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Office of the State Superintendent of Education
Office of Review and Compliance
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STUDENT HEARING OFFICE
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STUDENT[1], by and through her Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Date: May 23, 2011 Representatives: Counsel for Petitioners: Nicholas Ostrem, Esq. Brown and Associates 1220 L Street, NW Suite 700 Washington, DC 20005 Counsel for DCPS: Assistant Attorney General Tanya Chor, Esq. 1200 First Street, NW Washington, DC 20002 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 May 23, 2011, at the OSSE Student Hearing Office 810 First Street, NE, Washington, DC 20003, in Hearing Room 2007.

BACKGROUND:

Student or "the student" is age in the grade and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of intellectual disability also known as mild mental retardation ("MR"). The student is enrolled at a DCPS middle school hereinafter referred to as "School A." He has been enrolled at School A for the past three school years.

Petitioner filed a due process complaint on March 28, 2011, alleging, inter alia, DPCS had failed to timely reevaluate the student and the student's IEP and placement was inappropriate. Prior to the hearing DCPS authorized Petitioner to obtain independent re-evaluations. Petitioner is seeking, the student's placement and DPCS funding at a private full time special education school and compensatory education.

A resolution meeting was held on April 18, 2011.[2] The parties did not resolve the complaint and a pre-hearing conference was conducted on May 3, 2011.[3] This Hearing Officer issued a pre-hearing order on March 6, 2011, stating the issues to be adjudicated, the relief Petitioner is seeking and Respondent's position with regard to the complaint and/or defenses.

DCPS maintains the student's placement and IEP are appropriate and School A can and is providing the student the services prescribed by his IEP, and the student has not been denied a FAPE.

ISSUES: [4]

The issues adjudicated are:

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[2] At the conclusion of the resolution meeting the parties agreed that the case would proceed to hearing at the end of the 30-day resolution period and thus the 45-day timeline would begin after the last day of the resolution period.

[3] Attempts were made by this Hearing Officer to schedule the pre-hearing conference within a week of the resolution session. This was the first date mutually available for both counsel.

[4] The alleged violation(s) and/or issue(s) listed in the complaint may not directly correspond to the issue(s) outlined here. However, the parties agreed at the hearing that the issue(s) listed here and as stated in the pre-hearing order are the issue(s) to be adjudicated.

1. Whether DCPS failed provide the student a free appropriate public education ("FAPE') failing to timely re-evaluate the student.[5] DCPS has offered Petitioner independent evaluations and this claim is resolved except for the issue of compensatory education for alleged delay in conducting the reevaluations.

2. Whether DCPS failed provide the student a FAPE by failing to develop appropriate IEPs?[6]

3. Whether DCPS failed provide the student a FAPE by failing to implement an appropriate IEP? Petitioner alleges the student's IEP calls for 25 hours per week out of general education and School A cannot implement a full time special education IEP.

4. Whether DCPS failed provide the student a FAPE by failing to convene an appropriate IEP team?[7]

5. Whether DCPS failed provide the student a FAPE by failing to provide an appropriate placement?[8]

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[5] Petitioner alleged on December 13, 2006, DCPS conducted a speech-language evaluation and since then has failed to conduct a new speech-language evaluation. On June 8, 2007, DCPS conducted an occupational therapy evaluation and has failed to conduct a new occupational therapy evaluation. On November 30, 2007, DCPS conducted a psychological evaluation and since has failed to conduct a new psychological evaluation. Petitioner alleged on November 28, 2007, DCPS attempted to conduct an adaptive behavior (Vineland II) evaluation on the student but could not make any determinations or recommendations because the evaluation did not contain an IQ score. Since November 28, 2007, DCPS allegedly failed to conduct a new adaptive behavior evaluation.

[6] Petitioner alleged DCPS failed to develop an appropriate IEP for the student on April 29, 2009, October 28, 2009, and June 17, 2010. Petitioner alleges on April 29, 2009, DCPS developed an IEP which prescribes: no baselines in math, reading or written expression; and no Extended School Year ("ESY") rationale, goals, areas of concern, service determination, setting determination, beginning date, end date, or time/frequency. On October 28, 2009, DCPS developed an IEP that prescribes: no baselines in most areas of concern, inappropriate or no anticipated dates of achievement, an inappropriate needs statement for his occupational therapy area of concern; and no ESY rationale, goals, areas of concern, service determination, setting determination, beginning date, end date, or time/frequency. Petitioner alleged on June 17, 2010, DCPS developed an IEP that prescribes inappropriate goals and objectives in math; an inappropriate needs statement, impact statement, and goal and objective in speech-language, no baselines or dates of achievement in the social/emotional area of concern; no needs statement or baselines in the occupational therapy area of concern; and no ESY rationale, goals, areas of concern, service determination, setting determination, beginning date, end date, or time/frequency.

