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

Student Hearing Office  
1150 5<sup>th</sup> Street, S.E.  
Washington, DC 20003

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STUDENT,<sup>1</sup>  
through the Parent,

Petitioner,

v.

District of Columbia Public Schools,

Respondent.

Date Issued: August 1, 2010

Hearing Officer: Virginia A. Dietrich

Case No:

Hearing Dates: 07/22/10 Room: 5a  
07/28/10 Room: 5a

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**HEARING OFFICER DETERMINATION**

**BACKGROUND**

Petitioner, the father of Student, filed a due process complaint notice on 06/21/10, alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEIA") when the District of Columbia Public Schools ("DCPS") failed to develop an appropriate Individualized Education Program ("IEP") by failing to include speech and language services for the past two years, failing to include a description of how progress towards annual goals would be measured on Student's March 2009 IEP and by failing to include a Behavior Intervention Plan ("BIP") on Student's March 2010 IEP; when DCPS failed to conduct a triennial psychoeducational evaluation and a triennial speech and language evaluation to ascertain Student's current level of academic functioning and educational needs; when DCPS failed to timely review the results of an independent psychoeducational evaluation; when DCPS failed to include a disability classification of Other Health Impaired on Student's IEP for the past two years; and when DCPS maintained Student's placement at

despite Student's behavior problems that interfered with learning and despite Student's failure to experience any growth in academic achievement over the past two years. Petitioner also alleged that Student was entitled to compensatory education in the form of speech and language tutoring as a result of DCPS wrongfully omitting 1 hour/week of speech and language services on Student's IEP for the past two years.

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<sup>1</sup> Personal identification information is provided in Appendix A.

## Hearing Officer Determination

Parties were able to resolve all but two issues in the complaint; i.e., the issue of appropriate placement and that of DCPS' failure to review the independent psychoeducational evaluation in a timely manner. Petitioner asserted that two recent independent evaluations provided empirical data in support of his position that [redacted] was an inappropriate placement for Student, and along with school records and relevant testimony, was sufficient to show that Student was not receiving any educational benefit at [redacted] DCPS did not offer Petitioner any alternative public or private placement; it maintained that [redacted] was a full time therapeutic special education public school that was implementing Student's IEP and that Student was making educational progress there.

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEIA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

This Hearing Officer was assigned to the case on 06/22/10. Mediation took place on 07/08/10 and was unsuccessful. A prehearing conference was held on 07/15/10, and a Prehearing Order that memorialized the substance of the prehearing conference was issued on 07/15/10.

The due process hearing was a closed hearing that took place on 07/22/10 and 07/28/10. Petitioner was represented by Nina Isaacson, Esq. and DCPS was represented by Linda Smalls, Esq.. Petitioner presented the following three witnesses: Petitioner; [redacted] Ph.D., who qualified as an expert in the administration of psychoeducational assessments; and [redacted] educational consultant at [redacted] DCPS presented two witnesses: [redacted] Student's special education teacher during the 2009-2010 school year; and [redacted] Ph.D, Assistant Principal at [redacted]

Petitioner's Exhibits P-1 through P-49, and DCPS' Exhibits R-1 through R-9, were admitted into evidence without objection. No written closing arguments or briefs were required. On 07/20/10, Petitioner filed a Motion to Preclude Dr. Deborah Mosley and [redacted] from Testifying as Expert Witnesses. During the hearing, the motion was denied as moot because DCPS did not offer [redacted] as a witness and Dr. Deborah Mosley was not offered as an expert witness.

At the time the complaint was filed, Student was a 13 years old boy who had attended [redacted] a public school in the District of Columbia, for the 2008-2009 and 2009-2010 school years. [redacted] is a full-time special education school for students with a primary disability classification of Emotional Disturbance ("ED"). Student was a disabled child under the IDEIA, with his most current IEP, dated 03/12/10, ascribing him a disability classification of ED, and prescribing an educational program that consisted of 31 hours/week of specialized instruction and 1 hour/week of behavioral support services, all to be provided outside of general education. Student's 03/12/10 IEP contained annual goals in the academic areas of mathematics, reading, written expression, and emotional/social and behavioral development; and the IEP specified testing and classroom accommodations that included small work groups,

## Hearing Officer Determination

written and verbal instructions, defining appropriate behavior, seating in low traffic area, location with minimal distractions, and repetition of directions.

