

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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<b>Parent, on behalf of Student,<sup>1</sup></b>	)	
	)	
<b>Petitioner,</b>	)	<b>Date Issued: April 28, 2015</b>
	)	
<b>v.</b>	)	
	)	
<b>District of Columbia Public Schools,</b>	)	
	)	
<b>Respondent.</b>	)	<b>Hearing Officer: Michael Lazan</b>

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving a [REDACTED] year old student who is eligible for services as a Specific Learning Disability (“the Student”).

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on February 2, 2015 in regard to the Student. On February 12, 2015, Respondent filed a response. A resolution meeting was held on February 19, 2015. The resolution period expired on March 4, 2015.

**II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of

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<sup>1</sup> Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

### **III. Procedural History**

On March 11, 2015, this Hearing Officer held a prehearing conference. Roberta Gambale, Esq., counsel for Petitioner, appeared. Yair Inspektor, Esq. counsel for Respondent, appeared.

A prehearing conference order issued on March 16, 2015 summarizing the rules to be applied in this hearing and identifying the issues in the case.

On April 8, 2015, Respondent moved for a continuance. This motion was granted by the IHO and the decisional timelines in this matter were extended from April 18, 2015 to April 28, 2015.

A hearing date followed, on April 23, 2015.

Petitioners moved into evidence exhibits 1-47. Respondent objected to Exhibit 8, pages 9-11, and Exhibit 13 on the ground that these were Ms. Gambale's notes and that Ms. Gambale, as Petitioner's counsel, could not be subject to cross-examination. This objection was sustained. Exhibits 1-7, Exhibit 8 exclusive of pages 9-11, Exhibits 9-12, and Exhibits 14-47 were admitted. Respondent moved into evidence Exhibits 1-16. Petitioner objected to Exhibits 1-3 on relevance grounds. These objections were overruled. Exhibits 1-16 were admitted.

The parties presented closing statements orally, on the record, after completion of testimony on April 23, 2015. After the closing statements, Petitioner sought permission to file a supplemental brief, which permission was granted. Petitioner's Supplemental

Closing Statement on April 24, 2015. Though Respondent was given an opportunity to provide a supplemental closing statement, none was submitted.

Petitioners presented as witnesses: Petitioner; Witness A, a psychologist (expert: special education as it relates to IEPs and behavior interventions); Witness B, founder of a tutoring company; Witness C, a tutor. Respondent presented as witnesses: Witness D, an Assistant Principal at School B.

#### **IV. Credibility**

I found the Petitioner to be only partially credible in this proceeding. While much of her testimony was credible, she failed to fully acknowledge the Student's attendance and academic issues in her testimony. The evidence and testimony in this proceeding establish that the Student's attendance and performance at School B for 2013-2014 was poor throughout the year. Petitioner stated at one point that the Student's attendance was not that bad, and that she did not do poorly in the school during the first part of that year.

With the exception of the Petitioner, I found all the witnesses credible in this proceeding. There were no material inconsistencies uncovered in connection to any witness, and all witnesses presented their testimony with reasonable candor.

#### **V. Issues**

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issues to be determined are as follows:

1. Did DCPS deny the Student a FAPE through the IEP dated December 2, 2014, which did not provide sufficient specialized instruction, did not provide sufficient intervention in regard to the Student's behavioral issues, and did not provide for an appropriate transition plan and services?

2. Did DCPS deny the Student a FAPE though the Behavior Intervention Plan dated November 2014, which does not address the Student's issues with attendance?

As relief, Petitioner is seeking a revised IEP, a vocational assessment; specialized instruction in all 4 of the Student's academic classes; a revised BIP that addresses the Student's truancy, compensatory education in the form of tutoring and counseling, and credit recovery.

## **VI. Findings of Fact**

1. The Student is \_\_\_\_\_ eligible for services as a Student with a disability. (P-24-1)

2. She is a likable, concerned, sensitive, curious, communicative, emotionally fragile, abrasive, and defensive girl. (P-14-6)

3. She has a difficult personal history.

4. Recent testing has revealed that the Student's intellectual levels are low, though the Student's scores may be skewed due to a lack of motivation to take tests. According to the Reynolds Intellectual Assessment Scales, the Student's composite intelligence is a 66, which is significantly below average and exceeds the performance of 1 percent of individuals. Her composite memory index is an 80, which is in the low average range. (P-16-4-6)

5. Achievement testing is similarly low. According to the Woodcock-Johnson III Normative Update Tests of Achievement in January, 2013, the Student had a

standard score of 70 in broad reading, 78 in broad math, 74 in brief writing, and 73 in written expression. (P-17-2)

