DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Parent, on behalf of the Student,[1]

Petitioner,

v.

The District of Columbia Public Schools ("DCPS"),

Respondent.

Date Issued: April 19, 2011

Hearing Officer: Ramona M. Justice

Case No:

Hearing Room: Room 2004

OSSE STUDENT HEARING OFFICE
2011 APR 19 A 11:12

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[2]HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17; reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), Public Law 108-446 and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; Title 38 of the D.C. Code, Subtitle VII, Chapter 25; and Chapter 30, Title 5-E of the District of Columbia Municipal Regulations ("DCMR").

II. PROCEDURAL HISTORY

On January 10, 2011, parent, through her Attorney, filed with the District of Columbia, Office of the State Superintendent of Education ("OSSE"), Student Hearing Office, an "Administrative Due Process Complaint Notice", on behalf of the student.

The Respondent was required to convene a resolution meeting within fifteen (15) calendar days from the date of the complaint, which expired on January 25, 2011. The thirty (30) day resolution period ended on February 9, 2011. The resolution meeting was held on February 16, 2011, therefore, the forty-five (45) day timeline for convening a due process hearing and rendering a decision, began on February 17, 2011, the day after the resolution meeting; expiring on April 2, 2011.

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[1] *Personal identification information is provided in Appendix A.*

[2] *This decision is amended to accurately reflect and clarify the name of the High Road School proposed by Petitioner, testimony was received, and which the student is placed, Appendix A, and an error in a footnote on page 23 of the decision.*

On January 11, 2011, the Student Hearing Office assigned the due process complaint to this Hearing Officer. On January 20, 2011, the Respondent filed a response to the due process complaint. On January 24, 2011, the Hearing Officer issued to the parties a "Notice of Prehearing Conference", scheduling the prehearing conference for February 14, 2011 at 3:00 p.m.; and an Order requiring the parties to notify the Hearing Officer of the date, time, and outcome of the resolution meeting.

The prehearing conference was held on February 14, 2011; and on February 18, 2011 the Hearing Officer issued a prehearing order summarizing the matters discussed during the prehearing conference, issues before the Hearing Officer, and confirming the due process hearing for March 10, 2011, at 9:00 a.m...[3]

The due process hearing convened on March 10, 2011, at approximately 9:00 a.m., at 810 First Street, N.E., 2nd Floor, Washington, D.C... The hearing was closed to the public, pursuant to the Petitioner's request. Each party was represented by counsel.

During discussion of preliminary matters the Petitioner's Attorney informed the Hearing Officer that the parent failed to appear for the hearing, the parent was informed of the date and time for the hearing, and on March 9, 2011, the parent informed the Petitioner's Attorney that she would appear for the hearing. The Hearing Officer provided the Petitioners' Attorney several opportunities to contact the parent, to no avail.

The Petitioner's Attorney informed the Hearing Officer that the parent was actively involved and participated in all matters pertaining to the student's education, and that failure to appear for the hearing was uncharacteristic of the parent; and that some unforeseen even must have occurred precluding the parent from appearing for the hearing.

The Petitioner's Attorney made several attempts to contact the parent, to no avail; and upon returning to the hearing, requested a continuance. The Respondent's Attorney objected to continuance of the hearing, representing that parent was a necessary party to the hearing, particularly due to the significant number of allegations against the Respondent; and that it would be unduly prejudiced if the matter proceeded to hearing without the parent.

The Respondent's Attorney also requested that the Hearing Officer exercise her discretionary authority and dismiss the complaint due to parent's failure to appear. The Hearing Officer advised the Respondent's Attorney that it had the opportunity to compel the parent's appearance at the hearing, however, failed to do so.

After hearing arguments from the Attorneys, the Hearing Officer determined that in balancing the interests of both parties, each would benefit from the parent's appearance at the hearing; the Respondent would be unduly prejudiced if the hearing continued without the parent; and the student would be unduly prejudiced if the complaint was dismissed. The Hearing Officer issued a preliminary ruling, denying the Respondent's motion to dismiss and granting the Petitioner's request for continuance of the due process hearing.

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[3] The prehearing order provides that the parties will be held to the matters agreed upon, ordered, or otherwise set forth therein; and if either party believe that the Hearing Officer in the Order overlooked or misstated any item, s/he is directed to advise the Hearing Officer of the same within three (3) business days of the date of this Order (with a copy to opposing counsel); and the concerns will be immediately addressed. Neither party advised the Hearing Officer of any matter overlooked or misstated in the prehearing order.

The Petitioner offered into evidence Exhibits 1-19; and the Respondent offered into evidence Respondent's Exhibits 1-6. The Petitioner raised no objections to Respondent's exhibits. The Respondent's objected to the Attorneys' handwritten notes in Petitioner's Exhibits 3 and 4, and Petitioner's Exhibit 12. After hearing from the parties and ruling on the objections, the Hearing Officer admitted into the record as evidence, Petitioner's Exhibits 1, 2, 3 (excluding Attorney's handwritten notes, pages 1-5), 4 (excluding the Attorney's handwritten notes, pages 1-7); Exhibits 5-11, and 13-19, and Petitioner's Exhibit 12 is excluded in its entirety. The Hearing Officer also admitted into the record as evidence, Respondent's Exhibits 1-6. A witness list accompanied each party's disclosures.

On March 15, 2011, pursuant to the Hearing Officer's request, the Petitioner's Attorney filed with the Hearing Officer "Petitioner's Amended Motion for Continuance" describing the particular circumstances surrounding the parent's failure to appear for the March 10, 2011 due process hearing. On March 17, 2011, the Respondent informed the Hearing Officer that it takes no position in response to Petitioner's motion for continuance.

On March 17, 2011, after reviewing Petitioner's motion and Respondent's response, the Hearing Officer issued an Interim Order on Continuance Motion finding "good cause" for granting Petitioner's motion for continuance; and rescheduling the due process hearing for March 31, 2011. On March 30, 2011, an amended Interim Order on Continuance was issued to the parties, correcting a typographical error in the number of days the decision timeline was extended.

The due process hearing convened on March 14, 2011, at approximately 9:30 a.m., at 810 First Street, N.E., 2nd Floor, Washington, D.C... The hearing was closed to the public, pursuant to the Petitioner's request. Each party was represented by counsel; and the parent appeared for the hearing. The Hearing Officer reviewed with the parties the issues identified in the prehearing order and before the Hearing Officer; and there were no objections from either party.

During discussion of preliminary matters, the Petitioner's Attorney informed that due to a previous commitment of a witness, it was requested that prior to opening statements, the witness testify. The Respondent's Attorney raised no objection and the witness testified. The Hearing Officer reviewed the disclosures admitted into the record as evidence, and exhibits excluded. Thereafter, Petitioner's witness testified, followed by the Petitioner providing opening statements; and the Respondent's Attorney waiving opening statements.

Petitioner's witnesses included: the parent, a Psychologist, and the Admissions Director at High Road School. The Petitioner's Attorney initially offered the Psychologist as an expert in Clinical Psychology and Attention Deficit Hyperactivity Disorder (ADHD). The Psychologist testified, among others, that he is a "generalist", in clinical psychology.

During voir dire, the Hearing Officer requested that the witness expound upon his experience and qualifications which serve as the basis for his expertise in the areas in which he was offered an expert. The witness became uncooperative, and was excused. The Hearing Officer granted the Petitioner's Attorney a brief recess to consult with the witness, and upon returning to the hearing, withdrew its request to offer the witness as an expert; and requested to proceed with the witness testifying based upon his experience as a Psychologist. The Hearing Officer allowed testimony of the witness to continue. The Respondent presented no witnesses.

The due process hearing concluded with the Petitioner and Respondent providing closing arguments; and requesting that the Hearing Officer find in each party's favor on all issues in the complaint.

III. BACKGROUND

The student is years of age; and a grade student a District of Columbia high school. Prior to attending the high school, the student attending a District of Columbia middle school. The student struggled academically and behaviorally at both schools.

On January 10, 2011, the Petitioner, through her Attorney, filed this complaint challenging the appropriateness of the student's November 19, 2009 and November 2, 2010 Individualized Education Programs (IEPs), and placements, during the 2009/10 and 2010/11 school years.

