

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

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

OSSE
Student Hearing Office
September 09, 2013

GUARDIAN, on behalf of
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

v

Case No:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Room: 2003

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This is a case involving a 16 year old student who is currently attending school at an LEA that is not named in this proceeding. has been determined to be eligible for services as a Student with a Specific Learning Disability by such LEA.

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on June 25, 2013 in regard to the Student. This Hearing Officer was appointed to preside over this case on June 26, 2013.

A Response was filed by the District denying this contention on July 5, 2013. This Response was timely filed. A resolution meeting was held on July 15, 2013. This meeting was not timely pursuant to the applicable regulations. The resolution period ended on July 25, 2013.

On _____, this Hearing Officer held a prehearing conference. Tanya Chor, Esq., counsel for Respondent, appeared. _____, counsel for Petitioner, appeared. A prehearing conference order issued on August 2, 2013, outlining the summarizing the rules to be applied in this hearing and identifying the issues in the case.

By motion filed on August 13, 2013, Respondent moved to dismiss the Complaint or, alternatively, for summary judgment in regard to the Complaint. Respondent's motion was premised on the contention that there was no actual request for an evaluation by Petitioner to anyone at School B in 2011-2012, that School B is its own LEA with respect to general education students, and that it had no responsibility to evaluate this Student during 2011-2012. Respondent also contends that it has offered the Student 120 hours of compensatory tutoring and counseling to settle this matter, which renders Petitioner's claim to be moot.

On August 16, 2013, Petitioner submitted opposition papers together with Exhibits A-J. Exhibit A is a verified statement from Petitioner stating that Petitioner requested that a Mr. A evaluate the Student repeated times between August, 2011 and January, 2012. Exhibit B is a document indicating that School B operates with DCPS as its LEA. Petitioner accordingly contended that an issue of fact existed with respect to her requests for evaluation during the 2011-2012 school year, and that DCPS was the LEA for School B for any and all IDEA claims. Petitioner also argued that an offer of settlement should moot out a compensatory education claim.

By written order dated August 26, 2013, this IHO denied Respondent's motion, reasoning that: 1) issues of fact remained with respect to the allegations in the matter; 2) compensatory education claims cannot be mooted out by unilateral settlement offers by a school district.

A hearing date followed on September 3, 2013. This was a closed proceeding.

Petitioner was represented by

Respondent was represented by

Petitioner entered into evidence exhibits 1-9; Respondent entered into evidence exhibits 1-10. Petitioner presented as witnesses: Petitioner; Witness A, Special Education Coordinator at School C; Witness B, an expert in “the recommending of appropriate educational services that a Student may require”. Respondent presented as witnesses: Witness C, School Psychologist and expert in “special education eligibility and assessment”; Mr. A, former Special Education Coordinator at School B.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

BACKGROUND

The Complaint involves claims implicating 34 CFR 300.507(a) and 34 CFR Sect. 300.532. The Complaint raises a sole issue: that DCPS failed to evaluate the Student at Petitioner’s request while the Student was attending School B during the 2011-2012 school year.

ISSUES

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

1. Did the Petitioner request that DCPS evaluate the Student numerous times between summer and winter, 2011-2012? If so, did DCPS fail to conduct an evaluation of the Student? If so, did DCPS deny the Student a FAPE?

FINDINGS OF FACT

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

1. The Student is a sixteen year old who lives with grandmother ("the grandparent") in Washington, D.C. (P-7-1)
2. The Student has lived with the grandparent at various intervals over the years. has lived with the grandparent for most of life. (P-4-3; P-6-2)
3. The Student's mother is chronically addicted to Phencyclidine (PCP) and the Student's father is incarcerated in Pennsylvania. (P-4-3)
4. The grandparent was granted custody of the Student in or about December, 2009. (P-4-3)
5. The Student's mother gained custody of the Student in or about early 2010. (P-4-3)\
6. The grandparent regained custody in or about 2012. (Testimony of Grandparent)
7. The Student has been living with the grandparent since in or about April, 2012. (P-4-3)
8. The Student is currently experiencing clinical levels of depression and anxiety. (P-4-11, 13)
9. The Student has suffered from depression all during life. (Testimony of Grandparent)