[7] Petitioner alleged DCPS failed to convene an appropriate IEP team on April 29, 2009 and June 17, 2010, Petitioner alleged that at the April 29, 2009, IEP meeting the student's special education teacher was not part of the IEP team. Petitioner alleges that at the student's June 17, 2010, IEP meeting, neither the student's special education teacher nor a general education teacher was part of the IEP team.

[8] Petitioner alleges DCPS has failed to provide the student an appropriate placement. Petitioner alleges School is not an appropriate placement for the student; he is not progressing at School A, not receiving educational benefit and school cannot meet the student's needs.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-21 and DCPS Exhibit 1-9) that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: [9]

1. The student is age in the grade and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of intellectual disability also known as MR. The student is enrolled at a DCPS middle school, School A. He has been enrolled at School A for the past three school years. (Parent's testimony, Petitioner's Exhibit 2-1)

2. On December 13, 2006, DCPS conducted a speech-language evaluation. The student was prescribed speech language services in this most recent IEP of 30 minutes per week. DCPS did not conduct a speech language reevaluation prior to Petitioner filing the due process complaint. DCPS thereafter authorized Petitioner to obtain and independent speech-language evaluation. On April 28, 2011, an independent speech language evaluation was conducted. The evaluator concluded "in the classroom [the student] may have difficulty with recalling information, formulating grammatically correct sentences in verbal and written expression, new vocabulary concepts, identifying relationships amongst words and expressing himself verbally secondary to articulation and fluency. In the classroom [the student] will require repetition of information and sporadic checks throughout assignments to check comprehension." The recommended the student's speech language services be increased from 30 minutes per week to 60 minutes per week in individual sessions and/or groups as well as service implementation in the classroom. (Petitioner's Exhibits 2-6, 4-1, 9-1, 9-6)

3. On March 23, 2007, when the student was age nine in the fourth grade, DCPS administered an educational evaluation of the student. On the Woodcock-Johnson III Test of Achievement the student's scores indicated age equivalency and grade equivalency in broad math of 6-6 and 1.2 respectively; in academic skills 6-9 and 1.3 respectively. The evaluator concluded the student's academic skills were negligible and his sight-reading ability and math calculation skills and spelling were also negligible. When compared to others at his age level the student's academic skills and his ability to apply those skills were both within the very low range. (Petitioner's Exhibit 5-1, 5-2)

4. On June 8, 2007, when the student was age nine DCPS conducted an occupational therapy evaluation. The evaluation revealed the student was performing in the low range

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[9] 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 perhaps only cite one party's exhibit.

for upper extremity limb speed and dexterity and in the low range for visual motor control, and he scored in the very low range for visual perceptual skills. The evaluator recommended the student continue to occupational therapy ("OT") services in order to address decreased visual perceptual and visual motor control skills. DCPS did not conduct an OT reevaluation Petitioner filing the complaint. An independent evaluation was conduct by Petitioner with DCPS authorization and funding on April 27, 2011; the student was age The evaluator concluded the student demonstrated a significant delay in visual motor integration and visual perceptual skills and his overall writing abilities to be poor. (Petitioner's Exhibits 6-1, 8A-4)

5. On November 30, 2007, when the student was age ten, DCPS conducted a psychological evaluation and failed to conduct a new psychological evaluation prior to the complaint being filed. The November 2007 evaluator determined based on the Wechsler Intelligence Scale for Children- forth Edition (WISC-IV) the student had a full scale IQ of 55 in the extremely low range. The student's verbal comprehension index, perceptual reasoning index and working memory index and processing speed index were also all in the extremely low range. (Petitioner's Exhibit 8-4)
6. On November 28, 2007, DCPS attempted to conduct an adaptive behavior (Vineland II) evaluation on the student but could not make any determinations or recommendations because the evaluation did not contain an IQ score. Since November 28, 2007, DCPS had failed to conduct a new adaptive behavior evaluation. (Petitioner's Exhibit 7)
7. On April 18, 2011, DCPS authorized petitioner to obtain independent evaluations: comprehensive psychological, speech and language, occupational therapy, adaptive behavioral. (DCPS Exhibit 5)