The two issues to be determined in this Hearing Officer Determination are as follows:

Whether DCPS' failure to review an independent psychoeducational evaluation for more than one month after it was provided to DCPS and for more than three months after a triennial evaluation should have been conducted by DCPS, caused educational harm to Student where Student's behavior was deteriorating and Student had failed to make any academic progress over the past two years?

Whether DCPS failed to provide Student with an appropriate placement when DCPS maintained Student's placement at \_\_\_\_\_ for the past two years where Student experienced behavior problems that interfered with learning and where Student failed to make any academic progress?

Petitioner withdrew the following issues from litigation because the parties came to an agreement on them:

Whether DCPS failed to develop an appropriate IEP when DCPS failed to include any speech and language services on Student's March 2008, March 2009 and March 2010 IEP, when the March 2009 IEP failed to contain a description of how progress towards meeting annual goals would be measured and when the March 2010 IEP failed to include a BIP;

Whether DCPS failed to conduct triennial evaluations when it last completed a speech language evaluation in May 2006 and when it last completed a psychoeducational evaluation in March 2007;

Whether DCPS' failure to correctly identify Student's disability as Other Health Impaired for the past two years resulted in the denial of a FAPE; and

Is compensatory education in the form of make-up speech and language services the appropriate relief where Student has been denied a FAPE as a result of missed speech and language services for the past two years?

The parties agreed to the following in resolution of the issues that were withdrawn:

(1) Student shall receive compensatory education in the form of 130 hours of speech and language services via independent tutoring with a reading specialist at a rate not to exceed \$65.00/hour, with services to be completed by 12/31/11;

(2) DCPS shall convene an IEP Team meeting to review the independent psychoeducational evaluation dated 04/20/10 and the independent speech and language evaluation dated 07/19/10, and revise Student's IEP as appropriate;

(3) Direct speech and language services are warranted for Student;

## Hearing Officer Determination

(4) The IEP Team shall revise Student's BIP; and

(5) The IEP Team shall discuss Student's disability classification.

Parties agreed to the following stipulated fact:

#1. DCPS did not convene an IEP Team meeting to review the independent psychoeducational evaluation provided by Petitioner to DCPS on 05/10/10.

At the due process hearing, Petitioner's request for relief was that the Hearing Officer determine that Student had been denied a FAPE with respect to the two issues being litigated; and that DCPS place and fund Student, with transportation, at \_\_\_\_\_ All other requests for relief, as specified in the complaint, were withdrawn by Petitioner.

### 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. At the time the complaint was filed, Student, age \_\_\_\_\_ was a \_\_\_\_\_ grade student at \_\_\_\_\_ a full-time special education public school in the District of Columbia for students with a primary disability classification of Emotional Disturbance ("ED"). Student had also attended \_\_\_\_\_ during the 2008-2009 school year. (P-16). Student was classified under IDEIA as a student with ED, and had an IEP dated 03/12/10, that prescribed 31 hours/week of specialized instruction and 1 hour/week of behavioral support services, with all services to be provided outside of general education. Student's IEP also specified testing and classroom accommodations that included small work groups, written and verbal instructions, defining appropriate behavior, seating in low traffic area, location with minimal distractions, and repetition of directions; and the IEP had annual performance goals in mathematics, reading, written instruction and social/emotional development. (P-17).

#2. Each class at \_\_\_\_\_ contains no more than 10 students and has one certified special education teacher and one aide assigned to each class. Frequently, social workers are in the classroom to conduct observations and provide therapeutic/counseling assistance. \_\_\_\_\_ provides specialized instruction in reading, mathematics and writing, and has a school wide behavior management program based on a point system, as well as an alternative behavior class ("ABC") where students can de-escalate. The ABC is staffed by two behavior technicians and a school psychologist. The school staff also includes a nurse, speech and language pathologist, an occupational therapist, and eight behavioral technicians. (Testimony of Dr. Mosley).

