

DEUSDEDI MERCED, P.C.

November 18, 2009

Miguel A. Hull, Esq.
James E. Brown & Associates, PLLC
1220 L Street, N.W.
Washington, D.C. 20005

Blair Matsumoto, Esq.
Office of the General Counsel
825 North Capitol Street, N.E.
Washington, D.C. 20002

VIA FACSIMILE TRANSMISSION FOLLOWED BY ELECTRONIC MAIL
(Facsimile transmission nums.: (202) 742-2098/7; (202) 442-5098/7)



Dear Interested Parties:

Attached please find the Hearing Officer Determination in the above-referenced case.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Deusdedi Merced".

DEUSDEDI MERCED

Attachment (as stated)

STANDARD
2009 NOV 18 PM 4: 21
OFFICE

**DISTRICT OF COLUMBIA OFFICE OF THE STATE SUPERINTENDENT
STATE ENFORCEMENT AND INVESTIGATION DIVISION**

-----X
[REDACTED]

**HEARING OFFICER
DETERMINATION**

Petitioners,

SHO Case No. 2009-1437

- against -

Deusdedi Merced, Hearing Officer

District of Columbia Public Schools,

Respondent.

-----X

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioners Notice of Due Process Complaint, filed on or about October 22, 2009 (hereinafter, "Complaint"). HO 1.¹ I was appointed shortly thereafter. HO 2. The parties participated in a resolution meeting on November 2, 2009. See P 3. However, the parties did not reach an agreement. P 3-1. Respondent's Response to the Complaint was filed on or about November 4, 2009. HO 6. A pre-hearing conference in the matter was scheduled for, and held on, November 6, 2009. HO 7. The Pre-Hearing Conference Summary and Order was issued on November 6, 2009. Id.

A hearing was held on November 16, 2009.² It was a closed hearing, and the Petitioners were represented by Miguel A. Hull, Esq. Respondent was represented by

¹ The Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioners Exhibits will be referred to as "P" followed by the exhibit number; and, Respondent Exhibits will be referred to as "R" followed by the exhibit number.

² Petitioners presented the testimony of the parent, [REDACTED] M.D., T & T Healthcare, Inc.;

[REDACTED]
Respondent presented the testimony of [REDACTED] Elementary School and Quince

Blair Matsumoto, Esq. Petitioners entered into evidence exhibits 1 to 30; Respondent entered into evidence exhibits 1 to 11.

JURISDICTION

The due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter, "IDEIA"),³ 20 U.S.C. § 1400 et seq., its implementing regulations, 34 C.F.R. § 300 et seq., and the District of Columbia Municipal Regulations, Title 5, Chapter 30, Education of Handicapped (2003).

The undersigned is not authorized to hear matters brought pursuant to Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The scope of work of the undersigned Hearing Officer pursuant to his contract with the District of Columbia, Office of the State Superintendent of Education, is limited to due process hearings brought under IDEIA.

BACKGROUND

The student is 10 years old and attending [REDACTED] District of Columbia. On December 12, 2007, an Individualized Education Program (hereinafter, "IEP") Team meeting was held. The purpose of the meeting was to update the student's out-of-district IEP. The student was classified Other Health Impaired and recommended for five hours per week of specialized instruction hours by a special education teacher in the resource room, one hour per week of occupational therapy services, and one hour per week of social work services. Annual goals in Language Arts

Riley, Social Worker, [REDACTED] Witness testimony will be referred to as "Testimony of" followed by the name of the witness.

³ In 2004, Congress reauthorized the Individuals with Disabilities Education Act (hereinafter, "IDEA") as the IDEIA. See Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005.

and Reading were developed. The parent agreed with contents of the IEP and acknowledged having had the opportunity to be involved in its development.

On December 12, 2008, a multi-disciplinary team (hereinafter, "MDT") meeting was held. The purpose of the meeting was to exit the student from special education. The MDT determined that the student should be exited from special education. This appeal ensued.