8. The independent comprehensive psychological evaluation completed on May 9, 2011, and found the student has extremely low cognitive ability:

On the Wechsler Intelligence Scales for Children 4th Edition:

Area	Scaled Scores/Composite	Classification
Verbal Comprehension	63	Extremely Low
Perceptual Reasoning	65	Extremely Low
Working Memory	54	Extremely Low
Processing Speed	50	Extremely Low
Full Scale IQ	50	Extremely Low

On the Woodcock Johnson Achievement Assessment Third Edition:

Area	Standard Scores	GE	Percentile
Brief Achievement	41	1.9	0.1
Broad Reading	46	2.0	0.1
Broad Math	32	1.5	0.1
Broad Written Lang.	53	2.2	0.1
Brief Reading	46	2.0	0.1

Brief Math	32	1.5	0.1
Math Calc Skills	34	1.6	0.1
Academic Skills	36	2.0	0.1
Academic Fluency	46	1.9	0.1

(Petitioner's Exhibit 10-7, 10-13)

9. The evaluator also determined based on the assessments conducted the student displayed aggression and conduct problems, hyperactivity, anxiety, depression and learning problems. The evaluator determined the student suffers from low self-esteem and projects his perceived inadequacies outward at adults and peers and bullying other students. He needs interventions and without them he is at risk for delinquency, and drop out. The evaluator recommended that the student be in a highly structured, low student to teacher ratio academic setting where he can continue to have assistance from a special education teacher and further develop his writing, reading and mathematical skills. The evaluator also reviewed the student's social and emotional goals in his most recent IEP and observed that goal did not clearly state the frequency by which the student's progress relative to the goal would be measured and how the student is being observed and assessed. (Dr. Nelson's testimony)

10. In June 1997 with the student was age ten in the fourth grade DCPS conducted a Vineland II – Adaptive Behavior Scales. The Vineland II assesses adaptive behavior in four domains: communication, daily living skills, socialization and motor skills. The student's communication domain was in the 4th percentile. His age equivalent in the sub-domains averaged 6:2. The evaluator concluded the student's adaptive functioning was low and his scores were higher than only 2% of similarly aged individuals. His percentile rank for the daily living skills domain was 1. The student's age equivalents in the daily living skills sub-domains were: personal – 4:5, domestic – 4:6 and community – 6:1. The evaluator determined the student's interpersonal relationship skills were strength for him. His age equivalents for socialization sub-domains were 7:10 for interpersonal relationship sub-domain 4:7 for play and leisure time sub-domain and 2:7 for coping skills sub-domains. The evaluator could not make a determination of whether the student met the criteria for mental retardation because no IQ score had been reported. (Petitioner' Exhibit 7-4, 7-5)

11. An independent adaptive behavior assessment was conducted on May 15, 2011. The evaluator determined the student's daily living skills were moderately low for his age with age equivalency in the sub-domains of 7:6 in the personal sub-domain, 10:0 in the domestic sub-domain and 6:9 in the community sub-domain. The student's socialization was moderately low for his age group, with age equivalency for the sub-domains of 6:5 in interpersonal relations, 5:7 for the play and leisure time and 6:7 for the coping skills. The student's motor functioning was adequate for his age group. The evaluator concluded the student still qualified as a student with mild mental retardation.

The evaluator recommended the student would benefit from social skills training to enhance his adaptive functioning capabilities. (Petitioner's Exhibit 11-2, 11-3)

12. DCPS developed individualized educational programs (IEPs) for the student on April 29, 2009, October 28, 2009, and June 17, 2010. The student's April 29, 2009, IEP contained no baselines in math, reading or written expression. Although the IEP prescribed Extended School Year ("ESY") services the IEP did not contain an ESY rationale, goals, areas of concern, service determination, setting determination, beginning date, end date, or time/frequency. (Petitioner's Exhibit 1-2)