10. The Student blacks out when is angry. has cut in the past. (P-6-2-3)
11. The Student has difficulty sleeping due to fear of something happening in the night. (P-4-11)
12. The Student expects failure and feels inferior to others. (P-4-11-12)
13. The Student has been diagnosed with PTSD with Dissociative Features, Alcohol Abuse, Learning Disorder NOS, and Developmental Disorder of Adolescence. (P-4-12)
14. The Student does not like school. (P-6-5)
15. Academically, the Student exhibits a significant difference between verbal comprehension and perceptual reasoning. This indicates the presence of language deficits. (P-4-13)
16. The Student functions well below grade level in terms of language skills.
(Testimony of Witness B)
17. The Student's ability to process information accurately and quickly is poor. (P-4-7)
18. In writing, the Student will employ clauses such as "don't have no" as if were speaking. Also in writing, the Student uses a very basic and informal vocabulary. (P-7-6)
19. The Student struggles reading basic paragraphs. (P-7-4)
20. The Student struggles with vocabulary and analyzing the nuances of language. (P-7-4)
21. The Student requires "substantial" supports in the area of reading including graphic organizers, teacher check-ins, and other comprehension aids. (P-7-12)
22. The Student struggles with questions and prompts that ask to synthesize information that has to read. (P-7-12)

23. The Student struggles with decoding and reading fluency, which may make employment tasks difficult in the future. (P-7-12)
24. Since academic scores are all below the 10th percentile, needs academic support in the educational setting. (P-4-13; Testimony of Witness B)
25. The Student requires wrap-around services such as family therapy, individual therapy, substance abuse counseling, crisis intervention, and medication management. (P-4-13)
26. The Student's problems with absences are related to the Student's lack of support in class. (Testimony of Witness B)
27. The Student went to School A for grades 6 through 8. (P-4-4)
28. The Student went to School B during first year in the ninth grade. (P-4-4)
29. The grandparent enrolled the Student at School B in August, 2011. She spoke to a receptionist at the school and was given a package to fill out. (Testimony of Grandparent)
30. At about this time, the grandparent contacted the School B via phone asked the school receptionist who she should speak to in regard to an evaluation of the Student. (Testimony of Grandparent)
32. At the time, if a parent were to call School B requesting an evaluation for their child, they likely would have been referred to Mr. A. (Testimony of Mr. A)
33. Indeed, the grandparent was referred to a Mr. A. at School B when she asked that the Student be evaluated. (Testimony of Grandparent)
34. Mr. A spoke to the grandparent and gave her an appointment to see during the first week of September, 2011. (Testimony of Grandparent)
35. The grandparent went to see Mr. A at School B at the previously designated date and time, but was told that Mr. A was not available. (Testimony of Grandparent)

36. Thereafter, in September, 2011, the grandparent again spoke to Mr. A on the phone. Mr. A again gave her an appointment to see in connection to the requested evaluation of the Student. The appointment was set for a day during the week after Columbus Day, 2011. (Testimony of Grandparent)

37. The grandparent again went to see Mr. A at the previously designated date and time, but was told that Mr. A was not available. (Testimony of Grandparent)

38. On October 25, 2011, the Student's mother, the Student, and an administrator from School B discussed the Student's failing grades. They also discussed the Student's numerous unexcused absences, and a referral to the school's Student Intervention Team. (R-4-1)

39. On November 9, 2011, the Student's mother and the Student signed a code of behavioral conduct issued by School B. (R-5-1)

40. The grandparent called Mr. A on or about November 20, 2012 to find out "what the problem was" in regard to arranging for an appointment for an evaluation. Mr. A gave the grandparent another appointment to come in and discuss the Student's evaluation. (Testimony of Grandparent)

41. The grandparent went to see Mr. A at School B at the previously designated date and time, but was told that Mr. A was not available. (Testimony of Grandparent)

