

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

STUDENT,¹
through the Parent

Petitioner,

v

District of Columbia
Public Schools,

Respondent.

Date Issued: May 1, 2010

Hearing Officer: James Gerl

Case No:

Hearing Date: April 21 and 22, 2010

Room: 7B and 4B

HEARING OFFICER DETERMINATION

BACKGROUND

The due process complaint was filed on March 19, 2010. The matter was assigned to this Hearing Officer on March 23, 2010. A resolution session was convened on March 29, 2010, and it did not result in a settlement. A pre-hearing conference by telephone conference call was convened on April 7, 2010. The due process hearing was convened at the Student Hearing Office on April 21 and 22, 2010. The hearing was closed to the public; the student's parent attended the hearing; and the student did not attend the hearing. Seven witnesses testified on behalf of Petitioner, and four witnesses testified on behalf of Respondent. Petitioner's Exhibits 1 through 26 were admitted into evidence, and Respondent's Exhibits 1 through 24 were admitted into evidence. In addition, Hearing Officer Exhibit 1 was also admitted into evidence.

¹ Personal identification information is provided in Appendix A.

STUDENT HEARING OFFICE
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JURISDICTION

This proceeding was invoked pursuant to the provisions of the Individuals With Disabilities Education Act (“IDEA”), 20 U.S.C. Section 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia (“District” or “D.C.”) Municipal Regulations (“DCMR”), re-promulgated on February 19, 2003; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

PRELIMINARY MATTERS

All proposed exhibits and testimony received into evidence and all supporting arguments submitted by the parties have been considered. To the extent that the evidence and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

At the hearing the testimony of Petitioner’s expert speech/language therapist was not recorded due to an equipment malfunction. Counsel for the parties entered into a stipulation that a document they created, and which was entered into evidence as Hearing Officer Exhibit 1, accurately states the testimony given by Petitioner’s expert speech/language therapist.

ISSUES PRESENTED

The following four issues were identified by counsel at the pre-hearing conference and evidence concerning these issues was heard at the due process hearing:

1. Did the Respondent violate its Child Find obligations under IDEA by failing to identify the student as a child with a disability and provide her with an IEP from her third birthday until October 7, 2009? and
2. Did Respondent fail to appropriately evaluate the student? and
3. Was the IEP developed by Respondent for the student on October 7, 2009 appropriate? and
4. Did Respondent violate the McKinney-Vento Act?

FINDINGS OF FACT

After considering all the evidence in the record, as well as the arguments of both counsel, I find the following facts:

1. The student as born on _____ (Stipulation by counsel stated on the record.)
2. Respondent failed to identify the student as a child with a disability and had no IEP in place from her third birthday until October 7, 2009. (Stipulation.)
3. Respondent completed a speech language evaluation and a development evaluation for the student in September 2009. (Stipulation.)
4. On October 7, 2009, Respondent developed an IEP for the student that provided for ten hours of special education in the general education setting. The IEP provided for no speech language therapy or other related services. (Stipulation.)

5. The student's parent requested independent evaluations of the student for psychoeducational and speech language on March 3, 2010. Respondent agreed and such independent evaluations were conducted. (Stipulation.)
6. On July 29, 2009, the parent gave written consent for the student to be evaluated. (Respondent's Exhibit 4; references to exhibits shall hereafter be referred to as "P-1," etc. for the Petitioner's exhibits; "R-1," etc. for the Respondent's exhibits and "HO-1," etc. for the hearing officer exhibits; references to testimony at the hearing is hereafter designated as "T".)(P-6)
7. On July 29, 2009, the student's parent provided the information for an Early Childhood Developmental History questionnaire about the student. (R-5)
8. On July 29, 2009, Respondent conducted a screening for the student. The results of the screening were that the student passed the portions concerning motor skills and vision, but was referred for further evaluation for communication, pre-academics and hearing. (R-6)
9. On July 29, 2009, a multi-disciplinary team (hereafter sometimes referred to as "MDT") was convened for the student. Present at the meeting were the parent, a special educator, a speech language pathologist, a physical therapist, and a school psychologist. After reviewing the results of the screenings done on the student, the MDT determined that additional evaluations of the student would be necessary. The MDT team developed a Student Evaluation Plan concerning the student. The team decided that the student should have a speech/language evaluation, an educational evaluation and a hearing screening.(R-8, R-9; T of Respondent's speech pathologist; T of Respondent's developmental evaluator).
10. On July 29, 2009, the student's mother gave consent for the evaluations planned by the MDT team. (R-11)

11. On September 22, 2009, a special educator for Respondent conducted a Comprehensive Developmental Evaluation of the student. The evaluator had twenty-nine years experience in special education. In preparation for the evaluation, the evaluator reviewed information provided by the student's mother and interview the student's classroom teacher. In addition, the evaluator observed the student in the classroom and spent approximately an hour and a half with the student in observing her and conducting the evaluation. The evaluator administered the Battelle Developmental Inventory, Second Edition, to the student. The Battelle Developmental Inventory is a standardized individually administered assessment battery of key developmental skills in children from birth to 7 years of age and is an appropriate assessment tool for young children. The evaluator administered the cognitive, adaptive and personal social domains of the instrument to the student. The evaluator observed that the student was very friendly, very verbal and very active in participating in group activities. Although noting that the student's speaking was baby-like in manner and somewhat immature for her age, the evaluator noted that she was generally age/grade appropriate with regard to her behavior. On the Battelle Inventory, the student received an average range score on the adaptive domain, although the fact that she was not toilet trained caused her scores in the self-care and personal responsibility skills area to be somewhat low. On the personal social domain of the inventory, the student received an average score. On the cognitive domain portion of the inventory, the student received a significantly below average score. Her scores in all areas of the subdomain were low. The evaluator concluded that the student was in need of specialized instructional services. (R-12; T. of Respondent's developmental evaluator; R-24)

