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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 Dates: April 27, 2011 May 2, 2011 <u>Representatives:</u> Counsel for Petitioners: Darnell Henderson, Esq. Brown and Associates 1220 L Street, NW #700 Washington, D.C. 20005 Counsel for DCPS: Assistant Attorney General Tanya Chor, Esq. 1200 First Street, NW Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

[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 April 27, 2011, and concluded on May 2, 2011, at the OSSE Student Hearing Office 810 First Street, NE, Washington, DC 20003, in Hearing Room 2009 and Hearing Room 2003 respectively.

BACKGROUND:

Student or "the student" is age in 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 Specific Learning Disability ("SLD"). The student is enrolled at a District of Columbia public elementary school hereinafter referred to as "School A." She has been enrolled at School A since the start of the 2010-2011 school year. The student was first found eligible while attending a DCPS public elementary school in the first grade.

Prior to attending School A the student was enrolled in an elementary school in Montgomery County, Maryland, where she attended during the 2008-2009 school year and the 2009-2010 school year in the second and third grade respectively.

On March 7, 2011, Petitioner filed a due process complaint alleging, inter alia, DCPS had failed to provide the student an appropriate individualized education program ("IEP") and placement. A resolution meeting was held on March 21, 2011. The parties did not resolve the complaint. On March 23, 2011, Petitioner also filed a motion for default judgment based on DCPS untimely filing a response to the complaint. On March 28, 2011, DCPS filed an opposition to the motion.

On March 31, 2011,[2] this Hearing Officer conducted a pre-hearing conference. Petitioner's motion and the DCPS opposition was considered during the pre-hearing conference. On April 5, 2011, this Hearing Officer also issued an order denying Petitioner's motion for default judgment. This Hearing Officer also issued a pre-hearing order on April 5, 2011, stating the issues to be adjudicated, the relief Petitioner is seeking and Respondent's position with regard to the complaint and/or defenses.

ISSUES: [3]

The issues adjudicated are:

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[2] Attempts were made by this Hearing Officer to schedule the pre-hearing conference soon after the resolution session information was made available. This was the first date mutually available for both counsel.

[3] 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 revised pre-hearing order dated April 4, 2011, are the issue(s) to be adjudicated.

(1): Did DCPS deny the student a FAPE by failing to develop an appropriate IEP that is reasonably calculated to provide a FAPE?

> Petitioner alleges the student's IEP since attending School A, including the IEP developed at February 15, 2011, IEP meeting is inappropriate and does not meet the student's unique needs. Petitioner alleges DCPS has reduced the level of special education services the student requires as compared to the services she received at her prior school. Petitioner maintains that the student is in need a full time special education IEP and placement.

(2): Did DCPS deny the student a FAPE by failing to implement the student's IEP at School A?

> Petitioner's alleges School A cannot implement the student's IEP as it was written on September 24, 2010, and February 15, 2011?

(3): Did DCPS deny the student a FAPE by failing to determine a proper placement?

> Petitioner alleges that at School A the student is in a classroom with too many students (25 or more in a combined fourth/fifth grade) contrary to the requirements of the student's needs and as a result the student has regressed academically since attending School A.

(4): Did DCPS deny the student a FAPE by failing to evaluate the student in all areas of suspected disability and to identify all of the student's special education and related services needs?

> Petitioner alleges the student's independent comprehensive psychological evaluation recommended an occupational therapy evaluation to determine the student's handwriting needs. Petition alleges the parent requested DCPS conduct the evaluation at the February 15, 2011, IEP meeting and DCPS refused.

Petitioner seeks as relief: (1) DCPS funding of a private placement
and (2) DCPS funding of an independent occupational therapy evaluation, and (3) DCPS funding of a compensatory education plan for services the student missed and/or inappropriate services she received while at School A as a result of not being in a placement that can implement her IEP and/or meet her individual needs.

DCPS maintains that it implemented the student's June 9, 2010, IEP from the beginning of the 2010-2011 school year until September 24, 2010, when DCPS met to review the student's IEP and revised the IEP. DCPS maintains that the September 24, 2010, revised IEP as well as the revised February 15, 2011, IEP were implemented at School A and School A is an appropriate placement for the student. DCPS asserts the student does not require occupational therapy services as related service and the student's writing issues are being addressed in the classroom.

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 1-12)[4] that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B. The Hearing Officer also considered the written closing arguments submitted by DCPS counsel on May 3, 2011, and by Petitioner's counsel on May 4, 2011.

