

**DC Office of the State Superintendent of Education**  
**Office of Compliance & Review**  
 State Enforcement & Investigation Division  
 STUDENT HEARING OFFICE  
 Van Ness Elementary School  
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2009 OCT 23 PM 2:36  
 STUDENT HEARING OFFICE

**Virginia A. Dietrich, Esq.**  
**Impartial Due Process Hearing Officer**

**CONFIDENTIAL**

In Re the Matter of:	)	
Parent on behalf of Student *	)	CASE NO. 2009-1154
Petitioner,	)	Complaint Date: 08/07/09
vs.	)	Hearing Date: 10/13/09
The District of Columbia Public Schools	)	Hearing Site:
Respondent.	)	Van Ness Elementary School
	)	1150 5 <sup>th</sup> Street, S.E., 1 <sup>st</sup> Floor
	)	Washington, D.C. 20003

**HEARING OFFICER DETERMINATION**

Petitioner's Attorney:	Miguel Hull, Esq. James E. Brown & Associates, PLLC 1220 L Street, N.W., Suite 700 Washington, D.C. 20005
Respondent's Attorney:	Daniel McCall, Esq. Assistant Attorney General Office of the Attorney General as Counsel for D.C. Public Schools 825 North Capitol Street, N.E., 9 <sup>th</sup> Floor Washington, D.C. 20002

\*Personally identifiable information is attached as an Index to this decision and must be removed prior to public distribution.

## Hearing Officer Determination &amp; Order

**JURISDICTION**

The due process hearing was convened and this Hearing Officer Determination ("HOD") and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq., the implementing regulations for IDEIA; 34 Code of Federal Regulation ("C.F.R.") Part 300; and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

**INTRODUCTION**

On 08/07/09, a Due Process Complaint Notice ("Complaint") was filed by the parent ("Parent" or "Petitioner") on behalf of the [REDACTED] student ("Student"), alleging that District of Columbia Public Schools ("DCPS") denied Student a free appropriate public education ("FAPE") in violation of IDEIA when DCPS failed to comprehensively evaluate Student in all areas of suspected disability and when DCPS failed to find Student eligible for special education. Petitioner asserts that Student may be entitled to compensatory education due to the denials of a FAPE.

**THE DUE PROCESS HEARING**

The due process hearing convened on 10/13/09 at the Van Ness Elementary School located at 1150 5<sup>th</sup> Street, S.E., Washington, D.C. 20003.

Petitioner was represented by Miguel Hull, Esq. ("Petitioner's Attorney") and DCPS was represented by Daniel McCall, Esq. ("DCPS' Attorney"). Petitioner participated in the due process hearing in person.

Both parties declined to discuss settlement prior to the commencement of the due process hearing.

**Disclosures:**

Petitioner's Five-Day Disclosure letter dated 10/02/09 contained Petitioner's Exhibits #1-38. DCPS objected to the admission of all of Petitioner's Exhibits that predated a 04/26/09 HOD that was not admitted into evidence. Petitioner's Exhibits #1-38 were admitted into evidence over objection.

DCPS' Disclosure Statement dated 10/05/09 contained DCPS' Exhibits #1-6. DCPS' Exhibits #1-6 were admitted into evidence without objection.

**Witnesses:**

Petitioner presented the following witnesses: (1) Consuelo Ortega, educational advocate; and (2) Petitioner.

DCPS presented the following witness: (1) [REDACTED] Special Education Coordinator ("SEC") at [REDACTED]

Issues For Litigation:

The issues as stated in the Introduction section of this HOD were litigated, i.e., (1) whether DCPS failed to comprehensively evaluate Student in all areas of suspected disability, (2) whether DCPS failed to find Student eligible for special education, and (3) whether Student is entitled to compensatory education due to the denials of a FAPE.