ISSUES

The sole issue presented for determination is whether the student is a child with a disability as the term is defined in 34 C.F.R. § 300.8.⁴ Petitioners pray that the undersigned find the student eligible for special education and related services under the IDEIA.

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 student is 10 years old and attending [REDACTED] in the District of Columbia for the 2009 – 2010 school year. P 2-3. He had attended [REDACTED] as well during the 2007 – 2008 and 2008 – 2009 school

⁴ Two additional issues had been raised vis-à-vis the Complaint and identified in the Pre-Hearing Conference Summary and Order. Specifically, the two issues were:

1. Whether Respondent failed to properly implement the student's December 12, 2007 IEP when the student was not provided with specialized instruction outside the general education setting as called for by his IEP.
2. Whether Respondent's failure to properly implement the student's December 12, 2007 IEP is a denial of a free and appropriate public education (hereinafter, "FAPE").

HO 7 at 4 -5. Petitioners' counsel, however, withdrew these two issues at the commencement of the hearing.

years. Id.; Testimony of the Parent. He is currently in the fifth grade. R 6-3; Testimony of Looper.

2. On September 1, 2007, the parent met with the special education coordinator and adopted the student's out-of-district IEP. See P 9.

3. The student had been in special education in [REDACTED] for the two years preceding his arrival in the District of Columbia. Testimony of Parent.

4. The student was classified Other Health Impaired and recommended for seven hours per week of specialized instruction hours by a special education teacher in an inclusion setting, one hour per week of occupational therapy services, and 30 minutes per week of social work services. P 9-1 – 9-2.

5. On December 12, 2007, an IEP Team meeting was held. See P 7. The purpose of the meeting was to update the student's out-of-district IEP. P 7-2.

6. The student was classified Other Health Impaired and recommended for five hours per week of specialized instruction hours by a special education teacher in the resource room, one hour per week of occupational therapy services, and one hour per week of social work services. P 7-1, P 7-6.

7. Annual goals in Language Arts and Reading were developed. P 7-8 – 7-9.

8. The parent agreed with the contents of the IEP and acknowledged having had the opportunity to be involved in its development. P 7-1.

9. A Notice of Due Process Complaint was filed on June 2, 2008 (hereinafter, "June 2008 Complaint"). See P 4-1. The June 2008 Complaint resulted in a Hearing Officer Determination dated June 30, 2008 (hereinafter, "June 2008 HOD"). See P 4.

10. The June 2008 Complaint alleged that Respondent had failed to implement the student's December 12, 2007 IEP and further failed to conduct a functional behavioral assessment (hereinafter, "FBA") of the student. P 4-2.

11. The hearing officer who presided over the June 2008 Complaint determined that Petitioners had failed to demonstrate that Respondent had not provided the student with the recommended counseling services listed on the December 12, 2007 IEP, but had met their burden of demonstrating that the student had not been provided with the prescribed amount of specialized instruction hours. P 4-3. The hearing officer further determined that Petitioners failed to demonstrate that the student was in need of an FBA. See P 4-4.

12. Neither did Petitioners meet their burden of demonstrating that the student was entitled to compensatory education services for Respondent's failure to provide the student with the prescribed amount of specialized instruction hours. P 4-4, P 4-5.

13. The hearing officer authorized Petitioners to obtain an evaluation from the Lindamood-Bell Learning Processes Program, at Respondent's expense. P 4-5. The hearing officer further ordered an IEP Team meeting before the beginning of the 2008 – 2009 school year to review the student's IEP. P 4-5 – 4-6.

14. On August 14, 2008, a multidisciplinary team (hereinafter, "MDT") meeting was held. See P 12. The purpose of the meeting was to review the student's information. P 12-2. The student was to start the fourth grade for the 2008 – 2009 school year. P 12-3.

15. The student's special education teacher opined that the student did not need specialized instruction and that the student's behaviors were not impacting his

academic work. P 12-3 – 12-4. She further noted that the student is bright and able to keep up with the work. P 12-4.

16. A review of the ordered Lindamood-Bell Learning Process Program assessment revealed that the student was functioning above-grade level. P 12-4.