42. The grandparent then spoke to a Mr. B at School B. Mr. B works at the front desk at the middle school. She told Mr. B that she could not understand why Mr. A would not keep appointments. (Testimony of Grandparent)

43. The grandparent then called Mr. A again in December, 2012. An appointment was set up to for January, 2013 in connection to the grandparent's request to evaluate the Student. (Testimony of Grandparent)

44. The grandparent went to see Mr. A at School B at the previously designated date and time, but was told that Mr. A was not available. (Testimony of Grandparent)

45. On December 19, 2011, the Student's mother was sent a letter from School B. This letter indicated that, because of non-attendance/truancy, the Student may be involuntarily withdrawn from School B unless a meeting was set up with the Vice Principal or the Attendance Monitor. (R-2-1)

46. On March 8, 2012, the Student's parent and the Student signed a code of behavioral conduct issued by the school. (R-6-1)

47. The Student was asked to leave School B in or about April, 2012. (Testimony of Grandparent)

48. The Student was involved in 26 disciplinary referrals during 2011-2012. Nine referrals were for tardiness, two referrals were for disruptive behavior. More than half of the referrals involving incidents in the classroom. The referrals increased in frequency during January and February, and then stopped as of February 14, 2012. (R-1-1)

49. Referrals involved cursing, talking back, using cell phone inappropriately, being late to class, sleeping while in class, refusing to complete work, leaving class without permission. (R-1-1-10)

50. The Student failed every class during first and second quarters at School B. During the third quarter, the Student failed algebra and world history, but passed English (C-), Algebra Concepts (C-), Earth Science (C), and Art (B). (R-3-1)

51. The Student did not come home with homework while at School B. (Testimony of Grandparent)

52. If the Student had a Functional Behavior Assessment, a Behavior Intervention Plan, and counseling goals during 2011-2012, the Student would have done better at School B. (Testimony of Witness B)

53. The grandparent went to School B at the beginning of the 2012-2013 school year to reenroll the Student and was told that the Student had been expelled from School B in April, 2012. This was the first notice that the grandparent had received of the expulsion. (Testimony of Grandparent)

54. Shortly thereafter, the grandparent enrolled the Student at School C, which part of a separate LEA. (Testimony of Grandparent)

55. The Student has attended School C since that time. The Student repeated the ninth grade at School C. (Testimony of Grandparent)

56. The grandparent filled out a special education questionnaire in connection to the Student's application to attend School C. In this questionnaire, the grandparent stated that she had asked for the Student to be evaluated at the Student's previous school. The grandparent also sought to have the Student evaluated by School C. (Testimony of Witness A)

57. School C staff did not notice that the grandparent was seeking to have the Student evaluated until it was brought to their attention by the grandparent's attorney later that school year. (Testimony of Witness A)

58. The Student initially did not want to go to school at School C. (Testimony of Grandparent)

59. During first months at School C, the Student was involved in two large fights and was suspended. The Student was also involved in verbal confrontations. (Testimony of Witness A)

60. After the Student was the subject of legal action, a psychoeducational assessment was conducted of by a psychologist pursuant to a court order. This assessment was conducted on November 6, 2012. (P-4-1)

61. This assessment revealed that the Student had cognitive deficits. On the WISC-IV, the Student scored a full scale IQ of 72, in the borderline range at the 3rd percentile. In the Verbal Comprehension Index, the Student scored a 73 composite, in the borderline range at the 4th percentile. In the Perceptual Reasoning Index, the Student scored an 86 composite, in the low average range at the 18th percentile. In the Working Memory index, the Student scored an 88 composite, in the low average range at the 21st percentile. In the Processing Speed Index, the Student scored a 62 composite, in the extremely low range, at the 1st percentile. (P-4-6)

62. On the Woodcock-Johnson Tests of Achievement-III, the Student scored a 70 in broad reading, at the 2nd percentile with a grade equivalent of 4.2. The Student scored a 69 in reading comprehension, at the 2nd percentile, with a grade equivalent of 4.0. The Student scored a 72 in reading fluency, at the 3rd percentile, with a grade equivalent of 3.7. The Student scored a 75 in broad math, at the 5th percentile, with a grade level equivalent of 5.1. The Student scored an 83 in calculation, at the 13th percentile, with a grade level equivalent of 5.9. The Student scored a 75 in writing fluency, at the 5th percentile, with a grade equivalent of 4.5. (P-4-8)