Relief Requested by Petitioner:

At the due process hearing, Petitioner sought the following relief: (1) A finding of a denial of a FAPE on the issues presented in the Complaint; (2) A Hearing Officer determination that Student is eligible for special education as a student with Attention Deficit Hyperactivity Disorder ("ADHD") (Other Health Impaired ("OHI")/Emotional Disturbance ("ED") and an Order for DCPS to convene a Multidisciplinary Team ("MDT") within 10 days to develop an Individualized Education Program ("IEP") in accordance with that determination; or (3) DCPS to fund a comprehensive assessment (either medical review or psychological testing, or both, or a Conner's Scale using the parent as the subject of the test) to definitively rule out ADHD and address the educational implications of that diagnosis; and (4) DCPS to convene a MDT meeting within 10 days of receiving the last of the independent assessments to review those assessments, determine eligibility for special education and, if eligible, develop an IEP, determine any compensatory education that may be due, and determine placement with placement to be made within 10 days; and (5) An award of reasonable compensatory education; and (6) Any other relief deemed appropriate.

**FINDINGS OF FACT**

#1. Student attended the 4<sup>th</sup> grade at [REDACTED] ES during the 2008-2009 school year. (*Petitioner's Exhibits #26, #27, #28, 4<sup>th</sup> Grade Report Cards for SY 08-09; Petitioner's Exhibit #10, MDT Meeting Notes dated 05/19/09*).

#2. On 09/11/08, Student received a Student Incident Report for hollering in the hallway and fighting with another student. (*Petitioner's Exhibit #21, Student Incident Report dated 09/11/08*). On 09/18/08, Student received a Student Incident Report for fighting on the playground and being physically aggressive with the teacher by bending the teacher's fingers backwards when the teacher attempted to intervene in the fighting. (*Petitioner's Exhibit #20, Student Incident Report dated 09/18/08*). On 10/14/08, Student received a Student Incident Report for refusing to follow directions. (*Petitioner's Exhibit #19, Student Incident Report dated 10/14/08*). On 10/20/08, Student received a Student Incident Report for refusing to follow teacher directives, threatening to smack two female students, and hitting a male student and throwing an eraser at the student. (*Petitioner's Exhibit #18, Student Incident Report dated 10/20/08*). On 10/21/08, Student received a Student Incident Report for not reporting to the office as instructed, yelling into the

## Hearing Officer Determination &amp; Order

classroom, putting Student's foot in the door so that the door could not be closed, throwing another student's backpack to the floor, refusing to comply with teacher directives, and completely disrupting the entire class for 50 minutes, being defiant, and being disrespectful and physically aggressive towards the teacher. (*Petitioner's Exhibit #17, Student Incident Report dated 10/21/08*). On 10/28/08, Student bumped into another student and threatened the student, Student hit a student, and yelled into the classroom. On 10/30/08, Student received a Student Incident Report for inappropriate comments and unnecessary noise in classroom, ignoring consequences of behavior, leaving seat without permission, not following school/classroom rules and regulations, and being defiant and disrespectful to the teacher. (*Petitioner's Exhibit #16, Student Incident Reports dated 10/28/08 and 10/30/08*). On 11/07/08, Student was suspended for 3 days for fighting and disrespecting staff members, fighting another student, and calling the security guard an inappropriate name. (*Petitioner's Exhibit #15, Suspension Level I Report dated 11/07/08*). On 11/18/08, Student was cited for inappropriate comments and unnecessary noise in the classroom, being physically aggressive with teacher, agitating and provoking peers to the level of verbal and/or physical assault, ignoring consequences of behavior, not following school/classroom rules and regulations, and use of profanity, lying, and being disrespectful. (*Petitioner's Exhibit #13, Student Incident Report dated 11/18/08*). On 11/18/08, Student was suspended for four days for disrupting the class by yelling at the students and starting fights, approaching the teacher in a threatening manner, and pushing the teacher to get out of the classroom. (*Petitioner's Exhibit #14, Suspension Level I Report dated 11/18/08*).

#3. Student's negative classroom behavior, observed from Aug 25 – Nov 25, 2008, consisted of Student very often losing Student's temper; Student very often actively defying or refusing to comply with adult's requests or rules; Student very often angry or resentful; Student very often bullying, threatening, or intimidating others; Student very often physically cruel to people; Student often talking excessively; Student often interrupting or intruding on others; Student often spiteful and vindictive; and Student often lying to obtain goods for favors or to avoid obligations. (*Petitioner's Exhibit #24, Homeroom Observation Report dated 11/25/08*).

#4. An independent Diagnostic/Assessment Report of Student dated 12/18/08, gave Student an Axis I diagnosis of Oppositional Defiant Disorder and an Axis IV diagnosis of Academic Problems and Poor Peer Relations. The assessment did not contain a diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD"). (*Petitioner's Exhibit #7, Diagnostic/Assessment Report dated 12/18/08*).

