



## Hearing Officer Determination & Order

### **JURISDICTION**

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

### **INTRODUCTION**

On 06/22/09, a Due Process Complaint Notice (“Complaint”) was filed by the parents (“Parents” or “Petitioners”) on behalf of the year old student (“Student”), alleging that District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEIA”) when DCPS failed to develop an appropriate Individualized Education Program (“IEP”), when DCPS failed to convene a placement meeting and discuss and determine placement, when DCPS failed to evaluate Student in all areas of suspected disability, when DCPS failed to convene an IEP team meeting with appropriate IEP team members, when DCPS failed to conduct an appropriate functional behavioral assessment and behavior intervention plan, when DCPS failed to timely evaluate and determine Student eligible for special education services, and when DCPS failed to implement Student’s IEP.

### **THE DUE PROCESS HEARING**

The due process hearing convened on 08/04/09 at the Van Ness Elementary School located at 1150 5<sup>th</sup> Street, S.E., 1<sup>st</sup> Floor, Washington, D.C. 20003. At the conclusion of testimony on 08/04/09, Petitioners’ Attorney sought and was granted a continuance until 08/14/09 to allow Petitioner and DCPS to submit written closing arguments.

Petitioners were represented by Elizabeth Jester, Esq. (“Petitioners’ Attorney”) and DCPS was represented by Tanya Chor, Esq. (“DCPS’ Attorney”). Petitioners participated in the due process hearing in person.

The resolution session was waived by both parties. Parties discussed settlement, but settlement could not be reached.

#### **Disclosures:**

Petitioners’ Five-Day Disclosure letter dated 07/27/09 contained Petitioners’ Exhibits #1-46. Petitioners’ disclosures # 1-17, #20-21, and #23-46 were admitted into evidence without objection. Petitioners’ Exhibits #18, #19, and #22 were admitted into evidence over objection.

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DCPS' Disclosure Statement dated 07/28/09 contained DCPS' Exhibits #1-19. DCPS' Exhibits #2-17, and #19 were admitted into evidence without objection. DCPS' Exhibits #1 and #18 were admitted into evidence over objection.

### Witnesses:

Witnesses for Petitioners included: (1) Both Petitioners, and (2) Admissions Director at (via telephone).

Witnesses for DCPS included: (1) Barbara Bailey, DCPS special education specialist ("SEC") (via telephone), and (2) special education coordinator at (via telephone).

### Admissions by DCPS:

(1) On 03/11/09, Student received an Emotional Disturbance ("ED") classification and the Multidisciplinary Team ("MDT")/IEP team agreed that Student needed a more restrictive placement than

### Issues Presented in the Complaint:

All issues stated in the introduction section of this HOD remained active for litigation.

### Relief Requested by Petitioners

- (1) A finding of a denial of a FAPE on the issues presented in the Complaint;
- (2) DCPS to place and fund a private placement at the
- (3) DCPS to fund an independent clinical psychological evaluation (including academic/cognitive testing and testing for ADHD) and an independent psychiatric evaluation, and DCPS to conduct a functional behavioral assessment ("FBA");
- (4) Within 15 calendar days of receipt of all of the independent evaluation reports and the FBA identified in (3) above, DCPS to convene an MDT/IEP team meeting at Student's current school to review evaluations, and review and revise the IEP as appropriate; and
- (5) Any other relief that is fair and just.

### FINDINGS OF FACT

#1. On 09/01/07, the Student Support Team ("SST") at collected data from Student's teacher that described Student's classroom behavior as verbally and physically disruptive, verbally aggressive, bullying others, easily distracted, argumentative/defiant, hostile when criticized, attention seeking behavior, avoided by peers, and easily frustrated. Student's academic concerns were described as grades declining, disorganized, slow rate of work, incomplete assignment, does not follow directions, poor study skills, gives up easily, does not work well independently and does

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not work well with others. On 09/14/07, Student's classroom behavior was described as easily distracted by others, loses focus quickly, responds with hostility and "attitude" when corrected by an adult, short attention span and difficulty with sustained reading exceeding 3 minutes, and constantly out of seat and moving about. (*Petitioners' Exhibit #22, Student Support Team Request Forms dated 09/01/07 and 09/14/07*).

#2. On 10/01/07, Petitioner signed a release of information form for the SST to receive all of Student's records from the Department of Mental Health. The release of information form included a telephone number and a specific point of contact at the Department of Mental Health. (*Petitioners' Exhibit #22, Student Support Team Request Forms dated 09/01/07*).

#3. On 10/04/07, the SST developed a strategy and plan to address Student's behaviors that included weekly counseling; providing support/materials as needed for reading, social studies, math and science; and completing daily teacher monitoring forms. (*Petitioners' Exhibit #23, SST Academic and/or Behavioral Instructional Strategies Planning and Implementation Form dated 10/04/07*). Instructional strategies also included conducting a Functional Behavioral Assessment ("FBA") leading to the development of a Behavior Intervention Plan ("BIP") and completing a Woodcock Johnson III evaluation. (*Petitioners' Exhibit #24, SST Initial Meeting Report dated 10/04/07*). Student's classroom conduct continued to be problematic and Student continued to have constant outbursts in the classroom and was suspended for 5 days. (*Petitioners' Exhibit #25, SST Initial Meeting Report dated 10/23/07*). Between 11/13/07 and 11/19/07, Student continued to exhibit behaviors of not staying in seat, not remaining on task, not completing assignments, unable to settle down, struggling to focus and disrespectful, and does not follow directions; however, Student also did demonstrate positive classroom behaviors such as good behavior and staying on task in some classes. (*Petitioners' Exhibit #26, Student monitoring forms dated 11/13/07 through 11/16/07*).

#4. On 11/19/07, a disability was suspected by the SST and Petitioner signed a written request that Student be evaluated for special education. Student was referred to the MDT for determination of eligibility for special education. (*Petitioners' Exhibit #27, SST Ongoing/Final Meeting Report dated 11/19/07*). On 11/26/07, the psychologist at \_\_\_\_\_ was in possession of the SST release of information form dated 10/01/07 and the SST Final Meeting Report requesting evaluation and referral to the MDT dated 11/19/07. (*Petitioners' Exhibit #28, Interoffice Memorandum from Beverly McNairy, school psychologist dated 11/16/07*).

