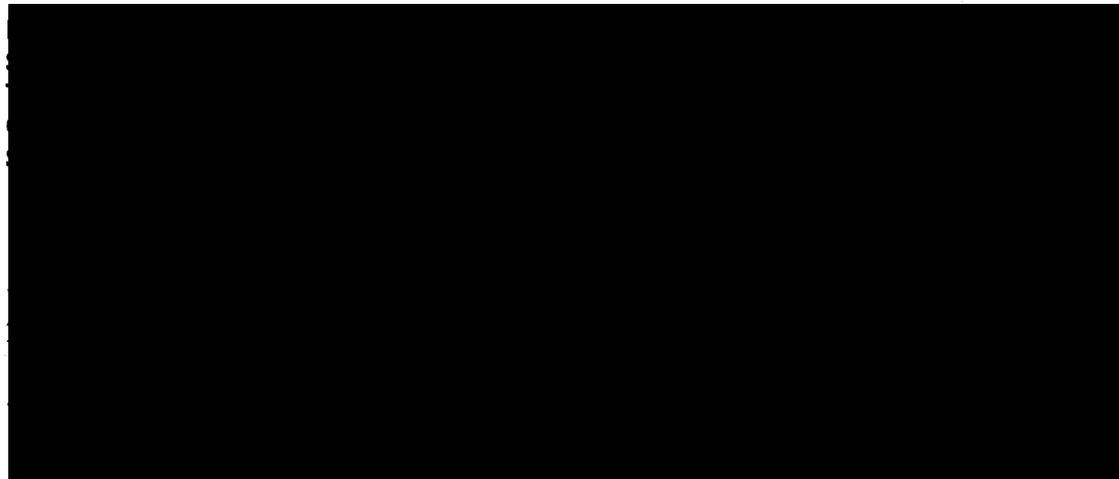


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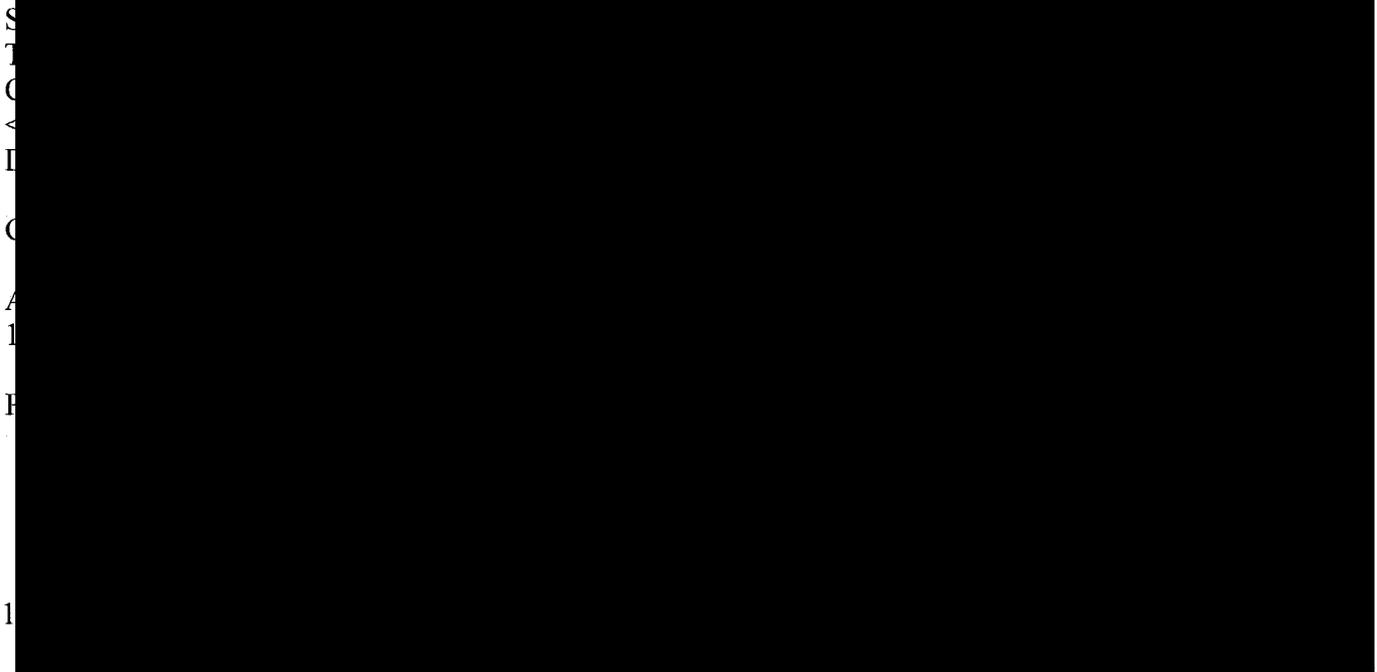
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Coles B. Ruff, Esq.
Independent Hearing Officer
Coles.Ruff2@dc.gov
202-352-2592