13. The student's October 28, 2009, IEP prescribed the following weekly services: 1500 minutes of specialized instruction outside general education, 30 minutes of speech-language pathology 30 minutes of behavioral support services and 60 minutes of occupational therapy, all outside general education. The IEP also contained no baseline for one of his math goals and no baseline for his written expression goal. The anticipated date of achievement for the second math goal was the same date the IEP was developed. The anticipated date of achievement for the other math goal was April 29, 2010. The anticipated date of achievement for other goals in the IEP was April 29, 2009. There was no baselines or anticipated dates of achievement for none of the student's emotional/social/behavioral development goals. There were also no baselines in the area of motor skills/physical development. There also no ESY rationale, goals, areas of concern, service determination, setting determination, beginning date, end date, or time/frequency. (Petitioner's Exhibit 2)

14. The student's June 17, 2010, IEP prescribed the following weekly services: 25.5 hours of specialized instruction outside general education, 30 minutes of speech-language pathology 30 minutes of behavioral support services and 60 minutes of occupational therapy, all the outside general education setting. The IEP contains the following social/emotional goal: [the student] will demonstrate growth in social emotional with 80% accuracy." The goal does not indicate with what frequency and in what time frames the student will be measured relative to this goal. The IEP also contained no baselines or dates of achievement in the social/emotional area of concern; no needs statement or baselines in the occupational therapy area of concern; and no ESY rationale, goals, areas of concern, service determination, setting determination, beginning date, end date, or time/frequency. (Petitioner's Exhibit 3)

15. Because the student's progress is slow it is important to closely measure his performance relative to the past. The IEP having no baselines makes it extremely difficult to measure the student's progress. This and the delayed evaluations may have resulted in the goals in each of the student's IEPs being similar and the present levels being the same in many of the IEPs. (Dr. Holman's testimony)

16. DCPS convened an individualized educational plan ("IEP") meeting on April 29, 2009. Participating the meeting were the student's special, and a regular education teacher, along with the parent and other DCPS personnel. Each attendee signed the IEP form as participants. (Petitioner's Exhibit 1-1)

17. On June 17, 2010, DCPS convened an IEP meeting for the student. The parent attended the meeting along with her educational advocate. The student's special education teacher, participated in the meeting along with other DCPS personnel. Each attendee signed the IEP form as participants. (DCPS Exhibit 2-1)

18. During the last three school years the student has attended School A he at first fared pretty well. The student's teacher still often calls to report when the student has done well academically. However, lately, the student has demonstrated more distractibility and has begun to bully and be bullied by other students at School A. The student's behavior has been meaner and he has begun to mimic undesirable behaviors of other students. The student becomes easily frustrated in attempts to do his school-work. Because the student is around students who are not in special education and he has low cognitive skills he gets taken advantage of by some of the general education students and often gets into trouble at school. The student is in the eighth grade now and is slated to move to high school next year. However, with his behaviors of late and lack of academic skills the parent does not believe the student is ready for such a change. The student can be easily negatively persuaded by others. The student needs to catch up more academically before going to high school. The parent believes the student would fare far better in a school setting that has fewer total students and where the student can get more one to one attention. (Parent's testimony)

19. The student is provided 25 hours of specialized instruction by a certified special education teacher and receives the related services in his IEP at School A. There are no more than eleven students in the student's classroom with his certified special education teacher. There are often three staff members in the classroom who assist the students. The student sometimes uses profanity and mimics inappropriate behaviors of other students. The school has attempted had behavior modifications; however, the student still exhibits these behaviors. The student's behavior has worsened since he visited and now doesn't want to do the work in class, student teacher believes, because the student thinks he will be going to another school. The student receives special subjects, Music, French, and Physical Education and Art. The student takes one of these subjects for 45 minutes each day. In these special subject areas and classrooms the student is only with special education students. For each day the student spends 45 minutes at lunch where he is with all students, including general education students. There are seven out of the nine academic periods during the school day the student is with his special education teacher. Each period lasts 45 minutes. Thus, the student is provided at least 25.5 hours of specialized instruction out of general education with a special education teacher. testimony)

20. On September 30, 2010, DCPS developed a BIP designed to stop the student from using profanity and intimidating others who he perceives a vulnerable. "[The student] will refrain from involving himself in situations that don not concern him and respond appropriate to constructive criticism from staff." (DCPS Exhibit 9)