12. On September 30, 2009, Respondent's speech language pathologist evaluated the student. She had fifteen years experience as a speech pathologist and holds a Masters degree in speech pathology. In addition to a clinic observation of the student, as well as an informal assessment of voice fluency pragmatics and hearing, the evaluator administered the following instruments during the speech language evaluation: Goldman Fristoe Test of Articulation 2; Expressive Once Word Picture Vocabulary Test; Receptive Once Word Picture Vocabulary Test; and Test of Early Language Development. These instruments are appropriate and standard assessment tools. The evaluator evaluated the student in her school environment, and the evaluation was conducted in the morning hours. The evaluator concluded that the child's voice, resonance, pragmatic and fluency skills are within normal limits. Her overall language skills were found to be in the average range of performance. Her receptive and expressive one word vocabulary skills were in the below average range. Her articulation and speech intelligibility skills were within the average range. The evaluator concluded that the student appears to be developing as typically developing peers in the area of speech and language development. Although her vocabulary skills were in the below average range, the evaluator expected her to continue to mature in this area given continued exposure in a language rich environment. The evaluator's report then contains a number of recommendations for the parent and the teacher to consider in order to foster continued language and vocabulary development. (R-13; T of Respondent's Speech Language Pathologist; R-23)

13. On July 29, 2009, the student was given a hearing screening, which she passed. (R-14, R_15)

14. On October 7, 2009, the MDT/eligibility team for the student met. The team reviewed the evaluation data and concluded that the student was eligible for special education because of developmental delay. (R-15, R-16; T of Respondent's speech pathologist; T of Respondent's developmental evaluator)
15. In conducting the assessments and evaluations of the student, the evaluators used by Respondent employed standard testing instruments and followed the appropriate protocols. (T of Respondent's speech pathologist; T of Respondent's developmental evaluator; HO Ex 1 =T of Petitioner's speech pathologist)
16. On October 7, 2009, Respondent convened an IEP team meeting for the student. Present at the IEP meeting were the student's mother, Respondent's developmental evaluator, who served as case manager, Respondent's speech pathologist, the early childhood director of the school that the student had been attending, and a health intern. (R-19; P-23; T of Respondent's speech pathologist; T of Respondent's developmental evaluator)
17. The IEP for the student created by Respondent on October 7, 2009 provided for ten hours of special education to be delivered in the general education setting. The IEP lists the student's present levels of performance with reference to the developmental evaluation score she received. The IEP identifies as the student's needs, deficits in the area of adaptive skills (toileting) and all areas of cognitive/pre-academic skills which need to be addressed through direct service delivery. The IEP then sets forth 14 goals for the student to improve her areas of need. (R-19; P-23)
18. On October 7, 2009, Respondent issued a prior written notice letter to the parent noting that the placement for the IEP developed on the same day would be at the neighborhood school for the student. Respondent's developmental evaluator, who was also serving as the case manager for the student, noted on the form that the

parent will think about the placement before making a decision regarding placement. The parent had stated at the IEP team that she might be moving in the near future and that she did not want the student to have to begin school at a different school two times in a short period of time. The parent and student were homeless at this time, but the parent did not share that information with the IEP team. (R-19; T of Respondent's developmental evaluator; T of the student's parent)

19. At the IEP team meeting on October 7, 2009, the parent raised two concerns, one involved her belief that the student required speech language therapy, and the second involved the school at which the IEP would be implemented. The team, and in particular, Respondent's speech pathologist discussed the results of the speech language evaluation and explained to the parent why she did not feel that speech language therapy was required at this point for the student. The mother was asked by the Respondent's developmental evaluator, who was serving as the case manager for the student, to contact the Respondent after she had moved so that further discussion concerning where the student would have her IEP implemented could take place. The IEP Team considered the input of the student's mother and responded appropriately. Other than the concerns with regard to speech language therapy and the location at which the IEP would be implemented, the parent agreed with the IEP, as written. There were not any requests by the parent or anyone on her behalf to provide more than the ten hours of special education provided by the IEP, to add additional services, to request a one-to-one aide, to request counseling as a related service, or to request any other modifications or changes to the IEP. In addition, the parent did not request, at this point, a psychological evaluation or any other further evaluations of the student. The parent agreed with the content of the IEP at the meeting on October 7, 2009, and Respondent's developmental evaluator

noted her agreement on the IEP form.(T of Respondent's development evaluator; T of Respondent's speech pathologist; T of student's parent; T of the early childhood director at the student's current school, who testified as an expert witness in social work on behalf of Petitioner; R-19; P-23)

20. The neighborhood school for the student, which is identified in the prior written notice as the place where the October 7, 2009 IEP would be implemented, was capable of implementing the IEP as written. The student's mother never consented to have the student receive special education under the IEP. The parent's decision in that regard was unreasonable.(R-19; T of special education coordinator from Petitioner's neighborhood school; T of student's parent)

21. The IEP developed for the student by Respondent on October 7, 2009 was reasonably calculated to confer academic benefit. (T of Respondent's development evaluator; T of Respondent's speech pathologist; T of Petitioner's witness – the educational coordinator at the homeless organization; T of Respondent's witness, the early childhood director at the student's current school)