17. The parent expressed concern about the student not having received his full five hours per week of specialized instruction hours during the 2007 – 2008 school year. P 12-2. However, the student's special education teacher disputed this explaining that she went into the classroom one hour daily for inclusion instruction. P 12-4.

18. Nonetheless the MDT agreed on 80 hours of compensatory education services to be provided through tutoring, one-on-one, by Respondent. P 12-6, P 12-8. The student has received approximately $\frac{3}{4}$ of the 80 hours during the period from November 2008 through early March 2009. Testimony of Parent.

19. On September 2, 2008, the student participated in a Comprehensive Psychological Evaluation. See R 7.

20. The examiner spoke with the student's general education and special education teachers. See R 7-1. The teachers reported that the student had not presented with significant behavioral concerns and was functioning on grade level. R 7-1.

21. The student's intellectual functioning was assessed to be in the Average range. R 7-4.

22. Academic achievement revealed that the student was functioning in the mid-seventh grade in Comprehension; beginning fifth grade in Basic Reading, with Pseudoword Decoding skills in the beginning third grade range; beginning fifth grade in computational mathematics, with mid-sixth grade skills being shown in applied

problems; and, beginning fourth grade range in Spelling. R 7-7. The student was just beginning the fourth grade. R 7-1.

23. The examiner opined that the student “does not appear to be stymied, educationally, by his previous diagnosed [Attention Deficit Hyperactivity Disorder (hereinafter, “AD/HD”).]” R 7-8. The student was first diagnosed with AD/HD in 2007;

Testimony of Parent.

24. The examiner further opined that the MDT should consider exiting the student from special education. R 7-8.

25. On October 7, 2008, an MDT meeting was held. See P 11. The purpose of the meeting was to reevaluate the student because the parent reported that the student continued to have anger management problems in the home, was obstinate, and threatened her. P 11-1, P 11-3.

26. The student had not exhibited in school any of the home behaviors reported by the parent. P 11-4. Reportedly, the student’s obstinate in-home behaviors have continued during the 2009 – 2010 school year. Testimony of Parent.

27. The student had been seeing an outside school therapist but had not been to the therapist since August 2008 because “where the office is, there is no parking.” P 11-1 – 11-2.

28. The MDT social worker recommended family therapy. P 11-3. The student and the parent participated in family therapy during the period of November 2008 through June 2009. Testimony of Parent.

29. On November 4, 2008, the student participated in an independent Comprehensive Psychological Evaluation. See P 14.

30. The examiner observed the student to exhibit “significant attention/concentration problems” and he was “easily distracted by extraneous environmental stimuli.” P 14-2.

31. The student’s general cognitive ability was assessed to be within the High Average range of intellectual functioning, his abilities exceeding those of approximately 84% of children his age. P 14-3.

32. The examiner noted that the student “poses a serious management problem to the home.” P 14-5. In contrast, “behaviors in the school setting are sometimes disruptive and detrimental to group process.” Id.

33. The student’s academic achievement was assessed in the Average to Above Average range in math and reading. P 14-6 – 14-9, 14-12.

34. The examiner diagnosed the student with AD/HD, Predominantly inattention, as well as Oppositional Defiant Disorder (hereinafter, “ODD”). P 14-10.

35. The examiner recommended a well-structured small classroom in an inclusive school program that can also address the student’s psychological, social/emotional needs. Id.

36. On November 21, 2008, an MDT meeting was held. See P 10. The purpose of the meeting was to exit the student from special education. P 10-1.

37. Present at the meeting were an occupational therapist, the student’s classroom teacher, two psychologists, the special education coordinator, the student’s social worker, and the student’s special education teacher. P 10-1. The parent was not present. P 10-1, P 10-3.

38. The MDT agreed that the student should be exited from special education. P 10-1.

39. The classroom teacher reported that the student was functioning on and above grade level academically, and that his behavior had improved. Id. The behavioral issues were typical for a student the student's age. P 10-2.