21. The parent's counsel engaged an educational advocate to assist the parent and/or student at IEP meetings. The advocate attended the student's most recent IEP meeting and also observed the student at School A. The advocate also prepared a compensatory education plan for the student for the alleged denials of FAPE. The advocate proposed that DCPS provide the student 100 hours of independent tutoring and 100 hours of independent mentoring that would focus on social skills and decision making, so the student will be able to transition into independent living once his formal education is complete. She believes these services would place the student in the position he would have been had he not been provided appropriate IEPs and services. (Dr. Holman's testimony, Petitioner's Exhibit 19)

22. The student has been accepted at located in Washington, DC. is a private full-time special education school that provides academic and vocational services to special education students. can provide the student specialized instruction, behavior support services and other related services in his IEP. There are a total of 54 students at from ages 6 to 22. All students are special education students. Most students are District of Columbia residents for whom DCPS is the LEA. There is a DCPS compliance monitor assigned to the school who visits the school weekly if not more often. There are seven students currently in the classroom that has been identified for the student; they range in age from thirteen to fifteen. Generally the teacher to student ratio is 1 to 4. The school offers specialized instruction and related services by certified teachers and professionals. There is a token economy behavioral program in place and there is a transitional department; students age 15 or over receive life skill and job preparation training and career development opportunities. The student had a three-day visit to the school and the staff at staff found the student an appropriate candidate for their program. When he visited the student was active, involved in the program, vocal and well behaved. testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §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 IDEIA §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.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [10] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the

[10] 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

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.

34 C.F.R. § 300.17 provides that 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.

Issue: 1 Whether DCPS failed provide the student a free appropriate public education ("FAPE') failing to timely re-evaluate the student? **Conclusion:** DCPS failed to timely reevaluate the student. Petitioner sustained the burden of proof by a preponderance of the evidence.

34 C.F.R. 300.303 provides: A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with Sec. Sec. 300.304 through 300.311--
(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation.
(b) Limitation. A reevaluation conducted under paragraph (a) of this section--
(1) may occur not more than once a year, unless the parent and the public agency agree otherwise; and (2) must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

The evidence clearly demonstrates that several of the student's evaluations including psychological, occupational therapy, speech/language and adaptive were conducted when the student was age ten in the fourth grade in 2007. Re-evaluations of the student should have been conducted no later than 2010 unless there had been agreement that the evaluations were unnecessary. There was no such agreement in this case. In at least one of these evaluations, the evaluator recommended an increase in the student's services. In addition, there seems to have been little progress by the student in the years between these evaluations. Clearly, this demonstrates harm to the student. The parent and the rest of an IEP team did not have the benefit of these evaluations in timely manner to review and revise the student's IEP, programming and placement to ensure the student's needs were being met. Consequently, the Hearing Officer determines the student was denied a FAPE because these evaluations were not timely conducted.

Issue 2: Whether DCPS failed provide the student a FAPE by failing to develop appropriate IEPs? **Conclusion:** The student's April 29, 2009, October 28, 2009, and June 17, 2010, IEP did not contain the required data and these inadequacies impeded the child's right to FAPE,

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relief presented sufficient evidence to meet the burden of proof.

significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, and caused the child a deprivation of educational benefits. Petitioner sustained the burden of proof by a preponderance of the evidence.

34 CFR 300.320 provides:

> (a) General. As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with Sec. Sec. 300.320 through 300.324, and that must include--
> (1) A statement of the child's present levels of academic achievement and functional performance, including--
> (i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
> (ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;
> (2)
> (i) A statement of measurable annual goals, including academic and functional goals designed to--
> (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
> (B) Meet each of the child's other educational needs that result from the child's disability;
> (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
> (3) A description of--
> (i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
> (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
> (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child--
> (i) To advance appropriately toward attaining the annual goals;
> (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
> (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
> (5) An explanation of the extent, if any, to which the child will not participate with

nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;

(6)

(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments consistent with section 612(a)(16) of the Act; and

(ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or district-wide assessment of student achievement, a statement of why--

(A) The child cannot participate in the regular assessment; and

(B) The particular alternate assessment selected is appropriate for the child; and

(7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.

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")).