#5. An Educational Evaluation dated 03/17/09, prepared by the SEC at [REDACTED] ES, contained a teacher's report that described Student's behaviors during the preceding month as difficult, argumentative, and defiant; intense "highs" of energy followed by periods of sadness or depression; frequently failing to give close attention to details or making careless mistakes; difficulty sustaining attention in tasks or play activities; often not following through on instructions and failing to finish classwork; attempting, but giving up easily, when confronted with difficult tasks; easily distracted and often leaving Student's desk when Student is expected to remain seated; talking excessively; difficulty

## Hearing Officer Determination &amp; Order

awaiting Student's turn and often interrupting or intruding on others; interactions with peers seriously impairing Student's classroom performance; Student demonstrating very serious and very disruptive, uncooperative, withdrawn, aggressive, and other inappropriate (nonaggressive) behaviors in the classroom; Student verbally abusing girls in the classroom; Student sometimes using vulgar language in front of teachers and students; Student displaying serious inattentive behaviors in the classroom that were very disruptive to others; and reported behaviors that may be inhibiting classroom performance. The teacher rated Student's levels of oral expression, listening comprehension, basic reading skill, reading comprehension, mathematics calculation, mathematics reasoning, basic writing skill, and written expression as average. Student's overall academic skills were average to advanced. (*Petitioner's Exhibit #8, Educational Evaluation dated 03/17/09*).

#6. Student was taking Concerta medication because Student had been diagnosed with ADHD on 12/23/08 and was unfocused and very hyperactive. (*Testimony of Petitioner*). At the 03/13/09 MDT meeting, Petitioner's educational advocate advised the MDT that Student had been diagnosed with ADHD on 12/23/08 and was taking 18 mg of Concerta daily, and as of 03/13/09, Student had been taking 27 mg of Concerta daily. (*Petitioner's Exhibit #30, Advocate's Notes dated 03/13/09; Testimony of Consuelo Ortega*).

#7. A psychological evaluation conducted by a DCPS school psychologist, dated 04/17/09, indicated that Petitioner advised the DCPS psychologist that Student had been diagnosed with ADHD on 12/23/08 and had been prescribed medication for ADHD. Behavior problems in school at that time, as reported by the teacher, consisted of "conflict with peers, banging on the desk, knocking things over, not following directions or any command, not reporting to class, getting out of line, walking out of the room, and never sitting down." On the Scale for Assessing Emotional Disturbance ("SAED"), Student obtained statistically significant scores (i.e., elevated scores) in the subscale areas of Relationship Problems and Inappropriate Behavior (Disruptive-Aggressive). The SAED contained scores of less than the 1<sup>st</sup> percentile for socially maladjusted behavior, indicating that Student's behavior was not considered social maladjustment (with social maladjustment being the measurement of the presence of antisocial or delinquent behaviors out of school). The Connor's Teacher Rating Scale - Revised contained data input from Student's teacher and social worker. The Connor's Teacher Rating Scale - Revised supported a finding of Oppositional Defiant Disorder, but did not support a finding of Hyperactivity or ADHD as per the protocol of the rating scale. (*Petitioner's Exhibit #12, Psychological Evaluation dated 04/07/09, 04/17/09*). The 04/17/09 psychological evaluation was reviewed by the MDT/IEP Team at the 05/19/09 IEP team meeting where Student was found ineligible for special education. (*Testimony of Angela Allen*).

#8. On 05/19/09, the MDT/IEP team met at [REDACTED] ES, and after review of records that included the psychological evaluation dated 04/17/09, determined that Student was ineligible for special education because Student's diagnosis of Oppositional Defiant Disorder constituted Social Maladjustment and not an Emotional Disturbance.