#3. During the 2009-2010 school year, Student's classroom at \_\_\_\_\_ consisted of 8-9 students taught by a certified special education teacher and 1-2 instructional aides who provided behavioral and academic assistance to students. (Testimony of \_\_\_\_\_ Testimony of Dr. Mosley). Student's teacher saw Student make improvements in \_\_\_\_\_

## Hearing Officer Determination

reading, math and socio-emotional areas that didn't necessarily translate to measurable achievement. Behaviorally, Student was making better choices towards the end of the 2009-2010 school year and the number of conflicts with staff and students decreased. There were many factors that may have contributed to Student's improvement in behavior. (Testimony of

#4. In a psychiatric evaluation dated 05/03/08, Student was medically diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), Combined Type and Oppositional Defiant Disorder ("ODD"); both of which had been previous diagnoses. At the time the psychiatric evaluation was conducted, Student was taking prescription medications to help increase his attention span and improve his behavior, and Student acknowledged that the medications helped him to be more in control of his behavior. The evaluator noted that Student had a high activity level during testing, in that he had difficulty sitting still, he fidgeted with objects within reach, and frequently got up from the table. (P-5). These behavior symptoms of impulsivity, short attention span and hyperactivity, and the negative impact of these behaviors on Student's ability to learn, were noted by the IEP Team in February 2004, March 2007, May 2007, March 2008, March 2009, March 2010 and by the Assistant Principal of (P-10; P-12; P-13; P-15; P-16; P-17; Testimony of Dr. Mosley). It was also noted by the IEP Team in March 2009 and March 2010 that Student's behavior was manageable when he was on medication because he exhibited these negative behaviors less, and unmanageable when he was not taking medication. (P-16; P-17). Approximately one year ago, Petitioner discontinued Student on prescription medications to control ADHD symptoms, and for personal reasons, Petitioner has no intention of resuming these medications in the future. (Testimony of Petitioner).

#5. On 03/12/09, DCPS conducted a Functional Behavioral Assessment ("FBA") that identified Student's negative behaviors in school as physical aggression, dependence on others, picking on other students, verbal aggression, talking out of turn, making excuses and yelling; all of which made it difficult for Student to focus on academic tasks and complete assignments. The negative ramifications of Student's behaviors in school were disruption, interference with social interactions, danger to others, intimidation to others, and interference with academic instruction. His behavior was described as manageable when on medication consistently, but difficult to manage when not on medication. Student's behaviors in school required a lot of attention, a consistent routine and structure. (P-7).

#6. Student's teacher during the 2009-2010 school year reported that Student has a tendency to react to external stimuli, and in the classroom he exhibited the ED and ADHD symptoms of annoying others on purpose, losing his temper easily, threatening other students, breaking the rules, difficulty maintaining focus, and needing twice as many breaks as the other students. Movement makes Student feel more comfortable, and Student constantly taps his fingers or foot, and either can't or won't stop when asked to by his classroom teacher. Student begins structured breaks earlier than the other students and if he can't take a break, he becomes unhappy. Student's impulse to move around occurs 30% more than his classmates and he needs to get up and take breaks where he can run around a bit or take quick walks. (Testimony of

It was a struggle for Student's teacher to balance allowing Student to take breaks as needed, with the desire to help redirect Student. (P-8).

## Hearing Officer Determination

#7. In the beginning of the 2009-2010 school year, Student would get into fights before getting to his classroom and when he got to class, he wouldn't begin the class work. During the middle six months of the 2009-2010 school year, Student's behavior at \_\_\_\_\_ was a real problem, but it improved near the end of the year when, among other things, a calmer environment was established after a chronic trouble maker student was permanently removed from Student's classroom. The smaller class size also allowed Student to receive more individualized attention. Student's violent outbursts in class would coincide with reading at a level he was uncomfortable with because he couldn't understand it, and sometimes Student would be destabilized by other problem children in the classroom. Student responded well to one-to-one assistance, but could not work independently. When asked to work independently, Student would avoid beginning the task. (Testimony of \_\_\_\_\_)