On April 29, 2009, DCPS developed an IEP which prescribes: no baselines in math, reading or written expression; and no Extended School Year ("ESY") rationale, goals, areas of concern, service determination, setting determination, beginning date, end date, or time/frequency. On October 28, 2009, DCPS developed an IEP that prescribes: no baselines in most areas of concern, inappropriate or no anticipated dates of achievement, an inappropriate needs statement for his occupational therapy area of concern; and no ESY rationale, goals, areas of concern, service determination, setting determination, beginning date, end date, or time/frequency. On June 17, 2010, DCPS developed an IEP that prescribes inappropriate goals and objectives in math; an inappropriate needs statement, impact statement, and goal and objective in speech-language, no baselines or dates of achievement in the social/emotional area of concern; no needs statement or baselines in the occupational therapy area of concern; and no ESY rationale, goals, areas of concern, service determination, setting determination, beginning date, end date, or time/frequency.

The evidence demonstrates student's April 29, 2009, October 28, 2009, and June 17, 2010, IEP did not contain the required data. As Dr. Holman aptly pointed to in her testimony, because the student's progress is so slow, given his cognitive abilities it is all the more important that his IEP contain the required baselines and present levels to effectively measure the student's progress and to adjust his program appropriately. These inadequacies in the student's IEPs impeded the student's right to FAPE, significantly impeded the parent's opportunity to participate in the

decision making process regarding provision of FAPE, and caused the child a deprivation of educational benefits. Petitioner sustained the burden of proof by a preponderance of the evidence.

Issue 3: Whether DCPS failed provide the student a FAPE by failing to implement an appropriate IEP? Petitioner alleges the student's IEP calls for 25 hours per week out of general education and School A cannot implement a full time special education IEP. **Conclusion:** DCPS at School A implement the student's IEP of 25 hours of specialized instruction weekly. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

The student's special education teacher credibly testified that the student is provided 25 hours of specialized instruction by a certified special education teacher and receives the related services in his IEP at School A. There are no more than eleven students in the student's classroom with his certified special education teacher. There are often three staff members in the classroom who assist the students. The student receives special subjects, Music, French, and Physical Education and Art. The student takes one of these subjects for 45 minutes each day. In these special subject areas and classrooms the student is only with special education students. For each day the student spends 45 minutes at lunch where he is with general education students. There are seven out of the nine academic periods during the school day the student is with his special education teacher. Each period lasts 45 minutes. Thus, the student is provided at least 25.5 hours of specialized instruction out of a general education with a special education teacher. Consequently, the Hearing Officer concludes there has been no denial of FAPE in this regard.

The student's teacher acknowledged that the student sometimes uses profanity and mimics inappropriate behaviors of other students. The school has attempted behavior modifications; however, the student is still exhibiting some of these behaviors. The teacher noted the student's behavior has worsened since he visited and now he doesn't want to do the work in class because the he believes he will be going to another school. The Hearing Officer does conclude that the student's recent behavior difficulties render School A an inappropriate placement or location of services, but the student's behavior should be considered when the IEP teams meets pursuant to the Order below.

Issue 4: Whether DCPS failed provide the student a FAPE by failing to convene an appropriate IEP team? **Conclusion:** DCPS convened appropriate IEP teams on April 29, 2009, and June 17, 2010. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

34 CFR 300.321 provides: The public agency must ensure that the IEP Team for each child with a disability includes--

(1) The parents of the child;

(2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);

(3) Not less than one special education teacher of the child, or where appropriate, not less then one special education provider of the child;

(4) A representative of the public agency who--
(i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
(ii) Is knowledgeable about the general education curriculum; and
(iii) Is knowledgeable about the availability of resources of the public agency.
(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;
(6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
(7) Whenever appropriate, the child with a disability.

DCPS convened an individualized educational plan ("IEP") meeting on April 29, 2009. Participating the meeting was the student's special, Ms. Kathleen Gall, and a regular education teacher, Ms Genia Blackwell along with the parent and other DCPS personnel. Each attendee signed the IEP form as participants.

On June 17, 2010, DCPS convened an IEP meeting for the student. The parent attended the meeting along with her educational advocate. The student's special education teacher, Ms. Melina Willoughby participated in the meeting along with other DCPS personnel. Each attendee signed the IEP form as participants. Although there was apparently no general education teacher at the student's most recent IEP meeting, it appears that he only has special subjects of Art, Music and PE with teachers other than his classroom special education teacher. There was insufficient evidence presented by Petitioner that the absence of a general education teacher impeded the student's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, and caused the child a deprivation of educational benefits.

This evidence demonstrates that the required participants were present at the student's April 29, 2009, and June 17, 2010, IEP meetings and there was no denial of FAPE in this regard.

