

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

on behalf of,

(DOB Student,
 STARS

Petitioner,

Case No.
Bruce Ryan, Hearing Officer

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing: May 4, 2009
Decided: May 18, 2009*

Respondent.

* A joint motion for continuance was granted to permit consideration of the parties' written closing statements extending the HOD deadline to May 18, 2009, 10 days following submission of the post-hearing briefs, pursuant Sections 402(A)(1) and 700.4 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP").

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

This Due Process Complaint was filed on March 31, 2009, on behalf of a year old student (the "Student") who resides in the District of Columbia and attends

School. The complaint was brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§ 1400 *et seq.*, and its implementing regulations, as well as relevant provisions of the District of Columbia Code and the Code of D.C. Municipal Regulations. The complaint alleges that the Student is being and has been denied a free appropriate public education ("FAPE") as a result of various failures by DCPS to provide an appropriate individualized education program ("IEP") and appropriate placement from the 2005-2006 through 2008-2009 school years.¹

On April 6, 2009, DCPS agreed to waive the resolution session and requested that this case proceed to a due process hearing on the merits. DCPS filed a response on that same date, which denies the allegations that DCPS denied the Student a FAPE and generally asserts that DCPS has acted appropriately regarding the Student's IEPs and placements. DCPS also asserted that any factual claims preceding the 2007-2008 school year are barred by the applicable statute of limitations.

¹ Petitioner is represented by Katherine Zeisel, Esq. of the Children's Law Center, and Respondent District of Columbia Public Schools ("DCPS") is represented by Daniel Kim, Esq., Assistant Attorney General for the District of Columbia.

OSSE
STUDENT HEARING OFFICE
2009 MAY 19 AM 9:04

A Prehearing Conference ("PHC") was held on April 15, 2009 to discuss and clarify the issues and address other pre-hearing procedural matters. Subsequent thereto, on April 23, 2009, Petitioner filed a Motion for Default and Summary Judgment, which was addressed in a Prehearing Order dated May 3, 2009. Five-day disclosures were filed by both parties on or about April 27, 2009; and the Due Process Hearing convened on May 4, 2009. The parent elected for the hearing to be closed.

As a result of the motion for default and summary judgment and the Prehearing Order, the parties discussed and agreed to various Stipulations of Fact at the outset of the hearing. The Stipulations of Fact agreed to at hearing were then submitted in writing for the record on May 6, 2009, and extensive written Closing Arguments and post-hearing briefs were filed by both parties on May 8, 2009.

At the Due Process Hearing, 33 documentary exhibits submitted by Petitioner (identified as -1" through -33") and two (2) documentary exhibits submitted by DCPS (identified as "DCPS-1" and "DCPS-2") were admitted into evidence. Petitioner presented three witnesses: (parent-Petitioner); Ms. Emily Peltzman (Investigator, Children's Law Center); and Dr. David Missar, PhD (expert psychologist). DCPS presented no witnesses and elected to rest on the record following Petitioner's case in chief. The hearing took place over the course of approximately eight (8) hours.

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and *SOP* Section 1003.

II. ISSUE(S) AND REQUESTED RELIEF

As summarized in the Prehearing Order and at the outset of the Due Process Hearing, the following sets of issues involving alleged denials of FAPE were presented for determination:

- A. *Identification and Evaluation*** — Whether DCPS wholly and/or in a untimely manner failed to locate, identify and/or fully and appropriately evaluate the Student;
- B. *Inappropriate IEPs*** — Whether DCPS failed to develop and/or timely develop appropriate IEPs for the Student from the 2005/06 school year to the present, including but not limited to the March 8, 2008 and March 17, 2009 IEPs;
- C. *Inappropriate placement*** — Whether DCPS failed to provide and/or timely provide the Student with an appropriate educational placement from the 2005/06 school year to the present;
- D. *Inappropriate disciplinary measures*** — Whether DCPS failed to implement appropriate disciplinary measures for the 2008/09 school year; and
- E. *Procedural violations*** — Whether DCPS committed procedural violations by, among other actions, failing to (1) provide Petitioner appropriate prior notice(s), (2) properly inform Petitioner about her procedural rights, (3) include Petitioner in the decision to change the Student's placement from _____ and/or (4) provide required personnel at IEP/MDT meetings, such that the Student's substantive rights were impacted with respect to receiving FAPE.

Petitioner requests the following relief: (1) change in the Student's disability classification, to include learning disabled; (2) immediate placement and funding for the Student to attend a non-public, full-time therapeutic special education school that can address all the Student's needs (namely, _____ in Laurel, MD); (3) a one-to-one aide for the Student; (4) payment for the independent psycho/educational evaluation obtained by Petitioner; (5) funding of an independent functional behavioral assessment ("FBA") and independent speech-language evaluation; and (6) compensatory education services for DCPS' denial of FAPE from 2005 to the present.