## Hearing Officer Determination &amp; Order

(Petitioner's Exhibit #11, Advocate Notes dated 05/19/09; Testimony of Consuelo Ortega). The DCPS members of the MDT recommended that Student receive ongoing counseling with the school social worker. (Petitioner's Exhibit #10, MDT Meeting Notes dated 05/19/09). At the 05/19/09 MDT meeting, Petitioner's educational advocate informed the MDT that Student had been diagnosed with ADHD on 12/23/08 and was taking Concerta medication for ADHD. (Petitioner's Exhibit #11, Advocate's Notes dated 05/19/09). All MDT members with the exception of Petitioner and Petitioner's educational advocate agreed that Student was not eligible for special education services. (Testimony of Consuelo Ortega). The DCPS members of the MDT agreed that Student did not meet the criteria per the criterion checklist for a classification of Learning Disabled ("LD") or Emotional Disturbance ("ED"). (Petitioner's Exhibit #10, MDT Meeting Notes dated 05/19/09; Testimony of Consuelo Ortega). The DCPS MDT members agreed that even though Student did not present with a disability, there was a need for intervention services and Petitioner was referred to the Department of Mental Health who had a therapist available in school, and to East of the River Collaborative for additional counseling and family support. (Petitioner's Exhibit #10, MDT Notes dated 05/19/09).

#9. On 05/19/09, Petitioner's educational advocate met with the principal of [REDACTED] ES and was informed that at the time of the MDT meeting on 05/19/09, Student was not participating in Student's regular education class because Student's general education teacher was fearful of Student's physical aggression. Student had been participating in a self-contained special education class for at least five days at the time of the 05/19/09 MDT meeting because Student had been unsuccessful in two regular education classrooms. (Testimony of Consuelo Ortega).

#10. Student's 2008-2009 4<sup>th</sup> Grade Report Card for the 1<sup>st</sup> - 3<sup>rd</sup> Advisories indicated that Student rarely followed directions, rarely worked well with others, rarely made an effort, rarely followed classroom rules, rarely followed playground rules/school rules, rarely respected the rights/property of others, rarely listened while others speak, and rarely practiced self control. The teachers' comments revealed that Student consistently disregarded school rules, that Student's increasingly hostile attitude was having a negative effect on schoolwork, and that Student was capable of being a good student but had great difficulty conforming to rules or authority. (Petitioner's Exhibit #28, 4<sup>th</sup> Grade Report Card for SY 08-09).

#11. The results of the Woodcock Johnson III assessment conducted on 03/17/09, revealed that although Student's grade norm was 4.7, Student obtained a grade level equivalent of 2.3 in reading fluency, a grade equivalent of 2.7 in understanding directions, and a grade equivalent of 3.9 in writing fluency. All other academic scores were at the 4<sup>th</sup> grade level or above grade level, with most scores being above grade level. (Petitioner's Exhibit #8, Educational Evaluation dated 03/17/09).

#12. The Connor's Rating Scale standard scores are typically derived from information obtained by the parent and the teacher. The parent is the primary data source because the parent can provide the most complete information and the teacher is the

## Hearing Officer Determination &amp; Order

secondary source of information because the student spends a lot of time in school. If additional information is needed, the social worker is utilized as a tertiary data source. (*Testimony of Consuelo Ortega*).

**DISCUSSION AND CONCLUSIONS OF LAW**

“The burden of proof in an administrative hearing...is properly placed upon the party seeking relief.” *Schaffer v. Weast, 44 IDELR 150 (2005)*. “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. 3030.3.

DCPS, as a local education agency, is required to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1, 300.2(b)(1)(ii); 38 D.C. Code 2561.01(2).

**Issue #1 – Whether DCPS failed to evaluate Student in all areas of suspected disability, thereby denying Student a FAPE?** Petitioner alleges that a December 2008 diagnostic report diagnosed Student with ADHD, and that in April 2009, a Connor’s Rating Scale ruled out ADHD, and the Connor’s Rating Scale was included in a 04/24/09 psychological assessment that was reviewed at a 05/19/09 MDT meeting at which time Student was determined ineligible for special education services. Petitioner argues that since DCPS limited the ADHD assessment to the results of the 04/29/09 psychological assessment that contained the Connor’s Rating Scale that did not contain Petitioner’s data input, DCPS failed to comprehensively evaluate Student in all areas of suspected disability.

Each public agency must ensure that the child is assessed in all areas related to the suspected disability. 34 C.F.R. 304(c)(4). Each public agency must also ensure that assessments and other evaluation materials used to assess the child are administered in accordance with any instructions provided by the producer of the assessment. 34 C.F.R. 304 (c)(1)(v). And, in interpreting evaluation data for the purpose of determining if a child is a child with a disability, and the educational needs of the child, each public agency must (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child’s physical condition, social or cultural background, and adaptive behavior; and (ii) Ensure that information obtained from all of these sources is documented and carefully considered. 34 C.F.R. 300.306(c).