F... King, D... (000) D... King, O...



Thank you,

Daniel Kim
Assistant Attorney General
Office of the Attorney General of the District of Columbia
Office of the General Counsel, District of Columbia Public Schools
825 North Capitol Street, N.E.
Ninth Floor
Washington, D.C. 20002
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2009 NOV -2 AM 9:00

<p>STUDENT¹, by and through his Parent Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS")</p> <p>Respondent.</p> <p>Case # 2009-1140</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Dates of Hearing: October 9, 2009 October 20, 2009</p> <p>Date of Complaint: August 4, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Stephen L. Watsky, Esq. 419 7th Street, NW Suite 405 Washington, DC 20004</p> <p>Counsel for DCPS: Daniel Kim, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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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.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened October 9, 2009, and reconvened on October 20, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on August 4, 2009, alleging the issues outlined below.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1- 19 and DCPS Exhibits 1-7)² which were admitted into the record. The record in the matter was closed with the submission of written closing statements by the parties on October 26, 2009.

ISSUE(S):³

1. Did DCPS deny the student a free and appropriate public education by failing to properly provide the student with an appropriate IEP? Petitioner alleges the student's February 5, 2009, IEP is inappropriate because it lacks specific goals and objectives, lacks measurable goals and objectives, and there was a failure to update the student's FBA and BIP.
2. Did DCPS deny the student a free and appropriate public education by failing to provide the student with an appropriate placement for the school year 2009-2010, where the child can derive educational benefit? Petitioner alleges the student has been at School A and has failed to make sufficient academic and emotional/behavioral progress.

²² Petitioner's Exhibits 14&15 were withdrawn by Petitioner and not admitted.

³ 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.

FINDINGS OF FACT 4:

1. The student is a [REDACTED] old resident of the District of Columbia who attends School A for the 2009-10 school year ("SY"). The student is a committed ward of the District of Columbia and is placed in the home of a foster parent. The student has had a court appointed surrogate parent from educational purposes since December 2008. (Ms. [REDACTED] testimony, Petitioner's Exhibit 1)
2. The student's family came to the attention of the Child and Family Services Agency ("CFSA") in November 2002 when he was five years old. An anonymous hotline caller alerted the Metropolitan Police Department that a child had been left alone in an apartment and was crying at the door. When the police responded, the student told the investigating officer that his mother had been gone for two days and he was hungry. He also reported that his mother had told him not to tell anyone that he was alone. (Petitioner's Exhibits 7, 9, 10)
3. The student's great aunt alerted CFSA that she had helped his mother raise the child. She was ultimately granted guardianship of the student by CFSA. However, the great aunt was often sick and required frequent and regular hospitalizations. Therefore, she often left the student in the care of her sister. This sister (another great aunt) moved in with the student and continued with his and her sister's care. Ultimately, CFSA awarded the second great aunt guardianship of the student. While in her care, the student displayed a great deal of aggression. The student also exhibited a great deal of difficulty in school. He was suspended often as early as the second grade for hitting a teacher, a peer, running out of the classroom, and cursing at a teacher. His second guardian died and the student was placed in foster care. Reportedly, the student felt a sense of guilt because his aunt would "playfully state" that the student's behavior would be the death of her. (Petitioner's Exhibits 7, 9, 10)
4. The student was placed with his cousin by the D.C. Superior Court in December 2007. In January 2008, he returned to school with serious behavioral problems. He experienced problems not only at school but as well as the aftercare program. He resumed fighting with teachers, peers, destroying property, and cursing at staff. Because of this behavior, he was suspended numerous times. (Petitioner's Exhibits 7, 9, 10)
5. The student became more and more disruptive while placed in his cousin's home. In February 2008, he was briefly placed at Children's Hospital for an emergency psychiatric evaluation and stay. In March 2008, the student was referred on an emergency basis to Crawford and Consultants because of a disruption in his psychological and psychiatric services. In May 2008, the student began receiving wrap-around services and his medication was changed. He was prescribed Vyvanse, Ivanga, and Depakote. (Petitioner's Exhibits 7, 9, 10)

⁴ 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 will cite only one party's Exhibit.

