

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

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

Parent, on behalf of the Student,¹

Petitioner,

v.

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

Respondent.

Date Issued: March 7, 2011

Hearing Officer: Ramona M. Justice

Case No:

Hearing Room: Room 2004

HEARING OFFICER DETERMINATION

I. INTRODUCTION

On January 3, 2011, the parent, through her Attorney, filed with the District of Columbia, Office of the State Superintendent of Education ("OSSE"), Student Hearing Office, an "Administrative Due Process Complaint Notice", on behalf of the student, alleging that the District of Columbia Public Schools, hereinafter referred to as "DCPS" or "Respondent", denied the student a free appropriate public education (FAPE), because it failed to:

- (1) Evaluate the student in all areas of suspected disability, and review the evaluations;
- (2) Develop an appropriate Individualized Education Program (IEP) for the student, during the 2010/11 school year; and
- (3) Provide the student an appropriate placement during the 2010/11 school year.

The Petitioner requests the following relief:

- (1) A full-time therapeutic school of the Petitioner's choice.
- (2) An independent Educational Evaluation (IEE) consisting of a Clinical Psychological Assessment.

¹ Personal identification information is provided in Appendix A.

- (3) Compensatory Education to compensate the student for services missed during the present school year, as a result of the Respondent's failure to address the student's anxiety.

On January 4, 2011, the Student Hearing Office assigned the due process complaint to Hearing Officer Jim Mortenson. On January 4, 2011, the Hearing Officer issued to the parties a "Notice of Prehearing Conference", scheduling the prehearing conference for January 14, 2011, at 11:00 a.m.; the due process hearing for February 17, 2011, at 9:00 a.m.; and a request that the parties notify the Hearing Officer of the date, time, and outcome of the resolution meeting. The Respondent filed a response to the complaint on January 12, 2011.

According to the IDEA, a resolution meeting must be held within fifteen (15) calendar days from the date of the complaint, which was filed in this matter on January 3, 2011. Therefore, the Respondent must convene a resolution meeting no later than January 18, 2011. The thirty (30) day resolution period expired on February 2, 2011. The resolution meeting was held on January 21, 2011, therefore, the forty-five (45) day timeline for convening a hearing and issuing a decision began on January 22, 2011, the date after the resolution meeting; and expires on March 7, 2011.

The prehearing conference was held on January 19, 2011; and on January 19, 2011, the Hearing Officer issued a prehearing order summarizing the matters discussed during the prehearing conference, the issues before the Hearing Officer; and confirming the due process hearing for March 3, 2011, from 9:00 a.m. to 5:00 p.m. . .

On January 25, 2011, the Respondent filed a Due Process Complaint Disposition, notifying the Hearing Officer that the resolution meeting was held on January 21, 2011, with no resolution; and that the parties request that the matter proceed to hearing. On February 18, 2010, the due process complaint was reassigned to this Hearing Officer.

The due process hearing convened on March 3, 2011, at 9:00 a.m., as scheduled, at 810 First Street, N.E., 2nd Floor, Washington, D.C. . . The hearing was closed to the public, pursuant to the parents' request. Each party was represented by counsel; and both counsels provided opening statements. There were no preliminary matters.

The Petitioner offered into evidence Petitioner's Exhibits 1-16; and the Respondent offered into evidence Respondent's Exhibits 1-12. Receiving no objections to the disclosures submitted, the disclosures submitted by the parties were admitted into the record as evidence.

Petitioner's witnesses included: petitioner; student, student's Education Advocate, and student's family therapist; and the Respondent's witnesses included: the Special Educational Coordinator, Special Education Teacher, and the student's school Counselor. The due process hearing concluded with the parties providing closing arguments.

II. JURISDICTION

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

III. BACKGROUND

The student is _____ years of age; and a _____ grade student at a District of Columbia Junior Public Charter School. The student has attended the school since the 2009/10 school year. The charter school adopts an inclusion model of teaching; where students such as this student, receives special education services in the general education setting, with nondisabled students.

The student has a history of social/emotional difficulties, impacting the student's learning, educational performance, and access to the general education curriculum. Since attending the charter school, the student has had difficulty functioning in the general education inclusion setting.

On January 3, 2011, the parent, through her Attorney, filed a due process complaint on behalf of the student. During the prehearing conference, the issues were revised wherein the Petitioner is challenging the Respondent's evaluation of the student; revision of the student's June 15, 2010 IEP; and the appropriateness of the student's placement, during the 2010/11 school year.

IV. ²ISSUES

The following issues are before the Hearing Officer:

- (1) Whether the District of Columbia Public Schools denied the student a free appropriate public education, by failing to evaluate the student in all areas of suspected disability, because it failed to conduct a Comprehensive Psychological Evaluation, to address the student's social/emotional needs; in violation of the IDEA, at 34 C.F.R. §300.304 (c)(4) and (6)?
- (2) Whether the District of Columbia Public Schools denied the student a free appropriate public education, by failing to revise the student's June 15, 2010 IEP during the 2010/11 school year, to address the student's lack of expected progress in the general education curriculum; in violation of the IDEA, at 34 C.F.R. §300.324 (b)(1)(ii)(A)?

² Petitioner withdrew Issue 1 of the complaint, prior to proceeding with a hearing on the merits of the issues in the complaint.

