District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
Student Hearing Office
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Confidential

STUDENT[1], by and through his Parent Petitioners, v. District of Columbia Public Schools "DCPS" Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Dates: October 5, 6, & 8, 13, 2010 <u>Representatives:</u> Counsel for Petitioners: Carolyn Houck 5505 Connecticut Ave. NW Suite 105 Washington, DC 20015 Counsel for DCPS: Tanya Chor, Esq. Assistant Attorney General District of Columbia DC Public Schools 1200 First Street, NE 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* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* ("I.D.E.I.A." or "IDEA"), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

BACKGROUND:

Student or "the student" is age six and attends a DCPS elementary school hereinafter "School A." He is currently a grader. Petitioner alleged in the complaint that DCPS failed to timely identify the student as a child with a disability under IDEA and once evaluations of the student were conducted DCPS failed to find the student eligible. DCPS initially denied the student was eligible and denied he had suffered any harm and/or been denied a FAPE.

A resolution meeting was held August 27, 2010, and the matter was not resolved. The pre-hearing conference conducted between Petitioner and DCPS on September 16, 2010, resulted in a pre-hearing order issued on September 22, 2010. Petitioner's counsel filed a motion for the two-year limitation on claims under IDEA to be waived. A second pre-hearing conference was conducted on September 28, 2010, to hear arguments on the motion. This Hearing Officer denied the motion at the conclusion of the conference and issued a written order noting denial of the motion on October 3, 2010.

The Due Process Hearing was convened October 5, 2010, at the OSSE Student Hearing Office 810 First Street, NW, Washington, DC, 20003, in hearing room 2006. The hearing reconvened on October 6, 2010, in hearing room 2004. The hearing resumed on October 8, 2010, in hearing room 2006. On October 8, 2010, Petitioner's counsel requested a continuance of the hearing. The Hearing Officer issued an order granting the continuance. The hearing resumed on October 13, 2010, in hearing room 2009. At the conclusion of the hearing Petitioner's counsel requested a second continuance to allow for the filing of written closing arguments. The closing arguments were submitted October 18, 2010, and responses to the closing were submitted October 19, 2010, and the hearing record was closed with submission of the closing responses.

At the outset of the hearing on October 5, 2010, the parties reached stipulations that eliminated some of the issues raised in the original complaint. The stipulations are noted in the Findings of Fact. The remaining issues to be adjudicated by the Hearing Officer are noted below.

In addition to a finding the student was denied a FAPE, Petitioner seeks as remedy for the alleged denials of a FAPE that the Hearing Officer: (1) find the student eligible under IDEA with disability classifications of Autism and Other Health Impairment, place the student at the private full-time special education school the parent has identified and grant the student compensatory education.

ISSUE(S): [2]

The issues adjudicated are: (1) Whether there is sufficient evidence that the student's disability classification is Autism and OHI as Petitioner asserts, (2) The appropriate program/placement for the student, and (3) The appropriate compensatory education to be provided the student.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations of both counsel that resulted in stipulations as noted in the Findings of Fact below, the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 & 29 and DCPS Exhibits1-18) which were admitted into the record and the parties written closing statements and responses.

FINDINGS OF FACT [3]**:**

1. The student is years old and resides in the District of Columbia with his parent(s), (hereinafter "Petitioner" or "Parent" or "the parent"). The student currently attends School A, a DCPS elementary school. (Parent's testimony)

2. Since attending School A the student has experienced difficulty retaining academic material and has had difficulties engaging with his peers. He is sometimes bullied by other students. The student is taking medication for a seizure condition and to calm him and assist him in sleeping at night. He often prefers to play by himself and doesn't seem to enjoy school. (Parent's testimony)

3. On June 3, 2009, the parent signed a form consenting to DCPS conducting evaluations of the student to determine his eligibility for special education services. At the time the student was age five and attending a private community day care center in the District of Columbia. (Petitioner's Exhibit 4)

4. On July 1, 2009, a comprehensive developmental evaluation was conducted of the student by DCPS. The evaluation included a parental questionnaire, student observations and the Battelle Developmental Inventory 2nd Edition. The assessments indicated the student's cognitive and adaptive abilities were in the low to high average range. (Petitioner's Exhibit 5)

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[2] The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

[3] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer may perhaps only cite one party's exhibit.