6. Soon thereafter, he was returned to his previous foster home because his cousin could no longer serve as a long-term placement. In August 2008 the student was again hospitalized at Children's Hospital as a consequence of mood swings, placement stressors, and concerns for suicidal ideation as a result of his behavior. Upon discharge, he was returned to the home of the foster parent where he currently remains. (Mr. [REDACTED] testimony, Petitioner's Exhibits 7, 9, 10)
7. For the school year ending 2008-09, the student was in the sixth grade at School A. He has been a student at School A since the third grade. Prior to attending School A, the student was a student at School B for the school year ("SY") 2004-05. School B first made an initial eligibility determination to allow the student access to special education. This occurred when he was in the second grade. (Mr. [REDACTED] testimony, Petitioner's Exhibit 10 & 17)
8. At a recent multidisciplinary team ("MDT") meeting held February 5, 2009, the student was found to be eligible under the classification of Emotionally Disturbance ("ED"). The student's individualized educational program ("IEP") prescribes the following weekly services: 31 hours of specialized instruction and one hour of psychological counseling. (Petitioner's Exhibit 16)
9. At the February 5, 2009, meeting DCPS staff maintained that School A is an appropriate placement for the student. The surrogate parent and the foster parent who were present at the meeting requested that DCPS place the student in another placement because of the student continued behavior difficulties and lack of significant academic progress. (Petitioner's Exhibit 16)
10. In January 2009 as a part of the renewal of his triennial evaluations for his IEP, DCPS conducted a psychological evaluation on the student. The evaluation included the following assessments: Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV). The Student's general cognitive ability was within the Low Average range of intellectual functioning, as measured by his Full Scale IQ (FSIQ). His WISC-IV Composite Scores Summary in Verbal Comprehension (VCI) was 85; Perceptual Reasoning (PRI) 84; Working Memory (WMI) 94; Processing Speed (PSI) was 75; and FSIQ was 80. (Petitioner's Exhibit 8)
11. The student was administered the Visual-Motor Perceptual Processing or the Beery Developmental Test of Visual Motor Integration (VMI). It is used to help identify significant difficulties that some students have in integrating, or coordinating, their visual perceptual and motor abilities. His standard score was 94 placing him in the Average range. (Petitioner's Exhibit 8)
12. The student was administered an Emotional Functioning Evaluation test of the Conners' Rating Scale to assess his behavioral emotional concerns, and helpful in screening children within the areas on Inattention, Hyperactivity/Impulsivity, Learning Problems/Executive Functioning, Learning Problems/Executive Function, Learning Problems, and Aggression. The Student obtained scores in the clinically significant range

in the areas of Aggression, Conduct Disorder, and Oppositional Defiant Disorder. (Petitioner's Exhibit 8)