#8. Between 08/28/09 and 12/16/09, while at \_\_\_\_\_ Student received 21 Student Behavioral Reports that cited specific incidences of instigating fights, walking out of class, running through the hallways, horse playing, using profanity or inappropriate language, refusing to follow instructions, talking without permission/disruptive behavior, making threats towards staff, destroying property, assaulting a staff member by mashing her finger on the door handle while trying to out of the ABC room, being unresponsive to interventions to break up fights, making sexual comments towards a female staff member, and jumping off the bus and walking to school. (P-21 through P-41). During the 2009-2010 school year, Student was suspended 14-18 times for behavior problems such as fighting or throwing things, with the last suspension occurring two weeks prior to the end of the school year. (Testimony of Petitioner; Testimony of \_\_\_\_\_)

#9. When Student attended \_\_\_\_\_ in the \_\_\_\_\_ and \_\_\_\_\_ grades with a full-time, outside of general education IEP (P-12; Testimony of Petitioner), Petitioner received very few calls or complaints concerning Student's behavior. \_\_\_\_\_ was a calm environment and there were very few students running the halls or acting out, and Student responded to the calm environment by being calm. Student's home environment is a calm one. At home, Student receives a very structured program of one hour of rigorous calisthenics when he arrives home from school, followed by a study period for homework where Student is usually assisted by his father, sister or tutor. Student is able to sit still and work on his homework because he has expended so much energy on calisthenics. Student's weekends are equally as structured with activities, and Petitioner reports very few behavior problems at home. (Testimony of Petitioner).

#10. Student's 03/17/08 IEP, in effect while Student attended Taft Center, reflected the following grade level equivalent test scores that were derived from a Peabody Individual Achievement Test administered on 03/06/08: 1.8 in Math Calculation, 1.8 in Math Reasoning, 2.2 in Reading Comprehension, 2.4 in Basic Reading, and 2.2 in Written Expression. (P-15; P-8). The Math Reasoning score is comparable to the Woodcock Johnson-III Broad Math score, and the Basic Reading score is comparable to the Woodcock Johnson-III Broad Reading score. (Testimony of Dr. Deborah Mosley).

#11. On 03/10/09, while Student was in the \_\_\_\_\_ grade at \_\_\_\_\_ Student was administered the Woodcock Johnson-III assessment, and achieved the following grade level

## Hearing Officer Determination

equivalent test scores: 2.6 in Broad Written Language, 2.2 in Broad Reading, and 3.2 in Broad Math. (P-6). On 04/20/10, when Student neared the end of the 7<sup>th</sup> grade at Student was again administered the Woodcock-Johnson III as part of the independent psychoeducational assessment and achieved the following grade level equivalent test scores: 1.6 in Broad Written Language, 2.2 in Broad Reading, and 3.2 in Broad Math Skills. Student's language and phonological processing skills fell below the 1<sup>st</sup> percentile, and that precluded additional testing in that area due to Student's severe impairment. (P-8).

#12. Student's 03/12/09 IEP contained IEP goals in the areas of mathematics, reading, written expression and emotional/social and behavioral development. The 03/12/09 IEP noted that Student's disability negatively impacted academic instruction; that Student required a lot of attention; that Student needed help in managing his behavior; that Student needed medication on a daily basis to help manage his behavior; that Student was all over the place without medication; and that Student had difficulty focusing, completing tasks, controlling his behavior and staying in his seat. Student's inability to stay attentive in class and proclivity to engage in off-task behaviors contributed to his low levels of educational performance. At that time, Student was performing on the third grade level in mathematics and on the second grade level in the areas of broad reading and written instruction. (P-16).