5. On August 13, 2009, an evaluation report was generated from an initial speech and language evaluation DCPS conducted of the student. The evaluation included among other assessments the Pre-School Language Scale 4th Edition. The evaluation revealed the student had average expressive and receptive language skills. The evaluator did not recommend the student for speech and language services. (Petitioner's Exhibit 6)

6. DCPS also conducted an occupational therapy evaluation the report for which was dated August 27, 2009. The evaluation included among other assessments, the Peabody Developmental Motor Scales, 2nd Edition and the Beery-Buktenica Developmental Test of Visual Motor Integration. The evaluator concluded as a result of the assessment and teacher interviews that the student had sensory processing difficulties in the areas of modulation of movement, sensory sensitivity, sensory-seeking behaviors, inattention and distractibility…demonstrating inadequate behaviors as outcomes of sensory visual and tactile processing difficulties which all impacted his classroom performance. (Petitioner's Exhibit 7)

7. On August 12, 2009, DCPS conducted a psychological evaluation of the student the report for which was dated August 29, 2009. The evaluation consisted of among other things a student observation, a teacher interview and the Reynolds Intellectual assessments Scales (RIAS). Based on the assessments, interview and observation the evaluator concluded the student had above average cognitive abilities but presented with significant behavior/emotional concerns that impacted his learning. (DCPS Exhibit 3)

8. At the start of the 2009-10 school year the student began attending School A in the kindergarten. (Parent's testimony)

9. On September 30, 2009, a DCPS team met, reviewed the student's evaluations and determined the student was not eligible as a child with a disability under IDEA in need of special education and/or related services. (DCPS Exhibits 7&8)

10. On December 2, 2009, based on a parental request the student was referred to the Student Support Team ("SST") at School A. The concerns stated in the SST form: "[the student] is unable to perform any classroom assignments. He is relatively new to this school. He is off task and disengaged from classroom learning. He makes excessive noise in the class and cries often over small matters." (DCPS Exhibit 11)

11. On December 16, 2009, an SST meeting was convened which the parent attended. Strategies were developed at the meeting to address the concerns that the student did not interact well with other students, did not follow directions and was among other things disruptive in the classroom. (DCPS Exhibit 12&13)

12. In January 2010 the parent took the student to be seen at the Department of Neurology of the Children's National Medical Center ("Children's"). The report from that visit indicates the student was diagnosed with developmental delay. The report also stated that the parent should follow up with the student's school regarding an individualized educational program ("IEP") for the student. (DCPS Exhibit 10)

13. On February 24, 2010, another SST meeting was convened that the parent attended. The SST concluded the strategies that had been implemented had been partially successful. Additional strategies were developed and the team determined that an evaluation of the student would be conducted. (DCPS Exhibit 14)

14. On March 4, 2010, a letter was generated from the student's physician at Children's to DCPS that stated the student had been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and that he had been prescribed medication to reduce his hyperactivity, impulsivity and distractibility. The letter gave several recommendations for classroom accommodations to assist the student in addressing these behaviors and to help him develop and maintain age appropriate relations and to achieve academic success. (DCPS Exhibit 17)

15. On March 3, 2010, and March 12, 2010, DCPS conducted a comprehensive psychological and school based neuropsychological evaluation of the student. In addition to records review and interviewing the parent and school staff the evaluator conducted a battery of assessments.[4] The evaluator concluded as a result of the evaluation that the student's general cognitive abilities were in the average range, that his social emotional development demonstrated problematic behaviors and that he presented with "autistic-like" behaviors that are manifested by his difficulty in processing sensory tactile, and kinesthetic information, "as this difficulty is typically common among individuals with Autism and /or those with ADHD." (DCPS Exhibit 4)

16. On March 26, 2010, the parent attended a conference at School A with the student's teacher and a school administrator. The parent expressed continued concern that the student was not progressing academically and expressed a desire to withdraw the student from School A as a result. The school staff noted that the school had implemented the recommendations made by the student's physician and that in their opinion the student was making some progress. (DPCS Exhibit 16)

17. On June 8, 2010, a final SST meeting was held that the parent attended. The members of the team concluded the strategies that had been implemented were not successful and the student would be referred to a multidisciplinary team ("MDT") to determine if the student was child with a disability under IDEA. (DCPS Exhibit 15)

18. On August 12, 2010, Petitioner filed the due process complaint alleging inter alia that DCPS had inappropriately found the student ineligible under IDEA in at the September 30, 2009, meeting. (Petitioner's Exhibit 2)

19. On August 27, 2010, DCPS authorized the parent to obtain additional independent evaluations at DCPS expense. (Petitioner's Exhibit 21)

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[4] The assessments included among other things, the Kaufman Assessment Battery of Children, Behavior Assessment System for Children, Gilliam Autism Rating Scale Second Edition, Developmental History for Diagnosis of Autism.

