his general education classes. School C only has ninth grade students during the current school year. The student seems to enjoy class. The student gets along well with his non-disabled peers and there have been no behavior problems since he began attending School C. The student has been provided the accommodations listed in his current IEP. testimony, testimony)

22. The parent's educational assistant visited School C recently and the School A special education coordinator informed her that the student's specialized instruction was being provided in an inclusion model only in the general education setting but by a special education teacher. testimony)

23. The student has been interviewed by and accepted to the School is a full time out of general education non-public school that services students with various disability classifications. All the student have average cognitive abilities with educational deficits that are language based. The program has students from pre-K to 12th grade. has certified special education teacher and certified related services provides. The average class size at the school is 10 students with two teachers. program, tuition and rates for related services have been approved of OSSE. A classroom has been identified for the student with a teacher who is currently awaiting her reciprocal certification from the District of Columbia. offers students credits toward a DCPS high school diploma and offers transition services that help students identify and pursue career and/or academic goals post high school. The school can offer the student an intensive reading and math program to help address his significant academic deficits. If the student cam to the student's IEP would be amended to include full time specialized instruction out of general education. testimony, Petitioner's Exhibit 15)

CONCLUSIONS OF LAW:

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

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the

decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [15] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

ISSUE 1: Whether DCPS denied the student a FAPE by failing to provide the student appropriate IEPs and appropriate services during SY 2009-2010 and SY 2010-2011?

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also Scott v. District of Columbia, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

20 U.S.C. 1414(a)(i) defines Individualized Education Program as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes a statement of the child's present levels of academic achievement and functional performance." It includes measurable goals, statements of related services, assistive technology and other appropriate accommodations. It is developed by the IEP team which consists of the child's parent, general education teachers, LEA special education teachers and anyone deemed as a necessary participant by reason of the services provided to the student. The IEP is the centerpiece or main ingredient of special education services.

Conclusion: The evidence clearly demonstrates the student's IEPs being implemented during SY 2009-2010 and most of SY 2010-2011 were not based on current evaluations. Consequently, the services provided to the student prior to the student's May 19, 2011, IEP were inappropriate

[15] The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the 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.

and denied the student a FAPE. However, the student's current IEP developed May 19, 2011, is based on current evaluations and contains increased specialized instruction and related services including OT as recommended by his most recent evaluations. Although the student's current psychological evaluation recommends that the student be in a full time special education program, despite the evaluations extensive experiences and creditials and designation as an expert in clinical psychology the Hearing Officer was not convinced by his testimony that the student should be in a total out of general education setting. The student is currently significantly behind grade level but with the increased services that are being provided in this his current IEP and the additional services that are provided below as compensatory education the Hearing Officer concludes the student's current services should be assessed after some has allowed for the new IEPs implementation in his new educational setting and the additional services have been provided.

ISSUE 2: Whether DCPS denied the student at FAPE by failing to implement the student's May 2010, IEP from May 2010 through the end of the 2009-2010 school year and from March 23, 2011, through May 19, 2011?

20 U.S.C. 1414(a)(i) defines Individualized Education Program as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes a statement of the child's present levels of academic achievement and functional performance." It includes measurable goals, statements of related services, assistive technology and other appropriate accommodations. It is developed by the IEP team which consists of the child's parent, general education teachers, LEA special education teachers and anyone deemed as a necessary participant by reason of the services provided to the student. The IEP is the centerpiece or main ingredient of special education services.

Conclusion: The evidence demonstrates, based on the parent's credible testimony that the student was not provided consistent special education servicers as prescribed by his IEP during the 2009-2010 school year, thus for the period covered during that period that is the subject of his hearing May 2010 through the end of the 2009-2010 school year the student did not receive his specialized instruction and related services. However, with regard to the 2010-2011 school year there was credible testimony offered by the staff of School A that the student's IEP was consistently implemented as his IEP prescribed.

ISSUE 3: Whether DCPS denied the student at FAPE by failing to provide the student appropriate educational placement during the 2010-2011 and 2011-2012 school years by not providing the student a full-time out of general education placement?

34 C.F.R. § 300.114 provides:

> LRE requirements.(a) General. (1) Except as provided in Sec. 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and Sec. Sec. 300.115 through 300.120.
> (2) Each public agency must ensure that--
> (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
> (ii) Special classes, separate schooling, or other removal of children with disabilities from the

regular educational environment occurs 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.

34 C.F.R. § 300.116 provides:

> In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that--
> (a) The placement decision--
> (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
> (2) Is made in conformity with the LRE provisions of this subpart, including Sec. Sec. 300.114 through 300.118;
> (b) The child's placement--
> (1) Is determined at least annually;
> (2) Is based on the child's IEP; and
> (3) Is as close as possible to the child's home;
> (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
> (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
> (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

The student's current IEP developed May 19, 2011, is based on current evaluations and contains increased specialized instruction and related services including OT as recommended by his most recent evaluations. Although the student's current psychological evaluation recommends that the student be in a full time special education program, despite the evaluations extensive experiences and credentials and designation as an expert in clinical psychology the Hearing Officer was not convinced by his testimony that the student should be in a total out of general education setting. The student is currently significantly behind grade level but with the increased services that are being provided in this his current IEP and the additional services that are provided below as compensatory education the Hearing Officer concludes the student's current services should be assessed after some has allowed for the new IEPs implementation in his new educational setting and the additional services have been provided.