22. On March 10, 2010, the student was evaluated by Petitioner's speech language therapist. The evaluator conducted the evaluation in her clinic. She obtained information from the student's parent, who accompanied her, but did not interview the student's teachers or any school personnel. The evaluator found using observation, the Preschool Language Scale-4 and the Test of Minimal Articulation Competence, that the student had moderately delayed receptive language skills and severely delayed expressive language skills. The speech language evaluation was the result of a request for an independent educational evaluation by Petitioner. (P-11; HO-1=T of Petitioner's speech language pathologist)

23. On April 7, 2010, the Petitioner was given a psychological/psychoeducational evaluation by Petitioner's expert witness clinical psychologist. This evaluation was the result of a request for an independent educational evaluation by Petitioner. In addition to observing the student, the evaluator administered the following tests: Differential Abilities Scale; Woodcock Johnson Psychoeducational Battery, Third Edition, Tests of Cognitive Ability; Developmental Test of Visual Motor Integration; Peabody Picture Vocabulary Test – Third Edition; Expressive Vocabulary Test; Incomplete Sentences Test; Roberts Apperception Test; and projective drawings. The evaluator found the student's cognitive function to be slightly higher than the levels found by Respondent. The evaluator concluded that the student has attention deficit hyperactivity disorder, an adjustment disorder, a communication disorder NOS and borderline intellectual functioning. Among the recommendations of the evaluator were that the student receive individual psychotherapy and that the psychotherapist work with the parent concerning some of the behaviors observed by the student. In addition, the evaluator recommended that the student see a psychiatrist for an appropriate psycho-stimulant medicine. The evaluator also recommended that the student be put in a full-time school setting that is small and has individualized attention. The evaluator concluded that she needs more than the number of hours of special education specified in the October 7, 2009 IEP. The evaluator recommended a full-time psychoeducational preschool program with an extra degree of therapeutic support and psychotherapeutic service in addition to her individual therapy. In addition, the evaluator concluded that the student needs counseling and speech language services. The evaluator did not speak with the student's parent or the student's teachers in conducting the evaluation. (P-10; T of Petitioner's expert witness clinical psychologist)

24. The years between ages 3 and 5 are very important for a student's development. (T of Petitioner's expert witness clinical psychologist)
25. The student loves to be with other kids. The student likes school and is able to name several of her friends there. (T of Petitioner's witness the education coordinator at the homeless center; P-10)
26. After the filing of the instant due process complaint, a resolution meeting occurred on March 29, 2010. Attending the resolution meeting were the student's mother, Petitioner's lawyer, a law clerk for Petitioner's lawyer, a special assistant at the school previously attended by the student, and Respondent's compliance case manager. At the resolution meeting, personnel representing Respondent conceded that Respondent violated its Child Find obligation with regard to the student but denied the other allegations in the complaint. As a potential resolution, Respondent proposed one of two options: that the student receive two hours per week of pre-academic tutoring for a period of ten months or that Respondent fund a summer camp or day camp for four months during the summer of 2010 for the student. The proposal was developed by Respondent's compliance case manager after she consulted with the other staff member from Respondent, who attended the resolution meeting, as well as the developmental evaluator for Respondent, who also served as the student's case manager. (R-22; T of Respondent's compliance case manager)
27. The resolution meeting conducted on March 29, 2010 did not result in a settlement agreement. (R-22; P-6; T of Respondent's compliance case manager)
28. The educational harm suffered by the student as a result of Respondent's failure to identify her as a child with a disability eligible for special education, from her third birthday until October 7, 2009, constitutes difficulty in the pre-academic/cognitive

domain and some difficulty in the adaptive domain, particularly with regard to toileting. (T of Respondent's compliance case manager; R-12; R-13; R-14, R-15, R-16; R-19)

29. Appropriate relief for the educational harm done to the student by the failure of Respondent to properly identify her as a child with a disability eligible for special education should include compensatory education that addresses her cognitive, pre-academic and adaptive needs as a result of her failure to receive special education. (T of Respondent's compliance case manager; R-12; R-13; R-14, R-15, R-16; R-19)

CONCLUSIONS OF LAW

Based upon the evidence in the record, the arguments of counsel, as well as my own legal research, I make the following Conclusions of Law:

1. The Respondent violated its Child Find obligation by failing to identify the student as a child with a disability eligible for special education and to develop and IEP for her from her third birthday on August 30, 2008 until the IEP that was developed on October 7, 2009. The Individuals with Disabilities Education Act, 20 U.S.C. §§1400 et seq. (hereafter sometimes referred to as "IDEA"), §§612(a)(1); 34 C.F.R. §§300.111; Hawkins ex rel. DK v. District of Columbia, 539 F. Supp. 2d 108, 49 IDELR 213 (D.D.C. March 7, 2008).

2. The evaluations conducted by Respondent of the student prior to the October 7, 2009 IEP were appropriate and complied with all necessary procedures. IDEA §614(b); 34 C.F.R. §§300.301 to 300.304.