63. Testing in the State-Trait Anger Expression Inventory, Second Edition, indicated mostly average scores, with elevated scores for “trait anger and “trait anger-temperament” and very high scores for “anger expression – in.” (P-4-10)

64. On the Achenbach Child Behavior Checklist, the Student was deemed “elevated” to the “clinical” range for total problems. was deemed “elevated” in terms of

withdrawn/depressed, anxious/depressed, internalizing problems, obsessive-compulsive problems, post-traumatic stress problems. (P-4-11)

65. On the Millon Adolescent Clinical Inventory, the Student was deemed “elevated” in Depressive Affect, Peer Insecurity, Self-Devaluation, and an Inhibited Personality Pattern. (P-4-11)

66. At School C, the Student exhibited attendance problems throughout 2012-2013. (Testimony of Witness A)

67. The Student was referred to the District’s “SSST” because of absences and academic struggles. (Testimony of Witness A)

68. A behavior tracker system was implemented to help the Student’s attendance. When the Student was not at school or was late, Witness A (the Special Education Coordinator) would text the grandparent. Also, the Student would pick up a document from Witness A every morning. This document was then presented to the Student’s teachers, who would indicate on the document whether or not the Student had handed in homework that day. (Testimony of Witness A)

69. Tutoring was initiated for the Student. Tutoring took place after school, from Monday to Thursday, for 30-45 minutes daily. Counseling was also provided as needed. (Testimony of Witness A)

70. Even with these supports at the Student was failing many of classes. (P-7-15)

71. By December 13, 2012, the Student was absent from school frequently. had missed Algebra 1 20 days, had missed Literary Genres 30 days, had missed Biology 24

days, had missed World History 1 25 days. received all F grades on report card for the Quarter 2 Interim Progress Report. (P-8-1)

72. Psychological testing was conducted of the Student in April, 2013 revealed that the Student is experiencing emotional challenges including excessive drinking and smoking, getting involved in fights, depression. The report recommends counseling. (P-6-13)

73. A formal Behavior Intervention Plan was written in May, 2013 with an IEP team. The grandparent was at the meeting to write the Behavior Intervention Plan. (Testimony of Witness A)

74. A meeting held by School C on May 14, 2013 determined that the Student was eligible for services as a Student with a Specific Learning Disability. An IEP was created for the Student. Areas of concern for the Student included math, reading, written expression, and emotional, social, and behavioral development. Goals were recommended in math, reading, writing and emotional, social, and behavioral development. (P-7-1-7)

75. The IEP notes that the student's learning disability impacts ability to process information in large chunks, as well as follow multi-step problems for extended periods of time. (P-7-3)

76. The IEP notes that the Student struggles with identifying and analyzing the theme of a passage and needs support in sound/letter correlation, strategies for chunking words, extended time for reading assignments, graphic organizers. (P-7-4)

77. The IEP indicates that the Student's letter word identifications skills and reading fluency are in the very limited range, and that passage comprehension is exceptionally low. (P-7-4)

78. The IEP indicates that the student cannot manage peer conflicts, struggles with recognizing emotions, and struggles with identifying how behavior impacts others. (P-7-7)

79. The IEP indicates that the Student has very elevated scores for defiance and aggression and learning problems based on observations from the parent, the teachers, and the Student (P-7-7)

80. The Student is recommended for 6 hours per week of specialized reading instruction outside general education, 6 hours per week of specialized math instruction outside general education, 2 hours per week of writing expression instruction outside general education, and behavioral support services outside general education for 60 minutes per week. (P-7-8)

81. Classroom accommodations on the IEP include interpretation of oral directions, reading of test questions, repetition of directions, location with minimal distractions, preferential seating, small group testing, flexible scheduling, breaks between subtests, and extended time on subtests. (P-7-10)