- (3) Whether the District of Columbia Public Schools failed to provide the student an appropriate placement during the 2010/11 school year, because the *location of services* identified in the student's June 15, 2010 IEP, is unable to provide the student the full-time special education program, outside general education, which she requires to access the general education curriculum and receive educational benefit; in violation of the IDEA, at 34 C.F.R. §§300.114(a)(2)(ii), 300.116 (a)(2) (b)(2); and 300.513?

V. CREDIBILITY DETERMINATIONS

The Hearing Officer finds that the testimony of all witnesses at the hearing was credible; although recommendations of the school Counselor, regarding the student's placement, were conflicting.³ The Respondent presented no witness testimony that contradicted the testimony of Petitioner's witnesses.

VI. 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 _____ years of age, and resides in the District of Columbia with her mother, the Petitioner, and siblings.⁴ The student has a history of social/emotional difficulties; and has a diagnosis of dysthymic disorder, anxiety disorder, disruptive behavior disorder, and a learning disorder.⁵ These disorders have had an adverse impact on the student's learning, educational performance, and ability to access the general education curriculum.
2. The student is disabled and eligible to receive special education services under the Individuals with Disabilities Education Act (IDEA); and the student's disability classification is Multiple Disabilities (MD), including emotionally disturbed (ED), and learning disabled (LD).⁶
3. The student is in the _____ grade at a District of Columbia Public Junior Public Charter School; which she began attending during the 2009/10 school year.⁷ The Charter School adopts an inclusion model of teaching; where students such as this student, receives special education services in the general education setting, with nondisabled students.⁸

³ At the November 23, 2010 IEP team meeting, the Counselor stated that the student requires and would benefit from a *smaller class setting* because of the student's issues of avoidance, and the student requires counseling to address anxiety, social issues, and low confidence.³ However, at the hearing the Counselor recommended a combination/resource room setting; small class in a therapeutic environment, where the student can receive 1:1 instruction in mathematics, and emotional support; and a small school, because the student has difficulty with basic life skills, problem solving, navigating public transportation, and low social skills.

⁴ Petitioner's Exhibit 1.

⁵ Petitioner's Exhibit 9, page 4.

⁶ Petitioner's Exhibit 4.

⁷ Testimony of student and parent.

⁸ Testimony of student's special education teacher.

The school has a student population of approximately 200 students; the student's classes consist of approximately 15-20 students; and students are expected to transition between classes, independently, within the extended population of students.⁹

4. During the beginning of the 2009/10 school year, the student attended classes regularly, however, spent the majority of time in the school counselor's office, due to the student's school based anxiety.¹⁰ As a result, the student failed all classes during the 2009/10 school years.¹¹ The Respondent advanced the student to the _____ grade, although the father disagreed, because the student failed all of her classes during the _____ grade.
5. At the beginning of the 2010/11 school year, the charter school delayed in providing students class schedules, and because of the delay, the parent enrolled the student at _____ the student's neighborhood school.¹² The student attended the school for approximately one week, however, decided not to remain at the school because the school population was too large, the classes were too large, and there were additional distractions in the classrooms.¹³

The parent returned the student to the charter school, however, since returning to the school, the student continued to struggle academically, socially, and emotionally, in the general education setting, due to the student's school based anxiety.¹⁴ The student's attendance began to suffer, and since November, 2010, the student failed to return to school or the general education inclusion setting.¹⁵

6. On *April 15, 2009*, a *Psycho-educational Evaluation* was completed.¹⁶ Test results revealed that the student's cognitive abilities were not commensurate with her academic achievement skills, indicating the presence of a learning disability, in mathematics, reading comprehension, written language, and oral language skills.¹⁷
7. On *April 24, 2009*, a *Clinical-Psychological Evaluation* was completed, to assess the student's social and emotional functioning.¹⁸ The student received a diagnosis of *dysthymic disorder, anxiety disorder, disruptive behavior disorder, and learning disorder*.¹⁹

⁹ Testimony of student's special education teacher, and school Counselor.

¹⁰ Petitioner's Exhibit 11, and Petitioner's Exhibit 12.

¹¹ Testimony of parent, and Petitioner's Exhibit 11..

¹² Testimony of parent.

¹³ Testimony of parent.

¹⁴ Petitioner's Exhibit 1, Petitioner's Exhibit 9, page 4, testimony of parent, student, school Counselor, and Family Therapist.

¹⁵ Respondent's Exhibit 6.

¹⁶ Petitioner's Exhibit 9, page 1.

¹⁷ Petitioner's Exhibit 9, page 2.

¹⁸ Petitioner's Exhibit 9, page 1.

¹⁹ Id.