III. FINDINGS OF FACT

1. The Student is a _____ year old resident of the District of Columbia whose date of birth is _____. The Student attends _____ School where she is currently repeating the _____ grade. *Parent Testimony*; ¶ 6.
2. The Student has been determined to be eligible for special education and related services, with a disability classification of Multiple Disabilities. *See* ¶ 6.
3. The Student's current IEP is dated March 17, 2009. ¶ 6. The IEP requires 20 hours per week of specialized instruction, 30 minutes per week of occupational therapy ("OT"), and 30 minutes per week of behavioral support services, all outside the General Education setting. *Id.*, p. 5. The IEP indicates that the Student's needs require removal from general education because (*inter alia*) the Student is functioning below grade level in reading, math and written expression, and the Student displays inappropriate behavior with peers and adults. *Id.*
4. In the 2005-2006 school year, the Student attended _____ School and was retained due to her failure to make academic progress or to develop appropriate social skills. *Stipulations of Fact*, ¶ 1.
5. DCPS did not refer the Student for special education, did not provide prior notice, and did not provide any notice of procedural rights to Petitioner during either the 2005-2006 or 2006-2007 school years. *Stipulations of Fact*, ¶¶ 2-3.
6. In the 2007-2008 school year, the Student started the year in first grade, where she struggled academically and with behavioral problems. *Stipulations of Fact*, ¶ 4.
7. DCPS did not refer the Student for any special education evaluations until Petitioner submitted a written referral on or about October 17, 2007. ¶ 1. Prior to that date, Petitioner was unaware of the existence of the referral form or the possibility of making a written referral, and did not become aware of it until the Student's teacher told her about it. *See Parent Testimony*.
8. On November 26, 2007, an IEP/MDT meeting was held to get consent for evaluations. *Stipulations of Fact*, ¶ 5.
9. In January 2008, the Student was promoted to second grade, where she struggled academically and with behavioral problems. The promotion to second grade was determined unilaterally by DCPS and without consultation with the IEP/MDT team. *Stipulations of Fact*, ¶¶ 6-7.

10. DCPS conducted a psychological evaluation on January 28, 2008, which found the Student's full-scale IQ to be 56 and which did not include adaptive testing or address the Student's ADHD diagnosis. *Stipulations of Fact*, ¶ 8.

11. DCPS conducted a social history evaluation on February 22, 2008, which did not address her diagnosis of ADHD or the behavioral problems at home or at school. *Stipulations of Fact*, ¶ 9.

12. The March 3, 2008 IEP did not classify the Student as a student with other health impairment-ADHD or mild mental retardation. The IEP provided for 15 hours of specialized instruction and failed to provide any classroom accommodations. *Stipulations of Fact*, ¶¶ 10-12.

13. No behavioral intervention plan was developed during the March 3, 2008 IEP/MDT meeting in spite of reports reflected in the March 3, 2008 MDT notes about behavioral problems in the classroom. *Stipulations of Fact*, ¶ 13. The March 3, 2008 IEP also did not provide Extended School Year ("ESY") services. *Id.*, ¶ 14.

14. According to Petitioner's uncontroverted testimony, she disagreed with DCPS' psychological evaluation of the Student and communicated that disagreement at the March 3, 2008 IEP/MDT meeting. *Parent Testimony*. She subsequently decided to obtain an independent psychological evaluation from Dr. David Missar and requested payment from DCPS for that evaluation. *Id.*; 6; RT-29.

15. No IEP/MDT meeting was convened at _____ until March 17, 2009. *Stipulations of Fact*, ¶ 15.

16. During the 2008-2009 school year, _____ conducted an Academic Evaluation without obtaining prior consent of the mother (Petitioner). *Stipulations of Fact*, ¶ 16.

17. The March 17, 2009 IEP does not classify the Student's disabilities to include a learning disability. *Stipulations of Fact*, ¶ 17.

18. The March 17, 2009 IEP does not provide full-time specialized instruction. *Stipulations of Fact*, ¶ 18. DCPS only increased the instruction hours from 15 to 20 per week.

19. The March 17, 2009 IEP does not provide for school-based social work services that are not counseling services. *Stipulations of Fact*, ¶ 19.

20. The March 17, 2009 IEP does not provide the necessary accommodation for a dedicated aide. *Stipulations of Fact*, ¶ 20.

21. The March 17, 2009 IEP does not provide other necessary accommodations, including a 4:1 student/staff ratio and a literacy coach. *Stipulations of Fact*, ¶ 21.

22. The March 17, 2009 IEP did provide ESY services. *Stipulations of Fact*, ¶ 22.

23. DCPS failed to create a behavioral intervention plan ("BIP") during the March 17, 2009 IEP/MDT meeting. No written notice other than the IEP was issued. *Stipulations of Fact*, ¶¶ 23-24.

24. During the 2007-2008 school year, _____ notified Petitioner that her children would not be permitted to attend _____ for the 2008-2009 school year. No IEP/MDT meeting was held to address this change of placement for the Student, no prior notice

was provided, and Petitioner was not given additional notice of her procedural rights at that time. *Stipulations of Fact*, ¶¶ 25-26; *see also* -21.

25. Despite the fact that the Student's current IEP calls for 20 hours per week of specialized instruction outside the general education setting, DCPS generally only removes the Student from her general education class to receive special education services from approximately 10:00 am to 10:30 am each day. *See Peltzman Testimony*; -31--32.