82. The IEP characterizes the Student as “substantially” below level in reading, mathematics, and written expression. (P-7-12)

83. The Student was placed in a self-contained setting for some reading and math classes during 2012-2013. (Testimony of Witness A)

84. The Student’s behavior was much better in the self-contained classes than it was in the general education classes. (Testimony of Witness A)

85. The Student passed self-contained classes during 2012-2013. (Testimony of Witness A)

86. School C is using the Compass online credit recovery program for students during the 2013-2014 school year. The School has plans to use this program with the Student for the 2013-2014 school year. (Testimony of Witness A)

87. I found all the witnesses credible in this proceeding except for Mr. A, who I found partly credible. The grandparent testified in detail that she called Mr. A numerous times during the 2011-2012 school year to discuss the Student's evaluation and schedule an appointment to see [redacted]. When questioned about this, Mr. A first indicated that [redacted] did not remember receiving any such calls. Then, upon questioning by this IHO, Mr. A testified that the grandparent could not have called [redacted] so many times during the school year without [redacted] remembering it. I credit the grandparent over Mr. A. The grandparent provided believable detail about the calls, including as to the dates of the calls and the dates of the proposed appointments. Further, the record indicates that the grandparent engaged in like behavior while admitting the Student into School C. Witness A, from School C, testified that the grandparent requested an evaluation from School C upon entry to the school. Witness A also testified that, upon submitting paperwork to School C, the grandparent specifically referenced her prior request to evaluate the Student at School B.

CONCLUSIONS OF LAW

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

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

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and

provided in conformance with a written IEP (i.e., free and appropriate public education, or “FAPE”). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005). The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the “basic floor of opportunity,” is whether the child has “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” Rowley, 458 U.S. at 201. The IDEA, according to Rowley, imposes “no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children.” Id. at 198; A.I. ex rel. Iapalucci v. Dist. of Columbia, 402 F. Supp. 2d 152, 167 (D.D.C. 2005)

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

D.C. Code Sect. 38-2561.02 (a) provides that "DCPS shall assess or evaluate a student, who may have a disability and who may require special education services, within 120 days from the date that the student was referred for an evaluation or assessment." This means that DCPS "must conduct a full and individual initial evaluation" within the required time frame of 120 days

from the date of referral. IDEA Public Charter School v. McKinley, 570 F. Supp. 2d 28 (D.D.C. 2008); 34 C.F.R. Sect. 300.301(a); 5-E DCMR §3005.2. DCPS must assess a Student in all areas of suspected disability, determine eligibility, develop an IEP, and determine an appropriate placement within 120 days. Hawkins v. D.C., 539 F. Supp. 2d 108 (D.D.C. 2008); D.C. v. Abramson, 493 F. Supp. 2d 80, 85 (D.D.C. 2007).

The District of Columbia Municipal Regulations specify that a child with a suspected disability who may need special education "shall be referred, in writing, to an IEP team." 5-E DCMR Sect. 3004.1 (a). Regulations provide that a "parent or a person within a parental relationship¹" may initiate a referral. 5-E DCMR . Sect. 3004.1(b)(1). Regulations further indicate that the party requesting the referral must state the basis for the belief that the child has a disability. 5-E DCMR Sect. 3004.1(a)-(b).

The grandparent testified that she called the Respondent to refer the Student by speaking to Mr. A in August, 2011 and then again in September, 2011, November, 2011, and December, 2011. The grandparent described the approximate dates of the calls, the circumstances of these calls, and the approximate dates of the appointments that were set up thereafter. She also testified about speaking to a Mr. B about the situation, complaining that Mr. A had not kept appointments.

Mr. A testified in this case. When questioned about the grandparent's contentions, Mr. A first indicated that [redacted] did not remember receiving any such calls. Then, upon questioning by this IHO, Mr. A testified that the grandparent could not have called [redacted] so many times during the school year without [redacted] remembering it. Mr. A did not seem concerned or surprised by the about the grandparent's contentions.