Test results revealed that the student has difficulty with conflict resolution; is experiencing anxiety, tension, and mild depression associated with her inability to perform on par with same-age peers.²⁰ The evaluator recommended, among others, a *small class setting where the student can receive 1:1 attention and support, in order to improve her academic and psychosocial functioning; and counseling.*²¹

8. On **January 14, 2010**, at the request of the student's mother, an ***Educational Evaluation*** was completed, to assess the student's academic functioning.²² The student was administered the Woodcock Johnson III: Test of Achievement.²³ According to standardized tests of academic achievement, the student's overall level of academic achievement is low average; and when compared to others at her grade level, the student's standard scores are within the low average range in broad reading, very low range in broad math, and average range within the broad written language areas of academia; and the student is performing significantly below grade level..²⁴
9. On **March 11, 2010**, the Respondent convened a Multidisciplinary Development Team (MDT) meeting.²⁵ The team reviewed the student's Educational Evaluation; discussed the student's academic performance; and the student's social/emotional status.²⁶ During discussion of the student's placement, the parent advised the team that she was satisfied with the student's placement at that time; and was not requesting a full-time placement or alternative academic setting for the student.²⁷ The Respondent agreed that the student's placement was appropriate, at that time.²⁸ The student's Educational Advocate stated that the student's placement should be revisited to reassess the student's progress, with interventions the school proposed to implement.²⁹
10. On **June 15, 2010**, the Respondent convened a Multidisciplinary Development Team (MDT) meeting, to update the student's May 20, 2009 IEP.³⁰ The MDT meeting proceeded without the parent and Education Advocate, to ensure that the IEP was reviewed and revised in a timely manner; and the Respondent documented efforts to include the parent in the meeting.³¹ The MDT adopted the student's social emotional goals, and revised the student's IEP to reflect an increase in the level of specialized instruction the student received, from 5 to 10 hours per week; and an increase in behavioral support services the student received, from 1 to 1.5 hours per week.³²

²⁰ Petitioner's Exhibit 9, page 4.

²¹ Id.

²² Petitioner's Exhibit 10, page 1.

²³ Id.

²⁴ Petitioner's Exhibit 10, page 3.

²⁵ Respondent's Exhibit 5.

²⁶ Id.

²⁷ Respondent's Exhibit 5, page 4; and Petitioner's Exhibit 3, page 2.

²⁸ Respondent's Exhibit 5, page 4.

²⁹ Petitioner's Exhibit 3, page 2.

³⁰ Respondent's Exhibit 3, page 1.

³¹ Respondent's Exhibit 3, page 2.

³² Respondent's Exhibit 3, pages 3 and 4.

Occupational therapy services were also included in the IEP, as well as, classroom and state assessment accommodations and supports.³³ In the IEP, the student's mathematics, reading, and written expression teachers noted that due to the student's behavior and learning disabilities, the student *has difficulty accessing the general education curriculum, without the support of the resource staff*, reflecting that the student is unable to work independently and requires 1:1 academic support.³⁴

11. On **November 3, 2010**, the Respondent issued to the parent a Letter of Invitation for a meeting on November 23, 2010, to review and update the student's present level of functioning, needs, goals and objectives, and develops a plan to provide special education and related services.³⁵
12. On **November 19, 2010**, the student was accepted to attend The _____ located in Hyattsville, Maryland, for the 2010/11 school year.³⁶
13. On **November 23, 2010**, the Respondent convened a MDT meeting for the purpose of discussing the student's attendance; and the Petitioner attended the meeting with the expectation that the purpose of the meeting was to discuss the level of specialized instruction services the student received; and the student's placement.³⁷

During the meeting, the student's father and Education Advocate requested a full-time special education program, self contained academic setting, and an increase in services hours.³⁸ The father advised the team that according to the student she does not prefer the current placement because there are too many students in her classes, and because of the frustration and embarrassment she experiences because of an inability to complete the assignments.³⁹ The father also advised the team that historically the student prefers schools with smaller classroom settings.⁴⁰

The father advised the team that the student is not prepared to proceed to the _____ grade, because she failed all of her 9th grade classes.⁴¹ The father requested placement of the student in a smaller setting, where the student can receive additional academic support; and advised the team that a resource room is not appropriate because the student does not prefer being pulled out of class to receive specialized instruction services, because of harassment from other students.⁴² The Special Education Coordinator advised the team that the student informed her that she does not prefer a large setting with a large number of students.⁴³

³³ Petitioner's Exhibit 4, page 13, and Respondent's Exhibit 4, page 11.

³⁴ Respondent's Exhibits 4, pages 3, 4, 5, 6, and 7.

³⁵ Petitioner's Exhibit 14, page 2.

³⁶ Petitioner's Exhibit 15.

³⁷ Testimony of Special Education Coordinator (SEC), and Education Advocate; and Respondent's Exhibit 2.

³⁸ Id.

³⁹ Testimony of parent.

⁴⁰ Id.

⁴¹ Petitioner's Exhibit 5, page 1.

⁴² Petitioner's Exhibit 6, page 3, and page 6.

⁴³ Petitioner's Exhibit 6, page 3.