#5. On 01/24/08, Student had failed 4 of the core classes that quarter. (*Petitioners' Exhibit #29, SST Meeting letter dated 01/24/08*). On 02/06/08, the school psychologist at \_\_\_\_\_ sent a memorandum to the SEC at \_\_\_\_\_ indicating that Student continued to have academic and behavior problems in the classroom and reminding the SEC that on 11/19/07 the SST team suspected a disability and that on 11/26/07, appropriate data was completed and given to the SEC. The psychologist indicated that a meeting with Petitioners on 02/11/08 due to Student's continued poor behavior and academic performance that included failing in 4 major

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courses had been requested, and suggested that the SEC promptly schedule a meeting with Petitioners to complete the next step in the determination of eligibility process and avoid unnecessary litigation. (*Petitioners' Exhibit #30, Memorandum from psychologist to SEC dated 02/06/08*).

#6. On 02/28/08, the MDT at \_\_\_\_\_ met, discussed Student's adjustment at school, and developed a Student Evaluation Plan ("SEP") that included psychological testing using the WISC-IV, BASC II, DAP, and ADD scales. Petitioners were present at the MDT meeting, but a representative from the Department of Mental Health was not present. Petitioners reported to the MDT that Student had been tested for ADHD approximately 2 years prior and had been on medication. The MDT noted that Student's behavior affects academics; that Student walks out of class and school, uses profanity, talks to other students in class during instruction, is unable to remain focused, and can't sit still to watch a movie; and that Student is argumentative and "out of control." At the 02/28/08 MDT meeting, Petitioners insisted that Student be evaluated by the special education department. For the second time, Petitioners signed consent for an initial evaluation to determine Student's eligibility for special education services. And, for the second time, Petitioners signed consent for release of information of Student's records from the Department of Mental Health; however, the release signed by Petitioners on 02/28/08 also included a request for the release of all Student's educational assessments, psychological assessments and clinical evaluations from DCPS schools and the Psychiatric Institute of Washington ("PIW"). (*Petitioners' Exhibit #32, MDT Meeting Notes dated 02/28/08; Petitioners' Exhibit #33, MDT SEP dated 02/28/08, Consent for Evaluation dated 02/28/08, Request for Release of Information dated 02/28/08*).

#7. On 04/03/08, the MDT met again because Student's behavior was a major concern as it was very disruptive to class instruction and impacted Student's ability to stay focused and make academic progress. The MDT once again developed a SEP that called for the administration of the WISC II, Beery, DAP, and BASC 2 assessments and established a due date of 05/30/08 for the assessments to be completed. The MDT again recommended assessment for special education and the MDT meeting notes state that it was the second time that testing had been requested. (*Petitioners' Exhibit #36, MDT SEP dated 04/03/08*).

#8. On 08/13/08, the Department of Mental Health sent a letter to the SEC at Macfarland MS in response to a request from the SEC, stating that Student had been diagnosed by the Department of Mental Health Community Services Agency with having Oppositional Defiant Disorder ("ODD") and Attention Deficit Hyperactivity Disorder ("ADHD"), had begun medication management in March 2008 and was under the care of a child psychiatrist. (*Petitioners' Exhibit #16, Department of Mental Health letter dated 08/13/08*).

#9. On 09/08/08, DCPS completed a comprehensive psychological report that utilized the Wechsler Intelligence Scale for Children – Fourth Edition ("WISC-IV"); the Beery-Buktenica Developmental Test of Visual-Motor Integration ("Beery"); the Scale

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for Assessing Emotional Disturbance (“SAED”); the “About Myself” Reynolds Adolescent Depression Scale; the Devereux Behavior Rating Scale – Parent Rating; Teacher Interview; Parent Interview; and Review of Record. Although the psychological report indicated that the Connors’ Teacher Rating Scales – Revised (“Connors”) was an instrument to be utilized in formulation of the comprehensive psychological report, the Connors’ was not administered as the results do not appear in the body of the report or in the list of assessment tools utilized that appears in the summary and recommendations section of the comprehensive psychological report. The comprehensive psychological report revealed overall Average cognitive abilities and academic performance and that academic performance was commensurate with Student’s overall IQ, but below grade and age expectations, particularly in the area of math; that Student was having social and emotional concerns related primarily to ADHD symptoms; that Student qualified for special education services as a student with learning disabilities based on poor performance on math testing; and that Student had the cognitive ability to be able to perform at grade level, given accommodations to address restlessness and attending deficits. The evaluator noted that final recommendations were pending the MDT meeting and the submission of any outside reports from the parent, including a statement from the family doctor with regard to attention deficit disorder. (*Petitioners’ Exhibit #15, Comprehensive Psychological Report by school psychologist dated 09/08/08*).

#10. The results of a Woodcock Johnson III assessment completed on 09/24/08 indicated that Student performed at a 3.1 grade equivalent in math calculations and at a 4.2 grade equivalent in math reasoning. (*Petitioners’ Exhibit #9, IEP dated 09/25/08*).

#11. On 09/25/08, an initial IEP was developed that classified Student with a Specific Learning Disability (“SLD”) and prescribed 5 hours/day of specialized instruction in the general education setting to address weakness in mathematic skills, and 30 minutes/day of behavioral support services in the general education setting to address Student’s social emotional weaknesses of impulsive and disruptive behaviors in the classroom. The 09/25/08 IEP prescribed that special education services be provided in a combination setting of general education and resource classroom. There was no general education teacher present at the IEP meeting. Although the front page of the 09/25/08 IEP did not indicate that a special education teacher was present at the IEP meeting, Section VII of the IEP, i.e., academic areas of concern in math, indicates that a special education teacher participated in the development of the IEP. A representative from the Department of Mental Health was not present at the 09/25/08 IEP team meeting. (*Petitioners’ Exhibit #9, IEP dated 09/25/08*).