In this case, the Hearing Officer determines that the Connor’s Rating Scale used by the MDT to rule out the presence of ADHD (*Finding of Fact #7*), which effectively ruled out a disability classification of OHI, was not comprehensive enough because it lacked data input from Petitioner as parent. The record was not clear as to why

## Hearing Officer Determination &amp; Order

Petitioner's input was missing from the Connor's Rating Scale assessment. The testimony of Petitioner's educational advocate, who held a Master's Degree in psychology and had training in the protocol for proper administration of the Connor's Rating Scale, was credible based on her training and experience in the field of special education and the administration of assessment tools. As stated by Petitioner's educational advocate, the parent or Petitioner is the primary data source for information regarding Student's behavior. (*Finding of Fact #12*). And, in this case, data input from Petitioner was critical because Student had been diagnosed with ADHD on 12/23/08 because Student was unfocused and hyperactive, and Student had been taking medication for it. (*Finding of Fact #6*). This is the very information that could have resulted in a different standard score outcome and perhaps a statistically significant rating for hyperactivity, which in turn might have qualified Student as a student with a disability classification of OHI. DCPS did not ensure that the assessment was administered in accordance with proper administration protocol, and therefore DCPS failed to comprehensively evaluate Student in all areas of suspected disability as is required by 34 C.F.R. 304(c)(4). Pursuant to 34 C.F.R. 300.304(c)(6), DCPS must ensure that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs... , but DCPS failed to do so. What is difficult to understand is why the DCPS psychologist who conducted the 04/17/09 psychological evaluation specifically reported that Petitioner mentioned that Student had been diagnosed with ADHD, but did not obtain the necessary data from Petitioner to comprehensively complete the Connor's Rating Scale assessment.

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. Section 300.513(a).

In this case, Petitioner did not agree with the eligibility determination on 05/19/09 that Student was ineligible for special education services. (*Finding of Fact #8*). DCPS' failure to properly include Petitioner's input in the Connor's Rating Scale prior to using it as a basis to determine ineligibility for special education services significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student. Student continued to struggle behaviorally at ██████ ES in the 4<sup>th</sup> grade during the 2008-2009 school to such an extent that Student was removed from the general education curriculum and placed in a special education classroom (*Finding of Fact #9*), although Student needed but did not have an IEP that prescribed special education services. As a result, Student was denied a FAPE.

Petitioner met its burden of proof on Issue #1.

**Issue #2 – Whether DCPS failed to find Student eligible for special education, thereby denying Student a FAPE?** Petitioner alleges that (a) on 05/19/09, the MDT

## Hearing Officer Determination &amp; Order

met and determined Student ineligible for special education because of the diagnosis of Oppositional Defiant Disorder, and the MDT did not take into consideration that Student had been diagnosed with ADHD and was under medication management for it; and (b) besides the presence of ADHD, Student had a history of school suspensions for fighting, being disruptive, being aggressive with teachers, inattentiveness in class, hyperactivity in class, and being placed in a special education classroom on 05/14/09 due to poor behavior; all indicators that Student was in need of special education services.

IDEIA requires a state to provide a "free appropriate public education" to all disabled children within its jurisdiction as a condition of receiving federal funds. *Doe v. Board of Educ.*, 9 F.3d 455, 459 (6<sup>th</sup> Cir. 1993). DCPS must make a free appropriate public education (FAPE) available to each child with a disability, ages three to twenty-two, who resides in, or is a ward of, the District. 5 D.C.M.R. 3002.1(a). Also, DCPS "must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade." 34 C.F.R. 3001.1(c)(1); 5 D.C.M.R. 3002.1(e).

A free appropriate public education consists of education instruction specially designed to meet the unique needs of the disabled child, supported by such services as are necessary to permit the child to benefit from the instruction. *Nack ex rel. Nack v. Orange City School Dist.*, 454 F.3d 604, 608 (6<sup>th</sup> Cir. 2006). "The Act provides no more than a "basic floor of opportunity... consisting of access to specialized institutions and related services which are individually designed to provide educational benefit" to the disabled child. *Doe*, 9 F.3d at 459 (quoting *Board of Educ. v. Rowley*), 458 U.S. 176, 201 (1982)). However, the school must provide educational benefits that are more than de minimis in order to be "appropriate." *Doe*, 9 F.3d at 459.