The student's Counselor advised the team that the student transferred to _____ for one week, however, returned to the charter school because the school was too large.⁴⁴ The Counselor also advised the team that the student is scheduled to receive 1.5 hours of behavioral support services per week, however, due to the student's increased stress related to her inability to function in the school setting, the student spends as much as 4 hours in counseling, each week.⁴⁵

The Counselor concluded that the student requires and would benefit from a *smaller class setting* because of the student's issues of avoidance, and the student requires counseling to address anxiety, social issues, and low confidence.⁴⁶ The Special Education Coordinator and student's special education teacher disagreed that the student requires a full-time special education setting.⁴⁷ The team also discussed the student's sporadic attendance; and threat of suicide.⁴⁸

The Respondent advised the parent and Education Advocate that a full team of specialists was necessary to revise the student's IEP, to reflect a full-time special education program, outside general education; and agreed to reconvene the IEP team meeting, to discuss a change in the level of services, and educational setting, in the student's IEP.⁴⁹

The Respondent represents that a follow-up letter was forwarded to the student's father requesting a follow-up meeting; and a telephone message was left with Petitioner's Attorney requesting a follow-up meeting, and neither responded. However, the Respondent presented no evidence of documented efforts to reconvene an IEP team placement meeting, to revise the student's IEP, discuss and determine placement.⁵⁰

14. Failure to Revise the Student's June 15, 2010 IEP to Address Lack of Progress

The Hearing Officer finds that during the 2010/11 school year, the Respondent failed to review the student's June 15, 2010 IEP to determine whether the annual goals of the student are being achieved; and failed to *revise* the student's IEP to address the student's lack of progress toward the annual goals in the IEP, and in the general education curriculum.⁵¹

First, the student's IEP is dated *June 15, 2010*, expiring on *June 15, 2011*. At the time that the IEP was developed, the student had failed all classes during the 2009/10 school year; receiving minimum to no educational benefit. Although the Respondent increased-

⁴⁴ Petitioner's Exhibit 5, page 2; and Petitioner's Exhibit 6, page 4.

⁴⁵ Petitioner's Exhibit 5, page 2.

⁴⁶ Petitioner's Exhibit 6, page 5.

⁴⁷ Petitioner's Exhibit 6, page 6.

⁴⁸ Petitioner's Exhibits 5, and 6, page 4.

⁴⁹ Petitioner's Exhibit 6, page 7, and Petitioner's Exhibit 5, page 3.

⁵⁰ Testimony of parent and Education Advocate.

⁵¹ Testimony of parent, Education Advocate, and SEC.

the level of specialized instruction from 5 to 10, the student's recent academic regression proves that at the time the IEP was developed, it was not reasonably calculated to provide the student educational benefit, or specifically designed to address the unique educational needs of this student.

Second, at the time the June 15, 2010 IEP was developed, the Respondent was aware that during the 2009/10 and 2010/11 school year, the student experienced increased stress, anxiety, and suicidal ideations, due to her inability to access the general education curriculum, and function in the general education setting; the student required an increase in the level of behavioral support services to address these behaviors; and that the student failed to progress academically in the general education setting during this period.⁵²

The Respondent increased the level of behavioral support services from 1 to 1.5, however, the student's behavioral regression during the 2010/11 school year, proves that at the time the IEP was developed, it was not reasonably calculated to provide the student educational benefit, or specifically designed to address the unique educational needs of this student.

Third, at the November 23, 2010 IEP team meeting, the student's teachers, school Counselor, parent, and Education Advocate reiterated concerns regarding the student's school based stress and anxiety, impacting her ability to access the general education curriculum, and function in the general education setting; the student's need for a small academic setting; and the impact on the student academic, emotional, and psychological functioning. The Respondent failed to carefully consider this information, and failed to revise the student's IEP.

Fourth, the Petitioner alleges that on November 23, 2010, the Respondent failed to comply with the procedural requirements of the IDEA, by failing to ensure that the IEP team include a representative of the public agency qualified to provide, or supervise the provision of specially designed instruction to meet the unique needs of the student; and as a result, the Respondent either was unable or refused to revise the student's IEP to address the student's lack of progress towards the goals in the June 15, 2010 IEP.

There is no evidence that on November 23, 2010, the Respondent failed to comply with the procedural requirements of the IDEA, by failing to ensure that the IEP team included an individual of the public agency qualified to provide, or supervise the provision of specially designed instruction to meet the unique needs of the student.

The team was properly convened to include the Special Education Coordinator, a representative of the public agency, parent, student's special education teacher, education advocate, and school Counselor; individuals having knowledge of the student and her educational needs. Therefore, the Respondent erred in its decision that the team was insufficient, and the IEP could not be revised to address the student's lack of expected progress towards the goals in the student's June 15, 2010 IEP.

⁵² Petitioner's Exhibit 5, page 2.

Finally, the April 15, 2009, Clinical Psychological Evaluation clearly states that *the student requires a small class setting whereby she can receive 1:1 attention and support in order to improve her academic and psychosocial functioning.*⁵³ This is supported by the recommendations of the student's school counselor; and independent counselor. However, the Respondent failed to carefully consider this information, failed to revise the student's IEP to address the level of services the student requires; and failed to address the student's lack of expected progress towards the goals in her IEP.

15. Failure to Provide the Student an Appropriate Placement (Location of Services)

The Hearing Officer finds that the District of Columbia Public Schools failed to provide the student an appropriate placement during the 2010/11 school year, because the *location of services* identified in the student's June 15, 2010 IEP, is unable to provide the student the full-time special education program, outside general education, which she requires to access the general education curriculum and receive educational benefit;

First, the Petitioner alleges that on November 23, 2010, the Respondent failed to comply with the *procedural* requirements of the IDEA, by failing to ensure that the IEP team included a representative of the public agency having knowledge of the availability of resource of the public agency (i.e. placement options and continuum of alternative placements).