13. The January 2009 DCPS evaluator concluded that based on the findings of this evaluation, the student continues to show evidence of emotional difficulties, which according to his teacher have an adverse effect on his academic performance. The student's emotional issues are characterized by deficits in interpersonal relationships, inappropriate behaviors, and noncompliance. Based on the aforementioned, the Student continues to meet the eligibility criteria as Emotionally Disturbed. (Petitioner's Exhibit 8)
14. In November 2008, by operation of an order of the D.C. Superior Court the Student was referred and tested by the D.C. Department of Mental Health ("DC DMH"). A comprehensive psychological evaluation was administered. (Petitioner's Exhibit 9)
15. In the testing done in November 2008 by DC DMH, the student's WISC-IV scores revealed that the student's cognitive scores fell within the borderline range of functioning with a FISQ of 71. His VCI was revealed to be 77, his PRI was 71. The evaluator stated that this indicates that his verbal comprehension skills and his nonverbal, perceptual reasoning skills are similarly developed. He scored within the borderline range on the WMI of 74 and his processing speed was 83. (Petitioner's Exhibit 9)
16. D.C. DMH further administered educational achievement testing on the student in its November 2008 psychological (Woodcock-Johnson Test of Achievement 3rd Edition (WJ-III)) assessing the student's skills in Reading, Mathematics, Written Language, and Academic Knowledge. The assessment revealed the student was functioning at the third grade level overall. Specifically, he is functioning at the 4th grade level in math, the 3rd grade level in reading, and the 2nd grade level in written language. (Petitioner's Exhibit 9)
17. A MDT meeting was convened at School A on February 5, 2009. The student's previous IEP had expired on January 25, 2008. The February 2009 IEP is divided in four different areas, math, reading, written-expression, and social-emotional development. The IEP requires the Student to "demonstrate one year's growth [in the four different areas] by mastering the following short term objectives with 80% accuracy." However, there is only one objective for each different area. (Petitioner's Exhibit 16 & 17)
18. The February 2009 IEP indicates that the student would have only one goal or one objective in each stated area. For example, in math his one stated need is to "work addition and subtraction of fractions with different denominators." No further objectives or goals are provided. (Petitioner's Exhibit 16)
19. For reading, although the student functions on the 4.4 grade equivalency, the student's sole stated goal and objective is to "satat (sic) the main idea of story read." No further objectives or goals are provided. (Petitioner's Exhibit 16)
20. For written-expression, "the student needs to work on complex sentences." It is noted that he is functioning at grade equivalency in written expression of 2.9. No further objectives or goals are provided. (Petitioner's Exhibit 16)

21. The sole need in the social emotional areas in the student's February 2009 IEP is that the student "needs to acquire skills necessary to attain anger management skills. His goal is to use coping skills to self-calm 80% of the time. He currently can perform this ability 50% of the time." (Petitioner's Exhibit 16)
22. The student's Surrogate Parent believes the February 2009 IEP devised by School A is vague, and inappropriate to remediate the student's academic and behavioral difficulties. (Ms. Taylor-Smith's testimony)
23. The student was administered the Woodcock Johnson III test of achievement by DCPS when he was eight years old and in the third grade at School A. The following scores were reported: Broad Reading he scored 73 with the age equivalence ("AE") of 7 and grade equivalence ("GE") of 1.7; Broad Math he scored 92 with AE at 7-10, and GE of 2.5; Broad Written Language he scored 77 with AE of 7-3 and GE of 1.7; Math Calculation Skills he scored 92 with AE of 8-0 and GE of 2.6; Written Expression he was 82 with AE of 7-3 and 1.9. (Petitioner's Exhibit 11)
24. DCPS has developed a draft functional behavior assessment ("FBA") for the student and draft behavior intervention plan ("BIP"). The FBA indicates the student has difficulty with change and transitions and often becomes very oppositional and defiant during those times. "When denied a request, he often becomes angry and may go into an explosive rage." The FBA also stated that the student did not work cooperatively with others, distracted others verbally and did not follow the teacher directives. "He demonstrated verbally aggressive opposition which distracted the other students from participating." (Petitioner's Exhibits 2, 3,)
25. School A is a full-time public placement of DCPS principally for students with emotional disturbance classification. The school has social workers on staff and a behavioral technician/instructional aide in each classroom with a special education teacher. The student's report cards indicate he met the goals as stated in his IEP. The teacher comments on the report cards simply state that the student is meeting the IEP goal. The student continues to have behavioral difficulties at School A in the current school year. The school staff attempts to address the students behavior but his behavior regularly interferes with his ability to make academic progress. The student's behavior gets tracked each day with a point sheet; however, the draft BIP has not been reviewed or updated. (Dr. [REDACTED] testimony, DCPS Exhibits 4, 5, 6, 7)
26. The student's current educational advocate has visited School A to observe the student on several occasions since October 2008, and reviewed the student's evaluations and IEPs. Based upon her years of experience in drafting and reviewing IEPs the educational advocate believes the academic goals in the student's IEP are too simplistic and inadequate to address the student's sever academic deficits. However, the educational advocate has not yet provided any specific input for the improvement of the goals to a MDT or a School A staff member. (Ms. [REDACTED] testimony)
27. The student has been with his current foster parent since 2005. The foster parent is regularly called by the staff at School A to assist to addressing the student's behavior.