In this case, Student's academic ability was at, near or above grade level in all testing areas except reading fluency, understanding directions and writing fluency. Additionally, Student's in-class academic skills were rated as average to above average. (*Finding of Fact #5*). There was no evidence that Student received poor grades or was not advancing from grade to grade. (*Finding of Fact #11*). However, the evidence was clear that Student had chronic and severe behavior problems in school beginning on 09/11/08 and amply documented through 05/19/09, (*Findings of Fact #2, #3, #5, #7, #9, #10*), and these behavior problems interfered with Student receiving educational benefit in the general education classroom. (*Finding of Fact #5, #10*). The Hearing Officer concludes that Student's behavior negatively affected the education of Student. Of utmost significance is the fact that at the time of the 05/19/09 MDT meeting, Student's behavior was so severely disruptive that Student could no longer be maintained in regular education classrooms at [REDACTED] ES. (*Finding of Fact #9*).

Student does not have to be diagnosed with ADHD or an Emotional Disturbance by a physician or psychologist in order to be classified as ED or OHI pursuant to 5 D.C.M.R 3001.1 and 34 C.F.R 300.8. And, Student is not automatically excluded from special education by virtue of average or above average academic abilities or

## Hearing Officer Determination &amp; Order

performance. See 34 C.F.R. 300.101. Furthermore, Student does not have to have failing grades or experience grade retention in order to qualify for special education services. Simply, Student can qualify for special education if Student's education cannot be met in a general education classroom. *Hood v. Encinitas Union School District*, 482 F.3d 1175 (2007), 47 IDELR 213. The Court in *Hood* observed that *Rowley's* "basic floor of opportunity" standard can also apply to eligibility determinations. "Just as courts look to the ability of a disabled child to benefit from the services provided to determine if that child is receiving an adequate special education, it is appropriate for courts to determine if a child classified as non-disabled is receiving adequate instruction in the general classroom – and thus not entitled to special education services – using the benefit standard."

Pursuant to 5 D.C.M.R. 3000.1, a child with a disability is "a child who satisfies District registration and residency requirements and who has been evaluated in accordance with Sections 3005-3006 of this Chapter as having one of the following conditions and who, as a result of the impairment, needs special education and related services...(e) Emotional disturbance;...(l) Other health impairment..."

Pursuant to 5 D.C.M.R. 3001.1, Emotional Disturbance is defined as "a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (a) An inability to learn that cannot be explained by intellectual, sensory, or health factors; (b) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (c) inappropriate types of behavior or feelings under normal circumstances; (d) a general, pervasive mood of unhappiness or depression; or (e) a tendency to develop physical symptoms or fears associated with personal or school problems. "Emotional Disturbance" does not include a child who is socially maladjusted, unless it is determined that the child has an emotional disturbance.

Student exhibited an inability to build or maintain satisfactory interpersonal relationships with peers and teachers from the beginning until the end of the 2008-2009 school year while attending 4<sup>th</sup> grade at ██████ ES. In addition, Student demonstrated inappropriate types of behavior or feelings under normal conditions. On a consistent basis, Student was yelling, fighting and provoking peers, disrespecting staff, and using physical and verbal aggression towards staff and students, etc. (*Findings of Fact* #2, #3, #5, #7, #10). And, Student consistently disregarded school rules and Student's increasingly hostile attitude was having a negative effect on schoolwork. (*Finding of Fact* #10). Moreover, an independent Diagnostic/Assessment Report dated 12/18/08 contained an Axis IV diagnosis of Academic Problems and Poor Peer Relations. (*Finding of Fact* #4). The results of the 04/17/09 psychological evaluation indicated that Student was not socially maladjusted, and the psychological evaluation reflected a reported history of ADHD and medication management for ADHD. (*Finding of Fact* #7). By a preponderance of the evidence, Petitioner proved that Student should have received a disability classification of Emotional Disturbance at the 05/19/09 MDT meeting. Nothing could have been more clear by Student's aberrant behavior over the entire 2008-2009 school year that Student needed special education services because

## Hearing Officer Determination &amp; Order

Student was not only disruptive to Student's own educational program, Student was disruptive to the education of the other students. (*Finding of Fact #2*). Consistently, over the period of the 2008-2009 academic year, Student exhibited an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, and Student displayed inappropriate types of behavior or feelings under normal circumstances in the school setting, thereby meeting the necessary criteria to be classified as a student with an Emotional Disturbance pursuant to 5 D.C.M.R. 3000.1 and 34 C.F.R. 300.8(c)(4)(i).