The record reflects that on November 3, 2010, the Respondent issued to the parent a Letter of Invitation (LOI) for a meeting on November 23, 2010, for the purpose of reviewing and updating the student's present level of functioning, needs, goals and objectives, and to develop a plan to provide special education and related services.⁵⁴ The LOI did not state that the purpose of the meeting was to discuss possible changes in the student's placement.⁵⁵ Therefore, the Petitioner's allegation is misplaced; and the Respondent was not obligated to ensure that the November 23, 2010 IEP team included a placement specialist.

However, once the Respondent received the parent's November 23, 2010 request for a change in the student's placement, it had an obligation to either convene an IEP team placement meeting, to discuss concerns of the parent, and determine the student's placement; or within a reasonable period of time of receiving the request, issue to the parent prior written notice of its refusal to initiate a change in the educational placement of the student, including an explanation of reasons the agency refuses to change the student's placement. As of the date of this decision, the Respondent failed to comply with the procedural requirements of the IDEA, by convening a placement meeting, or issuing to the parent, a prior written notice.

⁵³ Petitioner's Exhibit 9.

⁵⁴ Petitioner's Exhibit 15.

⁵⁵ Id.

Second, the nature and severity of the student's disabilities are such that education in the general education setting, cannot be accomplished satisfactorily; even with the use of supplementary aids and services.⁵⁶ The student requires a more restrictive academic setting, outside general education, in a small structured therapeutic environment, a-classroom with a small student to teacher ratio and small school population, and a school where she can receive 1:1 academic support throughout the school day, which is unavailable at the student's current placement.⁵⁷

Third, the Respondent is aware that during the 2009/10 and 2010/11 school year the student was unable to access the general education curriculum, in the general education setting, or receive educational benefit; that the student failed all classes during the 2009/10 school year, is failing all classes during this school year; and that the school is unable to provide the student education outside the general education setting, however, it has failed to ensure the availability of a continuum of alternative placements, to meet the needs of this student, and to enable the student to obtain some 'meaningful' educational benefit.

Fourth, at the November 23, 2010 IEP team meeting, the father and student's Education Advocate requested an increase in the level of specialized instruction services, to provide the student 1:1 academic support throughout each day; and a smaller class setting.

The father expressed concerns of the student to the team, which is that the student is unable to function in the general education setting, and the student does not want to attend this school because the classes are too large, and the student's frustration and embarrassment associated with her lack of understanding of the class assignments; and inability to function in the general education setting. However, the Respondent disregarded this information; and failed to carefully consider the potential harm on the student and the quality of education the student requires, by maintaining the student's placement in the general education setting.

The student's school Counselor reported that although the student's IEP prescribes 1.5 hours per week of counseling services, there are occasions where the student spent as much as 4 hours a week due to stress. The student's school Counselor, Special Education Coordinator (SEC), and special education teacher stated that the student would benefit from a combination of resource and inclusion, which the father disagreed. However, the student's IEP was not revised to reflect a combination/resource room setting; and this setting would not address the student's school based anxiety. This recommendation is also contrary to the SEC's report to the team that she provided the student the opportunity to visit the schools' resource room, and option of education in the resource room, and since that time, the student has not returned to school.

⁵⁶ Petitioner's Exhibits 9 and 10, and testimony of parent, student, school counselor, and Family Therapist.

⁵⁷ Testimony of parent, student, Family Therapist, school Counselor, and Petitioner's Exhibits 9, page 4.

Finally, the April 15, 2009, **Clinical Psychological Evaluation** clearly states that *the student requires a small class setting whereby she can receive 1:1 attention and support in order to improve her academic and psychosocial functioning*, however, the Respondent disregarded this information; and maintained the student's placement in the general education setting, where she continues to regress academically.

An **Educational Evaluation** completed on January 14, 2010, reflects that according to the Woodcock-Johnson Tests of Achievement, the student scores ranged from very low to average indicating that *the student will have varying degrees of difficulty completing assignments appropriate to her age group*.⁵⁸ The evaluator recommends an *educational program appropriate to the student's unique needs*.⁵⁹

VII. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as the Hearing Officer's review of governing legal authority and case law, the Conclusions of Law of this Hearing Officer are as follows:

1. The burden of proof is properly placed on the Petitioner, the party seeking relief in this matter.⁶⁰ Under the IDEA, the Petitioner must prove the allegations in the due process complaint, by a preponderance of the evidence.⁶¹
2. The Individuals with Disabilities Education Act ("IDEA")⁶² is the federal statute governing the education of students with disabilities.⁶³ The IDEA ensures that all children with disabilities have available to them a free appropriate public education ("FAPE"), that emphasizes special education and related services specifically designed to meet their unique needs and prepare them for further education, employment, and independent living. See, 20 U.S.C. §1400(d)(1)(A).
3. The IDEA defines a free appropriate public education (FAPE) as special education and related services provided at public expense, under public supervision and direction, and without charge; meet the school standards of the State educational agency; includes an appropriate preschool, elementary school, or secondary school education in the State-involved; and the special education and related services must be provided in conformity with an Individualized Education Program (IEP) that meets the requirements of §§300.321 through 300.324.⁶⁴

⁵⁸ Petitioner's Exhibit 10-2.

⁵⁹ Petitioner's Exhibit 10-3.