#13. Student's 03/09/10 IEP contained essentially the same information as the 03/12/09 IEP regarding Student's behaviors, except that his behaviors were more pronounced and he was described as moving continuously, cursing, having a short attention span during assignments, and using physical/verbal aggression in interactions with others. (P-17). Student's teacher during the 2009-2010 school year indicated that Student "almost always" or "often" annoys others on purpose, threatens to hurt others, loses his temper too easily, teases others, defies teachers, bullies others, calls peer names, hits his peers, breaks the rules, gets into trouble, uses others' things without permission, lies, disobeys, cheats, has difficulty maintaining focus, is easily distracted, has a short attention span, doesn't listen carefully, has great difficulty keeping up in school, does not complete his work, and has problems with math, reading, and writing. (P-8). In conjunction with testing for the independent psychoeducational evaluation completed on 04/20/10, Student was excused from the testing room at \_\_\_\_\_ unescorted, to use the restroom and never returned. Student was located approximately 30 minutes later, under reprimand by school staff for engaging in fighting/horse play with another student in the hallway and it took another 15 minutes for the staff and the evaluator to convince Student to return to the testing room. (P-8; Testimony of Dr. Schmookler).

#14. The independent psychoeducational evaluation, dated 04/20/10, recommended that Student receive schooling in a full-time therapeutic special education placement for children with a disability classification of ED and Other Health Impaired, in a structured classroom with a low teacher-student ratio not to exceed 8-10 students for every 1 teacher/1 aide, and with a high level of structure and consistent consequences for behavior, as can be provided by an educational program with a strong behavioral modification program, such as a token economy. Recommendations for classroom accommodations included providing a rubber exercise ball instead of a chair to improve focus due to Student's high need for stimulation, and integrating movements into lessons. (P-8). The recommendations were based on a classroom observation,

## Hearing Officer Determination

interviews with teacher and parent, review of records and testing data. (P-8; Testimony of Dr. Schmookler).

#15. On 05/20/10, Student was accepted for admission at \_\_\_\_\_ based on a review of all of Student's records including Student's Speech-Language IEE Assessment Report and his 03/09/10 IEP, which can be implemented there. \_\_\_\_\_ is a private, full-time special education school in the District of Columbia, which provides educational services to students with disabilities that include ED, ADHD, Learning Disabled and Other Health Impaired. The school uses the curriculum guidelines utilized by DCPS and participates in annual standardized testing administered by DCPS. Each classroom contains no more than 5 students to 1 teacher with at least one aide per classroom. The middle school, where Student would be assigned if he were to attend \_\_\_\_\_ is located on one floor of the building. Student would remain with the same class in the same classroom for academic subjects and change classrooms with the same class and same teacher for art, music, lunch, and physical education. All teachers are certified in special education and/or the specific content area of instruction; the school has eight licensed clinicians who provide direct and individual group therapy to all students; family therapy is provided in home and at school so that consistency in the application of behavior modification techniques and consequences can be achieved; two full time reading specialists provide individual support to all students and work with parents and staff; and other related service providers such as occupational therapists and physical therapists. The school has behavior specialists who help with the classrooms and prevent students from leaving the class and roaming the hallways, and students are escorted outside of the classroom at all times. (Testimony of

#16. \_\_\_\_\_ offers a range of programs geared towards behavior modification and behavior management. School wide, \_\_\_\_\_ provides a limit setting structure with a reward system for positive gains through the school store; Students get frequent breaks due to their short attention span; and the school strives to find out what is triggering poor impulse control, gets students to recognize their own triggers and helps them to learn to identify when one is coming and then frame an appropriate response. With respect to serving a student's individual behavioral needs, the school has a neuropsychologist on staff who assists in developing a specific behavior plan for each student. The school offers freedom of movement in the classrooms for their students who are generally characterized as being impulsive, aggressive, hyperactive, provoking peers and engaging in fighting, by using bean bag chairs where students can sit and do their assignments; rubberized bands that attach to chairs that can be used satisfy the student's need for stimulation without the student getting out of the chair; and colored cue cards that can be displayed by students when the trigger for moving occurs so that staff can immediately address the student's urge to move by giving the student alternatives to leaving the classroom to accomplish the movement. Adaptive physical education is provided to all students so that they can learn to move their bodies in a way that helps them structure their movement, complete classroom tasks and facilitate learning. Extracurricular activities such as JV football and basketball, Special Olympics and an award winning step team are offered to help students develop interpersonal skills. \_\_\_\_\_ ensures consistency with the application of rewards and consequences by providing staff training. (Testimony of