40. The MDT agreed to continue to provide counseling to the student through a general education counselor. P 10-2.

41. The occupational therapist reported that the student had met all of his annual goals and had tested out of occupational therapy. P 10-1 – 10-2.

42. The student had also mastered the Language Arts and Reading annual goals listed in the December 12, 2007 IEP. P 10-2.

43. Prior Notice was issued on November 21, 2008. P 10-5.

44. On December 12, 2008, an MDT meeting was held. See P 8. The purpose of the meeting was to exit the student from special education. P 8-1; Testimony of Ortega.

45. Present at the meeting were two social workers, the occupational therapist, the classroom teacher, two psychologists, a nurse, a speech and language pathologist, the special education coordinator, the parent's advocate, and the parent. P 8-1.

46. The student's classroom teacher reported that the student was on grade level and needed to be challenged, was sometimes one step ahead of her during the lesson, returned his homework daily, and demonstrated proficiency in both reading and math in the District of Columbia Criterion-Referenced Assessment (a.k.a., DC-CAS) of April 2008. P 8-2.

47. The Comprehensive Psychological Evaluation dated November 4, 2008 was reviewed. P 8-8.

48. The evaluation revealed that the student was able to do algebra at the sixth grade level and was functioning above-average in reading. P 8-5.

49. The student's social worker reported that she had observed the student being argumentative regarding instruction and wanting to be challenged. P 8-3. The arguments, however, were "infrequent and things have gotten better." Id.

50. The student's social worker further opined that there is a "power struggle" between the parent and the student. P 8-4, P 8-8.

51. The MDT noted that the student's behaviors had improved. P 8-5.

52. The student's occupational therapist opined that, based on the Occupational Therapy Assessment conducted on the student on October 10, 2008, the student did not require occupational therapy. P 8-5, P 8-9. The student was in the average range on all subtests. P 8-9.

53. The MDT determined that the student was a "504 student." P 8-6, P 8-9. The MDT further determined that, although the student needed "academic coaching" and "crisis counseling," he can receive these services as a "504 student." P 8-6.

54. The parent did not agree with the other members of the MDT, believing that the student required 15 hours per week of a small group setting, as well as counseling. P 8-6 – 8-7; Testimony of Parent, Ortega.

55. Prior Notice dated December 12, 2008 was issued to the parent. P 8-10.

56. On January 5, 2009, the student's teacher completed a Student Support Team Request Form. See P 6.

57. The teacher noted that the student exhibited impulsive behaviors and mood changes, such as tapping his pencil on his desk, being verbally aggressive towards his teacher and peers, and being disruptive. P 6-1, P 6-2. Various interventions had been attempted by the classroom teacher. P 6-3.

58. On January 5, 2009, Respondent drafted a 504 Education Plan for the student. See P 5. The 504 Education Plan team reviewed a number of assessments and other pertinent information prior to drafting the plan. See P 5-1, P 5-3.

59. The team consisted of the school Principal, the student's teacher and social worker, and the special education coordinator for the school. P 5-2.

60. The 504 Education Plan team determined that the student did not "demonstrate a consistent need for substantially more time to complete homework assignments and in-school assignments than is required by the average non-disabled student." P 5-1.

61. The 504 Education Plan team determined that modified testing is not "consistently necessary for the student to be able to demonstrate knowledge." Id.

62. The 504 Education Plan team determined that the student exhibits behaviors that interfere with learning, such as tapping his pencil on his desk, being verbally aggressive towards his teacher and peers, and being disruptive. P 5-1, P 5-6.

63. The 504 Education Plan team determined that the student does not "exhibit significant difficulty in planning, organizing and executing school-related activities and assignments." P 5-1.

64. The 504 Education Plan team determined that the student has not “experienced a steady decline in academic performance for which there is no known cause....” P 5-2.

65. The 504 Education Plan team determined that the student has not “experienced a steady increase in disciplinary incidents for which there is no known cause other than the diagnosed condition.” P 5-2.