Issue 5: Whether DCPS failed provide the student a FAPE by failing to provide an appropriate placement? Conclusion: The student's IEP prescribes the student receive 25.5 hours of specialized instruction and related services all in a out of general education setting. DCPS has provided this requirement during the 2011-2012 school year at School A. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

A student's placement is to be in the least restrictive environment and ***in a school that is capable of meeting the student's special education needs***. See Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C.§ 1402 (9) (D) ("FREE APPROPRIATE PUBLIC EDUCATION- The term 'free appropriate public education' means special education and related services that include an appropriate preschool, elementary school, or secondary school education in the state involved" [and] "are provided in conformity with the individualized education program"); § 1401 (29) (D) ("The term 'special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability [. . .]."); 34 C.F.R.

§ 300.17 & 39; 34 C.F.R. § 300.116 (placement is to be based on student's IEP as determined by team including the parents); 34 C.F.R. § 300.327 & 300.501 (c); D.C. Mun. Regs. Tit. 5E § 3013.1-7 (LEA to ensure that child's placement is based on the IEP); and D.C. Mun. Regs. Tit. 5E § 3000.

Petitioner alleges School A is not an appropriate placement for the student; he is not progressing at School, not receiving educational benefit and school cannot meet the student's needs. However, the evidence did not convince the Hearing Officer that the placement and location of services at School A is inappropriate. The evidence demonstrates the student is being provided the special education services prescribed by his IEP and in the IEP's least restrictive environment.

Although there was some testimony that the student's mimics other students' inappropriate behaviors by both the parent and the classroom teacher, this testimony was insufficient for the Hearing Officer to conclude that the conditions at School A are such that this location of services is inappropriate.

There was sufficient evidence presented that Kennedy can provide the specialized instruction, behavioral supports and vocational services that can meet the student's needs and implement his IEP; however, based on the conclusion that the student's IEP can be and is being implemented at School A, the Hearing Officer will not grant the requested relief of DCPS funding for the student at Kennedy.

The Hearing Officer notes, however, that the student is in the eighth grade at a middle school and is slated to change school locations in the 2011-2012 school year. There has apparently been no determination yet made where the student's ESY and services for the 2011-2012 school year will be provided. Thus, the Hearing Officer directs as a part of the Order below that in addition to the actions directed to be taken relative to the student's IEP, that an IEP team with the parent's participation discuss and determine the student's location of services for the coming school year at the IEP meeting ordered below. The Hearing Officer advises that if the student is slated to transition to a public high school setting that careful consideration be given to the concerns expressed about the student's behavior and propensity to mimic other students' inappropriate behaviors and that the team attempt to make the wisest choice for the student not simply a routine school assignment.

As to compensatory education for the denials of FAPE that have been found - compensatory education is an equitable remedy. Reid, 401 F.3d at 523. 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." Id. at 522. "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 at 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 student has been denied a FAPE by not being timely reevaluated and by his IEPs being inappropriate as a result and missing requirements that serve to ensure the student is making progress. The student has made limited academic progress and his social and behavioral concerns have recently increased. Had his evaluations been conducted timely and the IEPs appropriately updated the student may have well made greater academic progress and had fewer behavioral concerns. It seems reasonable that the proposed tutoring and mentoring services will help address the lack of progress and behavioral concerns that have resulted from DCPS failures to this student. The Hearing Officer concludes as compensatory education for the denials of FAPE there was credible testimony by Dr. Holman that the student would benefit from the tutoring and mentoring services in the amounts proposed. Consequently this Hearing Officer concludes the student should be provided torturing and mentoring services in the amounts suggested and in the Order below.

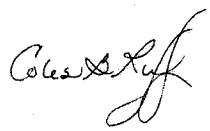
ORDER:

1. DCPS shall within fifteen (15) calendar days of date of this Order convene an IEP meeting for the student and (1) review the student's independent evaluations, (2) review and revise the student's IEP to create appropriate baselines in all goal areas, (3) review all goals for appropriateness and consider suggested modification of goals presented by the parent and/or representative, (4) include anticipated achievement dates for all goals, (5) determine the student's ESY services, (5) include in the IEP all required information relative to the ESY services, and (6) consider and determine the student's location of services for ESY and the 2011-2012 school year.

2. DCPS shall provide the student as compensatory education for the denials of FAPE, 100 hours of independent tutoring and 100 hours in independent mentoring at DCPS prescribed rates.

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: June 8, 2011**