26. While attending the Student was subjected to disciplinary measures that were inappropriate for a child of her cognitive functioning and capabilities. These included: (a) sending her to kindergarten class because her 2d grade classroom teacher told her she "does not teach babies" -31); and (b) requiring her to write 50 times sentences such as "I need to learn how to be attentive" and "I will learn how to respect [the teacher]" 28). *See also Parent Testimony; Peltzman Testimony*. DCPS also improperly suspended the Student following incidents that likely were a manifestation of her disability. *See* 24--26.

27. Uncontroverted evidence shows that the Student needs full-time specialized instruction and related services outside the general education setting based on the evaluations completed to date, the teachers' reports, and her lack of academic and behavioral progress. *See, e.g., Missar Testimony; Parent Testimony*; -10; -12.

28. Uncontroverted evidence shows that cannot provide full-time special education and related services to meet the Student's unique needs, and DCPS has not identified or offered any other placement option for the Student.

29. DCPS stipulated at the hearing that Maryland can provide an appropriate full-time program for the Student.

30. DCPS' failures to conduct appropriate evaluations, to develop appropriate IEPs, to provide the services called for in IEPs, and/or to provide appropriate placements for the Student for the 2005-2006 through 2008-2009 school years have harmed the Student and negatively impacted the Student's academic and behavioral progress.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see also Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). This burden applies to any challenged action and/or inaction, including failures to evaluate, develop an appropriate IEP, and/or provide an appropriate placement.

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-3030.3. The normal standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *see also* 20 U.S.C. §1415(i)(2)(C)(iii).

B. Statute of Limitations

3. DCPS asserted the affirmative defense of statute of limitations to all allegations prior to March 31, 2007. However, as discussed below, Petitioner has established that a statutory exception applies to the statute of limitations in this case and that, in any event, Petitioner has filed her complaint within two years of the date she knew or should have known about the alleged actions that form the basis of the complaint. The Hearing Officer therefore concludes that Petitioner's claims are not barred by the IDEA statute of limitations.

4. The IDEA provides that a "parent or agency shall request an impartial due process hearing *within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint...*" 20 U.S.C. §1415(f)(3)(C) (emphasis added). IDEA also provides for exceptions to that mandatory timeline. Specifically:

"The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to —

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or,

(ii) the local education agency's *withholding of information from the parent that was required under this subchapter to be provided to the parent*

20 U.S.C. §1415(f)(3)(D) (emphasis added); *see also* 34 C.F.R. §300.511(e), (f). *See also* SOP §301.2(B).

5. The evidence (including the parties' Stipulations of Fact) show that DCPS withheld information from Petitioner about special education and her procedural rights to challenge the decision not to provide the Student with special education on various occasions prior to March 31, 2007. Prior notice and notice of procedural rights are required to be provided to the parent. *See, e.g.*, 34 C.F.R. §300.503; DCMR §5-3020 and §5-3024.

6. At the hearing, DCPS stipulated that it had not provided special education, prior notice about its decision not to do so or any notice of procedural rights to Petitioner during either the 2005-2006 or 2006-2007 school years. DCPS did not refer the Student for any special education evaluations until Petitioner submitted a written referral on or about October 17, 2007, and not until November 26, 2007 was an IEP/MDT meeting held to get consent for evaluations. *See Findings of Fact*, ¶¶ 5-8.

7. Petitioner also testified that she had requested help for the Student from DCPS on several occasions and that the Student did not receive any help until the first IEP was developed on March 3, 2008. In addition to talking to the classroom teacher, Petitioner testified that she spoke with the Special Education Coordinator ("SEC") at _____ after the Student was diagnosed with ADHD while she was in kindergarten, but that the SEC did not refer the Student for special education even after learning of the diagnosis. Moreover, DCPS issued no notice for this, even though it clearly had made a decision not to refer the Student for special education in response to the parent's requests.

8. In light of the parties' stipulations and the other evidence presented at hearing as to the multiple instances in which DCPS withheld legally required information from Petitioner, the Hearing Officer concludes that the statutory exception contained in 20 U.S.C. §1415(f)(3)(D) (ii) applies in this case, and thus that the two-year statute of limitations does not operate to bar allegations prior to March 31, 2007. The Hearing Officer further concludes that, in any event, the date on which Petitioner "knew or should have known" about the alleged actions that form the basis for her complaint was likely no earlier than October 17, 2007, when Petitioner submitted a written referral for a special education evaluation.² Thus, by any measure, this action is timely filed, as Petitioner would have had until at least October 17, 2009 to request an impartial due process hearing.³

C. Issues/Alleged Violations by DCPS

9. For the reasons discussed below, the Hearing Officer concludes that Petitioner has carried her burden of proof as to each of the violations and denials of FAPE alleged in the complaint. DCPS presented no testimony to contradict and did not seriously contest any of these allegations. Indeed, the only issues even addressed in DCPS' Closing Argument were its statute of limitations defense and the appropriate elements of compensatory education.