⁶⁰ *Shaffer v. I Weast*, 546 U.S. 49, 56-057 (2005) and 5 D.C.M.R. §3030.3.

⁶¹ 20 U.S.C. §14115(i)(2)(c). See also *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir.2005) (standard of review)

⁶² The IDEA is reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) Public Law 108-446 and 20 U.S.C. §1400 et seq..

⁶³ The Federal regulations promulgated under the IDEA, are codified at 34 C.F.R. Part 300.

⁶⁴ IDEA, 34 C.F.R. §300.17(d).

In the District of Columbia, the local education agency (LEA) must ensure that all children with disabilities, between the ages of 3 and 21, have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. This student is a child with disabilities entitled to receive special education and related services, pursuant to the IDEA.

4. Hence, the U.S. Supreme Court has held that the FAPE required by the IDEA consists of an educational program specifically tailored to address the unique needs of the student by means of an 'individualized education program' (IEP).⁶⁵

According to *Rowley*, in order for FAPE to be offered a student, the school district must show it complied with the statutory elements of an IEP, and the goals and objectives in the IEP are reasonable, realistic and attainable. The special education and related services must be reasonably calculated to enable the child to receive educational benefit, and must be likely to produce progression, not regression.

5. When parents challenge the appropriateness of a *program or placement offered to their disabled child by a school district under the IDEA*, a Hearing Officers must undertake the following two-fold inquiry, in determining whether the Respondent provided the student a FAPE: 1) procedural compliance; and 2) educational benefit.

In this matter, the Petitioner challenges the Respondent's compliance with the *procedural* requirements of the IDEA; and the Respondent's compliance with the *substantive* requirements of the IDEA, in revising the student's June 15, 2010 IEP, and determining the student's placement.

(1) Procedural Compliance (Procedural FAPE).

First, the Hearing Officer must determine whether the State complied with the *procedural requirements* of the IDEA, in creating and implementing the student's IEP, or rendering the placement decision. However, the 2004 amendments to IDEA, at Section 615(f) (ii) specifically limit the jurisdiction of administrative hearing officers to make findings that a child did not receive FAPE due to procedural violations, unless it can be determined that the inadequacies:

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

⁶⁵ Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley, 458 U.S. 176 (1982).

(2) Conferral of Some Educational Benefit (Substantive FAPE).

Second, once the Hearing Officer addresses the first criteria, it must determine whether the State complied with the *substantive requirements* of the IDEA, by developing an IEP for the student that is reasonably calculated to enable the student to receive educational benefit. While a student's IEP must be reasonably calculated to provide a student educational benefit, school districts are required to provide only a "basic floor of opportunity." *Rowley*, 458 U.S. at 200-01. Thus, an "appropriate" public education does not mean the absolutely best or potential-maximizing education for the individual child. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (1987). However, the benefit cannot be trivial, *Rowley*, 458 U.S. 176, at 177 206-207.

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

6. Failure to Revise the Student's June 15, 2010 IEP to Address Lack of Progress

It is the Hearing Officer's decision that the Petitioner satisfied its burden by proving that the Respondent denied the student a free appropriate public education, by failing to revise the student's June 15, 2010 IEP during the 2010/11 school year, to address the student's lack of expected progress in the general education curriculum; in violation of the IDEA, at 34 C.F.R. §300.324 (b)(1)(ii)(A).

During the 2010/11 school year, the Respondent failed to comply with the *procedural* requirements of the IDEA, because it failed to convene an IEP team meeting, to address the student's lack of expected progress towards the goals in the June 15, 2010 IEP; and failed to issue to the parent a prior written notice of its decision not to revise the student's IEP to address the student's lack of progress in the general education curriculum.

The Respondent also failed to comply with the *substantive requirements* of the IDEA, by ensuring that an IEP team *reviewed* the student's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; *and revised*, as appropriate, to address any *lack of expected progress toward the annual goals* described in §300.320(a)(2), *and in the general education curriculum*, if appropriate; the results of any reevaluation conducted under §300.303; *information about the child provided to, or by, the parents*, as described under §300.305(a)(2); and the child's anticipated needs; or other matters.

The Respondent also failed to comply with the *substantive requirements* of the IDEA, 34 C.F.R. §300.324(a) (1) because it failed to consider: 1) *concerns of the parents for enhancing the student's education*; 2) *results of the initial or most recent evaluation* of the student; and 3) *academic, developmental, and functional needs of the student*.

IDEA also provides that on the basis of the IEP review, and input from the child's parents, the team *must* identify what additional data, if any, are needed to determine, among others, *whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum*, which failed to occur in this matter.

7. Failure to Provide the Student an Appropriate Placement (Location of Services)

It is the Hearing Officer's decision that the District of Columbia Public Schools denied the student a free appropriate public education, by failing to provide the student an appropriate placement during the 2010/11 school year, because the *location of services* identified in the student's June 15, 2010 IEP, is unable to provide the student the education outside the general education setting, which she requires to access the general education curriculum and receive educational benefit; in violation of the IDEA, at 34 C.F.R. §§300.114(a)(2)(ii), 300.116 (a)(2) (b)(2); and 300.513.

