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Student Hearing Office
February 21, 2013

**DISTRICT OF COLUMBIA**
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**
Student Hearing Office
810 First Street, N.E., 2nd floor
Washington, D.C. 20002

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STUDENT, a minor, by and through
her Parent[1]

Petitioner,

v

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent

Remand from Civil Action 10-1283
(ABJ)

SHO Case No: 2010-0997

Erin H. Leff, Hearing Officer

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# HEARING OFFICER DETERMINATION ON REMAND

## STATEMENT OF THE CASE

This matter is before me on remand from the United States District Court for the District of Columbia in Civil Action No. 10-1283 (ABJ). On November 2, 2010 Hearing Officer James Gerl[2] ("the hearing officer") issued a Hearing Officer Determination ("HOD"), pursuant to the Individuals with Disabilities Education Act ("IDEA") as amended, 20 U.S.C. §§ 1400 *et seq.* On June 1, 2012, the Court issued a remand Order directing the hearing officer to proceed consistent with the Magistrate Judge's Order and recommendation filed on February 14, 2012. The case was assigned to me on June 6, 2012.

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[1] Personal identifying information is provided in Appendix A, attached hereto.
[2] Mr. Gerl is no longer a hearing officer in this jurisdiction.

While the due process complaint at issue in SHO case no 2010 – 0997, the case underlying the instant remand, was pending, Petitioner's appeal regarding a May 1, 2010 HOD,[3] a case involving the student who is the focus of the instant matter, 2010-0997, proceeded through District Court. On November 2, 2010, Judge Kollar-Kotelly granted in part and denied in part Defendant's partial Motion to Dismiss the appeal regarding the May 1, 2010 HOD. On January 28, 2011, Plaintiff, Petitioner herein, filed a Motion for Leave to file an Amended and Supplemental Complaint regarding the May 1, 2010 to include an appeal of the November 2, 2010 HOD. Petitioner's Motion was granted on February 16, 2011. (Report and Recommendation). Plaintiff's action in District Court alleges DCPS failed to provide the student ("Student") a free, appropriate public education ("FAPE") as required by the Individuals with Disabilities Education Act, as amended. 20 U.S.C. §§ 1400 *et seq.*[4]

The November 2, 2010 HOD found the District of Columbia Public Schools ("DCPS") had failed to provide Student transportation to a summer speech camp as required by the May 1, 2010 HOD, noted above, and further found the July 2, 2010 individualized education program ("IEP") developed at a multidisciplinary team meeting by DCPS and Petitioner provided the student a FAPE in the least restrictive environment. The Magistrate Judge's Report and Recommendation recommends Defendant DCPS' Motion for Summary Judgment be granted on all issues except one. The Magistrate Judge Judge's Report and Recommendation indicates there is a question regarding whether the hearing officer's determination that the IEP met the appropriate legal requirements remains supported by the record if the hearing officer's mistaken

[3] For the reasons discussed below, See, FN 4, I find I need not review the May 1, 2010 IEP and related documents to address the instant remand.

[4] Additional reference is made to the McKiney-Vento Act, 42 U.S.C. §§ 11301 *et seq.*, which is outside my jurisdiction and will not be referenced herein.

determination that the Petitioner's experts used the wrong legal standard is disregarded. The Magistrate's Report and Recommendation was adopted by the Court.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C. §§ 1400, *et seq*; District of Columbia Code, §§ 38-2561.01, *et seq.*; federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, *et seq.*; and District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000, *et seq*.