FINDINGS OF FACT: [5]

1. The student is age in 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 SLD. The student was first found eligible while attending a DCPS public elementary school in first grade. The student is now enrolled at a District of Columbia public elementary school, School A. She has been enrolled at School A since the start of the 2010-2011 school year. (Parent's testimony, DCPS Exhibits 2 & 3)

2. In April 2008 the student witnessed a shooting in her household and as a result her aunt was given temporary custody. The student resided with her aunt and attended school in Montgomery County, Maryland for two years. The student was traumatized by the shooting and as a result was withdrawn and anxious. After awhile the student became acclimated to the aunt's home and her new school and began to make academic progress. The parent maintained nearly daily contact with the student during this period and the mother often assisted the student with her homework. (Parent's testimony, testimony, DCPS Exhibit 8-4)

3. In November 2008 and February 2009 Montgomery County Schools conducted triennial revaluations of the student. These included a psychological, a speech and language and an occupational therapy ("OT") evaluation. The OT evaluator noted the student's fine motor skills were adequate but noted her handwriting may have been affected by her inattention. The evaluator, however, did not recommend the student receive OT services. (Petitioner's Exhibits 12, 13, 14)

4. During the 2009-2010 school year the student attended third grade at a Montgomery County Elementary, hereinafter referred to as "School B." While at School B the student had difficulty doing third grade level work. Because her reading level was below third grade the parent would provide the student with first grade level reading material to complete her at home reading activities. (Parent's testimony)

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[4] Documents objected to by either counsel and not admitted into the record are so noted in Appendix A.

[5] 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.

5. When the student first came to live with her aunt she was operating at approximately the kindergarten level. In June 2010 the aunt believes the student was operating on a first grade level. On June 9, 2010, while the student was still attending School B her IEP was revised for the 2010-2011 school year. The student's aunt attended the IEP meeting. The IEP prescribed the student receive 22 hours of specialized instruction per week in an out of general education setting and 6 hours per week of specialized instruction in a general education setting. The IEP also prescribed the student receive 1 hour of speech/language therapy per week. This was an increase in services from what had been provided the student during the 2009-2010 school year and the school expressed an intention that the student would be in a self-contained special education class for the 2010-2011 school year if she remained at School B. The intention expressed by the IEP team for the self-contained classroom was to provide more intense services so the student's academic abilities hopefully would be significantly raised. testimony, DCPS Exhibit 2)

6. At the start of the 2010-2011 school year the student returned to live with her mother and the mother enrolled her at School A. She provided School A with the student's Montgomery County IEP. When the student first enrolled at School A she was nervous and afraid of returning home and starting a new school. She did not make friends easily and at times was teased by other students. As a result of her nervousness, the student often twisted on her hair and as a result she began balding in her temple areas. The parent believes the student has regressed academically since she began attending School A. (Parent's testimony)

7. From the start of the 2010-2011 school year DCPS implemented the student's Montgomery County IEP. The student was provided specialized instruction from a certified special education teacher and speech language services as prescribed by the IEP. testimony, testimony)

8. On September 24 2010, DCPS developed an IEP for the student and revised the student's special education services. The parent participated in the meeting by telephone. The revised IEP prescribed the following services: 60 minutes of specialized instruction per day in reading in an out of general education setting, 90 minutes per day of specialized instruction in reading in a general education setting. 60 minutes per day in math in out of general education setting, and 60 minutes per day of specialized instruction in math in a general education setting, 60 minutes per day of specialized instruction in written expression in a general education setting, and 60 minutes per week of speech-language pathology in an out of general education setting. Since the IEP was revised the student has consistently been provided the special education and related services prescribed by the IEP. testimony, DCPS Exhibit 3)

9. In the September 24, 2010, IEP the hours of specialized instruction out of general education were reduced based upon the experience the special education and general education teachers had working with the student over the few weeks she attended School A. The special education teacher found the student was grasping some of the curriculum and benefiting from being with her non-disabled peers, thus there was a legitimate basis for the out of general education hours to be reduced. testimony)

10. At School A the student spends each morning of the school day in the general education classroom with both the general education and special education teachers. There are twenty-five students in the student's general education classroom which has a combination of fourth and fifth graders. Of those twenty-five students seven of the students are in the fifth grade. The remaining students are in the fourth grade. Most of the students in the student's general education classroom are not operating on grade level; however, the student is the lowest functioning student academically. The students in the general education classroom are often separated and grouped for classroom assignments by ability level. testimony)