DCPS has an obligation to ensure that a student is educated with his non-diabled peers prior to the student be removed to a full time out of general education setting.
This Hearing Officer concludes that the IEP developed for the student including the educational placement and LRE are appropriate for this student. Thus, although the student has been admitted to the Hearing Officer notes that has no non disabled peers and only student's with special education needs.

A school district is not required to implement a program that will maximize the handicapped child's potential. *Rowley, 458 U.S. at 198-99*. Rather, a handicapped child has a right to "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley, 458 U.S. at 203*. Rowley explained that implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.. . .We therefore conclude that the 'basic floor of

opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley, 458 U.S. at 200-02.*

Pursuant to D.C. Code § 38-2561.02 (c)

> Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter:
>
> (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
> (2) Private or residential District of Columbia facilities; and
> (3) Facilities outside of the District of Columbia.

The evidence demonstrates based on credible testimony that the student's current IEP is being implemented and the student is gaining educational benefit at School A. Although Petitioner's witness testified that she was told the student was not receving pull-out services, the Hearing Officer did not find this hearsay testimony credible and found the testimony of the student case manager testimony far more credible based on his familiarty with the student's current class schedule.

ISSUE 4: Whether DCPS denied the student at FAPE by failing to conduct a FBA and develop a BIP in May 2011, following the May 19, 2011, MDR determination?

Conclusion: As addressed in the prior HOD regarding the MDR issues the Hearing Officer concludes that based upon the determination that the student's conduct was a manifestation of his disability, DCPS should have conducted a FBA and developed a BIP. Consequently, DCPS shall convene a meeting to review the independent FBA when Petitioner provides it and shall convene a IEP meeting to develop a BIP for the student.

Petitioner alleges DCPS denied the student a FAPE by failing to conduct a FBA and a BIP. 34 C.F.R. § 300.530(d)(ii) requires that the student receive a FBA and behavioral intervention services to address the behavior violation so that the violation does not recur. Because the conduct is considered a manifestation of his disability, DCPS is to ensure that a FBA is conducted and a BIP developed pursuant to 34 C.F.R. § 300.530 (f). The Hearing Officer notes that parties have already agreed that Petitioner will obtain an independent FBA, thus the issue of whether DCPS conducted a FBA and developed a BIP

ISSUE 5: Whether DCPS denied the student at FAPE by failing to make accommodations to allow the student to participate in his graduation ceremonies at School A in June 2011?

Conclusion: Petitioner failed to present sufficient evidence that the DCPS failed to provide accommodations for the student to attend the School A graduation.

ISSUE 6: Whether DCPS denied the student at FAPE by failing to provide the parent the student's educational records and thereby depriving her of meaningful participation in the student's educational planning?

Conclusion: The parent has not been provided all requested education records and DCPS' failure to do so significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE.

Petitioner has personally, and through counsel, repeatedly requested the student's full education records, but DCPS has failed to provide them. Specifically, 34 C.F.R. § 300.501 of the IDEA requires that parents of a child with a disability be afforded an opportunity to inspect and review all education records. Additionally, 20 U.S.C. § 1415(f)(3)(E)(ii) allows hearing officers to find that a child was denied FAPE based on procedural violations where the inadequacies or impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process in the provision of FAPE, to the child, or cause a deprivation of educational benefit. 20 U.S.C. § 1415(f)(3)(E)(ii).

Specifically, the parent was not provided all the IEP progress reports or service trackers and the all IEP meeting notes for the last two school years.
participate in Reggie's education to ensure that he was receiving a free and appropriate public education.

The law requires that parents of a child with a disability be afforded an opportunity to inspect and review all education records. 34 C.F.R. § 300.501 (2006). After multiple records requests, DCPS continued to exclude the parent from participating in her son's education by withholding the student's complete educational records.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program." "the inquiry must be fact-specific and, to accomplish IDEA'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." *Reid, 401 F.3d 522 & 524.* To aid the court or hearing officer's fact-specific inquiry, "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." Id. at 526.

The testimony and documents offered by Petitioner with regard to compensatory education the evidence presented did not specifically address the alleged lack of services such that the Hearing Officer will grant all the relief requested. Consequently, the Hearing Officer will order, based on equitable considerations, based on the student's missed services and his significant academic deficits as compensatory education, that DCPS fund a Lindamood Bell assessment and resulting program for one calendar year conduct a comprehensive psychological evaluation with educational and clinical components that can be considered when the IEP team meets to assist in developing appropriate programming for the student during the 2012-2013 school year.

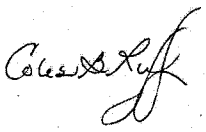
ORDER:

1. DCPS shall within thirty (30) calendar days of the date of this Order fund a Lindamood Bell assessment and resulting program for one calendar year conduct a comprehensive psychological evaluation with educational and clinical components that can be considered when the IEP team meets to assist in developing appropriate programming for the student during the 2012-2013 school year.

2. DCPS shall within thirty (30) calendar days of its receipt of the student's independent FBA convene a IEP team meeting to review the FBA and develop and BIP and review and revise the student's IEP as appropriate.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: October 12, 2011