#12. At the IEP team meeting on 09/25/08, Petitioners informed the IEP team that Student had a diagnosis of ODD and ADHD and that Student was receiving counseling and medication from the Department of Mental Health community health services. Student’s case manager from the Department of Mental Health participated in the IEP team meeting. Student’s scores on the WISC-IV, administered on 09/08/08, were in the average range, and on 09/25/08, the MDT determined that Student did not qualify for special education services based on Student’s even cognitive functioning. The MDT also determined that Student’s ADHD was not impacting Student’s ability to learn, and

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Student was referred back to the general education curriculum to develop a behavior intervention plan. (*Petitioners' Exhibit #10, IEP Meeting Notes dated 09/25/08*).

#13. In May 2009, Student was failing all core classes for the entire 2008-2009 school year. In January 2008, at the end of the second advisory for the 2007-2008 school year, Student was failing all core classes and had an unsatisfactory grade in citizenship. (*Petitioners' Exhibit #20, Student Progress Reports dated 05/07/09 and 01/19/08*).

#14. A FBA was conducted by DCPS based on classroom observation dates of 10/29/08 and 11/07/08. The FBA does not contain the signatures of any school personnel or Petitioners. (*Petitioners' Exhibit #42, undated FBA*). Petitioner had never seen a copy of the FBA. (*Testimony of Petitioner*).

#15. On 11/24/08, Student was admitted to the Psychiatric Institute PIW after increasing aggression, especially at school. The precipitating incident for the hospitalization occurred on 11/24/08 when Student entered another classroom and became angry when the teacher asked Student to leave. Student then proceeded to destroy property in the classroom, ruined books and work books, threw a pencil sharpener, a timer, and numerous other books. Student was discharged from PIW on 12/08/08 with a medical diagnosis of Oppositional Defiant Disorder, Mood Disorder, NOS and ADHD, and a prescription for Risperdal and Ritalin. (*Petitioners' Exhibit #12, Discharge Summary from Psychiatric Institute of Washington dated 01/21/09*).

#16. On 12/15/08, Student returned to school after discharge from PIW, and Student's classroom behavior was so oppositional, explosive and non-compliant that school staff telephoned PIW to speak with Student's medical doctor or social worker. Student's severe disruptive behavior included disrespect to teachers, walking out of the classroom, cursing, and refusing to comply with demands of authority. On 12/18/08, the MDT met specifically to discuss Student's behavior. The MDT considered Student a danger to self and others due to frequent hitting and kicking of others and running away from the school building, cursing, refusing to comply with authority, and disrespect to teachers, and the MDT recommended that Student be considered for a change of school placement once evaluations were completed. (*Petitioner's Exhibit #8, MDT Meeting Notes dated 12/18/08*).

#17. On 01/05/09, Student's behavior in class was described as: standing and yelling in class and cursing at the teacher and students in the class; yelling over the teacher during instruction; refusing to go to the school office upon direction of the teacher. The classroom situation was described as untenable and interfering with other students receiving educational benefit from the class. On 01/07/09, Student went to class for two minutes to return a book bag to another student and tease classmates for being stupid for coming to class. (*Petitioners' Exhibit #39, emails from Student's teacher to the principal and other DCPS staff dated 01/05/09 through 01/07/09*). On 01/09/09, Student slapped another student in the face, cursed, was disrespectful, disrupted a test, and threatened to hit the teacher in the head with the overhead projector. (*Petitioners' Exhibit #42, Disciplinary Referral Form dated 01/09/09*). On 01/12/09, Student exhibited

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behaviors of talking too much, yelling, cursing, refusing to take off sunglasses in class, leaving class several times without permission, being escorted back to class by the principal, cussing and fussing whenever the teacher gave classroom instruction, refusing to participate in any class work, singing along with music from an iPod during class, and preventing other students from receiving educational benefit. On 01/13/09, Student refused to come into the class, and threw a can of soda from the hallway that grazed the teacher's pant leg. On 01/21/09, after another student read a poem about the teacher that Student had written, Student tore up the poem and offered the paper pieces to the teacher, Student ate food in class while waving the food bag in the teacher's face, Student took out a make-up kit in class and refused to put it away or give it to the teacher, Student continuously unlocked a door that the teacher had locked, and Student's behaviors prevented the teacher from presenting the lesson to the class. (*Petitioners' Exhibit #39, emails from Student's teacher to the principal and other DCPS staff dated 01/09/09 through 01/21/09*).

#18. On 01/22/09, the MDT met to review assessments from PIW. The school nurse indicated that Student would not comply with taking medication at school. The MDT noted that the final diagnosis from PIW for Student was ODD, ADHD, and Mood Disorder NOS. The MDT intended to send the documentation from PIW and the 09/08/08 psychological evaluation downtown for review for determination as to whether Student met the criteria for ED. (*Petitioners' Exhibit #5, MDT Meeting Notes dated 01/22/09*).

#19. On 01/21/09, DCPS developed a Behavior Intervention Plan ("BIP) with the stated goals of improving Student's lack of self control with peers and staff, decreasing the amount of profanity Student uses towards staff and peers, and decreasing aggression towards staff and peers. The BIP delineated staff strategies of providing verbal praise when Student demonstrated appropriate behavior, and giving Student the opportunity to demonstrate behavior. Rewards/reinforcement were listed as giving Student additional computer time and earning food rewards. Consequences for inappropriate behavior consisted of lunch/after school detention. (*DCPS' Exhibit #8, BIP dated 01/21/09*).

#20. On 01/22/09, Student was suspended for pushing a teacher. Student's psychiatrist from Department of Mental Health Community Services Agency participated by telephone in the manifestation determination meeting. (*Petitioners' Exhibit #6, MDT Meeting Notes dated 01/22/09*).