## Hearing Officer Determination

#17. Student's 03/07/07 IEP prescribed 1 hour/week of speech and language services (P-12), whereas Student's 03/17/08, 03/12/09 and 03/09/10 IEP did not contain any speech and language services. (P-15; P-16; P-17). An independent Speech-Language IEE Assessment Report completed in July 2010 indicated that Student had severe deficits in word knowledge, word grammar and sentence structure levels of language knowledge that affected his abilities to comprehend, reason with, and conceptualize linguistic information; that Student had not developed his basic language knowledge up to the level identified from vocabulary testing in 2006; that Student needed intensive, daily speech and language therapy services for one year to address Student's language problems; and that Student's constant need for movement, as displayed during testing, must be addressed and handled appropriately in order for Student to be able to succeed and receive an appropriate education. (P-49). Direct speech and language services are warranted for Student. (Agreement of parties).

#18. DCPS last completed a psychoeducational evaluation of Student on 03/29/07. (P-4). On 05/10/10, Petitioner provided DCPS with a copy of an independent psychoeducational evaluation dated 04/20/10 with a request to review the evaluation (P-44; P-8), and as of the date of the due process hearing, DCPS had not convened an IEP Team to review it. (Stipulation #1).

### CONCLUSIONS OF LAW

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

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

The first issue to be addressed is whether DCPS' failure to review an independent psychoeducational evaluation for more than one month after it was provided to DCPS and for more than three months after a triennial evaluation should have been conducted by DCPS, caused educational harm to Student where Student's behavior was deteriorating and Student had failed to make any academic progress over the past two years?

As part of any reevaluation, the IEP Team must review existing evaluation data on the child, including evaluations and information provided by the parents of the child, and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine...the educational needs of the child...and 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. 34 C.F.R.300.305(a). If the parent shares with the public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. 34 C.F.R. 300.502(c).

## Hearing Officer Determination

In this case, pursuant to 34 C.F.R. 300.303(b), a triennial psychoeducational evaluation should have been completed by DCPS no later than 03/09/10, but DCPS didn't reassess Student at all. Rather, it was Petitioner who presented to DCPS an independent psychoeducational evaluation on 05/10/10 with a request to convene a meeting to review the evaluation. At the time of the due process hearing, which was more than two months after Petitioner's request to review the evaluation, DCPS still had not taken any action to review it. (Finding #18). It was important that the independent psychoeducational evaluation be reviewed as soon as possible because it revealed that Student had made no academic progress in reading for two years; that Student had made no academic progress in mathematics for the past year; that Student had regressed one full grade level equivalent in written expression over the past year; that Student's language and phonological processing skills were so low that it precluded additional testing due to Student's severe impairment; and that Student's ADHD symptoms manifested themselves in behaviors that seriously interfered with learning and needed to be addressed with specific accommodations that Student was not receiving at (Findings #11, #14). Review of the independent psychoeducational evaluation along with Student's prior IEPs, would have made it readily apparent to DCPS that Student required speech and language services on his IEP immediately. (Findings #11, #17). An independent Speech-Language IEE Assessment Report completed in July 2010, although not available to DCPS until July 2010, not only underscored the severity of Student's speech and language deficits, but also underscored the necessity of addressing Student's ADHD symptoms (Finding #17), and confirmed Petitioner's belief that Student needed more intensive services than he was getting at

In this case, the Hearing Officer concludes that even a one month delay in convening an IEP Team to review the independent psychoeducational evaluation was too long for Student who had not made any academic progress, required intensive speech and language services, and needed new accommodations in the classroom to address his hyperactivity since his hyperactivity was the main culprit that interfered with learning. (Finding #4). In actuality, Student had already missed two months of speech and language services and the opportunity to receive enhanced accommodations to address his ADHD symptoms by the time DCPS had been provided the independent psychoeducational evaluation, because it was DCPS' obligation, under IDEIA, to have conducted a triennial psychoeducational evaluation no later than March 2010.

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. 300.513(a).