Identification and Evaluation

10. Under its "child find" mandate, DCPS has an affirmative duty to identify, locate and evaluate a potentially disabled child. 20 U.S.C. §1412(a) (3) (A); DCMR 5-3002.1(d). After the child is identified as potentially disabled, DCPS "must conduct a full and individual initial evaluation" within the District of Columbia's time frame of 120 days from the date of referral. *IDEA Public Charter School v. McKinley*, 570 F. Supp. 2d 28 (D.D.C. 2008); see 34 C.F.R. §300.301(a); D.C. Code §38-2561.02 (a). In conducting such evaluation, DCPS must (*inter alia*) ensure that the child "is assessed in all areas related to the suspected disability," and that the evaluation is "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child [is] classified." 34 C.F.R. §300.304 (c) (4), (6). Thus, DCPS had the obligation to identify the Student and to provide her with appropriate services. See also 34 C.F.R. §300.11.

11. As evidenced by the report cards (*RT-13--16*), the reports from the Student's teachers in the MDT notes from November 26, 2007 and March 3, 2008 (-2, -5), and the parent's testimony, the Student struggled academically and behaviorally as early as kindergarten. Yet despite these struggles and Petitioner's requests for help, DCPS did not refer the Student for evaluations until the parent completed a written referral on October 17, 2007 (1).

² These conclusions make it unnecessary to consider other, non-statutory exceptions to the IDEA limitations period including the "continuing violations" and "equitable tolling" doctrines raised by Petitioner.

³ DCPS argues that Petitioner "effectively waived her claims predating March 31, 2007 when she waived filing a claim to redress any of her then FAPE allegations upon receiving notice of her procedural rights" on November 26, 2007, and again upon receiving a procedural safeguards manual on March 3, 2008. *DCPS' Closing Argument*, filed May 8, 2009, at pp. 2-3. But this argument is a *non sequiter*. If DCPS' withholding of required information ended, or if Petitioner otherwise knew or should have known of the action forming the basis of the instant complaint, on November 26, 2007, then Petitioner had until **November 26, 2009** to request a due process hearing. Petitioner did not somehow waive her claims by not filing a complaint immediately, as DCPS appears to suggest.

12. Two specific events in particular should have triggered special education evaluation by DCPS, in addition to the ongoing problems the Student experienced in school: *First*, when the Student was retained in kindergarten after the 2005-2006 school year; ⁴ and *Second*, when Ms. Thomas notified SEC about the Student's ADHD diagnosis in 2006. However, in neither event was any referral made to special education. Nor was any prior notice issued as to why DCPS decided not to refer the Student for special education; and no notice of procedural rights was provided to Petitioner. In both cases, in light of the academic and behavioral problems that the Student was experiencing, DCPS should have referred the Student for special education evaluation.

13. In short, the Student's disabilities were evident and were significantly impacting her education, but DCPS took no action prior to November 26, 2007. Thus, DCPS violated its child find obligations under IDEA. As a result, as Dr. Missar testified, the Student's academic deficits became more severe than would have been expected due to her cognitive impairments. *See Missar Testimony.*

14. Moreover, when DCPS finally did conduct evaluations, they were inadequate because they did not address the full range of problems that the Student was experiencing and/or were not completely reliable because they were not performed in a manner consistent with the standard of care normally used by experienced and qualified psychologists in the field. For example, the cognitive testing within the DCPS psychological evaluation conducted January 28, 2008, found that the Student's full-scale IQ was 56, which is at the low end of the range for mild mental retardation. Dr. Missar testified that it is the standard of practice to utilize the DSM-IV diagnostic criterion, which in this case required that adaptive testing be done to test for mental retardation. *See Missar Testimony.* Dr. Missar also testified that the evaluation could not be adequate without either additional ADHD testing or verifying the original diagnosis, particularly since the Student's behavioral concerns were impacting her education. *Id.* In addition, the DCPS evaluation failed to conduct any other social/emotional testing, which was critical to obtain an accurate diagnosis of the Student. Since the evaluation was not performed with the standard of care that would be normally utilized by psychologists, the result was a misdiagnosis of the Student that ultimately led to an inappropriate IEP and inappropriate placement. *Id.*⁵

⁴ At the time the Student was retained, D.C. law required a referral to special education when any student was retained. At the relevant time, DCMR 5-2201.10 provided: "If the student is retained, despite the intervention measures referenced in § 2201.8, or, if no intervention measures are taken, and the student has not already undergone assessment and evaluation for special education services under the provisions of Chapter 30, then the student shall be referred for assessment and evaluation under Chapter 30." This law was amended in 2007, after the time that the Student was retained.

⁵ As noted in the Findings above, Petitioner disagreed with the evaluation and testified that she voiced that disagreement at the March 3, 2008 IEP meeting. Based on her disagreement, she subsequently decided to obtain an independent evaluation by Dr. Missar and requested payment for that evaluation in writing twice from DCPS on February 10, 2009 and March 30, 2009 (-29, -6). No payment has been made for that evaluation despite the clear legal requirement that DCPS must fund the independent evaluation if parents disagree with the DCPS evaluation. *See* 34 C.F.R. §300.502; DCMR 5-3027.

Inappropriate IEPs

15. The evidence presented by Petitioner, and not contradicted by DCPS, also demonstrates that both the March 3, 2008 and March 17, 2009 IEPs are inappropriate and are not reasonably calculated to enable the Student to receive meaningful educational benefit. *See Board of Education v. Rowley*, 458 U.S. 176, 204 (1982); *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988).⁶ The failure to provide an appropriate IEP is a denial of FAPE.