11. The student is with the special education teacher in the general education setting in the morning shared reading block and for the guided reading block and for writing. The student then has center activities within the general education classroom where she works on activities grouped with other students who are operating near her functional academic level. Both the general education and special education teacher monitor the student's activities in the student academic centers within the classroom. When student completes the center activity she returns to the special education teacher for further instruction. The center activities are usually a group of five or six students. Whenever the student is in the general education classroom the special education teacher is present to assist her and other special education students in the class. There are seven special education students in the general education classroom. The student is being exposed to fourth grade curriculum in the classroom even though she is operating on a lower grade level. testimony)

12. In the afternoon the student receives specialized math instruction in a special education resource room with other special education students. The student then returns to the general education class for social studies and or science and the curriculum is modified for the student by the special education and general education teachers. testimony)

13. The student sometimes gets confused and distracted in the classroom. She is being provided both instructional and testing accommodations that are in her IEP in both the general education classroom and the resource special education classroom. testimony, DCPS Exhibit 10)

14. As the school year has progressed the student has become much more social with her classmates than she was when she first began attending School A. She is now more confident and asks and answers questions in the classroom. Most of the time the student is in the general education classroom she is working with the special education teacher. The student has progressed from about the kindergarten level when she first arrived and is now reading on the first to second grade level. testimony)

15. The student's handwriting is legible and she can improve her handwriting with work assignments in the classroom. Deficiency notices were sent to the parent to alert the

parent that the student was not functioning on grade level. These notices were sent to all parents whose children were operating below grade level. testimony)

16. On January 14, 2011, Dr. Natasha Nelson conducted a comprehensive psychological evaluation of the student. The report of that evaluation was completed on January 21, 2011. The evaluation included, among other assessments, a Woodcock Johnson Tests of Cognitive Abilities and Achievement (WJ-III) Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition (Berry VMI), Connors 3, and Behavior Assessment Scale for Children – Second Edition (BASC-2). The evaluation measured the student's cognitive/intellectual functioning in the low range, and her academic functioning at the mid first grade level in reading and beginning first grade level in math and written expression. Dr. Nelson diagnosed the student with a Learning Disorder Not Otherwise Specified, Posttraumatic Stress Disorder and Adjustment Disorder with Anxiety and Depressed Mood. (Dr. Nelson's testimony[6], DCPS Exhibit 8-17)

17. Dr. Nelson recommended the student be classified as both SLD and Other Health Impaired based on Attention Deficit Hyperactivity Disorder. She recommended the student receive school based counseling and suggested specific strategies to bolster the student's academic abilities. Dr. Nelson recommended the student be placed in a full-time special education classroom. Dr. Nelson concluded that the student's performance on the Berry VMI was very low perhaps due to her lackadaisical approach to completing the VMI may have contributed to her low score as she drew drawings very fast and refused to slow down with requested to do so. Dr. Nelson did not include the recommendation for an occupational therapy evaluation in the comprehensive psychological evaluation report. (Dr. Nelson's testimony[7], DCPS Exhibit 8-17)

18. On February 15, 2011, DCPS convened an IEP meeting to review the recent independent comprehensive psychological evaluation. The team revised the present levels of performance in the IEP as a result of the recent evaluation. The team maintained the level of services: 60 minutes of specialized instruction per day in reading in a out of general education setting, 90 minutes per day of specialized instruction in reading in a general education setting. 60 minutes per day in math in out of general education setting, and 60 minutes per day of specialized instruction in math in a general education setting, 60 minutes per day of specialized instruction in Written Expression in a general education setting, and 60 minutes per week of speech-language pathology in an out of general education setting. The parent and her educational advocate did not agree with the level of services the DCPS team members prescribed. They believed the student should receive specialized instruction in all subjects in a full time special education setting and the parent stated she wanted DCPS to place the student at School. (Parent's testimony, testimony, Petitioner's Exhibits 8 & 9)

19. The student's academic and related services goals have remained the same in each of the IEPs developed. The student has made progress in these goals but has not yet mastered any of the goals. When the student first came to School A she could not write or read

[6] Designated as an expert in conducted comprehensive psychological evaluations.
[7] Designated as an expert in conducted comprehensive psychological evaluations.

numbers 1 to 100. She was operating at approximately the kindergarten level. She can now write and identify numbers up to the 1000 place value. The student was operating at about the first grade level by the time her February 15, 2011, IEP was developed and has continued to make progress further along the first grade level since. The student is on tract to perhaps be operating on a second grade level by the end of the current school year. The students reading comprehension and reading fluency has improved during the school year. She has made more progress this school year in math than reading. She has made three to six months' progress in reading and perhaps six months to a year's growth in math since attending School A. There is little indication the student will regress during the summer without extended school year services, thus the IEP team on February 15, 2011 did not consider at that time that the student was in need of ESY services and did not add that service to the IEP, although the services was her June 9, 2010, IEP. The student's teachers believe she has benefited greatly form the general education setting it would be detrimental to the student to be in a full time general education setting with no non-disabled peers. testimony, DCPS Exhibit 6)