5. This test was given again in September, 2014. The Student had self-confidence and motivation concerns. She did not put forth effort and was distracted. This may have impacted the overall scores, which included a broad reading score of 58 (very low range), a broad math score of 74, and broad writing score of 74 as well. (P-16-4, 9)

6. She lacks a number of foundational and basic skills. (Testimony of Witness B)

7. In math, she is able to understand and compute basic mathematical problems and solve two step algebraic equations with some consistency. Accommodations and modifications are needed in her academic program in math in order for her to be successful in the general education environment. (P-24-3)

8. She will use her fingers to count. (Testimony of Witness B)

9. She is able to identify basic details in a text, and understand basic vocabulary terms. There are deficits in the areas of reading comprehension, determining theme or idea, word meaning, how the author unfolds a series of events, citing textual evidence, and drawing inferences. Accommodations and modifications are needed in her academic program in reading in order for her to be successful in the general education environment. (P-24-5)

10. In writing, she has difficulty with grammar mechanics, spelling, and “developing and strengthening” writing based on a given or selected topic.

Accommodations and modifications are needed in her academic program in writing in order for her to be successful in the general education environment. (P-24-7)

11. When she is focused, she can do quite well in English class. (R-16-3)

12. The Student feels a stigma about being different. She does not like special education classrooms. (P-14-7; Testimony of Petitioner)

13. The Student has difficulties staying focused and being aware of appropriate academic behavior. (P-39-1-2)

14. She has a low frustration level and can be defiant and disrespectful. She is easily angered. (P-14-1)

15. She does not like classes that are loud and unruly. Even so, she may engage in highly inappropriate verbal exchanges with other classmates in the middle of instruction. (P-14-6-7)

16. A function of the Student's behavior is to gain attention. (P-14-2)

17. When she does attend class, she can be engaged in the instruction. (P-14-6, 8)

18. She is generally able to grasp tasks once they are clearly explained. She can usually complete academic tasks with some support. (P-14-6-7)

19. She needs a special education teacher to establish a simple system to "check off her planner" each day. (R-16-3)

20. The Student benefits from redirection. (P-14-1)

21. When a therapist provides concomitant support, the Student will have better attendance. (Testimony of Witness B)

22. She has a significant problem in getting to school. She is consistently truant. (P-24)

23. For the 2012-2013 school year, the Student attended School A.

24. The Student's IEP dated January 22, 2013 recommended four hours per week of specialized instruction outside general education, two hours per week of specialized instruction inside general education in reading , and three hours per week of specialized instruction inside general education in mathematics, with speech and language therapy for 15 minutes per month. (P-44-9)

25. The Student did fairly well at School A. She had struggles, but the teachers helped her get through the classes. She passed her classes. She made progress at the school. (Testimony of Witness D; Testimony of Petitioner; R-13)

26. The Student herself loved attending School A. She felt that she did very well there and learned a lot. (P-14-6)

27. The Student made academic progress on all goals during each reporting period in the 2012-2013 school year at School A. Speech and language goals were mastered. (R-13)

28. For the 2013-2014 school year, the Student attended School B. (Testimony of Petitioner)

29. The Student's IEP dated January 8, 2014 continued to recommend four hours per week of specialized instruction outside general education, two hours per week of specialized instruction inside general education in reading, and three hours per week of specialized instruction inside general education in mathematics, with speech and language therapy for fifteen minutes per month. (P-45-9)

30. The Student did very poorly during this school year.

31. She was engaged in twenty-eight disciplinary infractions between August 26, 2013 and September 8, 2014, including refusal to comply with staff direction. (P-14-3)

32. For the 2013-2014 school year, she made no progress on her goals due to poor attendance and inactive classroom participation. (P-33)

33. After a Due Process Complaint was filed on behalf of the Student against Respondent, the parties entered into a settlement agreement. A stipulation of settlement was signed by the parties on July 22, 2014. In this stipulation, the parties agreed that the Student would receive sixty hours of independent tutoring, ten hours of independent behavior support, a truancy intervention plan, an Functional Behavior Assessment (“FBA”), a Comprehensive Psychological Evaluation, and a Speech and Language Evaluation. The parties also agreed on \$4200 worth of credit recovery. (P-1-2)

34. In providing for compensatory education to satisfy the order of settlement agreement, there have been “a number of challenges.” The Student will cancel appointments, not show up, will not be motivated, and will shut down sometimes.