¹ Respondent does not contest Petitioner's claim that she grandparent may bring this claim as a person within a parental relationship of the Student. This IHO agrees with Petitioner that she has the right to bring this action pursuant to 5E DCMR Sect. 3004.1(b)(1).

The grandparent provided energetic testimony in this connection. Further, the record establishes that the grandparent referred the Student while she was enrolling the Student into School C. Witness A, from School C, testified as much. Witness A also testified that, in her paperwork to enroll the Student into School C, the grandparent specifically referenced her prior requests to evaluate the Student at School B.

Given the above, this IHO credits the testimony of the grandparent over the rather vague, speculative testimony of Mr. A on this issue. I find that the grandparent did ask the school for an evaluation of the Student in August, 2011, September, 2011, October, 2011, December, 2011.

Respondent does not argue this particular point with much conviction. Rather, Respondent argues that the grandparent did not submit her request to evaluate in writing. However, Courts in the District of Columbia have not held parents to this standard given the “Child Find” obligations of school districts to identify and evaluate students in need of special education. In Scott v. District of Columbia, 2006 WL 1102839 (D.D.C. Mar. 31, 2006), DCPS made the same argument in response to a parent’s claims that DCPS failed to evaluate a student. The court noted the language in Reid v. District of Columbia, 401 F.3d 516, 519 (D.C.Cir.2005) and Branham v. District of Columbia, 427 F.3d 7, 8 (D.C.Cir.2005) and rejected this argument, indicating:

The Circuit's holdings require DCPS to identify and evaluate students in need of special education services and related services, whether or not parents have made any request, written or oral. The undersigned finds that Defendants' contention that DCPS was not required to evaluate J.B. because mother did not submit a written request is therefore without merit.

Scott, 2006 WL 1102839 at *7-*8.

It should be noted that, in connection to a parental request for an evaluation, DCPS must provide the parent with a copy of a procedural safeguards booklet describing the parent's rights and responsibilities regarding special education hearings. 5-E DCMR Sect. 3020.1(a)(1). The record indicates that no such safeguards were provided to the parent here. There was no way for this parent to know that she had to submit a written request for Respondent to evaluate this Student.

DCPS's primary argument here is that the testimony and evidence do not support the proposition that the Student would have eligible for services were an evaluation conducted in response to the grandparent's requests to evaluate.

The failure to conduct an evaluation should be characterized as a procedural violation. Lesesne v. District of Columbia, 447 F.3d 828, 834 (D.C. Cir. 2006). The question here is whether Respondent's failure to conduct this evaluation impacted this student in such a way that it impeded the Student's right to educational benefit, i.e., amounted to FAPE denial.

Petitioner suggests that the Student should have been deemed eligible for services as a Student with a Specific Learning Disability in 2011-2012. As defined in the DCMR, a Specific Learning Disability (SLD) is:

a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. SLD does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, mental retardation, emotional disturbance, or environmental, cultural or economic disadvantage. should have been deemed eligible for services as a Student with a specific learning disability.

5-E DCMR Sect. 3001.1.

In May, 2013, School C classified the Student as eligible for services as a student with a Specific Learning Disability. The LEA determined that the Student had deficits in reading, writing, math and social, emotional and behavioral areas. Goals were recommended in math, reading, writing and emotional, social, and behavioral development. The LEA's IEP states that the student's learning disability impacts ability to process information in large chunks, as well as follow multi-step problems for extended periods of time. The IEP notes that the Student struggles with identifying and analyzing the theme of a passage and needs support in sound/letter correlation, strategies for chunking words, extended time for reading assignments, and graphic organizers. The IEP indicates that the Student's letter word identifications skills and reading fluency are in the very limited range, and that passage comprehension is exceptionally low. This Student is 16 years old and still struggles reading basic paragraphs.

The IEP also indicates that the student cannot manage peer conflicts, struggles with recognizing emotions, and struggles with identifying how behavior impacts others. The IEP indicates that the Student has very elevated scores for defiance and aggression and learning problems based on observations from the parent, the teachers, and the Student. The IEP recommends that the Student receive 6 hours per week of specialized reading instruction outside general education, 6 hours per week of specialized math instruction outside general education, 2 hours per week of writing expression instruction outside general education, and behavioral support services outside general education for 60 minutes per week.