#21. From 02/23/09 through 04/08/09, Student continued to exhibit inappropriate behaviors in school that included wandering around the classroom and opening a window and yelling at someone in the street; cussing repeatedly at the teacher on 02/23/09; removal from the classroom by 2 school police officers on 02/24/09; walking out of the class, using profanity and refusing to participate in class work on 02/25/09; yelling, cussing and throwing things in class on 03/09/09; knocking over a chair and storming out of the classroom on 03/13/09; cussing, putting feet on classroom chairs, leaving the class and returning with a forged pass, and throwing a book at a student and onto the floor, on 03/16/09, cussing, throwing a pencil at an aide, threatening other students and walking

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out of the class on 03/17/09; and pushing the teacher twice on 04/08/09 and having to appear in court as a consequence. (*Petitioners' Exhibit #41, Notes and Incidents report dated 05/21/09; Petitioners' Exhibit #3, MDT Meeting Notes dated 03/11/09*).

#22. On 03/11/09, Student was determined eligible for special education services with a primary disability classification of Emotional Disturbance ("ED") and given an IEP that prescribed 25.5 hours/week of specialized instruction outside of general education and 2 hours/day of behavioral support services in the general education setting. The 03/11/09 IEP delineated objectives, evaluation procedures, an evaluation schedule and a method of measuring goals. Student's 03/11/09 IEP also contained provisions for Student to receive a dedicated aide and Extended School Year ("ESY") Services. (*DCPS' Exhibit #1, IEP dated 03/11/09*). No general education teacher participated in the IEP team meeting. (*Petitioner's Exhibit #2, IEP dated 03/11/09; Petitioner's Exhibit #3, MDT Meeting Notes dated 03/11/09*).

#23. On 03/11/09, the MDT determined that Student needed a more restrictive, intensive, therapeutic program for the emotionally disturbed, and that Student's disability should be changed from LD to ED/LD with an emphasis on ED. The MDT notes of 03/11/09 state that in September 2008 when the MDT met and determined that Student met the criteria for LD, there was no documentation of behaviors to determine ED. (*DCPS' Admission #; Petitioners' Exhibit #3, MDT Meeting Notes dated 03/11/09*).

#24. From 03/11/09 until the end of the 2008-2009 school year, Petitioner did not attend any MDT/IEP team meetings where school placement for Student was discussed and Petitioner is unaware of any new school placement for the 2009-2010 school year. (*Testimony of Petitioner*).

#25. On 07/08/09, Student was accepted for admission to  
for the 2009-2010 school year. (*Petitioners' Exhibit #46, Acceptance Letter from*  
is a 100 % full time out of  
general education therapeutic school for students with a primary disability classification of ED. The school is a year round program and provides Extended Year Services. All teachers are certified in special education and the school is approved and monitored by DCPS. The school's students have a similar behavioral profile to Student; the school is comprised of all former DCPS students; and the school has a strong behavior intervention program. can meet the educational needs of the Student as prescribed in Student's 03/11/09 IEP. Class size is a maximum of 10 students, and the class is taught by one teacher and a teacher assistant. There are 6 full time clinical social workers on staff that assist with the de-escalation of students. There is an immediate opening for Student at  
(*Testimony of*  
*Admissions Director at*

### **DISCUSSION AND CONCLUSIONS OF LAW**

"The burden of proof in an administrative hearing...is properly placed upon the party seeking relief." *Schaffer v. West, 44 IDELR 150 (2005)*. "Based solely upon

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evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. 3030.3.

The purpose of IDEIA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

### **Issue #1 – Whether DCPS failed to develop an appropriate IEP, thereby denying Student a FAPE?**

Petitioners allege that:

- (a) DCPS failed to develop an appropriate IEP on 09/25/08 when the IEP team failed to obtain and review Student's mental health records that contained a diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD") and Oppositional Defiant Disorder ("ODD"), despite Petitioners having signed a release of information form on 02/28/08.

On 10/01/07 and again on 02/28/08, Petitioners signed a release of information so that DCPS could obtain Student's mental health records from the Department of Mental Health. (*Findings of Fact #2, #6*). On 02/28/08, Petitioners informed the MDT that Student had been tested for ADHD approximately 2 years prior to that time and that Student had been receiving medication for ADHD. (*Finding of Fact #6*). On 08/13/08, the Department of Mental Health sent a letter to the SEC at \_\_\_\_\_ that provided information that Student had been diagnosed with ODD and ADHD and had begun medication management in March 2008. (*Finding of Fact #8*). On 09/25/08, the MDT met and determined that Student had a Specific Learning Disability. (*Finding of Fact #11*). The MDT that met on 03/11/09 stated that when the MDT met in September 2008, there was no documentation of behaviors to determine a disability classification of ED. (*Finding of Fact #22*).

Pursuant to 34 C.F.R. 300.305(a), "As part of an initial evaluation and as part of any reevaluation, the IEP Team and other qualified professions, as appropriate, must review existing evaluation data on the child including evaluations and information provided by the parents of the child..."

The evidence in this case clearly supports a conclusion that on 09/25/08, the IEP did not create an appropriate IEP for Student. There is concrete evidence that DCPS was in possession of a 08/13/08 letter from the Department of Mental Health stating that Student had been diagnosed and was under treatment for ODD and ADHD. This was critical information that should have been taken into account when constructing an appropriate IEP for Student. The evidence is also clear that on 10/01/07 and again on 02/28/08, Petitioners signed the necessary forms for DCPS to retrieve Student's mental health treatment records from the Department of Mental Health, but alas, DCPS failed to

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do so. The impact on the Student was that Student continued to be without the appropriate disability classification of ED until 03/11/09 (*Finding of Fact #22*), and Student continued to decline academically and behaviorally due to severe inappropriate behaviors at \_\_\_\_\_ from 09/25/08 until the end of the 2008-2009 school year. (*Findings of Fact #13, #15, #16, #17, #20, #21*).

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

Student's substantive right to have the MDT consider all relevant information prior to developing an educational program was severely crippled by DCPS' failure to obtain and review Student's records from the Department of Mental Health. This failure clearly caused a deprivation of educational benefit and significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student. Student was denied a FAPE. Petitioners met their burden of proof on Issue #1(a).