## ISSUE

The issue, as directed by the Court is whether, disregarding the prior hearing officer's assertion that the petitioner's experts used the wrong legal standard, the July 2, 2010 IEP met the appropriate legal requirements.[5]

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[5] As is made clear in the Findings of Fact, *infra*, the July 2, 2010 IEP was only in effect during the 2010-2011 school year for approximately three weeks. A new IEP was developed on September 14, 2010, subsequent to the filing of the due process complaint underlying the instant remand. The issue to be addressed at hearing as stated in the prehearing Order of August 19, 2010 is that Respondent violated IDEA by failing to develop an IEP on July 2, 2010 that provides a full-time special education placement, and it is the hearing officer's determination in this regard that was the basis for the instant remand. It is my understanding, therefore, that this remand is focused only on the July 2, 2010 IEP, and it is that IEP's compliance with IDEA that I address herein. While the September 14, 2010 IEP was discussed during the preliminary matters, opening statements, and testimony occurring at the October 2010 due process hearing as well as in Petitioner's Exhibit 37, the September 14, 2010 IEP, itself, was not introduced into evidence. It is my understanding that this IEP is not at issue in the instant remand and I make no determination as to its appropriateness.

I further recognize Petitioner's statement of the issue in the letter attached to the due process complaint is different than that certified in the Prehearing Order. The issues as stated by Petitioner were that DCPS failed to provide an IEP that was reasonably calculated to provided Student educational benefit for the 2010-2011 school year and that DCPS failed to provide Student an appropriate placement for the 2010-2011 school year. It is clear, however, that this complaint could not have addressed the September 2010 IEP as the complaint was filed prior to the development of that IEP. Further, there is no evidence that there was any disagreement regarding the statement of the issues in the Prehearing Order so again I find the issue before me relates only to the placement/hours of service under the July 2, 2010 IEP.

I further note this September 2010 IEP is referred to both as an IEP of September 14, 2010 and September 15, 2010. I assume these dates refer to the same IEP. However, as the appropriateness of this September IEP is not before me and it was not introduced into evidence I can make no final determination that these two dates do, in fact, refer to the same IEP.

## SUPPLEMENTAL RECORD

The administrative record is supplemented with the following documents that are identified as supplemental exhibits 1 – 6. (S 1 – S 6 ).

S 1 Hearing Officer Determination of November 2, 2010 issued by Hearing Officer James Gerl

S 2 Order of March 7, 2012 issued by Amy Berman Jackson, Judge, of the United States District Court of the District of Columbia

S 3 Report and Recommendation of 2/14/12 issued by the Magistrate Judge, United states District Court for the District of Columbia

S 4 Order of June 1, 2012 issued by Amy Berman Jackson, Judge, of the United States District Court of the District of Columbia

S 5 Notice of Hearing Officer Appointment dated June 5, 2012.

S 6 Memorandum and Order re Parties Agreement on the Process for Review of Issues on Remand dated July 4, 2012

## FINDINGS OF FACT[6]

1. The student ("Student") was born on [redacted]. Respondent did not identify Student pursuant to the Child Find obligations under IDEA by her third birthday. S 1

2. Student was found eligible for special education and related services under the IDEA in 2009.Completion of the Battelle Developmental Inventory led to a finding that Student was in need of special education instruction. The speech language evaluation performed at this time, however, concluded Student's overall language skills were in the average range of performance. The first IEP for Student was developed October 7, 2009. This IEP indicated Student was to be provided 10 hours of special instruction in the general education environment at her neighborhood school. S 3.

[6] The Findings of Fact herein are limited to those relevant to the issue on remand. Additional facts, addressing the other issue in this matter, which is not before me on the remand, have been redacted from these findings. I have made some additional findings of fact to allow me to resolve the issue on remand.

3. Student's mother, Petitioner herein, requested an independent a speech language evaluation and an independent psycho-educational and psychological evaluation. The independent speech language evaluation was completed on March 10, 2010. The evaluator [7] determined Student had moderate delays in receptive language skills and severe delays in expressive language skills. The report recommended Student be placed in a special education classroom with a low student teacher ratio (12 to 2). It also recommended Student receive speech language therapy two times per week for 45 minutes each session.

The independent psychological evaluation completed on March 22, 2010 resulted in the conclusions that Student had attention deficit hyperactivity disorder, an adjustment disorder, a communication disorder NOS and borderline intellectual functioning. The independent psychologist[8] recommended Student receive counseling (twice a week for 30 minutes each session), behavioral interventions and speech language therapy. He further recommended Student receive evaluation for possible medication if the counseling and behavioral interventions were not effective. The independent psychologist recommended Student be placed in a full- time psycho-educational preschool program with extra therapeutic support. S 1; S 3; P 16; P 18.