(Testimony of Witness B)

35. The tutors have had to provide manipulatives and repetition to have her understand material. (Testimony of Witness B)

36. She turned up quite “sporadically” for tutoring. (Testimony of Witness B)

37. Out of 5 days a week scheduled, she would show up 1-2 days a week.

(Testimony of Witness B)

38. The Student made no progress with tutoring in math because there would be too great a gap in time between lessons. (Testimony of Witness C)

39. To this day, the Student has received only about 30 hours of the tutoring that was awarded. (Testimony of Witness B)

40. For the 2014-2015 school year, the Student was retained. She is still a [REDACTED] grader. (Testimony of Petitioner)

41. The Student attended school at the start of the school year that her teachers had no opinion of her when they were interviewed per a psychological evaluation in September, 2014. (P-16-4-5)

42. A “truancy meeting” was held on September 3, 2014, at 10:00 A.M. Attending were the parent, her counsel, and DCPS representatives including a compliance officer and a transition coordinator. (P-8-1)

43. An attendance plan resulted from the meeting. The plan lists one “absence barrier,” which is “problems with the teacher or other school personnel.” The “details” of the barrier were “move math class, ECR English, outside counseling.” Actions to be taken to resolve the cause of excessive absence were: to keep her phone the Student must attend, and an attendance card will be used. Most of the six page form is blank, and the sloppy handwriting on the form suggests that it was filled out in a hasty manner. (P-8)

44. In or about October 20, 2014, the Student got involved in an incident with other students. During the fight, the other students took her phone charger, her coat, school pass, items in her hair, and she was kicked and hit in her eye. She had a couple of scratches, and her eye was swollen. (Testimony of Petitioner)

45. The incident was traumatic for her, and caused her to be fearful to return to school. (Testimony of Witness B)

46. She has not returned to school since. (Testimony of Petitioner)

47. Petitioner did not file a police report because the Student did not want to be retaliated against. (Testimony of Petitioner)

48. After the incident, Petitioner spoke to a DCPS representative over the phone about transferring to School C. (Testimony of Petitioner)

49. Petitioner went to School C with paperwork but the school said that they were overcrowded and did not have enough information to complete the transfer. (Testimony of Petitioner)

50. She then went to see another DCPS official, who asked for proof about the incident and said he would try to find a school. (Testimony of Petitioner)

51. This individual never called her back. She called him, and he said he did not have enough information and there was nothing he could do to help. (Testimony of Petitioner)

52. An FBA was written for the Student on September 23, 2014. The FBA states that the Student has a low frustration level, can be defiant and disrespectful, is easily angered, and may engage in highly inappropriate verbal exchanges with other classmates in the middle of instruction. It states that a function of the Student's behavior is to gain attention, that the Student can be focused and engaged in class, and that she can usually complete academic tasks with some support. (P-14)

53. The Student's BIP dated November 5, 2014 recommends a daily attendance monitoring sheet, identifying a support person with whom she trusts and has

an established working relationship with, use of a problem solving method called SOCS (situations/options/consequences/solutions), verbal encouragement and positive affirmation, one to one assistance, opportunities to express her feelings, an incremental workload, a collaborative school staff, communications with the parent, and the use of an attendance plan. (P-26-1-2)

54. At IEP meeting was held on December 1, 2014. (P-24-1)

55. DCPS team members concluded that the Student's issues are not school based and relate to home-based issues. (R-8-3)

56. The IEP contains math goals, reading goals, writing goals and emotional, social and behavioral development goals. (P-24)

57. The IEP recommends two hours per week of specialized instruction for reading, three hours per week of specialized instruction for mathematics, and four hours per week of specialized instruction outside general education. She is also recommended for 120 minutes per month of behavioral support services, and 120 minutes per month of consultation services/behavioral support services. Accommodations include repetition of directions, location with minimal distractions, small group testing, and use of a calculator. (P-24-10-12)

58. The IEP references the Student's Emotional, Social, and Behavioral Development concerns. It explains the Student's performance on the Ohio Scales Youth Version and contains a goal to explore her underlying issues relating to school motivation and attendance. (P-24-8-9)

59. The IEP's Post-Secondary Transition Plan is based on the Woodcock-Johnson III Tests of Achievement from November 24, 2014, and an Employment

Assessment by Angela Spinella, which was a “Comprehensive File and Transcript Review.” This review indicated that the Student may enjoy a career in business or finance because her best grade of the past year was in banking and credit. (P-24-14)

60. The plan involves researching and identifying at least three colleges that offer a degree in business, and provides assistance with college research for thirty minutes per month. There is also assistance with career exploration for 30 minutes per month. (P-24-15-16)

61. The Student has earned no credits thus far at School B. (P-34-1, 35-1)

## **VII. Conclusions of Law**

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The burden of proof in a special education due process hearing lies with the party seeking relief. 5-E DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or “FAPE”). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005).

Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support

services to permit the child to benefit educationally from that instruction.” Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

1. Specialized Instruction.

Petitioner contends that the IEP<sup>2</sup> did not provide sufficient specialized instruction to the Student. Petitioner points, in particular, to test scores showing that the Student is functioning at a very low level academically, and that the Student requires at least 15 hours of instruction outside of general education.

Respondent points out that the Student’s IEP – requiring four hours of specialized instruction outside of general education, two hours of specialized instruction inside general education in reading, and three hours of specialized instruction in math -- worked for the Student during her time at School A after January, 2013.

The Student’s functional levels are quite low for a Student in general education classroom, and her cognitive scores are low as well. However, the record indicates that the Student herself felt she had made good progress at School A. The record indicates, in fact, that the Student “loved” her time at the school.

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<sup>2</sup> The Prehearing Order refers to an IEP dated December 2, 2014, but the IEP at issue was written on December 1, 2014. The parties did not raise this as an issue during the hearing. I will accordingly address the adequacy of the IEP dated December 1, 2014.

The Student did not testify at the hearing – or appear at the hearing -- to explain away these statements. Moreover, Petitioner confirmed that the Student progressed at School A, including during the period of time that she received the same level of service as was proposed here.

Teacher reports in the record suggest that the Student was in fact able to understand material in general education classes with additional help. There is evidence in the record that the Student did well in a general education English class when she was focused. Additionally, there is evidence that the Student is resistant to standardized testing, suggesting that the Student’s actual academic levels may be higher than reported by psychologists.

I find that the IEP’s level of specialized instruction was reasonably calculated. Petitioner did not meet her burden on this issue.

## 2. Transition Plan/Services

Transition plans create “a coordinated set of activities for a child with a disability” that amounts to a “results oriented process” that is “based on the individual child’s needs.” 34 C.F.R. Sect. 300.43. The focus of transition services is to “improve the academic and functional achievement of a child with a disability, to facilitate the child’s movement from school to post-school activities.” Id. Services must be “based on an individual child’s needs, taking into account the child’s strengths, preferences and interests” and includes instruction, related services, community experiences, employment and other post-school adult living objectives, and “if appropriate” acquisition of daily living skills and provision of a functional vocational evaluation. Id.; see also 71 Fed. Reg. 46579 (2006)(definition of transition services is written broadly).

As stated by a federal court:

Congress in the IDEA placed "added emphasis on transition services so that special education students leave the system ready to be full productive citizens, whether they choose to go on to college or a job." 150 Cong. Rec. S11653-01, S11656 (Nov. 19, 2004) (Conf. Rep. accompanying H.R. 1350) (Statement of Sen. Dodd). Among its many changes, the IDEA is supposed to "enhance[ ] planning and transition services for children with disabilities," *id.* at S11655 (statement of Sen. Reed), and "significantly improve[ ] transition services to ensure that students with disabilities are prepared for postsecondary education or employment." *Id.* at S11659 (statement of Sen. Bingaman).

Carrie I. v. Department of Educ., 869 F. Supp.2d 1225 (D. Haw. 2012).

In the District of Columbia, courts have held that the absence of an adequate transition plan with adequate transition services is not a FAPE violation where the remainder of the IEP is appropriate. As Judge Collyer put it, the absence of a transition plan is "a mere procedural violation." Patterson v. D.C., 965 F. Supp. 2d 126, 131 (D.D.C. 2013)

The Student's transition plan in the IEP is not detailed. Services are limited to researching and identifying at least three colleges that offer a degree in business and providing assistance with college research for thirty minutes per month. There is also assistance with career exploration for thirty minutes per month. The plan was so developed only because the Student's best grade of the past year was in banking and credit. There was apparently no interview of the Student to determine what her level of interest might be in business and finance.

There is no testimony from Petitioner to explain how it might be that the lack of a transition plan denied this Student a FAPE. The Student did not testify, as noted previously. Under the circumstances, I cannot find that the deficiencies of the transition plan here rise to the level of FAPE denial.

3. Behavioral Interventions: IEP/BIP.

Petitioner contends that the Student's IEP and BIP do not contain sufficient behavioral interventions to address the Student's attendance issues. Petitioner points out that there is a duty for school districts to provide interventions to address truancy.