Petitioners allege that:

- (b) DCPS failed to develop an appropriate IEP on 01/22/09 when the Multidisciplinary Team ("MDT") met after Student was involved in an altercation with the teacher and reviewed Student's medical records from PIW indicating a diagnosis of ADHD, ODD and mood disorder, and sent the medical documentation along with the September 2008 psychological "downtown" for review for a determination of eligibility for an Emotional Disturbance ("ED") disability classification. A determination of eligibility was not made until 03/11/09 when the MDT met again following an escalation in Student's emotional and behavioral problems.

At the 01/22/09 MDT meeting, the MDT possessed and reviewed medical documentation indicating that Student had been diagnosed and was under treatment for ADHD and ODD. The MDT also had in its possession extensive documentation of Student's inappropriate conduct and medical diagnoses that interfered with learning for Student and other students in the class. (*Findings of Fact #1, #3, #5, #6, #7, #8, #9, #12, #15, #16, #17*). In fact, a representative from the Department of Mental Health participated in the IEP team meeting on 09/25/08 (*Finding of Fact #12*) and Student's psychiatrist from the Department of Mental Health Community Services Agency participated in the manifestation determination meeting that occurred on 01/22/09 (*Finding of Fact #20*). The MDT had sufficient information on 01/22/09 to give Student a disability classification of ED and determine an appropriate program for Student. It wasn't until 03/11/09, after Student's negative behaviors continued to escalate (*Finding of Fact #21*), that Student was finally determined to have a disability classification of ED.

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As a result of the MDT not giving Student a disability classification of ED on 01/22/09 when it had ample documentation to do so, Student was denied a FAPE. Petitioners met their burden of proof on Issue #1(b).

Petitioners allege that:

- (c) At the 03/11/09 MDT meeting, an IEP was developed that incorporated two vague and general goals contained in Student's September 2008 IEP, and the 03/11/09 IEP did not delineate any objectives, evaluation procedures, evaluation schedule, method of measuring goals, or delegation of responsibility for implementing the IEP, and Petitioners allege that ESY services were not discussed at the 03/11/09 IEP meeting.

Petitioners' Exhibit #2 and DCPS' Exhibit #1 were both admitted into evidence as Student's 03/11/09 IEP. There were glaring inconsistencies between the exhibits, and it was clear that the 03/11/09 IEP that Petitioners received by way of records request was not the only version of the 03/11/09 IEP.

DCPS' Exhibit #1 indicates that the MDT determined that Student was eligible for ESY services. As well, DCPS' Exhibit #1 delineates objectives, evaluation procedures, an evaluation schedule and a method of measuring goals. Therefore, the Hearing Officer concludes that Petitioners failed to meet their burden of proof by a preponderance of the evidence with respect to Issue #1(c).

Petitioners allege that:

- (d) On 12/18/08, the MDT met and did not revise the IEP to address Student's escalating negative behaviors.

On 12/18/08, the MDT met specifically to discuss Student's behavior. The MDT agreed that a change of placement would be considered once evaluations were completed, but the MDT did nothing by way of developing a BIP until 01/21/09. And, the BIP developed on 01/21/09 (*See Finding of Fact #19*) was woefully inadequate to address Student's severely inappropriate school behavior. Addressing Student's good behaviors by giving praise is a joke for Student who essentially terrorized the class on any given day. Offering Student a reward of more computer time and food is a joke as well for Student who was continually out of control in the classroom setting. The BIP developed by DCPS was inadequate to address Student's severe behavior problems. The Hearing Officer concludes that at the 12/18/08 MDT meeting and thereafter, DCPS did not take appropriate steps to address Student's chronic maladaptive behaviors by revising the IEP. Student was denied a FAPE. Petitioners met their burden of proof on Issue #1(d).

**Issue #2 – Whether DCPS failed to convene a placement meeting and discuss and determine an appropriate placement, thereby denying Student a FAPE?**

Petitioners allege that:

- (a) At the 09/25/08 MDT/IEP team meeting, Student was determined eligible for special education services as a student with a Learning Disability ("LD") and an IEP was

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developed. A Notice of Placement was issued indicating that Student was to receive regular and general education services. However, placement was not discussed and was unilaterally determined by DCPS.

There is no evidence in the record that DCPS discussed placement at the 09/25/08 MDT meeting. The 09/25/08 Prior to Action Notice (*Petitioner's Exhibit #1, Prior to Action Notice dated 09/25/08*) did not specify the location that special education services were to be provided even though it did specify that Student would be receiving services for a student with LD and psychological counseling as a related service. Moreover, nothing in the 09/25/08 IEP Meeting Notes (*Petitioner's Exhibit #10, IEP Meeting Notes dated 09/25/08*) indicates that placement was discussed. Petitioners met their burden of proof on Issue #2(a).

Petitioners allege that:

(b) In November 2008, Student's behaviors escalated to the point that Student was admitted to the Psychiatric Institute of Washington ("PIW") for three weeks. Student then returned to school and Student's behaviors escalated again. The MDT met on 12/18/08 and recommended the possibility of a change of placement due to Student's severe disruptive behaviors, but declined to take action until evaluations were completed.

On 11/24/08, Student was admitted to PIW as a result of out of control behaviors at school. (*Finding of Fact #15*). On 12/18/08, the MDT did decide to seriously discuss a change of placement once evaluations were completed (*Finding of Fact #16*); however, Petitioners' initial request for evaluations accompanied by written consent dated back to 11/19/07 (*Finding of Fact #4*). Pursuant to D.C. Code Section 38-2561.01 evaluations should have been completed by 03/17/08. By the time the MDT met on 12/18/08, the evaluations were already 9 months overdue. DCPS could not make a decision regarding placement until the evaluations were completed and the evaluations had not been completed due to the negligence and fault of DCPS. Student continued to decline at from 12/18/08 until the end of the 2008-2009 school year. (*Findings of Fact #17, #20, #21*). Student was denied a FAPE by DCPS' failure to have evaluations completed in a timely manner and make appropriate program and placement decisions based on those evaluations. Petitioner met their burden of proof on Issue #2(b).