The student has been physically aggressive, abusive and disrespectful to staff and other students. The student had an incident in the week prior to the hearing where he threw desks and was placed by the school staff in a room by himself in response to this behavior. The foster parent visits School A usually once per week. During his visits he has observed other students being disruptive in the classroom and aggressive with staff. The foster parent is concerned that the school staff does not adequately address the student's behavioral difficulties. The student is provided private tutoring at home, but despite the tutoring he remains significantly behind academically. (Mr. [REDACTED] testimony, Petitioner's Exhibit 10)

28. The student has been interviewed by and admitted to the [REDACTED] [REDACTED] is a full time special education school that can provide the student with specialized instruction and related services by certified special education teachers and related services providers. [REDACTED] specializes in providing special education and therapeutic services to students with emotional disturbance classification. The school has a psychiatrist on staff as well as a clinical director, small classes with no more than twelve students and two staff members including a certified special education teacher and behavior specialist in the classroom. There are additional academic enhancement staff and computer equipment in the classrooms to assist students, such as the student, with significant academic deficits. ([REDACTED] 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.⁵ 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.

1. Did DCPS deny the student a free and appropriate public education by failing to properly provide the student with an appropriate IEP? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

⁵ 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.

Petitioner alleges the student's February 5, 2009, IEP is inappropriate because it lacks specific goals and objectives, lacks measurable goals and objectives, and there was a failure to update the student's FBA and BIP.

An I.E.P. is required to include "a statement of measurable annual goals, including academic and function goals" that are designed to "meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum." (34 CFR 300.320 (a)(2)(i)(A). The IEP must also provide "A description of 'how the child's progress toward meeting the annual goals described... will be measured; and when periodic reports on the progress the child is making... will be provided'" (34 CFR 300.320m(a) 3 [i] and [ii]). Likewise, "appropriate objective criteria and evaluation procedures and schedules" are required, on at least an annual basis, "whether the short-term instructional objectives are being achieved." (5 DCMR 3007 f).

The student's goals and objectives as set forth in the February 5, 2005 IEP appear to be deficient. Only one annual goal was set forth, namely that "The student will demonstrate one year's growth in math skills by mastering the following short term objectives, with 80% accuracy." The goal is not further defined, nor is it measurable.

In the area of Written Instruction, an area in which the student is several years behind grade level, there is only one annual goal again assuming the statement of needs is the annual goal ("The student will demonstrate one year's growth in written skills by mastering the following short-term objectives with 80% accuracy), with again no further definition of the goal, no manner of measurability, no short term objectives and no statement as to when periodic reports on the progress the child is making will be provided.

Ms. [REDACTED] credibly testified that she has participated in the development of hundreds of IEPs and was familiar with the student's IEP, evaluations and school records. Ms. [REDACTED] testified in detail how the goals set forth in the student's IEP were neither quantifiable, measurable nor observable and were not sufficiently designed to meet the child's needs. DCPS presented insufficient evidence to the contrary.

2. Did DCPS deny the student a free and appropriate public education by failing to provide the student with an appropriate placement for the school year 2009-2010?
Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

Petitioner alleges the student has been at School A and has failed to make sufficient academic and emotional/behavioral progress.

The point of contention is whether the student's continued placement at School A and his most recent IEP developed on February 5, 2009, amounts to a denial of a Free Appropriate Public Education. Petitioner argues that (1) School A has been unable to provide the student with reasonable education benefit and (2) the IEP is deficient because its goals and objectives are insufficient to address his disability.

The level of instruction and services that must be provided to a disabled student has been set forth in *Board of Education vs. Rowley* 458 US 176; 102 S Ct. 3034; 73 L. Ed. 2nd 690 (1982). Specifically, a handicapped student must be provided with an IEP and services that are reasonably calculated to address the student's unique needs and provide some educational benefit. Admittedly, the state need not provide the best education available or implement a program designed to maximize the student's abilities; however educational benefit means more than trivial or minimal academic progress, but rather some form of meaningful education. (*Conklin vs. Anne Arundel Board of Education*, 947 F 2nd 306 (4th cir, 1991). The amount of progress required is to be determined with reference to the individual child.

The student has failed to derive meaningful academic benefit at School A. He is now in the [REDACTED] and has been at School A for the past several years. Several months into the [REDACTED] grade the student's overall educational functioning was on a [REDACTED] level. His foster father testified to the lack of educational progress the student has made over the years. The student's achievement assessments over the years also demonstrate nominal academic progress.