IV. ISSUES

The issues before the Hearing Officer are as follows:

(1) Whether the District of Columbia Public Schools denied the student a free appropriate public education, by failing to develop an appropriate Individualized Education Program (IEP) for the student on November 19, 2009, because the student was not identified and determined eligible to receive special education services, under the ***disability classification*** of emotionally disturbed, in violation of the IDEA, at 300.8(c) (4) (i) and 300.324(a) (1)?

(2) Whether the District of Columbia Public Schools denied the student a free appropriate public education, by failing to develop an appropriate Individualized Education Program (IEP) for the student on November 19, 2009 and November 2, 2010, because the ***level of specialized instruction services*** prescribed in the IEPs, is insufficient to provide the student access to the general education curriculum, and educational benefit, in violation of the IDEA, at 34 C.F.R. §§300.320, 300.324, and 300.513?

(3) Whether the District of Columbia Public Schools denied the student a free appropriate public education, by failing to develop an appropriate Individualized Education Program (IEP) for the student on November 2, 2010, because the ***academic goals*** in the IEP are not specifically designed to address the student's academic deficits; in violation of the IDEA, at 34 C.F.R. §§300.320 (2) (i) (A) (B) and 300.324?

(4) Whether the District of Columbia Public Schools denied the student a free appropriate public education, by failing to develop an appropriate Individualized Education Program (IEP) for the student on November 19, 2009 and November 2, 2010, because the IEPs failed to include ***social/emotional goals***, positive behavioral interventions, and supports, to address the student's behavior, in violation of the IDEA at 34 C.F.R. §300.324(a) (2) (i) and 300.320?

(5) Whether the District of Columbia Public Schools denied the student a free appropriate public education, by failing to develop an appropriate Individualized Education Program (IEP) for the student on November 19, 2009 and November 2, 2010, because the nature and severity of the student's disability is such that education of the student in the general ***education setting***, even with the use of supplementary aids and services, cannot be accomplished satisfactorily because the student requires education outside the general education setting; in violation of the IDEA, at 34 C.F.R. §300.114(a) (2) (ii), 300.116 (a) (2) (b) (2); and 300.513?

(6) Whether the District of Columbia Public Schools denied the student a free appropriate public education, because during the 2009/10, and 2010/11 school years, it failed to provide the student an appropriate placement, because the ***location of services*** identified in the student's November 19, 2009 and November 2, 2010 IEPs, is unable to provide the student the full-time special education program, outside general education, which he require(s) to access the general education curriculum; and receive educational benefit; in violation of the IDEA, at 34 C.F.R. §300.114 (a)(2)(ii), 300.116, and 300.513?

(7) Whether the District of Columbia Public Schools denied the student a free appropriate public education, because on October 6, 2010 and October 14, 2010, the Respondent failed to properly convene an ***IEP team***, by ensuring that the IEP team included the student's special education teacher, in violation of the IDEA, at 34 C.F.R. §300.321(a) (1) (2) and (3); 300.322(a), 300.324 and 300.513(a) (2)?

V. RELIEF REQUESTED

The Petitioner requests that the Hearing Officer issue an order requiring the Respondent to fund the student's placement at of Washington, D.C., a full-time special education program, outside the general education setting. The Petitioner also requests a meeting to develop an appropriate IEP; and compensatory education services for the 2009/10 and 2010/11 school years, to compensate the student for Respondent's alleged failure to provide the student an appropriate IEP and placement during this period.

VI. CREDIBILITY DETERMINATIONS

The testimony of Petitioner's witnesses was credible. The Respondent presented no witnesses, refuting the testimony presented by Petitioner's witnesses.

VII. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The student is disabled and eligible to receive special education and related services under the Individuals with Disabilities Education Act (IDEA).[4] The student's disability classification is identified as Other Health Impairment (OHI), specifically identified as Attention Deficit Hyperactivity Disorder (ADHD).[5]

2. The student resides in the District of Columbia, and attended District of Columbia Public Schools, throughout his education. The student is currently years of age, and in the grade at a District of Columbia Senior High School, which he began attending during the 2010/11 school year.[6] During the 2008/09 and 2009/10 school years, the student attended a District of Columbia public middle school.[7]

[4] Petitioner's Exhibit 2.
[5] Petitioner's Exhibit 2.
[6] Petitioner's Exhibit 2.
[7] Id.

3. Since the 2008/09 school year, the student struggled academically and behaviorally, in the classroom and at school.[8] The student exhibited problematic behavior in the classroom, including: failing grades, failing to attend classes[9] and complete assignments, difficulty interacting appropriately with other children his age and school staff, struggling in making decisions, and an inability to work well under pressure.[10] The student also exhibits behaviors of aggression and defiance; has a history of school discipline, due to inappropriate conduct at school; and recent became court involved, due to his problematic behavior in the school environment.[11]

4. On ***May 15, 2007***, while in elementary school, the Respondent completed a ***Confidential Psychological Evaluation*** to assess the student's levels of cognitive functioning and facilitate effective academic planning.[12] Tests administered included the Wechsler Abbreviated Scale of Intelligence (WASI). Compared to the Full Scale Intelligence Quotient (FSIQ) Score of 117, which the student received during a Psychological Evaluation completed on July 7 and 8, 2004, the student's FSIQ is 99, which is significantly lower than scores received in 2004, which the evaluator opines may be attributed to the student's perceived lack of interest in the testing process.[13]

5. On ***September 10, 2007***, while in elementary school, the Respondent completed an ***Educational Evaluation*** to assess the student's academic achievement.[14] Although the student's overall reading standard score is within the low range when compared to others in his grade, the student's performance varied on two different types of reading tasks.[15]

   The student's performance is limited on tasks requiring efficient operation of reading processes; and his performance is negligible on tasks requiring reading decoding and the ability to identify words.[16] The student's basic reading skills are very limited; tasks measuring reading skills above the 2.7grade level would be quite difficult for the student; and when compared to others at his grade level, the student's performance is low in broad reading and basic reading skills.[17]

6. On ***November 19, 2009***, while attending the middle school, an Individualized Education Program (IEP) was developed for the student prescribing 10 hours of specialized instruction services per week, in the general education setting.[18] The student's disability classification was identified as Specific Learning Disability (SLD).[19]

7. On ***July 28, 2010***, while attending the middle school, an independent Comprehensive Psychological Evaluation of the student was conducted, to assess the student's current cognitive, educational, and social emotional functioning; and assist in determining appropriate educational programming and services for the student.[20]

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[8] Petitioner's Exhibits 3, 4, 6, 7-11, 12, 14, 15, and 16.
[9] Respondent's Exhibit 3.
[10] Petitioner's Exhibit 6, page 8.
[11] Testimony of parent, Petitioner's Exhibits 4, Exhibit 6, page 7, Exhibits 8-12, and Respondent's Exhibit 3.
[12] Petitioner's Exhibit 15, page 1.
[13] Petitioner's Exhibit 15, page 3.
[14] Petitioner's Exhibit 14.
[15] Id.
[16] Id.
[17] Id.
[18] Petitioner's Exhibit 5, page 4.
[19] Petitioner's Exhibit 5, page 1.
[20] Petitioner's Exhibit 6.