16. **March 3, 2008 IEP.** The March 3, 2008 IEP classified the Student inappropriately and did not provide sufficient services or accommodations. The failure to provide these services, as detailed below and in Petitioner's written Closing Argument, constituted a denial of FAPE because the Student could not and did not progress with this inappropriate IEP. In the year that the IEP was in place, the Student made no academic progress according to both anecdotal reports and the DCPS academic testing conducted in February 2008 and again in February 2009 (10, 12). The IEP's specific deficiencies included the following:

(a.) **Inappropriate disability classification.** — The March 3, 2008 IEP erroneously classified the Student as only learning disabled, and then did not indicate in what academic areas she had a learning disability. This classification also failed to capture the severe behavioral and social emotional problems that prevented the Student from accessing her education, even though these problems were documented in her report cards and were discussed at the MDT meeting. As Dr. Missar testified, had the DCPS evaluations been conducted properly, the Student could have been classified appropriately as a student with the multiple disabilities of mild mental retardation, learning disability and other health impairment-ADHD.

(b.) **Inappropriate special education services.** — Dr. Missar testified that, in his expert opinion, the Student needed full-time instruction based on the DCPS evaluations and the teachers' reports that he reviewed. *See Missar Testimony*. Moreover, the fact that the Student made virtually no academic progress between the February 2008 and February 2009 DCPS academic testing (10, 12), as well as teacher reports of very little behavioral progress, indicate that the services provided were inappropriate.

(c.) **Inappropriate accommodations.** — Dr. Missar testified as to the necessity of classroom accommodations, including a dedicated aide, increased repetition and adapted teaching techniques. The failure to provide these accommodations prevented the Student from receiving FAPE.

(d.) **Failure to include BIP.** — The evidence shows that the Student's behavioral problems were impacting her education, but no BIP was created. Dr. Missar testified that based upon the behavioral reports in the report cards and at the IEP/MDT meetings, a BIP was appropriate and necessary for the Student.

⁶ As Petitioner notes, whether a child actually progresses is one factor that can be considered in determining whether an IEP is appropriate. *See, e.g., Simchick v VA Dpt of Education*, US App. LEXIS 565 (4th Cir, 2009).

(e.) **ESY inappropriately denied.** — The March 3, 2008 IEP failed to provide ESY services for the Student. As Dr. Missar testified, the ESY services were necessary for the Student to be able to retain any progress she had made.

17. **March 17, 2009 IEP.** The March 17, 2009 IEP failed to provide the necessary services and accommodations for the Student and therefore did not confer meaningful educational benefit. This IEP is inappropriate for the following reasons:

(a.) **Inappropriate special education services.** — The undisputed evidence shows that the Student is in need of full-time specialized instruction to ensure that she can access her education. Dr. Missar explained that without full-time instruction, the Student will continue to make very little progress, and DCPS has not disputed this point. During the March 17, 2009 IEP meeting, Petitioner requested full-time special education and was told by the SEC that the school could not provide full-time special education.

In addition, Petitioner presented evidence that was not contradicted establishing that: (i) the current level of psychological services should be provided by a psychologist or licensed social worker who is trained to work with students with mild mental retardation and other emotional issues, and should be accompanied by behavioral support in the classroom at the time there is a behavioral incident due to the Student's cognitive limitations; and (ii) the Student needs social work services that can provide wraparound support to the family and ensure coordination between school and community-based counseling as a related service (*see* DCMR 5-3001).⁷

(b.) **Inappropriate accommodations.** — The accommodations on the March 17, 2009 IEP are all necessary, but the Student requires additional accommodations so that she can access her education and receive FAPE. DCPS stipulated that the March 17, 2009 IEP does not provide the necessary accommodation for a dedicated aide and that the March 17, 2009 IEP does not provide other necessary accommodations, including a 4:1 student/staff ratio and a literacy coach. In addition to the stipulation, Dr. Missar gave detailed testimony about why a small class ratio and a dedicated aide are necessary. DCPS did not provide any evidence that disputes that these accommodations are necessary.

(c.) **Extended school year (“ESY”) services.** — Due to the Student's disabilities, she is unable to retain information without significant repetition and ongoing reinforcement and needs ESY so that she does not regress academically during the summer vacation. Although these services were requested during the March 17, 2009 IEP/MDT meeting and, as Dr. Missar testified, these services are necessary for the Student to retain any progress that she has made, DCPS refused to provide them. SEC stated that ESY is only available for children with critical life skills needs. This appears to be in violation of D.C. law, which provides that the LEA may not limit ESY services to particular categories of disability. DCMR 5-3017.3(a). DCPS did not dispute that ESY is necessary for the Student; rather, DCPS has inappropriately indicated that the Student should attend regular, general education summer school. However, attending general education summer school likely would not help the Student

⁷ Petitioner also presented some evidence indicating that the Student may need speech-language therapy due to deficits in expressive and receptive communication, and that Petitioner requested these services at the 3/17/09 IEP/MDT meeting. However, a speech-language evaluation by DCPS is now pending, which will establish definitively whether and to what extent the Student needs these services. Once that evaluation is completed, DCPS will need to determine if the Student's IEP should be revised in this regard.

make academic or behavioral progress, and could actually impede her progress. *See Missar Testimony.*

(d.) **Failure to create BIP.** — Pursuant to 34 C.F.R. §300.324(a)(2)(i), where a child's behavior impedes her learning, the team must consider the use of positive behavioral interventions and supports. Dr. Missar's evaluation, the report cards and the MDT notes from the March 17, 2009 meeting -6) all indicate that the Student has had significant behavioral problems that are impacting her education. Accordingly, DCPS should have conducted a functional behavioral assessment ("FBA") and then developed a BIP. DCPS did not dispute that a BIP was necessary in this case.