3. The individualized education plan (hereafter sometimes referred to as "IEP") developed by Respondent for the student on October 7, 2009 was reasonably calculated to provide educational benefit for the student in the least restrictive environment. IDEA §§612(a)(1) and (5); 34 C.F.R. §§300.101, 300.114, 300.320 to 300.324; Bd. of Educ. etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkham v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

4. When reviewing an IEP for appropriateness, hearing officers and courts must view the IEP as a snapshot and not a retrospective; in judging the appropriateness of an IEP, the IEP must be considered in terms of what was objectively reasonable when the snapshot was taken, that is, at the time that the IEP was promulgated and developed. S.S. ex rel. Shank v. Howard Road Academy, 585 F.2d 56, 51 IDELR 151 (D.D.C. November 12, 2008)

5. IDEA does not require a school district to maximize the potential of a child with disability; rather, it requires that an IEP be reasonably calculated to confer some educational benefit. Bd. of Educ. etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkham v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

6. The student's parent actively and meaningfully participated in the development of the October 7, 2009 IEP, and the parent's input was duly considered by the IEP team. 34 C.F.R. §300.322; TT v. District of Columbia, 48 IDELR 127 (D.D.C. July 23, 2007).

7. In determining placement for a child with a disability, a school district is required to the maximum extent appropriate to ensure that the child is educated with children who are not disabled, and that any removal from the regular education

environment must occur only if the nature or severity of the disability is such that education in the regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily. IDEA §612(a)(5); 34 C.F.R. §§300.114, 300.115. The placement of the student in the general education setting in the October 7, 2009 IEP developed by Respondent for the student was the least restrictive environment appropriate for this student.

8. An IDEA special education hearing officer has no authority to rule on alleged violations of or grant relief under the McKinney-Vento Homeless Assistance Act. 42 U.S.C. §11431 et seq; IDEA §615(f)(1)(A); §614(b)(6)(A).

9. Awards of compensatory education for violations of IDEA are equitable in nature and should be flexible and qualitative so that they compensate a student for the educational harm suffered by a deprivation of FAPE or other violation of the Act. In this case, as of the date of the end of the violation on October 7, 2009, the student's primary needs were her strong weaknesses in the area of cognitive and pre-academics. She also had needs in the adaptive skills area, particularly with regard to toileting. A compensatory education award consisting of a summer camp or day camp for the student during summer 2010, plus tutoring in pre-academic and cognitive skills for two hours per week for a period of 13 months, less the amount of time spent in the summer or day camp, should rectify the harm caused by Respondent's Child Find violation. Reid ex rel. Reid v. District of Columbia, 43 IDELR 32, 401 F.3d 516 (D.C. Cir. March 25, 2005).

DISCUSSION

1. Merits

A. Child Find

IDEA requires school districts to have in place policies and procedures to ensure that children with disabilities, who are in need of special education, are identified, located and evaluated. IDEA §612(a)(3); 34 C.F.R. §300.111; Hawkins ex rel. DK v. District of Columbia, 539 F. Supp. 2d 108, 49 IDELR 213 (D.C. 3/7/2008)

In the instant case Respondent concedes that it violated IDEA by failing to develop an IEP for the student from her third birthday until 13 months later on October 7, 2009. In so doing, Respondent violated IDEA and the Petitioner is entitled to relief.

The Petitioner has met her burden and prevailed on this issue.

B. Evaluations

IDEA requires a school district to evaluate a child in all suspected areas of disability in order to determine both whether she is eligible for special education and related services, as well as to determine her educational needs. In so doing, a school district must use a variety of technically sound assessment instruments, administer the assessment in the student's native language or other mode of communication and ensure that the assessments do not discriminate on the basis of race or culture. IDEA §614.(b); 34 C.F.R. §§300.301, 300.304. In the instant case, Respondent obtained consent for a screening of the student on July 29, 2009. Also on July 29, 2009, Respondent conducted a developmental history/early childhood questionnaire for the student and conducted an early childhood screening for the student. Also, on August 29, 2009, Respondent convened a multi-disciplinary team meeting for the student. Present at the MDT meeting were the student's mother, a special educator, a speech language pathologist, a physical therapist, and a school psychologist. The MDT team concluded

that further evaluations were necessary and proposed an educational evaluation, a speech language evaluation, a hearing rescreen and a referral for a medical checkup. The student's parent consented to the additional evaluations on July 29, 2009.

On September 22, 2009, Respondent conducted a Comprehensive Developmental Evaluation for the student. In conducting the evaluation, the evaluator spoke with the student's teacher and reviewed the reports completed by the student's mother. The evaluator observed the student in the classroom and spent approximately an hour and a half with the student in observing her and conducting the evaluation. In addition, the evaluator administered the Battelle Developmental Inventory, Second Edition, to the student. The Battelle is a standardized individually administered assessment battery of key developmental skills in children from birth to age 7.

In addition, the evaluator observed the student in her classroom. In assessing the evaluation results, the evaluator determined that the student was functioning in the low average range in the adaptive scale, in the average range in the personal social domain, and in the significantly delayed range in the cognitive domain. The evaluator concluded that the student does require specialized instruction services, particularly to redress her deficits in the area of pre-academic and cognitive skills.

On September 30, 2009, Respondent's speech pathologist conducted a speech language evaluation of the student. In addition to clinical observation of the student in her school environment and informal assessment of voice fluency pragmatics and hearing, the evaluator administered the following instruments to the students: Goldman Fristoe Test of Articulation 2; Expressive Once Word Picture Vocabulary Test; Receptive Once Word Picture Vocabulary Test; and the Test of Early Language Development. The evaluator determined from the evaluation that the formal informal testing and observation revealed that the student's voice resonance pragmatic and

fluency skills are within normal limits, that her overall language skills are in the average range of performance, that her articulation and speech intelligibility skills are within the average range, and that her receptive and expressive vocabulary skills are in the below average range. Overall, the evaluator determined that the student was developing as typically developing of peers in the area of speech language development. Although her vocabulary skills were below average in range, she was expected to continue to mature in this area given continued exposure to language in a rich environment. The evaluator then included several suggestions for the parent and teacher to use with regard to language development for the student.