66. The student takes medication prior to the commencement of the school day. P 5-2. The medication improves the student’s school performance. P 5-4.

67. The 504 Education Plan team recommended five in-school accommodations. P 5-7.

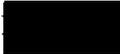
68. On April 20, 2009, the student participated in the DC-CAS. See P 21.

69. The student’s scale score in reading is in the Proficient range and his scale score in math is in the Advanced range. P 21-1.

70. On May 4, 2009, the student’s school-based social worker wrote a letter “To Whom It May Concern.” See P 13. The social worker wrote –

I am somewhat concerned because I have noticed a change in his behavior following the winter vacation this school year. [The student] seemed to be more irritable, easily agitated, and aggressive. He engages in verbal altercations with his teacher on a regular basis....[H]e has gotten into numerous physical altercations with male peers from his class during recess. Usually, the altercations stem from the boys playing touch football and [the student] normally becomes aggressive which leads to the altercation.

P 13-1.

71. The letter was intended for the student’s treating psychiatrist at the time and to advocate for outside interventions. Testimony of 

72. The social worker noted in the letter –

In short, [the student] is a highly intelligent student but I am concerned that his anger and aggression will impact his education. [The parent] informed me that his medication was changed during this school year and I am not sure if this contributes to his aggressiveness within the classroom setting. I highly recommend that his current medication is evaluated for its effectiveness, outside individual therapy, continued family therapy, structured outside-extra-curricular activities, and assessment of [the student's] anger, aggression, and impaired social skills.

P 13-2.

73. On May 18, 2009, the student's Educational Advocate observed the student in his class. See P 18.

74. The Educational Advocate observed the classroom teacher re-directing the student three times during the two hours and twenty minutes observation. Id.; See Testimony of Ortega.

75. The classroom teacher reported to the Educational Advocate that the student has better days and bad days. P 18-3.

76. The Educational Advocate reported that the classroom teacher opined that the student would benefit from a small classroom and that his academic skills are "o.k." Id.; Testimony of Ortega.

77. A review of the student's 4th Grade Report Card reveals that he made progress throughout the 2008 – 2009 school year. See R 6.

78. With the exception of Science and Social Studies – where the student was demonstrating a basic working knowledge of the skills and concepts, producing satisfactory work, and usually applying the skills and concepts correctly – the student demonstrated proficiency in Reading/Language Arts, Mathematics, Art, Music, and Health and Physical Education. See R 6-2 – 6-3.

79. The student was promoted to the fifth grade. R 6-3.

80. On August 1, 2009, the student's psychiatrist wrote a letter "To Whom It May Concern." See P 15. The psychiatrist had been treating the student since May 2009.⁵ Testimony of [REDACTED]

81. As of the date of the hearing, the psychiatrist had only seen the student a total of five times. Id.

82. The psychiatrist noted that the student's diagnoses are Mood Disorder, Not Otherwise Specified, AD/HD, and ODD. P 15-1.

83. The student was participating in individual therapy (id.) and had been prescribed Seroquel, Extended Release⁶ (Testimony of [REDACTED]).

84. The psychiatrist recommended placement of the student in a small therapeutic classroom in a group no larger than five to eight students and one teacher. P 15-2; Testimony of [REDACTED]. The psychiatrist has never observed the student in class or talked to his classroom teachers. Testimony of [REDACTED]

85. On August 4, 2009, the student's psycho-therapist completed a Psychological Report. See P 22. The student participated in psycho-therapy from October 25, 2008 through June 17, 2009. P 22-1. Psycho-therapy was discontinued during the summer because the parent could not afford it. P 23-5.

86. The psycho-therapist noted that the student's mental disorders were "remitting very slowly with medication." P 22-2.

87. The psycho-therapist opined that the student would "function significantly better in a small positive classroom setting until his condition is in full remission..." Id.

88. An MDT meeting was held on August 19, 2009. See P 23.

⁵ Reference in the letter to treatment having started in March 2009 is incorrect. Testimony of [REDACTED]

⁶ The letter from the psychiatrist indicates that the student was on Abilify and Trazodone. See P 15-1. However, the parent disputes that the student was on these two medications. Testimony of Parent.