18. Petitioner also claims that the March 17, 2009 reflects an inappropriate disability classification. The IEP/MDT has now classified the Student as a child with multiple disabilities, but the specific disabilities are disputed by Petitioner. The team agreed to classify the Student as a child with mild mental retardation and OHI-ADHD, but rejected Petitioner's request that the Student also be classified as learning disabled. Dr. Missar testified that the Student's classification as a learning disabled child is important because she is performing below the level that would be expected of other students with mild mental retardation; that her programming should include additional repetition and techniques that would reflect that learning disability; and that without this information, teachers would not be able to accurately program for the Student and may not take into account her additional problems with learning. *See Missar Testimony.* However, D.C. law provides that Specific Learning Disability ("SLD") "does not include learning problems that are primarily the result of ... mental retardation," CDCR 5-3001, so the MDT/IEP team's classification technically may be correct. On the basis of the present record, the Hearing Officer cannot conclude that the MDT's classification is necessarily wrong. The MDT may wish to revisit this issue when it next meets to update the Student's IEP in her new placement. Although the law states that a learning disability cannot be primarily the result of mild mental retardation, it does not say that a child cannot be both learning disabled and have mild mental retardation.⁸ The additional classification may be necessary to ensure that her teachers can appropriately program for her and adapt their lessons to her disabilities.

Inappropriate Placement

19. The evidence presented by Petitioner, and not contradicted by DCPS, further demonstrates that DCPS failed to provide an appropriate educational placement for the Student from the 2005-2006 school year to the present.

20. As described above, was not able to provide FAPE because it did not properly identify the Student as a student in need of special education services until early 2008, and when it did provide services, they were inappropriate.

21. The evidence discussed above also shows that is not an appropriate placement for the Student. SEC told Petitioner that cannot provide full-time special education services, both in a conversation earlier this school year and again at the March 17, 2009 IEP/MDT meeting. However, the uncontroverted evidence

⁸ A student generally may be classified as SLD if she demonstrates "a disorder in one or more of the basic psychological processes involved in understanding or using language...that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations..." CDCR 5-3001.

shows that full-time services are necessary for the Student to receive a FAPE. DCPS provided no evidence indicating that _____ is an appropriate placement, and DCPS has identified no other placement that can meet the Student's needs.

Inappropriate Discipline

22. As noted above, the Student was suspended at _____ after an incident which likely was a manifestation of her disability (25-26). Instead of signaling to DCPS that the Student lacked self-care skills, an indication of mild mental retardation, DCPS suspended the Student after she inappropriately toileted herself.

23. Similarly, at _____ the Student was sent to the kindergarten class, sometimes for a full day, by her general education teacher. Rather than teach the Student about why her behavior was inappropriate when she was doing it so that she could process her behavior at the time it was happening and before she forgot the incident, the teacher told Ms. Peltzman that, "If she acts like a baby, I put her with the babies." (31). The Student also received punishments that included writing paragraphs and copying sentences. (27-28). However, Petitioner testified that it took the Student 20 minutes to write the sentence in _____-28, and she could not read it or even understand it once it was explained to her. This is clearly an inappropriate punishment for a child of the Student's cognitive and academic capabilities.

Procedural Violations

24. Procedural violations can be so significant as to constitute a denial of FAPE if they impede the child's right to a FAPE, or significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child, or cause a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(E)(ii); 34 C.F.R. §300.513(a)(2). In this case, DCPS' procedural violations impeded the Student's right to FAPE and also significantly impeded Petitioner's ability to effectively participate in the decision-making process regarding provision of a FAPE.

25. Significant procedural violations shown on this record include: (a) DCPS' failure to provide prior notice or to provide Petitioner with a copy of her procedural rights when they refused to refer the Student to special education during 2005-2007; (b) DCPS' failure to refer the Student to special education when she was retained in kindergarten or to provide Petitioner with the required written notices of such action; (c) DCPS' failure to convene an MDT/IEP placement meeting when Petitioner was told that the Student could not return to _____ after the 2007-2008 school year (*see* DCMR 5-3013.1); and (d) DCPS' failure to obtain Petitioner's consent before conducting further academic testing in February 2009.