The Petitioner contends that the evaluations conducted by Respondent were not appropriate. The main thrust of Petitioner's argument seems to be that these evaluations were inappropriate because the student had lower test scores on later evaluations. There are a number of problems with Petitioner's argument. First, it ignores the fact that the parent chose not to take advantage of the special education program that Respondent offered to the student. The fact that the student did not receive special education services for a number of months undoubtedly adversely affected her.

Second, Petitioner's argument is devoid of any criticism of the testing instruments used. The witnesses who testified for Petitioner conceded that the instruments used by Respondent's evaluators were standard testing instruments. They could also point to no flaws in the method by which the instruments were administered to the student. As Petitioner's expert speech pathologist testified, she could not criticize Respondent's evaluation procedures because she was not there.

Third, it is simply not fair to compare later test scores to scores on evaluation instruments given much earlier. Moreover, according to Petitioner's expert clinical

psychologist, the scores that the student received in the cognitive areas were actually slightly higher on the test given on the later date. Petitioner's expert clinical psychologist also conceded that some of the cognitive problems being experienced by the student could well be genetic in nature.

Perhaps most importantly, the student's parent and all members of the MDT/IEP Team approved of Respondent's evaluations for this student. No member of the team requested any that any other evaluations be conducted. The collaborative nature of the evaluation/IEP process requires that the school district be given a chance to do the evaluations sought first before invoking the dispute resolution process. See, Shaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 44 IDELR 150 (2005).

Moreover, it is also unfair to compare a developmental evaluation with a full blown psychological evaluation. Petitioner's comparison of the psychological evaluation conducted by its expert clinical psychologist as more comprehensive is simply a bad comparison.

Petitioner raises one argument concerning this issue that does cause some concern. Petitioner points out that it was the testimony of the special education coordinator for Respondent, who conducted the development evaluation of the student, that the Battelle Inventory was the only evaluation instrument on an approved list that he had to work from. While this would be troubling if Petitioner could point to any flaws in the evaluation, as it affected the evaluation process for the student, Petitioner was able to provide no such evidence. Therefore, it is concluded that the fact that the Battelle was the only approved test on the evaluator's list did not adversely affect the student in this case and the fact that the Respondent maintains a list of approved tests and presumably unapproved tests not appearing on the list, does not result in a violation of

IDEA, at least on the facts of this case, because Petitioner has not shown that the approved list adversely affected this student.

It is concluded that the evaluations conducted by Respondent were appropriate and that Petitioner has not shown any violation of the law with regard to the evaluations that were conducted. The Petitioner has not carried her burden of persuasion as to this issue. Respondent prevails as to this issue.

C. The Individualized Education Program of October 7, 2009

Petitioner contends that the IEP developed by Respondent on October 7, 2009 is not appropriate. IDEA requires school districts such as Respondent to provide child with disabilities, such as Petitioner, with a free and appropriate public education (hereafter sometimes referred to as "FAPE") IDEA §§612(a)(1) and (5); 34 C.F.R. §§300.101, 300.114.

The United States Supreme Court has established a two-part test for determining whether a school district has provided FAPE to a student. There must be a determination as to whether the schools have complied with the procedural safeguards set forth in IDEA and whether the IEP is reasonably calculated to enable the child to receive educational benefit. Bd. of Educ. etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 555 IDELR 656 (1982). The IEP need not maximize the student's potential; rather, all that is required is that it be reasonably calculated to confer some educational benefit. Kerkham v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

In the instant case, Petitioner does not point to any procedural violations in the preparation of the student's IEP. Instead, it is the argument of Petitioner that the IEP is not reasonably calculated to confer educational benefit.

The IEP prepared for the student by Respondent on October 7, 2009 identifies her present levels of performance and needs as deficits in the area of adaptive skills (toileting) and all areas of cognitive/pre-academic skills. The IEP then sets forth 14 goals for the student to work on in her areas of need. The IEP provides that the student would receive ten hours per week of specialized instruction in the general education setting in order to improve her areas of weakness. It was the unrebutted testimony of the special education coordinator at the neighborhood school where the IEP was to be implemented that the school could implement the IEP.

At the IEP team meeting, neither the mother nor any of the team members who were supporting her expressed any problems with the ten hours per week of services set forth by the IEP or with regard to the present levels of performance or the annual goals it developed. The parent did question whether the student also needed speech language as a related service. This was then discussed at the meeting by the speech pathologist, who explained the findings of her evaluation of the student to the mother. Neither the mother nor the team members who were supporting her expressed any interest in additional evaluations of the student. The mother did, however, raise her concern that she would be moving and that she did not want to move the student into a new school twice in a short period of time. Accordingly, the special education coordinator, who administered the developmental evaluation and who was serving as case manager, noted on the front page of the IEP that the parent will think over the placement before making a decision regarding placement. Thereafter, the parent never consented to the initial placement and the student never received any special education as a result of the IEP. The decision by the parent to not allow the student to receive specialized instruction was unreasonable and inconsistent with the cooperative spirit underlying IDEA.