89. The student's fourth grade teacher (SY 2008 – 2009) participated via telephone. P 23-1.

90. The classroom teacher reported that the student made "strides in every academic area, especially math." P 23-1. She described his behaviors as "typical," noting the student's need for physical activity to burn off energy. Id.

91. The classroom teacher also reported that she used him as a peer tutor. P 23-3.

92. The classroom teacher opined that the student can handle the work in the fifth grade and that he would need outside counseling. Id.

93. An MDT meeting was held on November 2, 2009. See P 3-3. The purpose of the meeting was to discuss the student's progress and to address other concerns. Id.

94. The student's fifth grade classroom teacher reported that the student is doing very well and that he has been made a teacher's assistant for a number of areas. R 4-2.

95. The classroom teacher further reported that the student's mood will vary. R 4-2, R 10-2.

96. Although the student presents with inattention, the classroom teacher has noted progress in his classroom functioning. See R 4-3. At the beginning of the school year, the student's desk was separated from the other students due to his difficulty focusing. R 4-3. However, the student is now with all the other students again. Id.

97. The classroom teacher further reported that the student is no longer on anti-depressants, just on his AD/HD medication. Id., R 10-1.

98. The student has had three behavioral interventions with the social worker since the beginning of the school year. Testimony of [REDACTED]

99. The student "sometimes" arrives agitated from school and requires assistance to calm down. P 16-4.

100. The MDT drafted a new 504 Plan for the student. P 3-3, R 4-3., R 10-2. The accommodations include providing the student with a homework composition book and allowing the student to email his homework assignment to his parent on a daily basis. R 10-3.

101. The student would also be trained as a peer mediator and assume the role of peer mediator for the school year. Id.

102. The student's general education counseling sessions were continued and he is slated to meet with the school's social worker one time per week for 30-minute sessions. P 16-4; Testimony of [REDACTED]

103. The student was also assigned two male "Go To Persons," available to him when classroom teacher interventions have not worked. Testimony of [REDACTED]

104. On November 9, 2009, the student's Educational Advocate observed the student in his science and social studies classes. See P 16.

105. The Educational Advocate noted that the student required re-directing and that the student was unable to complete his class assignments. P 16-1, P 16-2; Testimony of [REDACTED]

106. The student's classroom science teacher opined that the student would benefit from a small classroom setting. P 16-3; Testimony of [REDACTED] In contrast, the Educational Advocate reported that the student's social studies teacher opined that,

although the student has attention problems, he is not disrespectful and completes his work. Id.

107. The student's in-school maladaptive behaviors have improved since the beginning of the current school year. Testimony of [REDACTED]

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:

To be eligible for special education services a child must be designated as having at least one of the enumerated 13 disability categories in IDEIA and, who, by reason thereof, needs special education and related services. See 34 C.F.R. § 300.8. Petitioners maintain that because the student is diagnosed with AD/HD, ODD and a Mood Disorder, NOS, the student should be found eligible for special education as other health impaired and/or emotionally disturbed. P 2-6. Other health impairment is defined 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 Tourette syndrome; and

(ii) Adversely affects a child's educational performance.

34 C.F.R. § 300.8 (c)(4)(i). An 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.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

34 C.F.R. § 300.8 (c)(9)(ii).

Neither party contests that AD/HD, ODD, or a Mood Disorder, NOS qualify as disabling conditions. The question is whether the student's experience of those conditions "adversely affected" his educational performance. See 34 C.F.R. § 300.8 (c)(4)(i) and (c)(9)(ii). The record evidence does not support the conclusion that the student's conditions adversely impacted his educational performance. To the contrary, the information presented at the hearing demonstrates that the student continuously performed well in his grades and test results despite his being prone to inattentiveness and distractibility.