26. Petitioner testified that she was unaware of her rights to challenge these decisions or to seek additional resources because she was not provided the legally required notice. As a result, the Student continued to be denied FAPE, and Petitioner was deprived of the opportunity to participate in the decision-making process regarding the provision of FAPE to her child. Had Petitioner been made aware of her rights, she could have challenged the failure of DCPS to provide special education services to the Student.⁹

⁹ With respect to the unauthorized academic testing, the law is explicit that written parental consent must be obtained before an evaluation; and if the parent refuses to consent, DCPS must file for a hearing, not conduct the

D. Appropriate Relief

27. The IDEA authorizes district courts and hearing officers to fashion "appropriate" relief, e.g., 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005).

28. As noted above, Petitioner requests the following forms of relief: (1) change in the Student's disability classification, to include learning disabled; (2) immediate placement and funding for the Student to attend a non-public, full-time therapeutic special education school that can address all the Student's needs (namely, _____ in Laurel, MD); (3) a one-to-one aide for the Student; (4) payment for the independent psycho/educational evaluation obtained by Petitioner; (5) funding of an independent functional behavioral assessment ("FBA") and independent speech-language evaluation; and (6) compensatory education services for DCPS' denial of FAPE from 2005 to the present.

29. With the exception of item (1) above (*see Conclusions ¶18, supra*), Petitioner's requests for relief shall be granted in whole or in part.

Placement at _____ School

30. The only educational placement shown on this record that can meet the Student's needs is Petitioner's proposed placement, the _____ in Laurel, Maryland. DCPS stipulated that _____ School can provide an appropriate program for the Student, and _____ School itself believes it can provide the appropriate services based on the information it reviewed concerning the Student. 30). This was the only possible appropriate placement put forth at the hearing.

31. As Petitioner testified, she learned through a visit to the school that _____ has classes of eight or nine students with two teachers in the classroom, that they have other children at the Student's level of functioning, and that they have counseling services available to the Student when she needs them. Petitioner believes they can meet all of the Student's needs. *See Parent Testimony. Accord Missar Testimony.*

32. The proposed placement to _____ School otherwise meets the criteria for judicial placement determinations and appears to be appropriately "tailored to meet the child's specific needs." *Branham v. District of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir. 2005); *Roark v. District of Columbia*, 460 F. Supp. 2d 32, 35 (D.D.C. 2006).

Compensatory education services

33. Compensatory education is an equitable remedy available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA. Under the theory of 'compensatory education,' courts and hearing officers may award educational services...to be

evaluation anyway. DCMR 5-3026. Conducting an evaluation without obtaining consent is a significant procedural violation that in and of itself may constitute a denial of FAPE. Written consent is an integral part of the law because in order for the parent to effectively participate in the decision-making process, the parent must know about and consent to evaluations.

provided prospectively to compensate for a past deficient program.” *Reid v. District of Columbia*, 401 F. 3d at 521 (quotations omitted). “In every case, however, 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.” 401 F.3d at 524. *See also Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a “‘qualitative, fact-intensive’ inquiry used to craft an award ‘tailored to the unique needs of the disabled student’”).

34. In this case, Petitioner demonstrated that DCPS’ failure to provide the Student with an appropriate special educational program and placement from 2005 to the present has resulted in harm to the Student, and DCPS did not rebut this showing at hearing. *See Missar Testimony*.

35. Based on careful consideration of all the testimony and evidence adduced in this case, the Hearing Officer concludes that a compensatory education plan containing the elements described below would be an appropriate equitable remedy under the circumstances. The plan meets the *Reid* standard because it has been shown to be (a) reasonably calculated to provide the educational benefits that likely would have accrued from special education services that DCPS should have supplied in the first place during the relevant time periods, and (b) reasonably tailored to the unique needs and deficits of the Student. The compensatory education plan addresses the Student’s specific deficiencies by enabling her to gain skills and other benefits she likely would have obtained had she not been placed in an inappropriate learning environment during the past several school years.

36. The specific elements of the compensatory education award requested by Petitioner as a remedy for DCPS’ denials of FAPE — and the Hearing Officer’s rulings with respect to each element — are as follows:

(a.) **Tutoring.** — Petitioner seeks 200 hours of tutoring across all subjects, with a tutor chosen by Petitioner. DCPS argues that “Petitioner has failed to provide a methodology of how 200 hours of individual tutoring would place the Student in the position she would have been but for DCPS’ alleged denial of FAPE,” and further that “Petitioner has failed to provide any specificity as to how those individual tutoring hours should be allocated between subject areas.”¹⁰ However, Dr. Missar explained that the Student is far behind in almost all major subject areas (*e.g.*, reading, math, written expression) as a result of the prior inappropriate IEPs and placements. She therefore requires a broader approach to tutoring to address her deficits, more intensively at the beginning and then “tapered” over the course of the school year. Dr. Missar arrived at the 200 hours by estimating the number of tutoring sessions reasonably anticipated to occur over the course of a full school year under this approach. *See Missar Testimony*. The Hearing Officer agrees that this component is an appropriate element of a compensatory education award for the Student under the circumstances.

(b.) **ESY for summer 2009.** — Petitioner seeks to order DCPS to provide ESY services to the Student during summer 2009. DCPS does not appear to oppose this item of compensatory education, and it will therefore be included.

¹⁰ DCPS’ Closing Argument, filed May 8, 2009, p. 3.