This IEP is consistent with an assessment of the Student that was conducted by order of the District of Columbia Family Court in November, 2012, 5 months after the 2011-2012 school year ended. This assessment found that the Student had such significant issues relating to language that was functioning at the fourth grade level when in ninth grade at School B. On

the Woodcock-Johnson Tests of Achievement-III, the Student scored a 70 in broad reading, at the 2nd percentile with a grade equivalent of 4.2. The Student scored a 69 in reading comprehension, at the 2nd percentile, with a grade equivalent of 4.0. The Student scored a 72 in reading fluency, at the 3rd percentile, with a grade equivalent of 3.7.

The IEP and the November, 2012 assessment are consistent with the Student's academic performance during 2011-2012. The Student failed every class at School B during the first and second quarter of 2011-2012, including English and Language and Composition. then failed several classes during the third quarter and was expelled in April, 2012. The Student was then forced to repeat the ninth grade, this time at School C.

Nevertheless, Witness C testified that the Student would not have been eligible for services as a student with a Specific Learning Disability during 2011-2012. Witness C focused on the fact that the Student's standard scores on the November, 2012 testing may not have been two standard deviations below the mean. However, Witness C's opinion did not take into account the regulatory requirements for determining eligibility for students with a Specific Learning Disability in the District of Columbia. The regulations do not suggest that a Specific Learning Disability classification is a function of the number of standard deviations that the Student tests below the mean. On the contrary, the DCMR looks broadly to whether the student's disorder "may manifest itself in an imperfect ability to listen, think, speak, read, write, spell. . . ." 5-E DCMR Sect. 3001.1.

It is reasonable to deduce that the Student had an imperfect ability to read in the 2011-2012 school year. Just five months later, the Student was a full five grade levels below was supposed to be in reading comprehension. reading fluency was very limited. was diagnosed with a Learning Disorder. There is nothing in the record to suggest that this Student's

reading skills might somehow have been better in the 2011-2012 school year than they were in November, 2012, or in May, 2013, when struggled to read a basic paragraph. The District's expert witness, Witness C did not state or suggest that the scores from November 2012 were an inaccurate mirror on the Student's 2011-2012 academic levels.

In sum, I find that the November, 2012 testing of the Student, when viewed together with the Student's failing grades, the subsequent IEP, and reports from School B indicating that the Student was doing poorly, are sufficient to support a finding of FAPE denial here.

It is noted that much recent caselaw in the District of Columbia favors parents in similar cases where there is a failure to conduct an initial evaluation and subsequent data revealed that the Student had a learning disorder or learning problems. In Long v. District of Columbia, 780 F. Supp.2d 49, 57 (D.D.C. 2011), Judge Gladys Kessler was presented with a case where an LEA failed to evaluate a Student in 2006 and the LEA ended up determining the Student to be eligible for services in 2009. In that case, as here, DCPS argued that the parents had failed to establish any harm to the student. Reversing the IHO, Judge Kessler concluded that the Student would have been eligible in 2006 because of a single psychoeducational assessment conducted in 2006 by an independent evaluator who found that the student had a learning disorder. See also N.G. v. District of Columbia, 556 F. Supp.2d 11, 36-37 (D.D.C. 2008)(reversing IHO, Court relied on grades, attendance and student's emotional state to determine that the failure to evaluate resulted in FAPE denial); cf. Gersten v. District of Columbia, 924 F. Supp.2d 273 (D.D.C. 2013)(reversing IHO, court held that failure to evaluate automatically resulted in FAPE denial); Hawkins v. District of Columbia, 539 F. Supp.2d 108 (D.D.C. 2008)(reversing IHO, even where no subsequent assessment or diagnosis, DCPS found to have substantively harm student and denied student a FAPE).