As of August 14, 2008, during an MDT meeting, the student's special education teacher opined that the student did not need specialized instruction and that his behaviors were not impacting his academic work. P 12-3 – 12-4. She further opined that the student was bright and able to keep up with the work. P 12-4. Formal testing by Lindamood-Bell Learning Process Program revealed that the student was functioning above-grade level.

A September 2, 2008 Comprehensive Psychological Evaluation resulted in the examiner recommending that the student be exited from special education because of the information he had gleaned from the testing and the student's teachers. See R 7. Both the student's general education and special education teachers reported to the examiner that the student did not present with significant behavioral concerns and that he was functioning on grade level. R 7-1. The testing revealed that the student's intellectual functioning was in the Average range and that the student's academic achievement ranged predominantly from the fourth grade level to the mid-seventh grade level. R 7-7. The student was just starting the fourth grade. R 7-1. The examiner concluded that the student did not appear to be "stymied, educationally" by his AD/HD. R 7-8.

In an October 7, 2008 MDT meeting, the student's social worker reported that the student was not presenting with behavioral problems in the classroom despite his parent reporting that the student's in-home behaviors were problematic. P 11-1 – 11-4. An independent Comprehensive Psychological Evaluation, conducted on November 4, 2008, revealed that the student "poses a serious management problem to the home," but that his "behaviors in the school setting are *sometimes* disruptive and detrimental to group process." P 14-5 (emphasis added). Further, although the examiner observed the student to exhibit "significant attention/concentration problems" and he was "easily distracted by extraneous environmental stimuli," his performance in the evaluation was not impacted, as the student "complied with the examiner's guidelines; he performed all the tasks, and answered all the questions presented to him." P 14-2. The information gathered by the examiner was deemed "valid and reliable." Id.

The student's general cognitive ability was assessed to be within the High Average range of intellectual functioning, his abilities exceeding those of approximately 84% of children his age. P 14-3. In September 2008, he had been assessed at the 50th percentile. R 7-4. Similarly to past testing and teacher reports, the student's academic achievement was assessed in the Average to Above Average range in math and reading. P 14-6 – 14-9, 14-12.

On November 21, 2008, the student's classroom teacher, two psychologists, the special education coordinator, the student's social worker, and the student's special education teacher all agreed that the student should be exited from special education, in part, because of his educational performance. See P 10. The student's classroom teacher reported that the student was functioning on and above grade level academically. P 10-1. He had met his Language Arts and Reading annual goals listed in the December 12, 2007 IEP. P 10-2. Behaviorally, the student had also improved. P 10-1. His remaining behavioral difficulties were typical for a student the student's age. P 10-2. The occupational therapist reported that the student had met all of his annual goals and had tested out of occupational therapy. P 10-1 – 10-2.

On December 12, 2008, a second MDT meeting was held to discuss the student's exit from special education. See P 8. The parent had not been in attendance at the November 21, 2008 MDT meeting. P 10-1, P 10-3. Again, the MDT consisted of multiple disciplines. See P 8-1. Present at the meeting were two social workers, the occupational therapist, the classroom teacher, two psychologists, a nurse, a speech and language pathologist, the special education coordinator, the parent's advocate, and the parent. P 8-1.

The student's classroom teacher reported that the student was on grade level and needed to be challenged, was sometimes one step ahead of her during the lesson, returned his homework daily, and demonstrated proficiency in both reading and math in the DC-CAS of April 2008. P 8-2. The social worker reported that the student had demonstrated improvement behaviorally and that his argumentative nature had "gotten better." P 8-3, P 8-5.

The MDT recommended a 504 Education Plan and one was drafted on January 5, 2009 to address the student's impulsive behaviors and mood changes. See P 6, P 5.

The student's educational performance does not appear to have suffered after he was exited from special education. See, e.g., P 21, P 23, R 4, R 6. The student continued to successfully perform in the classroom and in the DC-CAS. The results of the DC-CAS administered on April 20, 2009 yielded a scale score in reading in the Proficient range and a scale score in math in the Advanced range. P 21-1. The student's fourth grade progress report notes that the student demonstrated proficiency in reading/language arts, math, art, music, and health and physical fitness. R 6-2 – 6-3. And, although science and social studies were relative weaknesses, the student nonetheless demonstrated a basic working knowledge of the skills and concepts taught, produced satisfactory work, and applied the skills and concepts taught correctly. Id. Ultimately, the student was promoted to the fifth grade. R 6-3.