The mother did raise a concern as to whether the student could attend the neighborhood elementary school that was identified by Respondent for the IEP to be implemented because she was likely to move. At the IEP team meeting, the parent was asked to contact Respondent concerning her choice and she never did. The testimony of Respondent's witnesses concerning what was said to the parent in this regard was credible and persuasive. To the extent that the testimony of the witnesses called by Petitioner contradict this testimony by Respondent's witnesses, it is not credited because it was not credible. The credibility determination is based upon the demeanor of the witnesses and certain problems in the testimony of Petitioner's witnesses. In her testimony, the parent indicated that she was not forthright with the IEP team because she was uncomfortable telling them that she was homeless. In addition, the testimony of the Respondent's witnesses is also corroborated by the notation made by the case manager on the IEP form. The mother's memory of the events of the meeting was also unclear at points. In addition, the education coordinator of the homeless shelter gave testimony about the IEP meeting even though she did not attend the meeting.

Petitioner presented the testimony of witnesses who claim that the student needs a full-time placement in a separate school only for special education students with a one-on-one aide and speech language as a related service. There are a number of problems with Petitioner's argument in this regard. First, Petitioner presents as evidence of the student's current needs in support of its position. Petitioner's argument is in error with regard to the time at which to judge the IEP. An IEP is a snapshot not a retrospective; a school district is required to take into account what was and was not objectively reasonable at the time the snapshot was taken, that is at the time that the IEP was developed. See, S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp. 2d 56, 51 IDELR 151 (D.D.C. November 12, 2008). In the instant case, the IEP must be judged as

to what was reasonable on October 7, 2009 when the IEP was developed. Instead, Petitioner would have us review evidence of the student's needs as measured some 6½ months later. It must be concluded when viewed from the correct timeframe, that the October 7, 2009 IEP was appropriate at the time it was written. Neither the parent nor her representatives raised any objection to the ten hours of special education services that was provided in the IEP at the IEP team meeting. Clearly, no one at the meeting seriously thought that the student needed a full-time placement or a placement in a separate school for special education students only. In addition, no one at the meeting raised as a possibility the need of the student for a one-to-one aide, and no one at the meeting suggested that the student needed counseling. Because neither the parent nor any other IEP team member raised any serious disagreement with the IEP when it was created, it would defeat the collaborative philosophy of IDEA to permit Petitioner to later attack the IEP as insufficient. The testimony of respondent's witnesses concerning the needs of the student at the time that the IEP was developed is given greater weight. It is clear that when viewed from the appropriate timeframe, the October 7, 2009 IEP prepared by Respondent for the student was appropriate.

The later independent evaluations of the student are definitely relevant to the future IEPs for this student. Indeed, the team must consider all relevant information. They do not, however, render an IEP written almost seven months earlier inappropriate.

Moreover, the fact that the parent did not request a one-to-one aide, or counseling services, or increased hours at the IEP team meeting negates the later attack by this due process complaint. The collaborative nature of the evaluation/IEP process requires that the school district be given a chance to do what a parent seeks first before the

parent invokes the dispute resolution process. See, Shaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 44 IDELR 150 (2005).

In addition, the testimony of Petitioner's witnesses with regard to the student's "needs" is also tainted by their holding the school district to a potential maximizing standard. As stated above, the law does not require a school district to maximize the potential of a child with disability; rather, the law requires that an IEP be reasonably calculated to confer some educational benefit. Bd. of Educ, etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkham v. Superintendent, D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991). For example, on cross-examination, the education coordinator for the homeless shelter, who worked with the parent and the student and who attended the IEP meeting, testified that the October 7, 2009 IEP contained goals that were appropriate for the student and absolutely would derive some benefit for the student. She then stated that the goals just did not provide enough for the student to "catch up." Perhaps the best example of the potential maximizing standard used by Petitioner's witnesses was the parent's testimony that the student would do better at the private school. All parents want the best for their children, but the law does not require an LEA to provide the best education. Indeed, even Petitioner's expert clinical psychologist testified that ten hours of special education would have done the student some good. Accordingly, when judged by the correct standard, the testimony by Respondent's witnesses that the October 7, 2009 IEP would provide some educational benefit to the student is more credible and persuasive than testimony to the contrary by Petitioner's witnesses.

Third, IDEA requires that, to the maximum extent appropriate, children with disabilities be educated with children who are not disabled and that special classes, separate schooling or other removal of children with disabilities from the regular

education environment occur only if the nature or severity of the disability is such that the education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Student placement decisions under IDEA must be made in conformity with the least restrictive environment provisions quoted above. IDEA §612(a)(5); 34 C.F.R. §§300.114 through 300.120. Petitioner's proposal is to place the student in a full-time private school that serves only children with disabilities. Indeed, Petitioner's expert psychologist would have placed the student in a full-time special education environment for the last two years. Under Petitioner's placement, the student would have no interaction whatsoever with her non-disabled peers. Petitioner provides no cogent explanation for its position in this regard. All of the evidence in this case when viewed from the correct timeframe, that is the time that the October 7, 2009 IEP was developed, and through the correct standard, the some education benefit standard, yields the conclusion that the student did not need a full-time special education school. Indeed, if Respondent had proposed a full-time special education school for this student with the knowledge available as of October 7, 2009, Respondent would have been in clear violation of the least restrict environment provisions of IDEA. Considerations of least restrictive environment requirements compel a conclusion that the IEP proposed by Respondent on October 7, 2009, and not the alternative proposal for a full-time special education school proposed by the Petitioner is the correct placement for this student under IDEA.