Respondent also argues that the Student was not denied a FAPE because of poor attendance at the school. Caselaw indicates that Districts should not be held liable where students are not interested in attending an appropriate program. Garcia v. Albuquerque Public Schools, 520 F.3d 1116, 1127 (10th Cir. 2008)(Student's patterns of misbehavior would have prevented her from getting an educational benefit no matter what the District did). However, the record suggests to this IHO that this is a Student who, with appropriate special education services, would attend school. When the Student entered School C, staff almost immediately created an informal behavior plan to address the Student's attendance issues. This plan was reformulated in May, 2013. Witness A from School indicated that the Student has responded to special education interventions at School C. This witness indicated that the Student has done better in special education classes in math and reading at School C.

No witnesses were called by Respondent from School B to support the District's point that this was a Student who was not interested in coming to school even if were offered an appropriate education. It is noted that some of the evidence in the record suggests that the Student attended most of classes in 2011-2012. Though there is also some evidence that the Student's attendance was poor during the year (R-4), the Student's grade report from 2011-2012 indicates that the Student did not miss any classes in Language and Composition during the first two semesters, and did not miss any classes in World History during the first three semesters. (R-3) Nevertheless, failed both classes for all semesters, was expelled from school, and had to repeat the ninth grade at School C.²

As a result of the foregoing, I find that DCPS denied the Student a FAPE when it failed to evaluate at School B during the 2011-2012 school year.

² It should be pointed out that local Courts have recently found that students who are eligible for services as students with a specific learning disability may require BIPs. Long v. District of Columbia, 780 F. Supp.2d 49 (D.D.C. 2011); Shelton v. Maya Angelou Public Charter School, 578 F.Supp.2d 83 (D.D.C.2008).

As a remedy, Petitioner seeks compensatory education consisting of 4 hours per week of tutoring in the subjects of reading, writing and math to allow the Student to make up credits missed in 2012-2013.

One of the equitable remedies available to a hearing officer is compensatory education. Under the theory of compensatory education, courts and hearing officers may award “educational services...to be provided prospectively to compensate for a past deficient program.” Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F. 3d at 524.

A Petitioner need not "have a perfect case" to be entitled to a compensatory education award." Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011) Under the IDEA, if a Student is denied a FAPE, a hearing officer may not “simply refuse” to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010) Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Petitioner’s request for compensatory education is supported by testimony from an expert who indicated that such services are appropriate given the amount of time that the Student missed during the 2011-2012 school year. The expert, Witness B, testified that that these services should be designed so as to provide the Student with credits that were missed during the 2011-2012 school year. The Student’s current school, School C, in fact has a credit recovery program and intends to direct the Student to it for the 2013-2014 school year. Under the

circumstances, this compensatory education plan is within the mandate of Reid to provide services that would make up for educational services missed.

Since the District did have 120 days to complete its evaluation and determine the Student to be eligible, I find that the Student was only deprived of educational services from January, 2012 to June, 2012. Accordingly, I will order the District to provide the Student with 4 hours of compensatory education in the form of tutoring weekly to make up for credits missed during that six month period. To insure that the Student benefits from this tutoring regularly, I will require regular attendance in connection to this tutoring.

ORDER

Based upon the above Findings of Fact and Conclusions of Law:

1. Respondent is adjudged to have denied the Student a FAPE by failing to evaluate the Student after the grandparent's requests to evaluate from August, 2011 through January, 2012;
2. Respondent is ordered to provide the Student with 4 hours of individualized tutoring each week for a six month period during the 2013-2014 school year. Such services shall be provided in reading, math and writing, and shall be designed to help the Student complete credit recovery courses. Such services shall be provided by a certified teacher. Such services must be completed by the end of the 2013-2014 school year;
3. Tutoring may be provided by an employee of Respondent;
4. Any and all absences from the tutoring program must be documented by a note from a physician, and such medical note shall be provided to Respondent within 5 business days of the absence date;

5. If Petitioner fails to provide a medical note relating to such absence date to Respondent so that Respondent receives it within 5 business days of the absence date, the tutoring program may be terminated by Respondent upon written notice to Petitioner.

Dated: September 8, 2013

Michael Lazan
Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: September 8, 2013

Michael Lazan
Impartial Hearing Officer