20. On March 15, 2011, the parent's educational advocate conducted a classroom observation of the student at School A. The advocate observed the special education teacher assisting the student in the general education classroom. The special education teacher was working with a group of approximately five students. The general education teacher was working with a larger group of students. The advocate observed that the student required redirection and appeared to have difficulty completing assignments and took a great deal of time completing assignments. testimony)

21. The student has been accepted at is a full-time special education school with certified special education teachers and certified related services providers. admissions team examined the student's evaluations, her IEP as well as their own impressions of the student and decided to accept her. testimony, Petitioner's Exhibit 22)

22. can provide the student with the specialized instruction and speech and language services that are currently in his IEP. A lower school classroom with a certified special education teacher and a teacher's aide has been identified for the student. The classroom can accommodate up to eight students. Currently the class identified has seven students. has a full-time social worker for the lower school of 58 students in eight classrooms that all non-graded. The students are grouped roughly by age and by learning styles and modalities. has occupational therapists, speech therapists, and physical therapists on staff. testimony)

23. integrates related services into the day-to-day of the classroom, including the social worker's services. The disability classifications of the students in the classroom are SLD, OHI and a couple of student's with multiple disability of SLD and OHI and one student on the high end of the autistic spectrum, very significant language based learning challenges. The teacher who is assigned to the classroom identified for the student has worked at since January 2010 and is special education certified, pursuing a Master's degree. The tuition for lower school is per year. 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. [8] *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.

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): Did DCPS deny the student a FAPE by failing to develop an appropriate IEP that is reasonably calculated to provide a FAPE?

Petitioner alleges the student IEP since attending School A, including the February 15, 2011, IEP is inappropriate and does not meet the student unique needs. Petitioner alleges DCPS has reduced the level of special education services the student requires as compared to the services she received at her prior school. Petitioner maintains that the student is in need a full time special education IEP and placement. **Conclusion:** The IEPs developed by DCPS for the student on September 24, 2011, and February 15, 2011, are appropriate. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

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

[8] 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.

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")).

Additionally, the public agency must also ensure that an appropriate IEP is in place for the beginning of each school year. 20 U.S.C. § 1414 (d) (4) (A) (i); 34 C.F.R. § 300.323 (a); and D.C. Mun. Regs. Tit. 5 § 3010.1.

Pursuant to 34 C.F.R. § 300.323(f) If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency—(1) Conducts an evaluation pursuant to §§300.304 through 300.306 (if determined to be necessary by the new public agency); and(2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§300.320 through 300.324.

The evidence demonstrates that when the student arrived at School A with the Montgomery County IEP DCPS immediately implemented the IEP and provided the student the prescribed special education and related services. Both Ms. Batson and Ms. Barton credibly testified to this effect. When the student's IEP was revised on September 24, 2010, the student's specialized instruction hours out of general education were reduced at the suggestion of Ms. Barton who had been working with the student for nearly a month by then. Ms. Barton, nonetheless, continued to work with the student both in the general education and special education resource classrooms.

Both Ms. Barton's and Ms. Lamont's credible testimony demonstrated the student has made both academic and social progress at School A and in the combination setting. This Hearing Officer finds their testimony far more credible than that of Dr. Nelson as to the student's need for a full time IEP and placement. These teachers have worked with the student closely and assisted in her academic and social progress. Dr. Nelson did not conduct any classroom observation of the student. On the other hand these teachers have seen the student benefit from being and learning with her non disabled peers and have averred that the student being in a full time special education setting with no non-disabled peers would actually be detrimental. Although the student's IEP has different accommodations and does not yet contain ESY services, there is insufficient evidence that these changes to the student's IEP from that she had in Montgomery County is inappropriate. Consequently, this Hearing Officer concludes the student's DCPS IEP is appropriate and the student has not been denied a FAPE in this regard.

ISSUE (2): Did DCPS deny the student a FAPE by failing to implement the student's IEP at School A?

Petitioner's alleges School A cannot implement the student's IEP as developed on September 24, 2010, and February 15, 2011? **Conclusion:** School A can and has implemented the student's IEPs. Petitioner failed to sustain the burden of proof by a preponderance of the evidence.