4. On June 9, 2010, a DCPS school psychologist[9] reviewed the independent psychological report. The DCPS psychologist concluded the data did not support the independent psychologist's conclusion that Student had an adjustment disorder. She also concluded the record did not support a need for a full time special education therapeutic program. S 3; P 17.

5. On July 2, 2010 an IEP team including Petitioner, her attorney and Student's educational advocate met to develop a new IEP for Student. That IEP classified Student as a student with a developmental delay and required Student receive 15 hours of special instruction in the general

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[7] [redacted], M.S., CCC/SLP
[8] [redacted], Ph.D.
[9] [redacted], Ph.D,

education environment,[10] one hour of speech therapy, one hour of behavior support and one hour of behavior support consultation each week. Student also was to receive extended school year services. Petitioner did not object to the goals or objectives on this IEP. However she objected to the hours of service Student was to be provided. S 3; P 24.

6. Student attended a summer speech camp during the summer of 2010. Testimony of [redacted]; Testimony of [redacted].[11]

7. Student received the services identified on her July 2, 2010 IEP at the beginning of the 2010-2011 school year. S 1.

8. A new IEP was developed for Student on September 14, 2010. Testimony of [redacted].[12]

9. In the 2010-20111 school year, Student's kindergarten classroom at Simon Elementary School had approximately 25 students. It was staffed by a teacher and two aides. Both aides were not in the classroom at the same time. P 21; P 22.

10. Student was removed from her classroom from the beginning of the 2010 – 2011 school year through the dates of the due process hearing to receive supplemental services under the SAM[13] program. SAM program services are services provided to both general education and special education students to supplement their education. The SAM services provided Student supplemented Student's IEP services. Testimony of [redacted].

11. Student required a small, self-contained therapeutic placement, a low staff to student ratio and infused services. Student was highly distractible and needed repeated on-going redirection to keep her focused on tasks. She remains focused on tasks for 5 minutes when she appears to be

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[10] Five more hours than the 10 hours the DCPS psychologist indicated were appropriate.
[11] [redacted], Speech Language Pathologist, Treatment and Learning Centers, Katherine Thomas School
[12] Special Education Coordinator, Simon Elementary School, Student's school of attendance.
[13] Student Application Model

interested in the task and only a few seconds when she does not appear to be interested. Even when seated Student fidgets and frequently moves her focus one from one item of interest to another. Her struggles with language created resultant needs for more explanation and assistance. Student had difficulty in social relationships with her peers, both disabled and non-disabled. She had limited social interaction. She was not able to follow the rules of games and her inappropriate behavior was noticed by other students. Student also demonstrated behavior issues. Student's behavior could disrupt the classroom, at least at times, as she had temper tantrums, yelled and attempted to leave the classroom S 1; S 3; P 16; P 18; P 21; P 22; Testimony of [redacted]; Testimony of [redacted]; Testimony of [redacted];[14] Testimony of [redacted].[15]

12. Student did not receive IEP based services until the 2010-2011 school year. Testimony of [redacted].[16]

13. Student's need for repeated redirection indicates the redirection was not meaningful. Rather than refocusing her on the task at hand, Student was momentarily redirected but quickly becomes distracted once again. Testimony of [redacted].

14. Student's behavior and academics showed some improvement during the approximately two months school was in session during the 2010-2011 school year prior to the due process hearing in October 2010. When the July 2, 2010 IEP was developed and at the beginning of the 2010-2011 school year Student was unable, among other skills, to identify colors, count to 20, trace letters, or find the correct page number in her workbook. As of the due process hearing,

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[14] [redacted], Speech Language Pathologist and Director of Outpatient Services, Treatment and Learning Centers

[15] [redacted], Educational Advocate

[16] Speech-Language Pathologist, Early Stages, DCPS.

Student was able to identify some new letters and follow two step directions. She was beginning to model her peers. Testimony of [redacted];[17] Testimony of [redacted]; P 21; P 22; P 24.