First, the IDEA provides that each public agency must ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only *if* the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be accomplished satisfactorily, as in this case.⁶⁶

The nature and severity of this student's disabilities (school based anxiety disorder adjustment disorder, mood disorder, learning disorder, and depression) are such that education in the regular classes with the use of supplementary aids and services cannot be accomplished satisfactorily; the student is unable to access the general education curriculum.⁶⁷

The primary cause of the student's anxiety is school based, particularly, the school population and class sizes are too large for the student to manage; the student has difficulty transitioning between classes with a large number of students; class assignments are difficult for the student to comprehend.⁶⁸ The student also presents with deep rooted emotional issues, requiring consistent attention.⁶⁹

⁶⁶IDEA, at 34 C.F.R. §30.114(a)(2)(ii); and Letter to Tom Trigg.

⁶⁷ Testimony of Family Therapist, parent, student.

⁶⁸ Testimony of Family Therapist.

⁶⁹ Id.

The student requires a full-time special education program, outside general education, specifically tailored for student's with emotional and learning disabilities; a small structured therapeutic environment, with a small student to teacher ratio, where the student can receive 1:1 academic support throughout the school day; with minimum distractions and stimuli, which is not available at the student's current placement.⁷⁰

Second, the IDEA provides that each public agency must ensure the availability of a continuum of alternative placements, to meet the needs of children with disabilities for special educational and related services; which the Respondent failed to provide the student during the 2010/11 school year.⁷¹

Third, the Respondent failed to comply with the *substantive* requirements of the IDEA, because during the 2010/11 school year, the Respondent failed to convene an IEP team placement meeting to determine the student's placement; and the placement decision was not made in conformity with the least restrictive environment (LRE) provisions of the IDEA; although it has been evident since the beginning of the 2010/11 school year that this student requires some other arrangement, which is a small classroom, with a low student to teacher ratio, where she can receive 1:1 academic support throughout the school day, which is unavailable at the student's current placement.

Finally, the Respondent failed to comply with the *substantive* requirements of the IDEA, by ensuring that the student's IEP for the 2010/11 school year, is reasonably calculated to enable the student to receive educational benefit; and appropriately designed, emphasizing special education and related services specifically designed to meet the unique educational needs of this student.

8. Private School Placement

When a public school system has defaulted on its obligations under the IDEA, a private school placement is "proper under the Act" if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits."⁷² Special classes, separate schooling or other removal of children with disabilities from the regular education environment should occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, as in this case.⁷³

⁷⁰ Petitioners' Exhibits 9, 10, testimony of parent, student, Family therapist, school counselor, and student's special education teachers.

⁷¹ IDEA, at 34 C.F.R. §300.115 (a).

⁷² Florence County School District Four, et al. v. Shannon Carter, 510 U.S. 7 (1993).

⁷³ Letter to Tom Trigg.

The Respondent defaulted on its obligations under the IDEA, to ensure that this student receive a FAPE during the 2010/11 school year. Therefore, maintaining the student's current placement would be a disservice to this student, who has been without an appropriate educational program and placement this school year. The Respondent proposed no alternative placement for the student; and the Petitioner proposes placement of the student at the

The _____ is a private, non-public, self contained school for emotionally disturbed and learning disabled students, located in Hyattsville, Maryland. The school has approximately 28 students in the high school program, including six 9th grade students, and five 10th grade students, grades 6-12, and each class consists of one special education teacher, and one teachers' assistant. Students with similar profiles as this student, also attend the school. The class identified for this student has a capacity of 9 students.

The students attending the school receive individual and group therapy, the school utilizes a point reward system, and therapists monitor student's behavior daily. Students can earn Carnegie units and a high school diploma; and a representative of the District of Columbia Public Schools is at the school daily, to oversee the needs of DCPS students.

The school has three (3) full-time therapists, and three (3) social work interns, behavioral specialists, 2 instructional assistants, 2 students receiving 1:1 assistance; a consulting Psychologist and Psychiatrist, Occupational Therapist that meet with students weekly, and a Transition Coordinator. Classes are approximately 45 minutes in length, students have the same class schedule each day; all classes are on one floor of the school; and students transition between classes independently.

The Hearing Officer finds that the student's current placement is inappropriate; and the _____ is an appropriate alternative placement for the student.⁷⁴ The _____ can provide the student a full-time special education program, outside general education, a small structured therapeutic environment, with a small student to teacher ratio, where the student can receive 1:1 academic support throughout the school day; with minimum distractions and stimuli, and 'meaningful' educational benefit; which is not available at the students' current placement.⁷⁵

VIII. COMPENSATORY EDUCATION SERVICES

The Petitioner satisfied its burden by proving that the District of Columbia Public Schools denied the student a free appropriate public education, by failing to revise the student's June 15, 2010 IEP; and provide the student an appropriate placement, during the 2010/11 school year, entitling the student to compensatory education services.

⁷⁴ Testimony of student, parent, Family Therapist, school therapist, student's special education teachers, and Principal at the Pathways School.

⁷⁵ Id.

According to Mary McLeod Bethune Day Academy PCS v. Terri Bland, Civil Action No. 07-1223 (2008), a compensatory education award is an equitable remedy that “should aim to place disabled children in the same position they would have occupied but for the school district’s violations of the IDEA.” Reid, 401 F.3d at 518, 523.