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")).

There was credible testimony from and that DCPS implemented the student's June 2010 IEP from the beginning of the 2010-2011 school year until September 24, 2010, when DCPS met to review the student's IEP and revised the IEP to provide the following services:

- 2 hours/day of specialized instruction outside general education for a total of 10/week outside general education - split equally between math and reading.
- 2.5 hours per day of specialized instruction inside general education for a total of 12.5 hours/week in general education for at total of 22.5 total hours of specialized instruction per week.
- plus 1 hour/week of speech language outside general education.

Their credible testimony also demonstrates that since the student IEP was amended the student has consistently been provided the services prescribed in the IEP. There was no evidence presented by Petitioner to the contrary. Consequently, this Hearing Officer concludes DCPS implemented the student IEP at School A to its full degree. There was no denial of FAPE proved in this regard.

ISSUE (3): Did DCPS deny the student a FAPE by failing to determine a proper placement?

Petitioner alleges that at School A the student is in a classroom with too many students (25 or more in a combined fourth/fifth grade) contrary to the requirements of the student's needs and as a result the student has regressed academically since attending School A. **Conclusion:** The student's LRE and level of services as prescribed in the February 15, 2011, IEP and her current location of services, School A, are appropriate. Petitioner failed to 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.

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.

One reason IDEA was enacted was to provide students with access and exposure to typically developing peers, recognizing the inherent benefit for students with disabilities to be provided exposure to their typically developing peers, both academically and socially. Both Ms. Barton and Ms. Jackson credibly confirmed the student's benefit in the general education environment with her non-disabled peers. Even after all the student has weathered, she is capable of social and academic benefit in the general education setting. The witnesses testified that when the student began attending School A she was withdrawn and lacking confidence. Since her attendance there she has made friends now and grown academically. She is apparently making progress in the general education setting with support of the special education teacher. Albeit she is far from grade level she is still making significant progress.

Ms. Barton credibly testified that the student is making progress and is likely to be at the second grade level by the end of the school year. There is no requirement that an IEP be intended or FAPE be interpreted to mean that it is to bring a student to grade level. The student is apparently being educated and receiving educational programming from knowledgeable and caring educators. It is perhaps because the student has been benefiting in an environment with her non-disabled peers that she has achieved the progress in the past year that she has and hopefully with the continued efforts of the staff at School A the student's progress may even accelerate. This Hearing Officer encourages the parent of work closely with these teachers and closely monitors the student's progress to achieve such a result.

ISSUE (4): Did DCPS deny the student a FAPE by failing to evaluate the student in all areas of suspected disability and to identify all of the student's special education and related services needs?

Petitioner alleges the student's independent comprehensive psychological evaluation recommended an occupational therapy evaluation to determine the student's handwriting needs. Petition alleges the parent requested DCPS conduct the evaluation at the recent IEP meeting and DCPS refused. **Conclusion:** There was insufficient evidence based on the independent comprehensive psychological and other evidence presented that an occupational therapy

evaluation was warranted. Petitioner failed to sustain the burden of proof by a preponderance of the evidence.

DCPS is required to complete evaluations of children in 120 days under the IDEIA and DC law. 34 CFR § 300.301(c)(ii); D.C. Code § 38-26561.02 (2010) (DCPS shall evaluate within 120 days from the date the child was referred). Evaluation under the IDEIA includes assessment procedures as well as the eligibility determination. *See* 34 CFR §§ 300.15 (definition of evaluation includes § 300.306), 300.306 (procedures for eligibility meeting and decision).

The IDEA does not require LEAs to administer every test requested by a parent or educational advocate. Rather, to ensure that a child with a disability receives a FAPE, an LEA must use "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information." See 20 U.S.C. § 1414(b)(2)(A).

The evidence demonstrates the student was provided an occupational therapy evaluation in Montgomery County which did not recommend the student to receive occupational therapy services. Although Dr. Nelson noted the student's low VMI score she noted in her report that the score was probably due to the student's flippant approach to the assessment. In addition, the student's teachers credibly testified the student's handwriting appears to be appropriate. Although the student can apparently benefit from handwriting development, the evidence presented does not demonstrate that DCPS' failure and/or refusal to conduct the OT evaluation is a denial of FAPE. In fact, it was not clear from the evidence that a request for the evaluation was made and refused. Thus, this Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of evidence on this issue. However, this Hearing Officer suggests that the Petitioner make a formal request to DCPS for the evaluation and see if it will be conducted.

ORDER:

The complaint is this matter is hereby dismissed with prejudice.

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: May 5, 2011