According to the parent the student was referred for evaluation because the student had incurred 4 or 5 suspensions since attending the school due to problematic behavior, such as not "keeping still in class" and "talking back to teachers".[21] According to evaluation results, the student satisfies the eligibility criteria as a student with Multiple Disabilities (MD), including Learning Disabled (LD) in reading and written expression, Emotional Disturbance (ED), and Other Health Impaired (OHI), specifically identified as ADHD.[22]

Recommendations include: an Occupational Therapy Evaluation to address the student's difficulties with penmanship and determine whether specialized intervention is warranted, a disability classification of multiple disabilities including learning disabled, emotionally disturbed, and other health impaired, specialized instruction in a separate, full-day school, a Functional Behavioral Assessment, a Behavior Intervention Plan, school based counseling, and medication management.[23]

8. On ***October 6, 2010***, the Respondent convened a Multidisciplinary Development Team (MDT) meeting to review the student's independent Comprehensive Psychological Evaluation and IEP; and discuss the location of services and compensatory education services.[24] The MDT included the student's general education teacher, Special Education Coordinator, parent, student, student's Attorney, student's Special Education teacher, student's Social Worker, school Psychologist, and the Respondent's Compliance Case Manager.[25] The team did not include the student's special education teacher, or a special education provider of the student.[26]

   The team reviewed the independent Psychological Evaluation noting that the evaluation recommends an Occupational Therapy Evaluation, a Functional Behavioral Assessment, a Behavioral Intervention Plan, and a full-time therapeutic day school.[27] The Respondent determined that 1 hour of counseling services would be added to the student's IEP, review of the student's IEP was not necessary and the IEP would be revised with updated information from the independent Psychological Evaluation, new academic scores and new goals.[28]

   The Respondent also determined that social emotional goals would be developed for the student; and the student would remain at his Senior High School.[29] The student's Attorney requested the student's placement at the or and stated that she would notify the school which of the two (2) placements is requested.[30]

   The Respondent's Psychologist reviewed with the team findings and recommendations in the independent Comprehensive Psychological Evaluation. The Psychologist requested that the team consider a disability classification of multiple disabilities to include learning disabled and other health impaired.[31]

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[21] Petitioner's Exhibit 6, page 1.
[22] Petitioner's Exhibit 6, page 8.
[23] Id.
[24] Petitioner's Exhibit 4, page 1.
[25] Id.
[26] Id.
[27] Petitioner's Exhibit 4, page 2.
[28] Id.
[29] Id.
[30] Id.
[31] Petitioner's Exhibit 4, page 2.

The Psychologist also advised the team that the student failed to satisfy the eligibility criteria as a student with an emotional disability because to satisfy the eligibility criteria as a student with an emotional disability, the student must exhibit poor behavior at home and school, and because this student's behaviors are more at school than at home, the student fail to meet the eligibility criteria as a student with an emotional disturbance.[32]

The student was determined ineligible for services as a student with an emotional disability.[33] The student's Attorney disagreed with the disability classification decision.[34] The Attorney also requested a small structured therapeutic environment for the student, as recommended in the independent Comprehensive Psychological Evaluation. [35] The student's Attorney also expressed dissatisfaction with the meeting because the goals were not available for review.[36]

9. On ***October 14, 2010***, the Respondent convened a Multidisciplinary Development Team (MDT) meeting to review the student's IEP.[37] The MDT included the student's Attorney, parent, general education teachers, and school social worker. [38] The team did not include the student's special education teacher who was unresponsive to the Respondent's efforts to include the teacher in the meeting.[39]

   The student's general education teacher reports that the student's attendance is very poor, the student is very distracted when in class, can work only 15-20 minutes on an assignment and then the student stands up and starts moving around.[40] The teacher reports that the student's vocabulary is very low, and although the student is capable of completing certain assignments, he is not focused and has difficulty, paying attention.[41] The teacher also reports that the student's reading and vocabulary are on the 4th and 5th grade levels.[42] The student's social worker reports that the student refuses to attend counseling.[43]

   The team reviewed the social emotional goals in the student's IEP, and agreed to include a goal regarding respect and listening to directions.[44] The team also agreed to include math goals in the student's IEP, and offered 1 hour per week of mentoring for 6 months. The meeting notes reflect that the parent and student's Attorney agreed with the reading, written expression, and social and emotional goals in the student's IEP, however, the same notes reflect that the IEP would be emailed to the Attorney to review with the parent, and determine whether the parent agrees with the goals in the IEP.[45] The Attorney requested a full-time IEP and input from the student's special education teacher regarding the request for a full-time IEP.

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[32]Petitioner's Exhibit 4, page 2.

[33] Petitioner's Exhibit 4, page 2.
[34] Id.
[35] Id.
[36] Id.
[37] Petitioner's Exhibit 3.
[38] Petitioner's Exhibit 3, pages 1 and 2.
[39] Petitioner's Exhibit 3, page 2.
[40] Petitioner's Exhibit 3, page 1.
[41] Id.
[42] Id.
[43] Id.
[44] Id.
[45] Id.

According to the meeting notes, an Occupational Therapy Evaluation and a Functional Behavioral Assessment was ordered, and the team agreed to reconvene to review the evaluations, once completed.[46] An Occupational Therapy Evaluation was completed; however, there is no evidence that a Functional Behavioral Assessment was completed.[47]

10. On ***November 2, 2010***, while attending the Senior High School, an Individualized Education Program (IEP) was developed for the student prescribing10 hours of specialized instruction services per week, outside the general education setting; and 2 hours of behavioral support services, monthly.[48] The student's IEP identifies the students disability classification as Other Health Impairment (OHI); specifically identified as Attention Deficit Hyperactivity Disorder (ADHD).[49]

11. On ***November 17, 2010***, the Respondent completed an Occupational Therapy Evaluation.[50] The evaluator determined that based on evaluation results, occupational therapy services were not warranted for the student.

12. Appropriateness of IEP (Eligibility Determination)

The Hearing Officer finds that the student's November 19, 2009 Individualized Education Program (IEP) is inappropriate, because at that time that the IEP was developed, the student satisfied the eligibility criteria as a student with an emotional disability, however, the student's IEP does not identify the student as a student with an emotional disability.

First, the student attended the Respondent's public schools throughout his education, and at the time that the November 19, 2009 IEP was developed, the student had attended the Respondent's middle school for the 2008/09 school year, and approximately four (4) months into the 2009/10 school year. During this period, the student exhibited problematic behavior that significantly impeded the student's learning and educational performance. Therefore, the Respondent had reason to suspect that this student may have a disability other than a learning disability; however, the student was not reevaluated and the evaluations completed failed to address the student's social emotional needs.

According to the parent, throughout the 2008/09 and 2009/10 school year, while attending the middle school, she was repeatedly contacted by the school regarding the student's aggressive and defiant behavior towards other students and staff, and school suspensions due to the student's problematic behavior. The parent testified that although she does not recall whether she expressed concern regarding the student's academic performance, she informed the Respondent that the student required assistance with the student's behavior; and that she was advised by one of the student's teachers that "the student did not belong at the school".

Second, in the areas of emotional, social, and behavioral development, the Respondent was aware that the student's academic success and access to the general education curriculum while attending the middle and high schools, was/is adversely affected by the student's disabilities.[51]

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[46] Id.
[47] Petitioner's Exhibit 7.
[48] Petitioner's Exhibit 2, page 7.
[49] Petitioner's Exhibit 2, page 1.
[50] Petitioner's Exhibit 7.
[51] Testimony of parent, Petitioner's Exhibits 6 and 8-12.

The Respondent was also aware that the student's avoidance behavior, problematic behaviors regarding aggression, defiance, oppositional defiant behavior, and poor class room attendance, prevented the student from attending to his academic tasks and full-time participation in the general education curriculum; that this behavior occurred over an extended period of time; and continued into the 2010/11 school year.[52] However, the student's November 19, 2009 IEP was not revised to include social/emotional goals, positive behavioral interventions, and support to address the student's behavior, and lack of progress towards the goals in the student's IEP.[53]

Third, at the time that the November 19, 2009 IEP was developed, the Respondent was aware that the student exhibit the following behavioral characteristics, and that these behaviors persisted into the 2010/11 school year: 1) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; 2) inappropriate types of behavior or feelings under normal circumstances; and 3) a tendency to develop physical symptoms or fears associated with personal or school problems (i.e. avoidance behavior).[54] Based on this information, the student satisfied more than one of the IDEA's eligibility criteria, as a student with an emotional disability.

Assuming the Respondent did not suspect that the student had an emotional disability, at the least, the Respondent was aware that the student exhibited behavioral problems which adversely impact his learning and educational performance, and for these reasons independent of any others, additional evaluation should have been conducted to address the student's social emotional needs and behavior, which was not done.[55]

Fourth, the Respondent failed to evaluate the student in all areas of suspected disability, including the student's social emotional functioning, although not commonly linked to the learning disability category in which the student was classified. The 2007 Psychological and Educational Evaluations were not sufficiently comprehensive to identify all of the student's special education and related service needs.

A review of the Psychological Evaluation reflects that the evaluator assessed the student's verbal and nonverbal cognitive functioning; and the Educational Evaluation assessed the student's academic achievement. The evaluations included no assessment of the student's social emotional functioning, thinking ability, verbal ability, phonemic -awareness, working memory; or include a social history. As a result, the evaluations were not sufficiently comprehensive to identify all of the student's educational needs; and the student failed to receive an appropriate IEP specifically tailored to address the student's unique needs; and would provide the student educational benefit.