"Reevaluations should be conducted in a "reasonable period of time," or "without undue delay," as determined in each individual case. The more current an evaluation and IEP determination, the less likely that a delay in responding to the reevaluation request will be prejudicial or injurious." *Herbin v. District of Columbia*, 43 IDELR 110 (U.S. District Court, District of Columbia (2005)). In this case, the Hearing Officer concludes that DCPS' failure to respond to a request to review an independent psychoeducational evaluation for more than one month, was harmful to Student. It had been more than three years since Student's achievement

## Hearing Officer Determination

levels had been formally assessed by DCPS, and as it turned out, Student's academic progress over the past two years had been pretty much nil and his behavior was on a slippery, downhill slope due to the absence of medication to control his ADHD symptoms. DCPS should have taken steps immediately to convene an IEP Team to review the results of the independent psychoeducational evaluation, and didn't. As a result, Student was deprived of the educational benefit of not having sorely needed intensive speech and language services added to his IEP, and he was deprived of the benefit of having his classroom accommodations and instruction modified to accommodate his constant need for movement. The independent psychoeducational evaluation recommended that Student be given a rubber exercise ball to sit on instead of a chair, and that movement be integrated into lessons (Finding #14), and no where in the list of accommodations that Student received at \_\_\_\_\_ (Finding #1) was anything of the sort mentioned.

The Hearing Officer concludes that Petitioner's proof was adequate to demonstrate by a preponderance of the evidence that DCPS' failure to review an independent psychoeducational evaluation for more than one month after it was provided to DCPS and for more than three months after DCPS should have conducted a triennial reevaluation, resulted in the denial of a FAPE because Student was deprived of the educational benefit of receiving much needed intensive speech and language services and classroom accommodations that would address his very high level of hyperactivity that seriously interfered with learning.

The second issue to be addressed is whether DCPS failed to provide Student with an appropriate placement when DCPS maintained Student's placement at \_\_\_\_\_ for the past two years where Student experienced behavior problems that interfered with learning and where Student failed to make any academic progress?

The overall 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. Special education is defined as specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability. 34 C.F.R. 300.39(a). Specially designed instruction means adapting, as appropriate to the needs of an eligible child under IDEIA, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability and to ensure access of the child to the general education curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. 300.39(b)(3).

Student, with long standing diagnoses of ADHD and ODD, demonstrated significant problems with restlessness, impulsivity, aggression, hyperactivity, and poor judgment. (Finding #4). In school, these disorders manifested themselves in behavior that included verbal and physical aggression towards staff and peers and an inability to sit still and focus on academic work, and school personnel reported time and time again that these behaviors interfered with learning. During the first half of the 2009-2010 school year, Student received 21 Student Behavioral Reports that cited instances of horse playing, refusal to follow instructions, walking out of class, using inappropriate language, etc. During the 2009-2010 school year, Student was

## Hearing Officer Determination

suspended 14-18 times with the last suspension occurring just two weeks before the end of the school year. During class, Student moved constantly and his need for movement was 30% greater than his classmates. He either tapped his foot or his fingers for constant movement stimulation. Student took twice as many breaks as the other children and his teacher struggled with balancing breaks with redirection. Student responds well to one-to-one assistance in class, but cannot work independently. His behaviors require a lot of attention, a consistent routine and structure. (Findings #4 #5, #6, #7, #8, #12, #13). Prior to one year ago, Student was taking medication to control his ADHD symptoms, and according to Student, the FBA and the IEP Team in 2009, his behavior was more under control when he took medication. (Findings #4, #12). Petitioner's prerogative as parent of Student, was to discontinue medication, and it is not likely that medication will resume while Student is a minor under the law. (Finding #4). Therefore, it can be expected that Student's behaviors will continue to cause problems for Student and interfere with learning.