School A may have a special education program for students who are emotionally disturbed, as testified to by Dr. Mosley, but it is inadequate to address a student with academic and emotional issues as severe as the student. In fact, the foster father states that he is virtually never contacted about the student except when the school needs his assistance in calming the student during a volatile situation because the school is unable to do so. The credible testimony of the foster parent who has visited the school on numerous occasions describes a chaotic situation at School A of students being disruptive.

Based on the forgoing conclusion that the student has made nominal academic progress and continues to exhibit severe behavior difficulties at School A, that the School staff cannot on their own adequately address, the Hearing Officer concludes the student's placement at School A is inappropriate and a denial of FAPE.

The student has been accepted by Foundation School, a full time special education program that offers the student the educational benefit, including intense social and emotional services he is not receiving at School A. Consequently, the Hearing Officer will order that DCPS place and fund the student at the Foundations School for the remainder of the 2009-10 school year and that the student's IEP be reviewed and revised at a MDT meeting within 30 days of his placement.

ORDER:

1. DCPS shall immediately place and fund the student at the Foundations School for the remainder of the 2009-10 school year and provide transportation services.
2. DCPS shall within thirty (30) calendar days of the issuance of this Order convene a MDT meeting to review and revise the student's IEP as appropriate.

3. The MDT meeting shall be scheduled through counsel for the student and parent.
4. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

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 30, 2009

Appendix A



EXHIBIT #	IDENTIFICATION	ADMITTED
O.K. #1	D.C. Superior Court order dated December 12, 2008	YES
O.K. #2	The Parent's Due Process Complaint Notice dated August 3, 2009	YES
O.K. #3	DCPS' Response to Parent's Due Process Complaint dated August 21, 2009	YES
O.K. #4	DCPS Due Process Complaint Disposition dated August 18, 2009	YES
O.K. #5	DCPS Student Hearing Office Interim Order dated September 10, 2009	YES
O.K. #6	Joint Motion for a Hearing and an Extension for the Issuance of a HOD dated October 1, 2009	YES
O.K. #7	D.C. DMH Psychiatric Evaluation dated January 21, 2009	YES
O.K. #8	DCPS Psychological Evaluation dated January 29, 2009	YES
O.K. #9	D.C. DMH Psychological and Psycho education Evaluation dated November 24, 2008	YES
O.K. #10	Mental Health Resources Plus Psychological Evaluation dated June 7, 2005	YES
O.K. #11	DCPS Psycho education Report dated January 14, 2005	YES
O.K. #12	DCPS Student Incident/Behavior Form dated May 21, 2008, 2008	YES
O.K. #13	The Student's 6 th Grade Report Cards and Progress Report maintained by DCPS School A Center	YES
O.K. #14	The Student's 5 th Grade Report Cards and Progress Report maintained by DCPS School A Center	NO
O.K. #15	Parent's Letter to the School A Center listed	NO
O.K. #16	The Student's DCPS IEP dated February 5, 2009	YES
O.K. #17	The Student's DCPS IEP dated January 25, 2008	YES
O.K. #18	The Foundation School of PG County Letter of Acceptance dated February 3, 2009	YES
O.K. #19	 Curriculum vitae listed	YES
DCPS -01	IEP 2/5/09 (Parties agreed that O.K. 16 is the accurate IEP)	YES
DCPS-02	FBA 2/209	YES

DCPS-03	BIP 2/5/09	YES
DCPS-04	IEP Report Card 4/3/09	YES
DCPS-05	IEP Report Card 6/12/09	YES
DCPS-06	IEP Report Card 7/15/09	YES
DCPS-07	IEP Report Card 7/23/09	YES
	* A detailed list of the documents disclosed is contained in the parties' disclosure notices	

Appendix B

INDEX OF NAMES

In the MATTER OF C [REDACTED]
[REDACTED]

Child and "Student"	The student [REDACTED]
Child's Parent(s) (specific relationship)	[REDACTED] Designated as the Surrogate Parent in the HOD *+
Child/Parent's Representative	[REDACTED]
School System's Representative	[REDACTED]
Educational Advocate	[REDACTED]
Special Education Coordinator School A Academy, Foundations School	[REDACTED]
Student's Attending School: [REDACTED] [REDACTED] Identified in the HOD as "School A"	
Student's School for SY 2004-2005: Houston E.S. Identified in the HOD as "School B"	
School from which student obtained letter of acceptance: [REDACTED] PG County	
	*Witness + Testified by Phone