Fifth, according to the independent Comprehensive Psychological Evaluation, the behaviors currently exhibited by the student and supporting the determination that the student satisfies the eligibility criteria, as a student with an emotional disability, are the same behaviors the parent reports were exhibited by the student during the 2008/09 and 2009/10 school years.[56] Therefore, it is more probable than not that, had the Respondent comprehensively evaluated the student in all areas of suspected disability it would have been determined that the student satisfied the eligibility criteria as a student with an emotional disability prior to this recent determination.

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[52] Petitioner's Exhibit 6, page 7.
[53] Petitioner's Exhibits 1, pages 2-6, and
[54] IDEA, 34 C.F.R. §300.8 (c)(4)(i).
[55] Petitioner's Exhibit 5.
[56] Testimony of parent, Petitioner's Exhibits 6, and 8-12.

Finally, the Hearing Officer finds that the student's November 19, 2009 IEP is inappropriate because it is not specifically tailored to address the student's social emotional needs, as a student presenting with an emotional disability; and therefore, the IEP is not reasonably calculated to provide the student access to the general education curriculum, or 'meaningful' educational benefit.

13. Appropriateness of IEPs (Level of Services)

The Hearing Officer finds that the November 19, 2009 and November 2, 2010 IEPs are inappropriate because the ten (10) hours of specialized instruction services per week, as prescribed in the student's IEPs, is insufficient to provide the student access to the general education curriculum, and 'meaningful' educational benefit.[57]

According to the Educational Evaluation completed by the Respondent on September 10, 2007, when compared to others at his grade level, the student's performance was low in broad reading and basic reading skills; and it was determined at that time that tasks measuring reading skills above the grade 2.7 level, would be quite difficult for the student. [58]

According to the August 19, 2010 Comprehensive Psychological Evaluation, Woodcock Johnson III Achievement Tests, the student scores indicate that the student is functioning below expectations for his age and grade level in some major subject areas. Overall, the student is currently performing at a grade equivalent of 4.7, which indicates that the 10 hours per week of specialized instruction the student received since the 2008/09 school year, is insufficient to meet the educational needs of the student, because during this period the student made no more than de minimis educational benefit.[59]

The independent Comprehensive Psychological Evaluation recommends an increase in the level of specialized instruction the student receives, consisting of a full-time special education program, to effectively address the student's educational needs.[60] Furthermore, the Respondent's Occupational Therapy Evaluation also reports that the student *continue* to demonstrate difficulties with reading comprehension, writing, and mathematics academic skills; his poor attention span and cognitive function greatly impact his ability to complete grade level academic skills; and that the student could benefit from services including a reading specialist/or program, writing skills development, and a math tutorial.[61]

The Respondent presented no evidence refuting Petitioner's allegations regarding the appropriateness of the student's IEP and level of services. The Respondent's argument that the parent signed the student's IEP agreeing to its content fails, because signing the student's IEP does not negate the Respondent's obligation under the statute to ensure that the IEP includes a sufficient level of specialized instruction services, to meet the educational needs of the student; and the student receives a FAPE.

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[57] Petitioner's Exhibits 5, page 4, and Exhibit 2, page 8.
[58] Petitioner's Exhibit 8, testimony of parent, and Petitioner's Exhibit 14.
[59] Petitioner's Exhibit 6, pages 4-6, and Petitioner's Exhibits 7-12.
[60] Petitioner's Exhibit 6, page 9.
[61] Petitioner's Exhibit 7, page 5.

In summary, the student's overall cognitive functioning, learning deficits, and academic regression since the 2008/09 school year, support a finding that ten (10) hours of specialized instruction, per week, as prescribed in the student's IEP is insufficient to provide the student access to the general education curriculum, and 'meaningful' educational benefit.[62]

14. Appropriateness of IEP (Academic Goals)

The Hearing Officer finds that the Petitioner failed to present evidence that on November 2, 2010, the Respondent developed an inappropriate IEP for the student because the academic goals in the IEP are not specifically tailored to meet the student's educational needs.

The Educational Evaluation completed on September 10, 2007 reflects that the student had a specific disability in reading, and the November 19, 2009 IEP is specifically tailored to address the student's specific learning disability in reading.[63] According to the August 19, 2010 independent Comprehensive Psychological Evaluation the student remains deficient in brief reading, brief writing, and struggles in comprehending information.[64]

The student's November 2, 2010 IEP is specifically tailored to meet the academic needs of the student, and reasonably calculated to provide the student educational benefit, and therefore, is appropriate. The fact that the student would benefit from an increase in the level of specialized instruction services in his IEP, does not equate to an inappropriate. There must be evidence to support such a finding, which is not present in this case.

15. Appropriateness of IEPs (Social/Emotional Goals/Behavioral Interventions and Supports)

The Hearing Officer finds that on ***November 19, 2009***, the Respondent failed to develop an appropriate IEP for the student, by ensuring that the IEP included ***social/emotional goals***, and positive behavioral interventions and supports, to address the student's problematic behavior.[65]

In developing the student's ***November 19, 2009*** IEP, the Respondent was aware that the student's behavior significantly impeded his learning;[66] however, it failed to consider the use of positive behavioral interventions and supports, and other strategies to address the student's behavior, and lack of progress towards the goals in his IEP.[67] In fact, the November 19, 2009, IEP includes no social/emotional goals, or positive behavioral interventions and supports, to address the student's behavior.[68]

The Hearing Officer also finds that in developing the student's ***November 2, 2010 IEP***, the Respondent ensured that the IEP included social emotional goals and behavioral support services; however, failed to ensure that the IEP included positive behavioral interventions, such as a Behavioral Intervention Plan (BIP), based on Functional Behavioral Assessment, to address the student's behavior.[69]

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[62] Petitioner's Exhibit 6, pages 2- 9, Petitioner's Exhibits 7, 8, 9, 10, 14, and 15, and testimony of parent.
[63] Petitioner's Exhibit 2.
[64] Petitioner's Exhibit 6, page 8.
[65] Respondent's Exhibits 1, pages 2-7.
[66] Petitioner's Exhibits 11, testimony of parent.
[67] Petitioner's Exhibits 8, 11, Testimony of parent, and Respondent's Exhibit 1.
[68] Respondent's Exhibit 1.
[69] Petitioner's Exhibit 2, page 7.

The student's IEP reflects that the student receives supplemental support in his classes that includes behavioral interventions; however, the Respondent presented no evidence that the student receives supplemental support in the classroom. Assuming arguendo the student behavioral interventions are utilized in the classroom, the student's academic and behavioral regression indicates that the interventions are unsuccessful, and should be revisited.

Third, the student's academic and behavioral regression since the 2008/09 school year is reflected in the student's consistent aggressive and defiant behavior, significant number of school suspensions, progress and report cards reflecting failing grades, recent court involvement, and the student's recent lack of interest in school.[70]

Fourth, the August 19, 2010 Comprehensive Psychological Evaluation, recommends a Functional Behavioral Assessment (FBA); and Behavioral Intervention Plan (BIP).[71] A FBA would assist the IEP team in identifying reasons the student engages in challenging behavior and how the student's behavior relates to the school environment; develop appropriate social/emotional goals specifically tailored to this student's social emotional needs.

A FBA would also assist the IEP team in developing an appropriate Behavioral Intervention Plan (BIP) for the student, to address the student's disruptive behavior, identify the student's specific target behaviors, as well as, the frequency, intensity, and duration of the behaviors that interfere with the student's daily learning.[72] However, as of the date of this decision a FBA or BIP has not been conducted.

Fifth, according to results of the August 19, 2010, independent Comprehensive Psychological Evaluation, the student presents with a conduct disorder and satisfies the eligibility criteria for a Multiple Disabilities classification, including among others, emotionally disturbed.[73] However, on November 2, 2010, the Respondent relied solely upon the advice and recommendations of the school Psychologist , albeit in error, and determined that the student failed to satisfy the eligibility criteria as a student with an emotional disturbance.