(c.) **Therapeutic summer camp.** — Petitioner seeks an award of a full-time therapeutic summer program, in addition to ESY services. As DCPS points out,¹¹ Dr. Missar testified that this component was mainly an avenue for the Student to develop social skills, but there appears to be insufficient evidence linking the services to a specific educational deficit. For example, no evidence was adduced showing that the Student required more counseling services than the 30 minutes per week provided by DCPS pursuant to the IEPs (and also recommended by Dr. Missar). *See* -5; -6; -11. The Hearing Officer agrees with DCPS, and thus this element will not be included.

(d.) **Speech-language therapy.** — Petitioner seeks 160 hours of speech-language therapy services. DCPS disputes this item on the ground (*inter alia*) that Petitioner has not shown either the Student's eligibility for speech-language therapy or DCPS' failure to provide any speech-language services owed to the Student.¹² However, Dr. Missar found that the Student has significant language deficits that were evident prior to his evaluation, although no speech-language evaluation was ever conducted to determine what services are necessary. The Hearing Officer concludes that this element should be included, and that the specific nature of the services should be guided by the results of the independent speech-language evaluation to be funded by DCPS.

(e.) **Occupational therapy.** — Petitioner requests 160 hours of occupational therapy ("OT") services as well. DCPS argues that Petitioner also has not met her burden on this item, for reasons similar to the speech-language therapy. DCPS asserts that Petitioner has not alleged or shown that OT services provided to the Student were inadequate or undelivered, and that no OT evaluations (or even Dr. Missar's evaluation) call for greater levels of service.¹³ The Hearing Officer agrees with DCPS, and thus this element will not be included.

(f.) **Laptop computer.** — Petitioner requests the award of a laptop computer with appropriate educational software as a learning aid. The Hearing Officer agrees with DCPS that Petitioner has failed to show how the provision of a laptop would educationally remediate or compensate for past denials of FAPE. For example, there was no assistive technology assessment presented to show the Student's need for such technology, and no educator testified regarding the need for the Student to have a computer to access her curriculum.¹⁴ Again, the Hearing Officer agrees with DCPS, and thus this element will not be included.

37. In sum, the compensatory education award for DCPS' denials of FAPE shall include (1) 200 hours of tutoring services; (2) ESY services for summer 2009; and (3) 160 hours of speech-language therapy services. The other requested elements are denied as not having been proved with sufficient specificity to meet the *Reid* standard.

¹¹ *Id.*, p. 4.

¹² DCPS' Closing Argument, filed May 8, 2009, pp. 4-5.

¹³ *Id.*, p. 5.

¹⁴ *Id.*, p. 6.

Other appropriate equitable relief

38. In addition to immediate placement and an award of compensatory education, the Hearing Officer has exercised his discretion to award other appropriate equitable relief as a remedy for DCPS' denials of FAPE, as follows:

(a.) **One-to-one aide.** — DCPS will provide the Student with a one-to-one aide immediately, until such time that the Student can be successfully placed at _____ School. The aide will be assigned to the Student in order to address her behavioral problems in the classroom so that she can receive a FAPE.

(b.) **Independent evaluations.** — DCPS will be ordered to provide payment for the independent psycho/educational evaluation obtained by Petitioner from Dr. Missar. DCPS will also provide payment for an independent FBA and an independent speech-language evaluation.

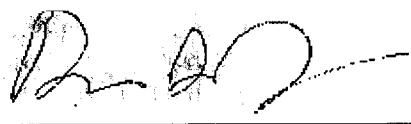
V. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby ordered:

1. DCPS shall immediately issue a notice of placement and provide funding for and transportation for the Student to the _____ Maryland. Notice of placement shall be issued within three (3) school days of this Order, and transportation shall begin within five (5) school days of this Order.
2. DCPS shall immediately provide a dedicated aide for the Student, until such time that the Student can be successfully placed at _____ School and it is determined by her MDT/IEP team that she no longer needs the aide.
3. DCPS shall provide funding for the independent psychological evaluation conducted by Dr. David Missar in January 2009, within 20 days of receiving a bill for these services.
4. DCPS shall provide funding for an independent functional behavioral assessment (FBA) to be conducted by an evaluator of Petitioner's choosing.
5. DCPS shall provide funding for an independent speech-language evaluation to be conducted by an evaluator of Petitioner's choosing.
6. DCPS shall provide compensatory education services to the Student in the form of: (a) 200 hours of educational tutoring with a tutor chosen by Petitioner; (b) Extended School Year (ESY) services for summer 2009; and (c) 160 hours of speech-language therapy services, in a type and manner consistent with the results of the independent speech-language assessment to be obtained by Petitioner.
7. Within 30 calendar days of placement at _____ School, the Student's MDT/IEP team shall meet to review and revise, as appropriate, the Student's IEP to govern the provision of specialized instruction and related services in the program in which she becomes enrolled.

8. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioner, Katherine Zeisel, Esq., via facsimile (202-552-6001), or via email (kzeisel@childrenslawcenter.org).
9. Any delay in meeting deadlines in this Order that are caused by Petitioner shall extend the deadlines by the number of days attributable to such delay.
10. This case shall be, and hereby is, **CLOSED**.

Dated: May 18, 2009


/s/

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any State court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).