Pursuant to 5 D.C.M.R. 3001.1, Other Health Impairment is defined as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, resulting in limited alertness with respect to the educational environment, and adversely affecting a child's educational performance, due to chronic or acute health problems such as: (a) Asthma; (b) Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder..."

The evidence in the record is that Student's behaviors during the month of February 2009, as reported in an Educational Evaluation dated 03/17/09, consisted of Student frequently failing to give close attention to details or making careless mistakes, difficulty sustaining attention in tasks and play activities, often not following through on instructions and failing to finish classwork, giving up easily when confronted with difficult tasks, easily distracted, interrupting or intruding on others, with interactions with peers seriously impairing Student's classroom performance. (*Finding of Fact #5*). Later in the academic year, per Student's 4<sup>th</sup> Grade Report Card for the 1<sup>st</sup> - 3<sup>rd</sup> Advisories, Student rarely listened while others spoke, and rarely followed classroom rules, and rarely practiced self-control. (*Finding of Fact #10*). All of these documented behaviors indicate, by a preponderance of the evidence, that on 05/19/09, Student qualified for a disability classification of Other Health Impairment ("OHI") on the basis of limited alertness in the educational environment, and on 05/19/09, DCPS failed to identify Student as a student with a disability classification of OHI.

Student's substantive right to have an IEP with services to be provided outside of the general education curriculum so that Student could obtain meaningful educational benefit was denied when DCPS failed to determine Student eligible for special education services on 05/19/09. (*Finding of Fact # 8*). Student was deprived of the right to educational benefit and the right to have a FAPE. Student was denied a FAPE beginning on 05/19/09.

Petitioner met its burden of proof on Issue #2.

**Issue #3 – Whether Student is entitled to compensatory education?**

Petitioner argues that Student may be entitled to compensatory education due to the denials of a FAPE.

This Hearing Officer found that DCPS denied Student a FAPE on Issues #1 and #2, as discussed above. IDEIA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.

## Hearing Officer Determination &amp; Order

20 U.S.C. Sections 1400 (d)(1)(A), 1412(a)(1). Where a school system fails to provide special education or related services to a disabled student, the student is entitled to compensatory education. *Walker v. D.C.*, 157 F. Supp. 2d 11, 30 (D.D.C. 2001). See also *Reid v. District of Columbia*, 43 IDELR 32 (2005), 401 F.3d 516, at 522 (“Under the theory of compensatory education, courts and hearing officers may award education services to be provided prospectively to compensate for a past deficient program”). In this case, Student is entitled to compensatory education for the period of time that Student was denied special education services, i.e., beginning from 05/19/09 until the time an appropriate IEP is developed and implemented by DCPS.

Petitioner met its burden of proof on Issue #3.

**ORDER**

**IT IS ORDERED**, that

- (1) Student is determined eligible for special education services as a student with a disability classification of Multiple Disabilities consisting of Emotional Disturbance and Other Health Impaired;
- (2) The MDT/IEP Team shall convene within 10 business days of the date of this Order to develop an appropriate IEP for Student, discuss and determine placement with placement to be made within 5 days if to a public placement or 30 days if to a non-public placement, and the MDT/IEP Team shall discuss and determine any compensatory education due Student;
- (3) All meetings shall be scheduled through Petitioner’s Attorney in writing via facsimile; and
- (4) Any delay caused by Petitioner or any representative of Petitioner shall result in a day for day extension of time for DCPS to meet any deadline specified in this Order.

**IT IS SO ORDERED.**

**This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).**

*Virginia A. Dietrich /s/*

Virginia A. Dietrich, Esq.  
Impartial Due Process Hearing Officer

10/23/09

Date

Issued: October 23, 2009