Prior to rendering the determination of ineligibility, the Respondent failed to carefully consider information from various sources, including the IDEA's eligibility criteria for emotional disability, the student's behavioral and academic history, and input from the parent and student's teachers.[74] As a result, the student continues to be deprived an appropriate IEP.

Finally, the Hearing Officer finds that the November 19, 2009 and November 2, 2010 IEPs are inappropriate, because the IEPs are not specifically tailored to meet the student's social emotional needs, and are not reasonably calculated to provide the student 'meaningful' educational benefit; for reasons indicated herein.

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[70] Testimony of parent, and
[71] Petitioner's Exhibit 6, page 9.
[72] Petitioner's Exhibit 6, page 9.
[73] Petitioner's Exhibit 6, page 8.
[74] Petitioner's Exhibit 4, page 2.

16. Appropriateness of IEPs (Educational Setting)

The Hearing Officer finds that the student's November 19, 2009 and November 2, 2010 IEPs are inappropriate because the nature of the student's disabilities are such that education in the general education setting cannot be achieved satisfactorily, even with the use of supplementary aids and services; and the student requires education outside the general education setting.[75]

At age 6, the student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), and receives medication for the ADHD.[76] Since the 2008/09 school year, the student received specialized instruction services, in the general education setting, where he continued to struggle academically and behaviorally.

The Hearing Officer finds that at the time that the IEPs were developed for this student, the Respondent was aware that the student failed to progress in the general education setting; however, instead of placing the student in a more restrictive setting, it disregarded the needs of the student and maintained the student's placement in the general education setting.

According to the student's general education teacher, when taking the ADHD medication the student is attentive and can complete class assignments, and although his classroom work improves dramatically, he receives failing grades.[77] The teacher also reports that without the ADHD medication, the student becomes inattentive, defiant, unfocused, easily distracted, physically aggressive, restless, has difficulty interacting with other students, "jumping around the classroom, can only work 15-20 minutes on an assignment, and arrives to class late.[78] The parent also reports that without the ADHD medication the student "can't keep still," "runs from one end of the house to the other," and "does a lot of banging."[79]

According to the Conner's-3 Self Report scales used in the assessment of ADHD and screening behaviors such as attention, hyperactivity, and impulsivity; and oppositional behavior, conduct problems, aggression, learning problems, emotional functioning, family relations, and executive functioning, the student's T-score of 65 indicates that the student has *significant* problems in global functioning; which inhibits the student's ability to function effectively in the general education setting.[80]

Additionally, according to the Conners-3 Teacher Report completed by the student's special education teacher, the student's T-scores are in the *very elevated range* on the following scales: inattention (T=78), hyperactivity/impulsivity (T=90), Aggression (T=90), and Peer Relations (T=71).[81] The teacher also rates the student in the high average range on learning problems/executive functioning (T=61). Overall, the student's teacher reports elevated scores in multiples areas, suggesting that the student is easily distracted, restless, physically aggressive, and has difficulty interacting with other students in the general education setting.

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[75] Testimony of parent, testimony of Admissions Director, of Washington, D.C., and Petitioner's Exhibits 6, 7-12, 14 and 15.
[76] Testimony of parent.
[77] Petitioner's Exhibit 6, page 2.
[78] Petitioner's Exhibit 6, page 1.
[79] Petitioner's Exhibit 6, page 2.
[80] Petitioner's Exhibit 6, page 6.
[81] Petitioner's Exhibit 6, pages 6-7.

Recent evaluations, parent, student, and teacher reports support a finding that during the 2009/10 and 2010/11 school years, the student experienced difficulty accessing the general education curriculum, due to his inability to effectively manage the symptoms of his disabilities, in the general education setting.[82] The class sizes and school populations at the student's middle and high schools are too large for the student to effectively manage, given the nature and severity of the student's multiple disabilities; and as a result, the student is unable to access to the general education curriculum, and receive 'meaningful' educational benefit.[83] Furthermore, the record reflects that maintaining this student's placement in the general education setting, continues to prove unsuccessful.

For these reasons, the Hearing Officer finds that the student's November 19, 2009 and November 2, 2010 IEP are inappropriate, because the IEPs are not specifically tailored to meet the educational needs of this student, and therefore, are not reasonably calculated to provide the student educational benefit.

17. Appropriateness of IEP (Location of Services)

The Hearing Officer finds that the student's November 19, 2009 and November 2, 2010 IEPs are inappropriate, because the location of services identified in the IEPs are unable to provide the student the level of specialized instruction services, ***outside*** the general education setting, which he requires to access the general education curriculum; and receive educational benefit.

The record reflects that at age 6, the student was diagnosed with ADHD, and since the 2008/09 school year, the student has struggled academically and behaviorally, and the student continues to struggle because of his disabilities.[84] Academically, the student's general education teacher reports that the student is easily distracted when in class, can work only 15-20 minutes on an assignment; and then the student stands up and starts moving around.[85] The student's mathematics teacher reports that the student need to increase his ability to focus to complete assignments and follow directions; and his problematic behaviors in school affect his academic performance and his relationships with peers and staff.[86]

The student's reading teacher reports that the student needs to increase his overall reading comprehension skills and decoding/vocabulary skill ability.[87] Finally, the student's written expression teacher reports that the student needs to improve his overall written language skill ability, ability to formulate paragraphs with the proper sentence structure and grammar and increase penmanship skills.[88]

In the areas of emotional, social, and behavioral development and functioning, the student 's academic success and access to the general education curriculum is adversely affected by the student's disabilities; and the student's tendency towards avoidance, ADHD and poor class-

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[82] Testimony of parent, Testimony of Admissions Director at the of Washington, D.C., and Petitioner's Exhibit 6.
[83] Testimony of parent, Petitioner's Exhibit 6, and Testimony of Admissions Director, of Washington, D.C..
[84] Petitioner's Exhibits 8-12, 14, and 15.
[85] Petitioner's Exhibit 3, page 1.
[86] Respondent's Exhibit 2, page 4.
[87] Petitioner's Exhibit 2, page 5.
[88] Petitioner's Exhibit 2, page 6.

room attendance, have prevented the student from attending to his academic tasks and full-time participation in the general education curriculum.[89]
The student requires a full-time special education program outside the general education setting, to effectively address his educational needs, behavioral, and emotional issues; which was/is not available at the location of services identified in the student's November19, 2009 and November 2, 2010 IEPs.[90]

The student also requires a small, highly structured academic setting, with minimum distractions and external stimuli; medication management; low student to teacher ratio to address his academic deficits; and a structured behavior management program with clear and consistent reinforcements and consequences; to access the general education curriculum and receive education benefit, which was/is not available at the location of services identified in the student's IEPs.[91]

The Respondent failed to carefully consider the academic, developmental, and functional needs of the student in determining the location of services for this student in developing the student's IEPs; and failed to consider any potential harmful effects on the child or on the quality of services the student requires, should it maintain the student's placement at the location of services identified in the IEPs.[92]

18. IEP Team Composition

The Hearing Officer finds that on October 6, 2010 and October 14, 2010, the Respondent failed to properly convene an IEP team meeting, by ensuring that the team included not less than one special education teacher of the student, or where appropriate, not less than one special education provider of the student.[93]

The student's special education teacher appeared for the October 6, 2010 IEP team meeting, however, the teacher departed the meeting prior to its conclusion and review of the student's IEP.[94] The IEP team reconvened on October 14, 2010, to review the student's IEP, however, the student's special education teacher was "unresponsive", and the team was unable to secure the teacher's participation in the meeting.[95]

The student's November 2, 2010 IEP was developed, without the benefit of input from the student's special education teacher. As a result, the student was deprived of an IEP specifically tailored to address the student's unique special education and related service needs; and an IEP reasonably calculated to provide the student educational benefit.

[89] Petitioner's Exhibit 6, page 7.
[90] Petitioner's Exhibit 6, page 9.
[91] Petitioner's Exhibit 6, page 9, and Testimony of parent.
[92] Petitioner's Exhibit 8.
[93] Petitioner's Exhibits 4, and 1.
[94] Id.
[95] Petitioner's Exhibit 3, page 2.