The final argument raised by Petitioner with regard to this issue involves the allegation by Petitioner that the parent was not allowed to participate meaningfully in the IEP development process. A parent's right to meaningful participation is an important safeguard under IDEA. TT v. District of Columbia, 48 IDELR 127 (D.D.C. July 23, 2007). The evidence in the record, however, does not support this argument.

The student's mother participated in questionnaires for the MDT team, she was interviewed by the evaluators used by Respondent, and most importantly, she and her supporters were active participants at the MDT/IEP team meetings. The Petitioner and the other members of the IEP team did not object to the level of services of ten hours of special education per week in the general education setting provided by the IEP. The parent did desire additional speech language therapy as a related service, and this request was considered by the IEP team but given the comments of the speech language pathologist on the team that the student did not need such therapy based upon her evaluation, the team did not accept it as a recommendation. The right to participate meaningfully does not give a parent the right to dictate the terms of an IEP. In this case, Respondent properly considered the input of the parent and developed an IEP that was appropriate for the student. The Petitioner has not carried her burden of persuasion as to this issue. The Respondent has prevailed on this issue.

D. McKinney-Vento Act

The parties agree that disabled children who are homeless have the same rights as disabled children who are not homeless under IDEA. IDEA §615(b)(7); 34 C.F.R. §300.508(b); Questions and Answers on Special Education and Homelessness 110 L.R.P. 212 (OSERS February 1, 2008). In this case, however, Petitioner urges the hearing officer to find Respondent to be in violation of the McKinney-Vento Act. The hearing officer had some doubt as to whether he had the authority to rule on alleged violations of the McKinney-Vento Act and provide relief therefor. Accordingly, the hearing officer requested pre-hearing briefs from counsel for the parties as to this issue.

In its brief, Petitioner cites the case of Lampkin v. District of Columbia, 27 F.3d 605 (D.C. Cir. July 1, 1994) in support of its argument. The Lampkin decision holds that McKinney-Vento creates enforceable rights that may be invoked under Section 1983 in a

court. Because an administrative hearing officer is not a court, Petitioner's argument is rejected. Under the provisions of IDEA, and IDEA hearing officer may hear and rule upon any issue with respect to a matter relating to the *identification, evaluation, or educational placement of a child with a disability, or the provision of a free and appropriate public education to such child.* IDEA §615(f)(1)(A); §614(b)(6)(A)(emphasis added). In addition, it is clear that an administrative hearing officer under IDEA also has the power to do whatever is necessary to achieve the responsibilities created for the hearing officer under the statute. At a minimum, this would include the right to control the hearing process, impose order, require adherence to lawful directives and the ability to require professional behavior of attorneys, litigants and witnesses. Moreover, it is also clear that the administrative hearing officer has broad equitable authority to award appropriate relief where a violation of IDEA has been found. Forest Grove School District v. TA, 557 U.S. ____, 129 S. Ct. 2484, 52 IDELR 151, n.11 (2009); (hearing officers and courts both have powers to grant broad relief where there has been a violation of IDEA); Shaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 44 IDELR 150 (2005) (IDEA hearings are intended to give hearing officers the flexibility they need to ensure that each side can fairly present its evidence); Stancourt v. Worthington City School District, 44 IDELR 166 (Ohio App. Ct. October 27, 2005) (hearing officer has implied powers to impose silence, respect and decorum); Heeter Construction v. West Virginia Human Rights Commission, 618 S.E.2d 592 (W. Va. S. St. 2005) (Under principles of administrative law, a hearing officer can and must maintain order in a hearing room); Walled Lake Consolidated Schs., 106 LRP 11733 (SEA Mich. January 13, 2006) (hearing officer has broad authority to control hearing process); JD by Davis v. Kanawha County Bd. of Educ., 53 IDELR 225 (S.D. W. Va. November 11, 2009); (power to deny continuances and impose sanctions); School District

of Swastopol, 24 IDELR 482 (SEA Wisc. 1986) (considerable discretion); Letter to Anonymous 23 IDELR 1073 (OSEP 1994) (Agency overseeing IDEA concludes that hearing officers have wide discretion to conduct the hearing.); Analysis of Comments to Proposed to Regulations, 71 Fed. Register No. 156 at pp. 46704-46706, and pp. 46691-46699 (OSEP conclusions regarding wide discretion afforded to IDEA hearing officers in a number of areas).

Thus, it is clear that hearing officers have wide powers and broad discretion in order to conduct hearings and issue appropriate decisions in special education cases, and to do all that is necessary to achieve those purposes, but the provision of IDEA quoted above limits the authority of IDEA hearing officers to rule only on special education issues, or issues involving the identification, evaluation, placement, or free and appropriate public education for children with disabilities. Accordingly, it is beyond the authority of an IDEA hearing officer to rule on alleged violations of unrelated statutes, such as the McKinney-Vento Act.

To be clear, a hearing officer under IDEA certainly has the authority to rule on questions as to whether the IDEA rights of a homeless child have been violated. See previous sections of this decision. An IDEA hearing officer, however, cannot rule on alleged violations of unrelated statutes, such as the McKinney-Vento Act.

The Petitioner has not carried her burden of persuasion as to this issue. The Respondent has prevailed on this issue.