Compensatory education is not a contractual remedy, but an equitable remedy that is part of the court’s resources in crafting appropriate relief. Reid v. District of Columbia, 401 F.3d 516, 523 (D.C. Cir. 2005). Compensatory education is also an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that she is receiving only a de minimis benefit and fails to correct the situation, as in this case. M.C. on behalf of J.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996).

Under the theory of compensatory education, courts and hearing officers may award “educational services...to be provided prospectively to compensate for a past deficient program.” See G. ex rel. RG v. Fort Bragg Dependent Schs. 343 F.3d 295, 308 (4th Cir. 2003). Its purpose is to help the child make the progress that he/she would have made if an appropriate program had been available. The specific compensatory education services provided the student; must be tailored to the child’s needs.

The Hearing Officer finds that the IDEA includes no express authority for Hearing Officer to grant compensatory education services, however, empowers Hearing Officers with considerable discretion when fashioning a remedy, when there is a finding of denial of a FAPE, as in this instance. 20 U.S.C. § 1415(i)(2)(C)(iii) (the Hearing Officer "shall grant such relief as the Hearing Officer determines is appropriate.") The Office of Special Education Programs.⁷⁶

Reid provides that a compensatory education “award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” Reid, 401 F. 3d at 524. (D.C. Cir. 2005). This standard “carries a qualitative rather than quantitative focus,” and must be applied with “[f]lexibility rather than rigidity.” According to Reid, in crafting an appropriate remedy for denial of FAPE, the Hearing Officer must engage in a fact intensive analysis that is qualitative rather than quantitative. Branham v. D.C., 427 F.3d 7, 11 (D.C. Cir 2005); Reid, 401 F.4d at 524. The amount of compensatory education is calculated by finding the period of deprivation of special education services; and excluding the time reasonably required for the school district to rectify the problem. M.C. v. Cent. Reg'l. Sch. Dist., 81 F.3d at 397 (3rd Cir. 2007).

Reid also stresses that the Hearing Officer must take into account individual individualized assessments of the student so that the ultimate award is tailored to the student’s unique needs; and must be reasonably calculated to provide the student the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.

⁷⁶ See, e.g., Letter to Riffel, 34 IDELR 292 (OSEP 2000) (discussing a hearing officer’s authority to grant compensatory education services); Letter to Anonymous, 21 IDELR 1061 (OSEP 1994)(advising that hearing officers have the authority to require compensatory education); Letter to Kohn, 17 IDELR 522 (OSEP 1991).

As indicated supra, compensatory education is an equitable remedy, and as such, equity dictates that the Hearing Officer craft an appropriate compensatory education award, to compensate the student for failure to receive an appropriate IEP and placement, during the 2010/11 school year. Heather D. v. Northampton Area Sch. Dist., 48 IDELR 67 (E.D. Pa. 2007).

The Hearing Officer finds that the evaluations of record, student and parent testimony, testimony of witnesses, student's educational history, and the record presented by the parties, is sufficient for the Hearing Officer to determine harm, and craft an appropriate compensatory education award for this student.

The Hearing Officer also finds that the compensatory education services proposed by the Petitioner in its compensatory education plan, are specifically tailored to the student's unique academic, developmental, and social/emotional needs; and the following compensatory education services are intended to assist the student in making the progress she would have made if an appropriate program and placement were available to her during the 2010/11 school year; and to mitigate any harm the student may have suffered as a result of the violation:

- 100 hours of independent specialized instruction in the form of tutoring, to address the student's academic needs, regression, and acclimation into the 10th grade, at a cost not to exceed _____ per hour; available to the student through the end of the 2011/12 school year.
- 60 hours of independent counseling and behavior support through the Hillcrest Center to address the student's social and emotional needs, at a cost not to exceed _____ per hour; available to the student through the end of the 2011/12 school year.
- 40 hours of occupational therapy to make up for missed occupational therapy services and assist the student in recouping the harm caused and loss of skills, to be provided at the Pathways High School and funded by the Respondent.
- Funding for the student's participation in two of DC Impact's Self-Defense Into to IMPACT for teens and young women, in order to foster the student's independence and self-esteem, as well as provide her a suitable outlet for developing social and emotional development with same aged peers; at a total cost of _____.
- Provide the student bus tokens and/or metro fare cards, to facilitate the student's participation in Divine Images Network, Inc., specifically the Royal Girls Club, located, in Temple Hills, Maryland, to foster the student's self esteem and confidence, improve the student's perspective toward education, provide the student with positive support and encouragement, assist the student in becoming self-sufficient, and assist the student in coping with diverse populations and peers to abate her school based anxiety disorder.

IX. ORDER

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

1. **ORDERED**, that within ten (10) calendar days of this decision, the Respondent shall issue to the parent a Prior Notice of Placement, reflecting the student's placement at the _____, located in Hyattsville, Maryland; and the Respondent's funding of the student's tuition and transportation, for the student to attend the _____ for the remainder of the 2010/11 school year; and the 2011/12 school year; and it is further _____
2. **ORDERED**, that the Respondent shall fund the student's compensatory education plan; and it is further _____
3. **ORDERED**, that this decision and order are effective immediately

X. NOTICE OF RIGHT TO APPEAL

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

Date: March 7, 2011

Ramona M. Justice
Attorney Ramona M. Justice
Hearing Officer