VIII. 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:

1. The burden of proof is properly placed on the Petitioner, the party seeking relief in this matter.[96] Petitioner must prove the allegations in the due process complaint, by a preponderance of the evidence.[97]

2. The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 et seq., reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), is the federal statute governing the education of students with disabilities; and the Federal regulations promulgated under the IDEA, are codified at 34 C.F.R. Part 300.

   The IDEIA ensures that all children with disabilities have available to them a free appropriate public education ("FAPE"), emphasizing special education and related services specifically designed to meet their unique needs and prepare them for further education, employment, and independent living. *See, 20 U.S.C. §1400(d) (I) (A).*

   The IDEIA defines a FAPE as special education and related services provided at public expense, under public supervision and direction, and without charge; meet the school standards of the State educational agency; includes an appropriate preschool, elementary school, or secondary school education in the State involved; and that the special education and related services must be provided in conformity with an Individualized Education Program (IEP) that meets the requirements of §§300.321 through 300.324.[98]

   According to *Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley, 458 U.S. 176 (1982),* in order for FAPE to be offered a student, the school district must show it complied with the statutory elements of an IEP, and the goals and objectives in the IEP are reasonable, realistic and attainable. The special education and related services must also be reasonably calculated to enable the child to receive educational benefit, and must be likely to produce progression, not regression.

3. When parents challenge the appropriateness of a program or placement offered to their disabled child by a school district under the IDEA, a Hearing Officers must undertake the following two-fold inquiry: 1) procedural compliance; and 2) substantive compliance.

   (1) Procedural FAPE (Procedural Compliance)

   First, the Hearing Officer must determine whether the State complied with the *procedural requirements* of the IDEIA, in creating and implementing the student's IEP, or rendering the placement decision. However, the 2004 amendments to IDEA, at Section 615(f) (ii) specifically limit the jurisdiction of administrative hearing officers to make findings that a child failed to receive a FAPE due to procedural violations, unless it can be determined that the procedural violations:

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[96] *Shaffer v. Weast*, 546 U.S. 49, 56-057 (2005) and 5 D.C.M.R. §3030.3.
[97] 20 U.S.C. §14115(i)(2)(c). See also *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir.2005) (standard of review)
[98] IDEA, 34 C.F.R. §300.17(d).

(I) impeded the child's right to a free and appropriate public education;
(II) significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or
(III) caused a deprivation of educational benefit to the student.

(2) Substantive FAPE (Conferral of Educational Benefit)

Second, once the Hearing Officer addresses the first criteria, it must determine whether the State complied with the *substantive requirements* of the IDEA, by developing an IEP for the student that is ***reasonably calculated to enable the student to receive educational benefit.*** According to Rowley v. Board of Education, at 458 U.S. at 200-01 (1982), school districts are only required to provide students a "basic floor of opportunity"; and although an "appropriate' public education does not mean the absolutely best or potential maximizing education for the individual child; the educational benefit received by the student must be more than trivial.[99]

The IEP must also be ***appropriately designed and implemented***, emphasizing special education and related services specifically designed to meet the student's unique needs, supported by such services, as are necessary to provide the student 'meaningful', benefit. If these two (2) requirements are satisfied, the State has complied with the obligation imposed by Congress, and the courts can require no more.

In this matter, the Petitioner challenges the Respondent's compliance with the procedural and substantive requirements of the IDEA, in developing the student's IEPs, and determining the student's placement.

4. **Appropriateness of IEP (Eligibility Determination)**

It is the decision of the Hearing Officer that the District of Columbia Public Schools denied the student a free appropriate public education, by failing to develop an appropriate Individualized Education Program (IEP) for the student on November 19, 2009 , in violation of the IDEA, at 300.8(c)(4)(i) and 300.324(a)(1), because the IEP does not identify the student as disabled and eligible to receive special education services, under the ***disability classification*** of emotionally disturbed, although at the time the IEP was developed, the student satisfied the eligibility criteria under the IDEA, as a student with an emotional disability.

In developing the student's IEP and determining this student's eligibility and educational needs, the Respondent failed to comply with the procedural and substantive requirements of the IDEA for the following reasons:[100]

First, the Respondent failed to ensure that the student was evaluated in all areas of suspected disability, including, the student's general intelligence, academic performance, and most important, the student social emotional functioning, although the student presented with problematic behaviors at school, which significantly impacted the student's learning and educational performance.[101]

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[99] Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1314 (1987); and Rowley, 458 U.S. 176, at 177 206-207 (1982).
[100] IDEA, 34 C.F.R. §300.306(c)(1)(i)(ii).
[101] IDEA, 34 C.F.R. §300.304(c)(4) and (6).

Second, the Respondent failed to ensure that the May 16, 2007 Psychological Evaluation and September 10, 2007 Educational Evaluations, were sufficiently comprehensive to identify all of the student's special education needs, whether or not commonly linked to the learning disability category in which the student was classified.

Third, in reviewing the 2007 Psychological and Educational evaluations and student's IEP on November 19, 2009, the IEP team failed to carefully review and consider the information in the evaluations; and if it had, it would have determined that the evaluations were not sufficiently comprehensive to identify all of the student's special education and related services needs; and additional evaluations were warranted.

Finally, in interpreting the 2007 evaluation data on November 19, 2009, for the purpose of determining whether the student is a child with a disability under §300.8, and the educational needs of the student, the Respondent failed to: 1) draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, as well as information regarding the student's physical condition, social background, and adaptive behavior; and 2) ensure that the information obtained from the various sources was documented and carefully considered.

5. **Appropriateness of IEPs (Level of Services)**

It is the Hearing Officer's Decision that the Petitioner satisfied its burden by proving that the District of Columbia Public Schools failed to comply with the ***substantive*** requirements of the IDEA, by ensuring that the level of specialized instruction services in the November 19, 2009 and November 2, 2010 IEPs, was/is sufficient to provide the student access the general education curriculum; and educational benefit, in violation of the IDEA, at 34 C.F.R. §§300.320, 300.324, and 300.513.

The Respondent also failed to comply with the ***substantive requirements*** of the IDEA, by ensuring that in developing the November 19, 2009 and November 2, 2010 IEPs , the IEP team carefully considered the strengths of the child; concerns of the parents for enhancing the education of their child, results of the initial or most recent evaluations of the child; the academic, developmental, and functional needs of the child; and the potential harm on the student and on the quality of services the student requires, should the student fail to receive the level of specialized instruction necessary to access the general education curriculum and receive educational benefit.[102]

The November 19, 2009 and November 2, 2010 IEPs are not ***appropriately designed***, emphasizing special education and related services specifically designed to meet this student's unique needs, supported by such services, as are necessary.

In addition, because the level of specialized instruction services is insufficient in the IEPs, the IEPs are not ***reasonably calculated*** to provide the student 'meaningful', educational benefit. For these reasons, the IEPs are inappropriate. The Respondent failed to satisfy these two (2) requirements, thus, it failed to fulfill its obligation under the IDEA.

[102] IDEA, at 34 C.F.R. §300.324(a)(1)(iv).

6. **Appropriateness of IEP (Academic Goals)**

It is the Hearing Officers' decision that the Petitioner failed to satisfy its burden by proving that the District of Columbia Public Schools denied the student a free appropriate public education (FAPE), by failing to develop an appropriate Individualized Education Program (IEP) for the student on November 2, 2010, because the academic goals in the IEP are not specifically designed to address the student's academic deficits; in violation of the IDEA, at 34 C.F.R. §§300.320(2)(i)(A)(B) and 300.324.

7. **Appropriateness of IEPs (Social/Emotional Goals/Behavioral Interventions and Supports)**

It is the Hearing Officers' decision that the Petitioner satisfied its burden by proving that the District of Columbia Public Schools denied the student a free appropriate public education (FAPE), by failing to develop an appropriate Individualized Education Program (IEP) for the student on ***November19, 2009***, because the IEP failed to include social/emotional goals, positive behavioral interventions and supports, to address the student's behavior, in violation of the IDEA, at 34 C.F.R. §§300.324(a)(2)(i) and 300.320.

It is also the Hearing Officers' decision that the Petitioner proved that the District of Columbia Public Schools denied the student a FAPE, because the ***November 2, 2010*** IEP fail to include positive behavioral interventions, to address the student's behavior, in violation of the IDEA, at 34 C.F.R. §§300.324(a)(2)(i) and 300.320.[103]

However, the Petitioner failed to satisfy its burden by proving that on ***November 2, 2010*** the District of Columbia Public Schools denied the student a free appropriate public education by failing to ensure that the IEP included social/emotional goals and behavioral support services, because the IEP includes social emotional goals and behavioral support services for the student.