2. Relief

Beginning at the pre-hearing conference and continuing during the hearing, the hearing officer reminded counsel for the parties of the requirements of Reid ex rel. Reid

v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. March 25, 2005). In particular, counsel were cautioned to present proof of the educational harm, if any, suffered by the student as a result of the alleged violations of IDEA and evidence of the types and amounts of compensatory education programs that would make the student whole. The Reid decision notes that compensatory education is an appropriate form of relief under IDEA, that it is equitable in nature, and that compensatory education should not be based on a "cooker cutter" analysis that awards the same number of hours or days of compensatory education as the number or days of the violation of the Act. Instead, the Reid decision requires a qualitative and flexible approach based upon the child's needs.

Despite the admonitions of the hearing officer, the evidence concerning the effects of the alleged violations offered at the due process hearing is a bit thin. The Petitioner has provided a compensatory education plan that is well explained, but not helpful because it is based upon faulty assumptions and allegations that were not proven. Petitioner's request for two 45-minute sessions per week of speech and language therapy; placement and funding in a private summer school program; and funding at the same private school program for the remainder of the current academic year and the entire next academic year with a dedicated one-to-one aide is rejected as excessive and beyond the harm to the student cause by Respondent's child find violation.

Petitioner's proposal is based upon violations of the act the Petitioner did not prove. In addition, Petitioner bases its entire body of evidence upon the student's current condition. Because the only violation proven was the child find violation by Respondent, which ended on October 7, 2009, the appropriate time to look at the harm to the student would be the student's needs as of October 7, 2009. The student's current condition could be due to many factors beyond the violation of the Act by Respondent. Moreover,

because compensatory education is equitable in nature, the fact that the parent refused to take advantage of the special education program offered by Respondent necessitates a conclusion that the period for compensatory education be cut off as of the point that the parent unreasonably refused the special education program offered by respondent. The Petitioner's proposed compensatory education program is rejected. On the other hand, Respondent presented witness testimony from its compliance case manager regarding compensatory education. Although the testimony did not clearly describe all the connections in the witness' reasoning, it is clear that the testimony of the compliance case manager was based upon an analysis of the harm suffered by the student as a result of the Child Find violation as of the time of the creation of the IEP on October 7, 2009.

Moreover, the compliance case manager testified that she had consulted with the special educator who had conducted the developmental evaluation of the student, as well as another person on the resolution team of Respondent familiar with the needs of the student as of October 7, 2009. Although the connections between the information received by the compliance case manager and the compensatory education offer made by Respondent are not extremely clear, despite questioning by both counsel and the hearing officer, the compliance case manager's testimony does provide useful information.

Indeed, the evaluations of the student conducted by the Respondent shortly before October 7, 2009 showed that she had strong weaknesses in cognitive/pre-academic skills and that she had some weakness in adaptive skills, particularly with regard to toileting. Given the child's needs as assessed at the appropriate period of time, a compensatory education program should provide help for the student in the cognitive, pre-academic and adaptive skills areas where she had a substantial need.

It was the testimony of Respondent's compliance case manager that an appropriate compensatory education plan, in view of the child find violation, would be two hours per week of pre-academic tutoring for ten months or a summer or day camp for four months during the summer of 2010. The compliance case manager, however, made it clear in her testimony that there was some wiggle room in her position and that she was anticipating a response from the Petitioner to the proposal and was contemplating an agreement that would provide more services for the student than the initial offer. Accordingly, it seems appropriate given the child's needs as determined by the evaluations conducted by Respondent just prior to the October 7, 2009 IEP that an appropriate compensatory education award would include both components offered by Respondent as compensatory education for the child find violation. In other words, appropriate compensatory education as relief for this violation of IDEA should include both the summer or day camp and the tutor for the student's pre-academic needs. Accordingly, the relief awarded to the Petitioner shall include two hours per week of tutoring in pre-academic needs for a period of 13 months, which was the period of actual violation or denial of FAPE, minus the time that the student is in a summer or day camp program for the student during summer 2010 which will be funded by Respondent. In order to provide additional flexibility to accommodate the student's needs, the parties have the option to modify this compensatory education award by agreement of the parties.

All other relief requested by Petitioner herein is hereby denied.

ORDER

Based upon the foregoing, the following is HEREBY ORDERED:

1. Petitioner is awarded compensatory education as follows:
 - a. Unless the parties agree otherwise, Respondent shall pay for two hours per week of tutoring in pre-academic areas for the student for a period of 13 months, minus the time the student is in day or summer camp pursuant to paragraph b below. In the event that the parties cannot agree upon the identity of the tutor within seven days of the issuance of this decision, counsel for Respondent shall provide the names of three tutors to the counsel for Petitioner, who are qualified to provide pre-academic tutoring for the student. Within seven days of the provision of the three names to counsel for Petitioner, Petitioner shall notify counsel for Respondent of the identity of the provider for the tutoring that has been selected.
 - b. Unless the parties agree otherwise, Respondent shall pay for a day camp or summer camp program for the student during the summer of 2010 that will address some of her needs in the cognitive, pre-academic or adaptive skills categories. If the parties have not agreed upon a summer camp or day camp for the student within seven days of the date of this decision, counsel for Respondent shall provide the names of three summer or day camp programs to counsel for Petitioner. Within seven days of the receipt of the names of the three camps, counsel for Petitioner shall identify the camp that has been selected for this award of compensatory education.

- c. In the event that both parties agree, either component of the compensatory education award may be modified to suit the needs of the student.
- 2. All other relief requested in the foregoing due process complaint is hereby denied.

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).

Dated: May 1, 2010

/s/ **James Gerl**
James Gerl,
Hearing Officer