This is true. Respondent has an "affirmative duty" to address a Student's truancy. Lexington County Sch. Dist. One v. Frazier, 57 IDELR 190 (D.S.C. 2011)(SRO's ruling that District failed to assess Student's truancy issue upheld by District Court); Springfield School Committee v. Doe, 623 F.Supp.2d 150 (D. Mass 2009)("behavior management services" fall within the scope of IDEA); cf. R.B. v. Mastery Charter School, 762 F. Supp.2d 745 (E.D. Pa 2010)(District had duty to respond to absences through educational intervention); Independent Sch. Dist. No. 284, Wayzata Area Sch. v. A.C., 258 F.2d 769 (8th Cir. 2001)(neuropsychological assessment conducted of truant student; assessment was relied upon by the court to determine appropriate educational program for Student).

However, courts also recognize that some students simply do not want to go to school. Garcia v. Albuquerque Public Schools, 520 F.3d 1116, 1127 (10<sup>th</sup> Cir. 2008)(Student's pattern of misbehavior would have prevented her from getting an educational benefit no matter what the District did).

It is unclear from this record whether this Student has a sincere interest in going to school. She attended very infrequently in 2013-2014, and Petitioner did not present any convincing testimony that this Student is particularly interested in attending in the future. Moreover, the record does not support the suggestion that the Student's attendance issues are related to difficulties in school. Even with respect to the 1:1

tutoring that was awarded to this Student pursuant to the settlement agreement, the Student has attended infrequently. This suggests to this IHO that the Student's difficulties with attendance do not stem from difficulties in class but, at least in part, from a disinterest in education generally.

Assuming that the Student's truancy problems did in fact stem from school-related difficulties, courts in the District of Columbia have held that it is "essential" for the LEA to develop an FBA when students have behavioral issues. The FBA's role is to determine the cause, or "function," of the behaviors and then the consequences of that behavior. Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008); see also Long v. Dist. of Columbia, 780 F. Supp.2d 49 (D.D.C. 2008)(in ruling the District failed to provide an FBA/BIP for a Student, court stated that "the quality of a student's education is inextricably linked to the student's behavior"); Shelton v. Maya Angelou Charter School, 578 F.Supp.2d 83 (D.D.C. 2008)(FBA/BIP required where learning disabled student was suspended) .

In addition to an FBA, if the behavior of a student impedes the student's learning, the IEP team shall consider the use of positive behavioral supports and other strategies to address that behavior in conformance with the IDEA and its implementing regulations.

20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i).

Here, DCPS did a detailed and thoughtful FBA for the Student in September, 2014. The FBA states that the Student has a low frustration level, can be defiant and disrespectful, and may engage in highly inappropriate verbal exchanges with other classmates in the middle of instruction. It states that a function of the Student's behavior

is to gain attention, that the Student can be focused and engaged in class, and that she can usually complete academic tasks with some support.

The BIP dated November 5, 2014 specifically addresses attendance issues – as stated by Petitioner’s own witness, Witness A. The BIP addresses attendance issues by making it easier for the Student to manage everyday life in school. It recommends a daily attendance monitoring sheet, identifying a support person with whom the Student trusts and has an established working relationship with, use of a problem solving method called SOCS (situations/options/consequences/solutions), verbal encouragement and positive affirmation, one to one assistance, opportunities to express her feelings, an incremental workload, a collaborative school staff, communications with the parent, and the use of an attendance plan.

Moreover, the IEP does contain a goal relating to attendance. Annual Goal 1 relates to exploring the underlying school motivation issues through participation in counseling, which was added to this IEP.

Petitioner has pointed out that there is no clear plan in the BIP to address the October, 2014 incident with other students except to indicate that an attendance plan should be developed. This failure, and the concomitant failure of the FBA and IEP to reference this incident, does make this IHO pause. However, Petitioner’s case was largely premised on the testimony of her expert witness, Witness A. This witness stated that he did not have any issues with this BIP, including in regard to attendance. Given this testimony by Petitioner’s expert witness, given the Student’s questionable interest in school generally, and given the quality of the FBA in this record, I must find that Petitioner failed to meet her burden on this issue.

**IX. Order**

As a result of the foregoing, Petitioner's claims are hereby dismissed with prejudice.

Dated: April 28, 2015

Michael Lazan  
Impartial Hearing Officer

## **X. Notice of Appeal Rights**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may 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 Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: April 28, 2015

*Michael Lazan*  
Impartial Hearing Officer