8. **Appropriateness of IEPs (Educational Setting)**

It is the Hearing Officer's Decision that the Petitioner satisfied its burden by proving that on November 19, 2009 and November 2, 2010, the District of Columbia Public Schools failed to comply with the ***substantive*** requirements of the IDEA, because the IEPs developed for the student recommend education of the student in the general education setting, although the nature and severity of the student's disability is such that education of the student in the general ***education setting*** cannot be achieved satisfactorily, even with the use of supplementary aids and services; and the student requires education outside the general education setting; in violation of the IDEA, at 34 C.F.R. §§§300.114(a)(2)(ii), 300.116(a)(2)(b)(2), 300.324 (a)(1)(iv), and 300.513.

[103] In determining any relief the student may be entitled the Hearing Officer must consider the fact that on October 14, 2010, the Petitioner and Petitioners' Attorney agreed with the social emotional goals in the student's IEP, and thereafter, filed this complaint representing that the IEP fail to include social emotional goals.

In determining the educational setting for a student, the public agency must identify an educational setting most likely to enable the student to access the general education curriculum; and receive 'meaningful' educational benefit. The educational setting decision should not be based solely on whether the student will continue to interact with non-disabled students, as often represented by the Respondent in these proceedings.[104]

The Hearing Officer concludes that the November 19, 2009 and November 2, 2010 IEPs are inappropriate because the IEPs are not ***specifically designed*** to address this student's functional needs; and therefore, are not ***reasonably calculated*** to provide the student 'meaningful', educational benefit. The Respondent failed to satisfy these two (2) requirements, thus, it failed to fulfill its obligation under the IDEA.

9. **Appropriateness of IEPs (Location of Services)**

It is the Hearing Officer's decision that the Petitioner satisfied its burden of proof by presenting evidence that the District of Columbia Public Schools denied the student a free appropriate public education, because during the 2009/10, and 2010/11 school years, it failed to fulfill its ***substantive*** obligations under the IDEA, by providing the student an appropriate placement, because the ***location of services*** identified in the student's November 19, 2009 and November 2, 2010 IEPs, is unable to provide the student the full-time special education program, outside general education, which he requires to access the general education curriculum, and receive educational benefit; in violation of the IDEA, at 34 C.F.R. §300.114(a)(2)(ii), 300.116, and 300.513.

The IDEA provides that in selected the least restrictive environment (LRE) for a student, the public agency must ensure that to the *maximum extent appropriate*, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled.[105] This requirement also applies to non-academic and extracurricular services and activities such as recess, meals, athletics, counseling, groups, and clubs.[106]

Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[107] Consideration must also be given to any potential harmful effect on the child or on the quality of services the student requires.[108]

In the District of Columbia, special education placements shall be made in the following order of priority, provided, that the placement is appropriate for the student and made in accordance with the IDEA:

(1) DCPS schools, or District of Columbia public charter Schools pursuant to an agreement between the DCPS and the public charter school;
(2) Private or residential District of Columbia facilities; and
(3) Facilities outside of the District of Columbia.[109]

[104] IDEA, 34 C.F.R. §300.116 (d), and §114.
[105] IDEA, 34 C.F.R. §300.114(a)(1)(2)(i).
[106] IDEA, at 34 C.F.R. §300.117.
[107] IDEA, 34 C.F.R. §300.114 (a)(1)(2)(ii).
[108] IDEA, 34 C.F.R. §300.116 (d).
[109] D.C. Code §38-2561.02.

An "appropriate' public education does not mean the absolutely best or potentially maximizing education for the individual child. *Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1314 (1987)*. Rather, the public agency only has to provide the student a "basic floor of opportunity"; and according to Rowley, in providing the student the basic floor of opportunity, the educational benefit received by the student must be 'meaningful' and cannot be trivial.[110]

It is the Hearing Officer's decision that in developing the student's IEPs, the Respondent failed to comply with the procedural and substantive requirements of the IDEA. Specifically, during the 2009/10 and 2010/11 school years, the Respondent failed to comply with the LRE requirements of the IDEA in determining the location of services for this student; and defaulted on its obligations under the IDEA, to ensure that this student received the "basic floor of opportunity", required under the law, and 'meaningful' educational benefit.

10. **IEP Team Composition**

It is the Hearing Officers' decision that the Petitioner satisfied its burden by proving that in developing the student's November 2, 2010 IEP, the District of Columbia Public Schools failed to comply with the ***procedural*** requirements of the IDEA, by ensuring that the IEP teams that convened on October 6, 2010 and October 14, 2010, included not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child; in violation of the IDEIA, 34 C.F.R. Section 300.321(a)(1)(2) and (3), 300.322(a), 300.324, and 300.513(a)(2).

It is also the Hearing Officer's decision that the Petitioner proved that the student was denied a FAPE, because the procedural violations in this matter impeded the student's right to a free appropriate public education; significantly impeded the parent's opportunity to provide 'meaningful' input in decisions regarding the student's educational program and the provision of a FAPE to the student; and resulted in a deprivation of educational benefit to the student because the student continues to be deprived an IEP specifically tailored to address his unique special education and related service needs, and an IEP reasonably calculated to provide the student 'meaningful' educational benefit.

11. **Private School Placement**

When a public school system has defaulted on its obligations under the IDEA, a private school placement is "proper under the Act", if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefit."[111] In this matter, the Respondent defaulted on its obligations under the IDEA, to ensure that this student received an appropriate IEP and placement, during the 2008/09 and 2010/11 school years. The Respondent proposed no alternative placement for the student; and presented no evidence refuting any of the allegations in the complaint.

The Petitioner proposes placement of the student at the of Washington, D.C., located in Washington, D.C ... The of Washington, D.C. is a private, non-public, self contained school for learning disabled, ADHD, emotionally disturbed, and mildly retarded students.

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[110] *Rowley v. Board of Education*, 458 U.S. 176, at 177 206-207 (1982).

[111] *Florence County School District Four, et al. v. Shannon Carter, 510 U.S. 7 (1993).*

The school is designed to assist male and female students, ages 13 – 21, experiencing educational difficulties with an emotional or behavioral component, such as this student.[112] A student may earn Carnegie Credits and work toward completion of the following: (1) High School Diploma, (2) High School Certificate at age 21, or (3) High School Certificate, prior to reaching age 21.[113]

A special education teacher and a teacher assistant staff each classroom, and each class size is limited to 10 students.[114] Students are generally grouped in classes according to their ages, levels of achievement, and required course work. Classes are approximately 1 hour and 20 minutes in length, and students receive 1:1 instruction in the classroom. [115] The classroom identified for this student would consist of ten (10) students, including this student.

The school provides students behavioral support services, and each student receives a behavioral modification program and contract.[116] The students attending the school receive individual and group therapy; the school utilizes a point reward system as a behavioral management strategy; and therapists monitor student's behavior daily. The school utilizes a progressive approach to addressing problematic behavior; however, the school also utilizes more aggressive measures of restraint, as warranted.[117] Parents are also contacted regarding a student's behavior

Teachers utilize a variety of reading and writing programs and 3-4 math programs. Teachers also use different workbooks, textbooks, and computer programs focused on the uniqueness of each student's academic needs, learning style, and interests. The school also utilizes a tutorial based model ensuring that each student's instruction supports their individual learning style.

The student has been accepted at the school, and the school commits to providing the student educational benefit.[118] The parent and student visited the school, and the parent requests that the Hearing Officer place the student at the school. A representative of the District of Columbia Public Schools is present at the school daily, to oversee the needs of DCPS students.

The Hearing Officer finds that the student's current placement is inappropriate; and the of Washington, D.C., is an appropriate alternative placement for the student. [119] The of Washington, D.C. can provide the student a full-time special education program, outside general education, a small structured therapeutic environment, with a small student to teacher ratio, where the student can receive 1:1 academic support throughout the school day, with minimum distractions and stimuli, behavioral support and management; and 'meaningful' educational benefit, which is not available at the students' current placement. [120]

IX. COMPENSATORY EDUCATION SERVICES

[112] Id.
[113] Testimony of Admissions Director, of Washington, D.C..
[114] Id.
[115] Id.
[116] Id.
[117] Id.
[118] Id.
[119] Testimony of parent and Admissions Director, of Washington, D.C..
[120] Id.