20. The student is currently eligible as a child with a disability under IDEA. DCPS acknowledges the student could have been identified as eligible from the start of the 2009-2010 School Year ("SY") and acknowledges the student is due compensatory education back to start of the 2009-2010 school year. (Stipulation)[5]

21. On August 19, 2010, Nicole Zeitlin, Psy.D conducted an independent psychological clinical evaluation of the student. The report for the evaluation is dated September 9, 2010. The evaluation included review of the student's pervious evaluations and academic records and diagnostic assessments.[6] Dr. Zeitlin concluded based on her evaluation that the student's cognitive abilities were in the low average to borderline range with a full scale IQ of 71. His verbal comprehension and perceptual reasoning in the average range. However, the student's working memory was in the first percentile. The student's nonverbal intelligence was measured at the 24th percentile. The student's reading and math skills were in the low average range; his spelling was in the average range but his written expression was borderline at the 4th percentile; and his visual motor function was in the low average range at the 10th percentile. (Dr. Zeitlin's testimony, Petitioner's Exhibit 22)

22. Based on the Autism Rating Scales Dr. Zeitlin noted the student's demonstrated probability of Autism was "very likely." Dr. Zeitlin also determined the student is experiencing clinically significant difficulties of hyperactivity, depression and attention problems. Dr. Zeitlin[7] expressed her expert opinion that the student is eligible as a special education student under IDEA with disabilities of Other Health Impairment for ADHD and Autism. In addition to the difficulties noted by her own assessments Dr. Zeitlin noted the student's sensory processing and integration difficulties noted in the DCPS evaluation were significant in arriving at her opinion that the student had Pervasive Developmental Disorder ("PDD") Not Otherwise Specified, a condition on the Autism spectrum. (Dr. Zeitlin's testimony, Petitioner's Exhibit 22)

23. Based upon the student disabilities and academic deficits the student should have received special education services at the start of his kindergarten year and a result of not having done so has fallen significantly behind his non-disabled peers in social and academic development. Because it is early in the student's academic career it is a critical period for him to acquire skills through intensive remediation and not fall any further behind. The student would only fall further behind absent intense services that would be provided in a full-time special education setting. In the appropriate program he will

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[5] The parties specifically did not make any stipulation as to the student's disability classification, the appropriate program/placement, the amount and/or form of compensatory education that is appropriate.

[6] The evaluation included the following assessments: Wechsler Intelligence Scale for Children 4th Edition, Test of Nonverbal Intelligence 3rd Edition, Woodcock Johnson III, Berry Buktenica Test of Visual Motor Integration, and student interview Behavior Assessment System for Children 2nd Edition, Adaptive Behavior Assessment Scale, Gilliam Autism Rating Scales 2nd Edition, Woodcock Johnson III Parent Checklist.

[7] Dr. Zeitlin was designated as an expert in the area of evaluation of student's for special education, classification and programming and placement of special education students.

begin to make up for the loss of academic and social skills development he has lost. If the student had received full time special education services for the past year he might very well be at grade level now. There is no reason to think that with the proper program and some remediation he could not catch up. It is very possible the student could progress one academic year with full time special education services. (Dr Zeitin's testimony)

24. School A is a DCPS elementary school that was reconstituted at the start of the 2010-2011 school year. The student is in one of the school's three first grade classrooms with approximately eighteen other students. School A provides special education services to its students through inclusion services. There are three special education teachers in the school, one of whom services students in the lower grades including those in the first grade classrooms. If the student remains at School A he is likely to receive 5 to 7 hours weekly of specialized instruction. At least one of those hours would be used for collaboration and planning between the general education teacher and the special education teacher. The remaining hours would be delivered to the student with the special education teacher assisting the student and other special education students in the general education classroom. It would be up to the student's two teachers whether any of the specialized instruction hours were delivered in a separate "pull out" classroom, based on the student's need and academic performance. testimony)

25. The student has been interviewed by and accepted to The staff reviewed the student educational records including his evaluations. The student visited a classroom and was observed by the staff. To the school staff the student first appeared to have higher academic abilities based on his evaluations than he displayed when he visited the school. He needed a lot of support of repeated directions in order to accomplish the work that was presented to him during his visit. He appeared not to have basic strategies to solve basic math problems. Once given repeated support and direction he could perform the tasks. testimony)

26. The school serves 205 students from eight jurisdictions with the largest number of students funded by the District of Columbia. The school has been in existence approximately 50 years. Students range in age from 4 to 21 with a range of disabilities classifications. Approximately 68% of the students at the school, however, are on the autism spectrum. At the student would be in a classroom with approximately six students and would have the services of a special education teacher and aide, an occupational therapist and speech language pathologist. The student's academic, occupational therapy and other needs could be effectively met at With the intense services the student would receive at he might easily be ready to return to a general education setting and perform adequately within a year or two of receiving services at 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 5 DCMR 3030.3 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.

Issue 1: Whether there is sufficient evidence that the student's disability classification is Autism and OHI as Petitioner asserts. Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student's disability classification is Autism and Other Health Impairment based on the condition of ADHD.

DCPS acknowledged at the outset of the hearing and by stipulation that the student is eligible under IDEA and could have been found eligible at the start of the 2009-2010 school year and that compensatory education is warranted from that time. Inherent in this acknowledgment is the conclusion that the student has been denied a FAPE by not having been previously found eligible and provided special education and its related services. However, DCPS did not agree to the disability classification under which the student would be found eligible.