## DISCUSSION

The burden of proof in a special education case is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005); DCMR 5-3030.3. An impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. DCMR 5-303.3. In the instant matter, the Petitioner had the burden of proof, at the October 20 and 22, 2010 due process hearing regarding whether she was entitled to relief as a result of Respondent, DCPS, denying Student a FAPE because the July 2, 2010 individualized education program did not provide the student a full time special education placement. The Hearing Officer Determination of November 2, 2010 found the July 2, 2010 IEP was appropriate. In reaching this conclusion the hearing officer found Petitioner's experts used a "potential maximizing" [18] standard and frequently changed their testimony in this regard. The hearing officer found, as a result,[19] that Respondent's witnesses were more credible than Petitioner's. The Magistrate Judge found the hearing officer's determination that the Petitioner's witnesses used a potential maximizing standard was not supported by the record. Thus in the remand before me I am to determine whether disregarding this mistaken assertion that the witnesses used the wrong legal standard, the IEP can be found to have met the appropriate legal requirements.

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[17] Student's general education kindergarten teacher.

[18] Under IDEA students are to receive an appropriate education, thus the acronym FAPE, with "A" standing for appropriate, used throughout the instant HOD. Appropriate is not potential maximizing. Rather appropriate is sufficient to create the possibility of educational benefit. See Rowley. It is perhaps best understood by analogy. IDEA does not create an entitlement to an education that could be described as meeting a Cadillac standard, rather it creates an entitlement to an education that can be described as meeting a Chevrolet standard. Thus educational benefit does not require a student receive the best possible education, but it does require a student receive more than a *de minimis* benefit.

[19] The hearing officer also cited additional reasons for finding Respondent's witnesses were more credible. While the hearing officer's conclusions regarding witness credibility is not before me, and I have not reached a determination as to whether these conclusions regarding credibility fall within the clearly erroneous standard that would allow me to decide they were not supportable, I note I am concerned with the hearing officer's possible misunderstandings and confusions regarding the testimony.

Under the IDEA each local education agency is required to provide a FAPE to each student found eligible for special education and related services. A FAPE is:

> Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . .[a]re provided in conformity with an . . .IEP that meets the requirements of [the IDEA regulations]. 34 C.F.R. § 300.17. See also, D.C. Code § 30.3001.1.

An IEP is a written statement that includes, in pertinent part, the eligible student's: present levels of academic and functional performance; the effect of the student's disability on his/her involvement and progress in the general curriculum; measurable annual academic and functional goals designed to meet the student's educational needs resulting from his/her disability; a statement of the special education and related services, supplementary aids and services, and program modifications and supports to be provided to the student to allow him/her to advance toward attaining the IEP goals and progress in the general curriculum and to participate in nonacademic activities. In addition the extent of the student's participation with nondisabled peers must be addressed. 34 C.F.R. § 300.320. See also, D.C. Code § 30.3009. In developing the IEP the team is to consider the strengths of the child, the concerns of the parent for enhancing the education of the student, the results of the most recent evaluation and the academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a). See also, D.C. Code § 30.3007. If a student's behavior impedes the student's learning or that of other students, the team is to consider interventions and strategies to address the behavior. *Id.* An IEP that memorializes the team's FAPE determination must be designed to provide the student with some educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982).

The content of an IEP is a team decision 34 C.F.R. §§ 300.320 – 300.323. *See also*, D.C. Code §§ 30.3007.1 & 3008.1. Teams are required to consider all the relevant information before them. *Id.* In reviewing whether an IEP provides a student a FAPE as required by IDEA, a hearing officer must consider whether the district complied with IDEA's procedural requirements and determine whether the program was reasonably calculated to enable the student to receive educational benefit. *Rowley*, 458 U.S. at 207. Here, there is no question raised regarding the district's compliance with IDEA procedural requirements. The only question is whether the IEP at issue is calculated to enable the student to receive educational benefit, in particular whether there are a sufficient number of hours of service included on the IEP and whether the provision of these services in a general education environment will allow Student to receive educational benefit.