The Petitioner satisfied its burden by proving that the District of Columbia Public Schools denied the student a free appropriate public education, by failing to provide the student an appropriate IEP and placement during the 2009/10 and 2010/11 school years, entitling the student to compensatory education services for the denial of a FAPE occurring during this period.

Compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that the student is receiving only a de minimis benefit and fails to correct the situation, as in this case. *M.C. on behalf of J.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d. Cir. 1996).*

According to *Mary McLeod Bethune Day Academy PCS v. Terri Bland, Civil Action No. 07-1223 (2008)*, a compensatory education award is an equitable remedy that "should aim to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA. Compensatory education is also part of the court's resources in crafting appropriate relief." *See, Reid v. District of Columbia, 401 F.3d 516, 523 (D.C. Cir. 2005)*. Its purpose is to help the child make the progress that he/she would have made if an appropriate program had been available. The specific services provided the student must be tailored to the student's needs.

Under the theory of compensatory education, courts and hearing officers may award "educational services...to be provided prospectively to compensate for a past deficient program." *See G. ex rel. RG v. Fort Bragg Dependent Schs. 343 F.3d 295, 308 (4th Cir. 2003)*.

The IDEA empowers Hearing Officers with considerable discretion when fashioning a remedy. *See, 20 U.S.C. § 1415(i) (2) (C) (iii)* (the Hearing Officer "shall grant such relief as the Hearing Officer determines is appropriate.") However, a Hearing Officer cannot determine the amount of compensatory education that a student requires unless the record provides him with "insight about the precise types of education services [the student] needs to progress." *Branham, 427 F.3d at 12 (2005)*.

Relevant evidence includes "the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive environment." Id. In *Nesbitt,* the Court found that an "award was not adequately individualized or supported by the record", when the Hearing Officer was not provided with any information regarding the student's current grade level of functioning.

According to *Reid* a compensatory education "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." Reid, 401 F. 3d at 524. *(D.C. Cir. 2005)*. This standard "carries a qualitative rather than quantitative focus," and must be applied with "[f]lexibility rather than rigidity."

The crafting of an award of compensatory education under IDEA simply cannot be nebulous; and an arbitrary compensatory education award will never pass muster under the *Reid* standard. In crafting an appropriate remedy for denial of FAPE, the Hearing Officer must engage in a fact intensive analysis that is qualitative rather than quantitative. *Branham v. D.C., 427 F.3d 7, 11 (D.C. Cir 2005); Reid, 401 F.4d at 524*.

The amount of compensatory education is calculated by finding the period of deprivation of special education services; and excluding the time reasonably required for the school district to rectify the problem. *M.C. v. Cent. Reg'l. Sch. Dist., 81 F.3d at 397 (3rd Cir. 1996).*

The prehearing order issued in this matter required the Petitioner to include in its disclosures a proposed compensatory education plan for the student. The Petitioner failed to comply with the Hearing Officer's order, and failed to include in its disclosures a compensatory education plan for the student. However, equity dictates that the Hearing Officer craft an appropriate compensatory education award for this student, to compensate the student for the past violation. *Heather D. v. Northampton Area Sch. Dist., 48 IDELR 67 (E.D. Pa. 2007).*

In crafting an appropriate remedy for this student, the Hearing Officer accepts the student as she finds him; taking into consideration the totality of facts surrounding the student's education, the student's educational needs, the period of time the student has been without an appropriate IEP and placement; the fact that the student is in the 9th grade and overall, is performing at the 4.7 grade level, and has approximately three (3) years of high school education remaining.

The Hearing Officer relies on the student's evaluations, assessments, and evidence of record to ensure that the ultimate award is tailored to the student's unique needs. The following compensatory education plan is specifically tailored to the student's unique needs; and is reasonably calculated to provide the student educational benefits that likely would have accrued had the violation not occurred; and are intended to mitigate any harm the student may have suffered as a result of the violations:

Compensatory Education Services Plan

(1) Evaluations

Within ten (10) school days of the date of this decision and order, the Respondent shall issue to the parent, an independent educational evaluation letter authorizing funding of an independent Functional Behavioral Assessment (FBA) to identify the student's specific target behaviors, frequency, intensity, and duration of the behaviors that interfere with the student's learning; and independent Occupational Therapy (OT) Evaluation to address concerns regarding the student's penmanship and recommendations for writing skill development.

Within ten (10) school days of receiving the FBA and OT evaluation, the Respondent shall convene an IEP team meeting with the parent and/or parent's representative, representatives from the of Washington, D.C., to review the evaluation, develop a Behavioral Intervention Plan (BIP) to address the student's aggressive and disruptive behavior, and revise the student's IEP, consistent with the findings and recommendations in the independent evaluations.

(2) IEP

The students November 2, 2010 IEP is revised to reflect that the student will receive 27.5 hours of specialized instruction per week, *outside* general education; and two (2) hours of behavioral support services, per week, to assist the student in processing his discordant feelings regarding his academic difficulties; learn effective measures to express himself when needed, rather than isolating himself when upset and engaging in avoidance behaviors; understand how his disabilities interfere with his ability to function in the classroom; and assist him in addressing his attendance.

The student's IEP is revised to reflect a disability classification of Multiple Disabilities, including Specific Learning Disability in reading and written expression, Emotional Disturbance, and Other Health Impaired, specifically identified as Attention Deficit Hyperactivity Disorder (ADHD).

Within fifteen (15) school days from the date of this decision and order, the Respondent shall convene an IEP team placement meeting with the parent and/or the parent's representative, for the purpose of revising the November 2, 2010 IEP to reflect that the student will receive 27.5 hours of specialized instruction, *outside* general education; and two (2) hours of behavioral support services, weekly.

(3) Medication Management

Within thirty (30) days of the student's placement at the of Washington, D.C., the Respondent and representatives of the of Washington, D.C., and parent and/or parent's representatives, with the student, shall develop a medication management plan, to manage the student's medication for attention deficit hyperactivity disorder (ADHD). The team shall refer to page 9 of the Comprehensive Psychological Evaluation completed on August 19, 2010, for guidance on developing the medication management plan for the student.

(4) Independent Tutoring Services

The Respondent shall fund tutorial services for the student at the Lindamood-Bell Diagnostic Learning Evaluation, at a cost not to exceed to remediate the student's deficits in reading, mathematics, reading comprehension, written language skills; and assist the student in learning specific comprehension strategies such as reading for the main idea and using context clues to determine word meaning.

The tutorial services may be provided at the student's school, at the end of each school day; at a Lindamood-Bell Learning Center; and/or at a Summer Clinic; and the student has until the end of the 2011/12 school year, to utilize the tutorial services. The Respondent shall provide the student transportation for the student to attend the Lindamood-Bell learning center, after school tutoring, and/or Summer clinic, if the tutoring is not provided at the student's school.

X. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby:

1. **ORDERED**, that within ten (10) school days from the date of this decision, the Respondent shall issue to the parent a Prior Notice of Placement, placing the student at the of Washington, D.C.. The Respondent shall fund the student's tuition and transportation for the student to attend of Washington, D.C., for the remainder of the 2010/11 school year; and the 2011/12 school year; and it is further

2. **ORDERED**, that the student's November 2, 2010 IEP is revised to reflect that the student shall receive 27.5 hours of specialized instruction, *outside* the general education setting, and two (2) hours of behavioral support services, weekly; and it is further

3. **ORDERED,** that the student's November 2, 2010 IEP is revised to reflect a disability classification of Multiple Disabilities, including Specific Learning Disability in reading and written expression, Emotional Disturbance, and Other Health Impaired, specifically identified as Attention Deficit Hyperactivity Disorder (ADHD); and it is further

4. **ORDERED**, that the Respondent shall implement and fund the student's compensatory education Plan.

X. NOTICE OF RIGHT TO APPEAL

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 19, 2011

Ramona M. Justice

Attorney Ramona M. Justice, Hearing Officer