Pursuant to 34 C.F.R. 300.8 (1) Child with a disability means a child evaluated in accordance with Sec. Sec. 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

34 C.F.R. 300.8 (c) states: The terms used in this definition of a child with a disability are defined as follows:(1) (i) Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with

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[8] 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 that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

Pursuant to 34 C.F.R. 300.8 9 (c) (9) Other health impairment means 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.

Although there was testimony from DCPS witnesses who were familiar with the student and stated an opinion the student was not Autistic those witnesses did not have the level and depth of experience to sufficiently refute Dr. Zeitlin's findings and opinion. In addition, DCPS' earlier occupational therapy and school-based neuropsychological evaluations strongly suggested the sensory and autistic-like behaviors that also support this conclusion that student has a condition on the autism spectrum. The student has also been diagnosed with ADHD by Children's and the witnesses who were familiar with the student noted his distractibility and need for continual redirection in the classroom. Thus, this Hearing Officer also finds sufficient basis to conclude the student has the disability classification of OHI based on his ADHD condition.

Issue 2: The appropriate program/placement for the student. Conclusion: Petitioner sustained the burden of proof that the student is in need of a full-time special education placement.

Pursuant to 34 C.F.R. 300.114 (a) (2) Each public agency must ensure that--
(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Pursuant to 34 C.F.R. 300.116 (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled; (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.
(Authority: 20 U.S.C. 1412(a)(5))

Although the student has not yet been provided specialized instruction and related services at his current school, there was credible and expert testimony offered by Dr. Zeitlin that the student's has significant academic deficits and that if he continues in a general education setting without sufficient supports he would continue to regress both academically and in other areas associated with his disabilities. The level of instruction and services that would be offered to the student in the general education/inclusion setting at School A based on Dr. Zietlin's credible and expert

testimony would in fact be detrimental to the student. Thus, this Hearing Officer concludes the student's appropriate placement at this time is a full time special education setting. There is sufficient evidence on the record that can provide appropriate services to meet the student needs and based on the fact there are other DCPS funded students attending the Hearing Officer reasonably infers that the cost of is reasonable.

Issue 3: What is the appropriate compensatory education for the student. Conclusion: The Hearing Officer concludes based on the evidence presented that Petitioner is due a compensatory education award in the amount of services awarded in the Order below. The parties stipulated that compensatory education is warranted for the student from the start of the 2009-2010 school year.

In *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) the Court stated, "courts and hearing officers may award 'educational services . . . to be provided prospectively to compensate for a past deficient program.'" *Id.* citing *G. ex. Rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003). Compensatory education is an equitable remedy crafted to remedy educational deficit created by "an educational agency's failure over a given period of time to provide FAPE to a student'" *Id.* "Appropriate compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place." *Id.*

A Hearing Officer cannot determine the amount of compensatory education that a student requires unless the record provides him with "insight about the precise types of education services [the student] needs to progress." *Branham,* 427 F.3d at 12. Relevant evidence includes "the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment." *Id.* In *Nesbitt,* the Court found that an "award was not adequately individualized or supported by the record" when the Hearing Officer was not provided with any information about the student's current grade level of functioning. *Nesbitt,* 532 F.Supp.2d at 124-25. (*Mary McLeod Bethune Day Academy Public Charter School v. Bland*, 534 F. Supp. 2d 109.)

Although Dr. Zeitlin proposed a number of components of compensatory education for the student she noted that the student might very well be able to progress to the level he would have been if he had received appropriate services in kindergarten. Consequently, the Hearing Officer concludes that there was sufficient proof that the student's deficits and missed services could be effectively remediated within the first year of his attendance at coupled with the services that he would receive there. Consequently, this Hearing Officer grants the relief in the Order as appropriate compensatory education based on the evidence presented.

ORDER:

1. DCPS shall place and fund the student at for the remainder of 2010-2011 school year and provide transportation services.

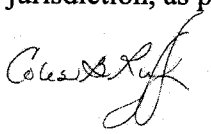
2. Within thirty (30) calendar days of the student's arrival at DCPS shall ensure that a multidisciplinary team/individualized educational program ("IEP") meeting is convened to develop an IEP for the student consistent with the findings of this Order.

3. As compensatory education for the denial of FAPE to the student from the start of 2009-2010 school year DCPS shall fund 6 hours per week of individualized tutoring focused on both academic remediation and adaptive skill and social emotional remediation with an appropriately trained professional at DCPS prescribed rates for the remainder of the academic 2010-2011 school year following the date of this Order.

4. At the end of the 2010-2011 academic year DCPS should as customary convene a meeting to determine if the student has made sufficient academic and progress in other areas to warrant the student returning to a general education and/or inclusion setting.

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. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: October 21, 2010