The appropriateness of an IEP is evaluated based on the information available to the IEP team at the time the IEP is developed. *See, S.S. ex rel. Shank v. Howard Road Academy*, 538 F.Supp.2d 56, 66 (D.D.C. 2008). Moreover, actual success is an important determinant of whether an IEP is reasonably calculated to provide educational benefit. *Roark ex rel. Roark v. District of Columbia,* 460 F.Supp 2d 32, 44 (D.D.C. 2006) *relying on Berger b. Medina Sch. Dist.*, 338 F.3d 513, 512 (6th Cir. 2003).

The evidence is that Student was eligible for special education as a student with a developmental delay. A March 10, 2010 independent speech language assessment report indicates Student had moderately delayed receptive language skills and severely delayed expressive language skills. The report recommended Student be placed in a full time, therapeutic environment with a low teacher student ratio of 12 to 2. An independent clinical psychologist issued a report on March 22, 2010 indicating Student had attention deficit hyperactivity disorder,

an adjustment disorder, a communication disorder NOS and borderline functioning. The report recommended Student be placed in a full time, therapeutic environment with a low teacher student ratio. A DCPS psychologist who reviewed the independent psychological report disagreed with the independent psychologist's conclusions that Student had an adjustment disorder and with the recommendation that Student receive a full time therapeutic placement. In both instances, the DCPS psychologist stated, the record did not support these conclusions. The DCPS psychologist's position was that moving Student to a full time placement outside a general education setting was premature because there had been no time to determine whether this intensity of services was necessary. The DCPS psychologist noted Student was in kindergarten and had not had the opportunity to benefit from a special education program in an academic setting.[20]

The July 2, 2010 IEP, at issue here, provided student 15 hours of special instruction in the general education environment, an hour of speech language service, one hour of behavioral support and one of hour of behavioral support consultation each week. Student also was to receive extended school year services.

Petitioner's educational advocate, the independent clinical psychologist who evaluated Student and a speech language therapist from the 2010 summer speech camp attended by Student testified Student required a small, self-contained therapeutic placement, a low staff to student ratio and infused services in order to benefit from education. They noted Student's high distractibility, the need for repeated on-going redirection to keep her focused on tasks as well as her struggles with language and the resultant need for more explanation and assistance. They

[20] It is relevant to note, in this regard, that the prior due process case involving this child had addressed a child find violation stemming from DCPS' failure to identify the student as in need of special education from August 30, 2008, the student's third birthday, through October 7, 2009 when an IEP was developed.

also noted her difficulty in social relationships with her peers disabled and non-disabled as well as behavioral concerns such as running out of the classroom.

Student was observed by her educational advocate, the independent psychologist who evaluated her in March 2010 and a DCPS staff member. The observations revealed Student's distractibility and the related need to repeatedly redirect Student as well as some disconnects in her interaction with her peers. Petitioner's witnesses expressed concern with Student's limited skills, distractibility and inability to interact with her peers revealed during these observations while Respondent's witnesses expressed their view that Student was improving. DCPS witness testimony expressed the view that Student was learning and her need for redirection was decreasing. Yet the observations revealed a student who was highly distractible, had difficulty following directions and displayed distracting and inappropriate behavior. The independent psychologist's uncontradicted testimony is that the need for repeated redirection, revealed in the classroom observations, demonstrates the redirection is not working – rather than gaining Student's attention and focus, the intent of redirection, the observed redirection served only to momentarily focus her on the task at hand.

The DCPS witnesses testified Student's school had implemented her IEP, the July 2, 2010 IEP was designed to provide Student educational benefit and Student did receive educational benefit. Her general education teacher noted Student's interest in learning and her willingness to learn. She added Student had learned to follow two step directions and could identify her colors and five letters of the alphabet as of the due process hearing on October 20 and 22, 2010. Unfortunately, this improvement occurred, at least in part under the September 14, 2010 IEP. Therefore, this improvement cannot be said to support a conclusion that the July 2, 2010 IEP provided Student educational benefit. For the reasons that follow, I find the July 2,