In an MDT meeting held at the start of the 2009 – 2010 school year, the student's fourth grade teacher reported that the student had made "strides in every academic area, especially math." P 23-1. He was used as a peer tutor in the previous school year. P 23-3. She described his behaviors as "typical." P 23-1. In an MDT meeting held on

November 2, 2009, the student's fifth grade teacher had a similar assessment of the student. See R 4. The classroom teacher reported that the student was doing very well and that he had been made a teacher's assistant in a number of areas. R 4-2. The classroom teacher further noted that, although the student presented with inattention at the commencement of the school year necessitating his desk being separated from the other students, he has been able to be re-integrated into small work groups. R 4-3. The student's general education counselor has also noted improvement in his behaviors.

Testimony of Riley.

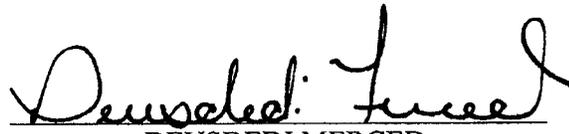
The record evidence is insufficient to show that the student has suffered adverse impact on his educational performance. Accordingly, the undersigned remains unconvinced that Petitioners have shouldered the burden of demonstrating that the student is a child with a disability with an other health impairment and/or emotional disturbance as the terms are defined by 34 C.F.R. § 300.8.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, Petitioners' relief is DENIED and the Complaint is DISMISSED with prejudice.

IT IS SO ORDERED.

DATED: November 18, 2009


DEUSEDI MERCED

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 90 days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. § 1415(i)(2)(B).

*** TX REPORT ***

TRANSMISSION OK

TX/RX NO	1334
RECIPIENT ADDRESS	12024425098
DESTINATION ID	
ST. TIME	11/18 15:56
TIME USE	03'01
PAGES SENT	24
RESULT	OK

DEUSEDI MERCED, P.C.

November 18, 2009

Miguel A. Hull, Esq.
James E. Brown & Associates, PLLC
1220 L Street, N.W.
Washington, D.C. 20005

Blair Matsumoto, Esq.
Office of the General Counsel
825 North Capitol Street, N.E.
Washington, D.C. 20002

VIA FACSIMILE TRANSMISSION FOLLOWED BY ELECTRONIC MAIL
(Facsimile transmission nums.: (202) 742-2098/7; (202) 442-5098/7)



Dear Interested Parties:

Attached please find the Hearing Officer Determination in the above-referenced case.

Very truly yours,

DEUSEDI MERCED

Attachment (as stated)

*** TX REPORT ***

TRANSMISSION OK

TX/RX NO	1333
RECIPIENT ADDRESS	12027422098
DESTINATION ID	
ST. TIME	11/18 16:02
TIME USE	02'38
PAGES SENT	24
RESULT	OK

DEUSDEDI MERCED, P.C.

November 18, 2009

Miguel A. Hull, Esq.
James E. Brown & Associates, PLLC
1220 L Street, N.W.
Washington, D.C. 20005

Blair Matsumoto, Esq.
Office of the General Counsel
825 North Capitol Street, N.E.
Washington, D.C. 20002

VIA FACSIMILE TRANSMISSION FOLLOWED BY ELECTRONIC MAIL
(Facsimile transmission nums.: (202) 742-2098/7; (202) 442-5098/7)



Dear Interested Parties:

Attached please find the Hearing Officer Determination in the above-referenced case.

Very truly yours,

DEUSDEDI MERCED

Attachment (as stated)



Attorneys Hull and Matsumoto,
Attached is the HOD in this matter. The case is now closed.
Best,
Deusdedi

DCSHO
HEARING OFFICE
NOV 18 PM 4:21