Petitioners allege that:

(c) At the 03/11/09 MDT meeting, Student received an Emotional Disturbance ("ED") disability classification and an IEP that prescribed 25.5 hours/week of specialized instruction and 2 hours/day of behavioral support services. The MDT determined that Student required an intensive therapeutic ED program and that \_\_\_\_\_ could not provide these services, but placement was not discussed or determined at that time. At the time the Complaint was filed, DCPS still had not provided an appropriate placement for Student.

On 03/11/09, the MDT determined that \_\_\_\_\_ was not an appropriate placement for Student. (*Finding of Fact #23*). As of the end of the school year, Petitioners had not met with the MDT to discuss an alternate placement and had not been

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informed that DCPS had identified an alternate placement for Student. (*Finding of Fact #24*). The Hearing Officer concludes by a preponderance of the evidence that DCPS denied Student a FAPE by not changing Student's placement when the MDT determined on 03/11/09 that \_\_\_\_\_ was an inappropriate placement. Student's behavior at school continued to decline to the point where Student failed all classes and was arrested for assaulting a teacher in 04/08/09. (*Findings of Fact #13, #21*). Student suffered educational harm and was denied a FAPE. Petitioners met their burden of proof on Issue #2(c).

**Issue #3 – Whether DCPS failed to timely evaluate Student in all areas of suspected disability, thereby denying Student a FAPE?**

Petitioners allege that:

(a) In September 2007, DCPS began the Student Support Team ("SST") process to determine whether or not Student should be evaluated for special education services because Student was exhibiting academic and behavioral problems. On 11/19/07, the SST team referred Student's case to the MDT to determine eligibility and Petitioner signed consent for evaluation. Despite parental consent for evaluation, DCPS failed to conduct a psychiatric evaluation, a clinical psychological evaluation, an educational evaluation, and an evaluation for Attention Deficit Hyperactivity Disorder ("ADHD").

Beginning on 10/01/07, DCPS was on notice that Student was being treated at the Department of Mental Health. (*Finding of Fact #2*). There is ample evidence in the record that Student had a past and current diagnosis of ADHD and DCPS knew about it. (*Findings of Fact #6, #8, #9, #12, #16, #18*). When Student's SEP was developed on 02/28/08, it did not include a psychiatric evaluation, a clinical evaluation, and an educational evaluation. With the exception of a Woodcock Johnson III evaluation conducted on 09/24/08 (*Finding of Fact #10*), there is no evidence in the record that any of the other named evaluations were completed by DCPS. There also was no evidence in the record that the Woodcock Johnson III evaluation had been reviewed by the MDT and Petitioners at any of the MDT/IEP team meetings.

Pursuant to 34 C.F.R. 300.304(c)(4), each public agency must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

The Hearing Officer concludes that based on Student's severe and chronic behavior problems that impacted learning, it would have been appropriate for DCPS to conduct a psychiatric evaluation, a clinical psychological evaluation and an evaluation for ADHD. The Hearing Officer concludes that DCPS' failure to do so resulted in the denial of a FAPE for Student. Petitioners met their burden of proof on Issue #3(a).

Petitioners allege that:

(b) On 02/06/08, the school psychologist contacted the SEC regarding Student's continued academic and behavioral difficulties. A MDT meeting was scheduled and

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occurred on 02/28/08, and the MDT determined that a psychological evaluation was warranted. Petitioner signed consent for the psychological evaluation and consent for DCPS to access Student's mental health treatment records. DCPS did not conduct the psychological evaluation and did not obtain Student's mental health treatment records. DCPS also failed to conduct a psychiatric evaluation, an educational evaluation, and an evaluation for ADHD.

There was nothing in the record that indicated that DCPS had ever obtained Student's mental health records. Although a representative from the Department of Mental Health was present at the 09/25/08 IEP team meeting (*Finding of Fact #12*) and at the manifestation determination meeting on 01/22/09 (*Finding of Fact #20*), and although the Department of Mental Health sent a letter to \_\_\_\_\_ regarding Student's diagnosis of ADHD and ODD (*Finding of Fact #8*), this does not cure Petitioners' right to have the MDT review all relevant records and information presented by Petitioners. For the reasons stated under Issue #1(a) with respect to obtaining records from the Department of Mental Health, and Issue #2(b) with respect to evaluations, Petitioners met their burden of proof that DCPS failed to secure Student's mental health records and DCPS failed to conduct the necessary evaluations, and thus Student was denied a FAPE. Petitioners met their burden of proof on Issue #3(b).

Petitioners allege that:

(c) On 04/03/08, another MDT meeting occurred and the MDT determined that a psychological evaluation was warranted. Again, DCPS failed to conduct a psychiatric evaluation, a clinical psychological evaluation, an educational evaluation, and an evaluation for ADHD.

For the reasons stated under Issue #2b and #3(b), Petitioners met their burden of proof on Issue #3(c) that DCPS once again failed to conduct necessary evaluations on behalf of Student.

Petitioners allege that:

(d) A psychological evaluation was conducted on 08/28/08 and 09/08/08, but it did not include any educational testing. Upon information and belief, Student's school records do not contain any educational testing results. Again, DCPS failed to conduct a psychiatric evaluation, an educational evaluation and an evaluation for ADHD.

Student's 03/11/09 IEP indicates that Student was administered the Woodcock Johnson III evaluation on 09/24/08, and the results of the evaluation are indicated on the IEP. (*Finding of Fact #10*). Petitioners failed to meet their burden of proof with respect to DCPS failing to conduct educational testing. However, Petitioners did meet their burden of proof with respect to DCPS failing to conduct a psychiatric evaluation and an evaluation for ADHD for the reasons stated under Issue #2(b) and #3(b).

Petitioners allege that:

(e) On 9/25/08, the MDT met and Student was given a disability classification of Learning Disabled ("LD") and an IEP that prescribed specialized instruction in

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mathematics and 30 minutes/week of counseling. The MDT was informed by Student's mental health counselor of Student's diagnosis of ADHD and oppositional defiant disorder, but Student's mental health records had not been obtained by DCPS and were not reviewed by the MDT. DCPS failed to timely evaluate Student, and DCPS failed to conduct a psychiatric evaluation, educational testing, and an ADHD evaluation.