2010 IEP did not meet the appropriate legal standard, and note DCPS' own actions are telling in this regard.

While I accept the testimony of DCPS[21] that the July 2, 2010 IEP was implemented from the beginning of school year, the record does not support a finding that this IEP provided the student a FAPE designed to provide her educational benefit. The July 2, 2010 IEP required Student receive 15 hours of special education in a general education environment. While the record supports a finding that she received such services, the record also supports a finding that these services were not sufficient to address Student's needs. Student was removed from the general education class with other students, apparently both general and special education students, for additional support.[22] This support was provided by an assigned special education teacher. While DCPS argued that this was a general education service provided to all students and was provided to supplement Student's IEP services, the provision of such additional services reveals that the IEP did not adequately address Student's educational needs. That is, her educational needs were not addressed through the 15 hours of special education services in the general education classroom required by her IEP. Student required additional services and received additional hours of service outside the general education environment under the auspices of the SAM program.[23] While it is true that Student's school provided these support

[21] The question of the credibility of the DCPS witnesses is not before me, nor does the record provide a suggestion of clear error in assessing the credibility of Respondent's witnesses. I note my concern with some of Respondent's witnesses' testimony.

[22] While I find these additional services are evidence that Student's July 2, 2010 IEP did not meet legal requirements, I note Student's school was attempting to act in Student's interest by providing her supplemental services the school believed she required. However, IDEA requires that programs and services provided to a special education student are to be provided in accordance with an IEP developed by a team including the parent. The supplementary services provided do not meet these criteria.

[23] I note the testimony as to when these additional pull-out services began was not clear. I note however that at least one observation of Student that occurred prior to the September 14, 2010 IEP meeting occurred in this pull out setting. As there were no pull out services on Student's July 2, 2010 IEP I must assume these observed pull out services were the supplemental services provided to Student in addition to her IEP required services.

services to other students, a special education student's IEP is supposed to include the full array of services necessary for the student to receive educational benefit from her education. The IEP, then, by definition did not provide the full array of needed services because Student received additional services to supplement her IEP services. Further, DCPS quickly recognized the July 2, 2010 IEP was not appropriate. On September 14, 2010 DCPS developed a new IEP for Student.

DCPS witnesses testified that Student had a difficult start to the school year but that things had improved over time. The date the improvement began, however, was not specified. It is not possible to determine whether the improvement began before or after the development and implementation of the September 14, 2010 IEP and thus it is not possible to conclude the July 2, 2010 IEP supported this improvement.[24]Student continued to need supplemental services, thus requiring more hours of special education instruction as alleged by Petitioner and she continued to demonstrate behavioral issues suggesting the need for more interventions to address her behavior as well. Student ran from the classroom or attempted to run from the classroom on more than one occasion, and as of the dates of the observations of Student, prior to the development of the September 14, 2010 IEP, she demonstrated the need for intense adult supervision and intervention on a close to continual basis. Placement in a more restrictive setting, more hours of specialized instruction and/or the provision of a one-on one aide, as requested by Petitioner, could have addressed these concerns. It is clear the July 2, 2010 IEP did not.

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I further note there was some indication that SAM services are provided as a program designed to address the students' response to intervention. If, in fact, that was the intent of these pull out services the effort was misplaced as response to intervention is a process occurring prior to the development of an IEP and is a procedure used for identifying children with specific learning disabilities. 34 C.F. R. § 300.307(a). Student had already been identified when these SAM services were provided. Further, there is no indication that she was thought to have a specific learning disability. .

[24] I further note that under this alleged improvement Student still functioned well below her peers. She could only recognize about 5 letters of the alphabet. She was able to identify colors inconsistently, and she was able to follow two step directions.

For the reasons stated above, I find, by a preponderance of the evidence, Student's July 2, 2010 IEP did not provide Student the number of hours of service she required, nor did it provide her IEP services is an appropriate setting. Student required additional services and she required services be provided in a separate setting for a significant portion if not the entire school day.

## CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that the July 2, 2010 IEP did not meet the appropriate legal standard.

Feb 21, 2013
Date

Erin H. Leff
Hearing Officer

## NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).