If DCPS had procured Student's records from the Department of Mental Health and had completed assessments in a timely manner, it is highly likely that based on the assessments and Student's poor behavior and academic performance, Student would have been determined eligible for services as a ED student by the MDT that met on 09/25/08. After much delay, Student was finally given an ED disability classification on 03/11/09. Petitioners met their burden of proof with respect to DCPS failing to obtain Student's mental health records and failing to conduct a psychiatric evaluation and an ADHD evaluation, all of which resulted in the denial of a FAPE for Student.

**Issue #4 – Whether DCPS failed to convene an IEP team meeting with appropriate IEP team members, thereby denying Student a FAPE?**

Petitioners allege that:

(a) On 09/25/08, the IEP team determined the need for services in the general education and the special education curriculums; however, neither a special education teacher or a general education teacher participated as members of the IEP team and in the determination of appropriate services.

There is no evidence in the record that a general education teacher was present at the 09/25/08 IEP team meeting where Student was determined eligible for special education services with a disability classification of LD; however, there was evidence in the record that a special education teacher participated in the development of the IEP. (*Finding of Fact #11*). Pursuant to 34 C.F.R. 300.321(a), DCPS must ensure that the IEP team for each child with a disability includes...not less than one regular education teacher of the child (if the child is, or may be participating the regular education environment)...

On 09/25/08, Student was initially determined eligible for special education services. Prior to that date, Student participated in the regular education environment and after that date, Student continued to partially participate in the regular education environment. DCPS' failure to include a general education teacher as part of the IEP team (*Finding of Fact #11*) violated the procedural requirements of IDEIA. And, because Student's behavior in the general education environment was so chronically out of control (*Findings of Fact #1, #3, #6, #7*), the input of the general education teacher was necessary and critical in developing an appropriate educational program for Student. Student was denied a FAPE. Petitioners met their burden of proof on Issue #4(a) with respect to Student being denied a FAPE as a result of the absence of the general education teacher at the 09/25/08 IEP team meeting.

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(b) At the 03/11/09 MDT meeting, the MDT determined that Student was eligible for special education services as an ED student, and prescribed 25.5 hours/week of specialized instruction and 2 hours/day of behavioral support services. Student's general education teacher was not present at the meeting.

The evidence in the record reveals that there was no general education teacher present at the 03/11/09 IEP team meeting (*Finding of Fact #22*), and at the time the meeting convened, Student's program consisted of classes in the general education environment (*Finding of Fact #11*). As discussed under Issue #4(a), the absence of the general education teacher at the 03/11/09 IEP team meeting violated the procedural requirements of IDEIA and resulted in a denial of FAPE for Student. The conclusion here is the same. Petitioners met their burden of proof with respect to Issue #4(b).

### **Issue #5 – Whether DCPS failed to conduct an appropriate functional behavioral assessment and behavior intervention plan, thereby denying Student a FAPE?**

Petitioners allege that on 9/25/08, the MDT met and referred Student's file back to the regular education program for development of a behavior intervention plan. At some point in late 2008, a functional behavioral assessment was begun, but not completed.

The record shows that a FBA was completed by DCPS, but the FBA is undated and does not contain the signatures of any school staff or Petitioners. Prior to the due process hearing, Petitioner had never seen the FBA. (*Finding of Fact #14*). The Hearing Officer concludes that the FBA was a paper document with no authority or effect. The FBA was not discussed by MDT/IEP team members nor was it incorporated into the Student's IEP as a necessary part of Student's educational program.

A BIP was developed by DCPS on 01/21/09. However, it was ineffective and useless for Student who had severe and chronic behavior problems at school. (*Finding of Fact #19*).

Pursuant to 34 C.F.R. 300.324, the IEP Team must in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. In Student's case, the MDT/IEP team never gazed upon the FBA and it was the FBA that was to be used to develop a BIP. None of this occurred for Student who desperately needed positive and effective behavioral interventions and supports. As a result, Petitioners were denied the opportunity to participate in the decision making process regarding the provision of an appropriate educational program for Student, and Student was educationally harmed as Student's behavior continued to deteriorate over time. (*Findings of Fact #6, #7, #15, #16, #17, #21*). Student was denied a FAPE. Petitioners met their burden of proof on Issue #5.

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**Issue #6 – Whether DCPS failed to timely evaluate and determine Student eligible for special education services, thereby denying Student a FAPE?**

Petitioners allege that:

(a) In September 2007, DCPS began the SST process to determine whether or not Student should be evaluated for special education services because Student was exhibiting academic and behavioral problems. On 11/19/07, the SST team referred Student's case to the MDT to determine eligibility and Petitioner signed consent for evaluation; however, no evaluations were conducted within 120 days.

Petitioners did sign consent on 11/19/07 for an initial evaluation to determine whether or not Student required special education services. (*Finding of Fact #4*). The first evaluation completed was a comprehensive psychological evaluation dated 09/08/08, approximately 6 months after it should have been completed. Beginning in September 2007, Student's behaviors in school were inappropriate, severe and chronic. Student was not determined eligible for special education services until 09/25/08. Pursuant to D.C. Code Section 38-2561.021, evaluations are to be completed within 120 days. Theoretically, Student should have been determined eligible for special education services no later than 03/19/08. Thus, from 03/19/08 until 09/25/08, Student was without sorely needed special education instruction, psychological counseling and a BIP. Student was denied a FAPE. Petitioners met their burden of proof with respect to Issue #6(a).

Petitioners allege that:

(b) On 02/06/08, the school psychologist contacted the special education coordinator regarding Student's continued academic and behavioral difficulties. A MDT meeting was scheduled and occurred on 02/28/08, and the MDT determined that a psychological evaluation was warranted. Petitioner signed consent for the evaluation and consent for DCPS to access Student's mental health treatment records. DCPS did not conduct the psychological evaluation, the psychiatric evaluation or educational testing and did not obtain Student's mental health treatment records in order to evaluate and determine eligibility for a disability classification.

There is no evidence in the record that any of these evaluations were completed prior to 02/26/08 or Student's mental health records were obtained from the Department of Mental Health. Petitioners met their burden of proof with respect to Issue #6(b).

Petitioners allege that:

(c) A psychological evaluation was conducted on 08/28/08 and 09/08/08, but it did not include any educational testing. Upon information and belief, Student's school records do not contain any educational testing results or testing results for ADHD.

The 03/11/09 IEP references the educational testing results of a Woodcock Johnson III evaluation completed on 09/24/08. (*Finding of Fact #10*). However, there is no evidence in the record that Student was administered an evaluation for ADHD, as the Connors assessment was not completed. (*Finding of Fact #9*).

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Petitioners met their burden of proof with respect to DCPS' failure to complete testing for ADHD. Student was denied a FAPE, as the record clearly indicates knowledge by DCPS as far back as 02/28/08 that Student had been diagnosed and treated for ADHD. (*Finding of Fact #6*).

Petitioners allege that:

(d) On 9/25/08, the MDT met and Student was classified as LD and prescribed specialized instruction in mathematics and 30 minutes/week of counseling. The MDT was informed by Student's mental health counselor of Student's diagnoses of ADHD and oppositional defiant disorder, but Student's records had not been obtained by DCPS and were not reviewed by the MDT.

As previously discussed throughout this HOD, DCPS had a duty to obtain Student's mental health records from the Department of Mental Health and failed to do so. Student was denied a FAPE. Petitioners met their burden of proof with respect to Issue #6(d).

Petitioners allege that:

(e) Despite Petitioners signing consent on 02/28/08 for DCPS to obtain Student's mental health records from the Department of Mental Health containing diagnoses of ADHD and ODD, DCPS did not obtain and review these records at all and DCPS did not change Student's disability classification to ED until 03/11/09 after review of Student's records from the Psychiatric Institute of Washington and a letter from the Department of Mental Health dated 08/13/08.

Student's diagnosis and treatment for ADHD and ODD (*Finding of Fact #8*) was an important factor in the determination of an appropriate disability classification, i.e., ED, for Student. If DCPS had obtained Student's mental health records from the Department of Mental Health as early as 10/01/07 when Petitioners first signed a release of information, Student could have been appropriately classified as ED prior to 03/11/09 and Student could have received a more appropriate educational program. It wasn't until the ED classification on 03/11/09 that the IEP team gave Student an IEP that required full time special education services in a therapeutic setting geared for ED students. Student should have had an ED classification and a full time ED school program since 09/25/08, as it was patently obvious that Student suffered from an emotional disturbance.

As defined in 5 D.C.M.R. 3001.1, Emotional Disturbance is a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (a) An inability to learn that cannot be explained by intellectual, sensory, or health factors; (b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers... Student had Average cognitive functioning (*Finding of Fact #9*); however, Student's behavior was out of control and had a negative impact on learning since September 2007. Petitioners met their burden of proof on this issue. Student was denied a FAPE.

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**Issue #7 – Whether DCPS failed to implement Student’s IEP, thereby denying Student a FAPE?**

Petitioners allege that:

- (a) On 09/25/08, an IEP was developed that prescribed specialized instruction in mathematics and 30 minutes/week of counseling. Based upon information and belief, these services were never provided in the resource classroom.

Insufficient evidence was presented for the Hearing Officer to conclude that services were never provided in the resource classroom. Petitioners failed to meet their burden of proof with respect to this issue.

Petitioners allege that:

- (b) On 03/11/09, Student was classified as an ED student and an IEP was developed that prescribed 25.5 hours/week of specialized instruction and 2 hours/day of behavioral support services in an intensive, therapeutic ED program. Student has remained at \_\_\_\_\_ where the 03/11/09 IEP cannot be implemented. In mid April 2009, Student began receiving some pull-out services with a special education teacher while still participating in the general education curriculum part-time. As a result, Student is failing classes and Student’s behavior problems have escalated. At the time the Complaint was filed, DCPS still had not identified an appropriate placement where the 03/11/09 IEP could be implemented.

The fact that at the time of the due process hearing, Student still had not received an educational placement other than \_\_\_\_\_ was discussed under Issue #2(c). Petitioners met their burden of proof that since 03/11/09 DCPS failed to provide Student with a placement that could implement the 03/11/09 IEP. Student has been deprived of appropriate educational services since that time and the impact on Student has been devastating, including failing all classes and being arrested for assaulting a teacher. (*Finding of Fact #13, #21*). Student was denied a FAPE.

**CONCLUSION**

DCPS’ failure to evaluate Student in a timely manner, failure to determine Student eligible for special education services as a student with a disability in a timely manner, failure to provide Student with an appropriate IEP and placement, failure to evaluate Student in all areas of suspected disability, and failure to address Student’s chronic and severe behavior problems with a FBA and effective BIP were all egregious violations of IDEIA, and as a result Student suffered much educational harm. As of the date of the due process hearing, DCPS still had not convened an IEP team meeting to discuss and determine an appropriate placement for Student for the upcoming 2009-1010 school year. All of the evidence taken together indicates that since at least March 2008, Student has been without appropriate evaluations, IEP, educational placement and services, and Student has been denied a FAPE continuously since that time.

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**ORDER**

**WHEREFORE**, it is

**ORDERED** that

(1) DCPS shall immediately place and fund Student at the \_\_\_\_\_ with transportation as necessary; and

(2) DCPS shall fund an independent clinical psychological evaluation (including academic/cognitive testing and testing for ADHD) and an independent psychiatric evaluation within 10 business day of the date of this Order, and DCPS shall conduct a FBA within 30 calendar days of Student's placement at \_\_\_\_\_ and

(3) Within 15 calendar days of receipt of all of the independent evaluation reports and the FBA identified in (2) above, DCPS shall convene an MDT/IEP team meeting at \_\_\_\_\_ to review evaluations, review and revise the IEP as appropriate, and develop an appropriate BIP.

**IT IS SO ORDERED.**

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

*Virginia A. Dietrich /s/*

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

08/20/09

Date

Issued: August 20, 2009