provided a strong, therapeutic full-time special education placement for Student during the 2008-2009 and 2009-2010 school years (Finding #1, #2), and there was no evidence in the record that Student's IEPs were not implemented there, but the program was not intensive enough to meet Student's unique educational needs and allow him to access the curriculum in order to make academic and behavioral progress. This was the conclusion drawn by Dr. Schmookler, who conducted the independent psychoeducational evaluation in April 2010 (Testimony of Dr. Schmookler), and the Hearing Officer endorses the conclusion. At

classrooms were small, therapeutic staff were on hand to assist with behavior problems, there was a de-escalation room for students, a school wide token economy behavior management program existed, and Student's teacher during the 2009-2010 school year did his best to manage Student's classroom behavior. (Findings #2, #6). Student made improvements in decision making about his behavior and showed some improvement in reading, writing and mathematics, but academic progress was so miniscule that it could not be measured by the educational staff (Finding #3) or by an objective achievement testing instrument known as the Woodcock Johnson-III. The Woodcock Johnson-III, administered to Student in March 2009 and again in April 2010, revealed that Student had made no academic progress in reading and mathematics, where he performed at the 2.2 and 3.2 grade levels respectively, and had regressed one full grade level in written expression from 2.6 to 1.6. (Finding #11). When comparing achievement test levels from 2008 to 2009, it appeared that Student made progress in Broad Math when his scores went from a 1.8 grade level to a 3.2 grade level, he regressed in Broad Reading when his scores went from 2.4 to 2.2, and he improved slightly in Written Expression when his scores went from 2.2 to 2.6. (Findings #10, #11). Therefore, the Hearing Officer concludes that Student made no academic progress in mathematics for the past one year, he made no progress in reading for the past two years, and he made no progress in writing for the past one year. Educational benefit can be measured by academic progress, and in this case, there was no measureable amount.

The evidence showed that Student's aggressive and off-task behaviors in school had increased from March 2009 to March 2010 (Findings #5, #6, #7, #8, #12, #13). The record made it clear that Student had not been on medication to control ADHD symptoms such as impulsivity, irritability, and aggressiveness, for the past year, and when not on medication, Student's behavior was unmanageable, and he was "all over the place." (Findings #4, #5). Student's

## Hearing Officer Determination

behavior directly interfered with his ability to learn (Finding #4), and it is fair to conclude that since Student did not make any academic progress, he didn't make any behavioral progress because it was his behavior that consistently interfered with learning. Student could not sit still for any length of time and his need for self-stimulation through movement was constant and exceeded his peers at [redacted] by 30%. Student's teacher during the 2009-2010 school year struggled to balance redirection with taking breaks, as Student required twice as many breaks as his classmates. (Finding #6). Based on the evidence presented, the Hearing Officer concludes that Student did not make sufficient progress in meeting social/emotional goals for the past two years to come to the conclusion that he made academic progress.

The fact that Petitioner will not resume Student on medication to control his ADHD symptoms is an important factor when considering what type of placement Student will need to become successful and experience some educational benefit. It is imperative that Student is provided with a placement that has a very strong behavior modification program and one that can help him learn how to harness his impulsivity and need for constant movement in a positive way that facilitates learning. The record showed that Student's behavior was influenced by external stimuli (Finding #6), and if placed in a calm setting with a very high degree of consistency and structure, Student was likely to perform better. (Findings #7, #9).

Understanding that Student's behavior will not improve and will most likely worsen without pharmaceutical intervention, DCPS must meet Student where he is and provide the necessary accommodations and program to help Student progress. The Hearing Officer concurs with the recommendation of the Speech-Language IEE assessor that Student's constant need for movement must be addressed first and handled appropriately in order for Student to be able to succeed and receive an appropriate education. (Finding #17).

The evidence presented is persuasive that [redacted] can provide the structured, more intensively therapeutic environment that Student needs to begin climbing the ladder of academic achievement. [redacted] a private full-time therapeutic school, has the type of behavior modification program that can meet Student's needs. First and foremost, in order to be successful in school, Student must be taught techniques to harness movement in a constructive way. [redacted] with its smaller teacher to student ratio than [redacted] severe restrictions on unescorted movement, adaptive physical therapy program, reading specialists, behavior specialists, clinical social workers, family therapy to ensure consistency between the school and the home environment, school wide behavior management and token economy program, and extracurricular sports activities (Findings #15, #16), appears to be an appropriate placement for Student because a student's need and proclivity for movement is incorporated into the teaching methodologies. Movement is built into [redacted] educational program with the use of bean bag chairs and or a rubberized band for the chair, both of which can potentially satisfy Student's need to move while allowing him to remain in his chair and be available for learning. (Finding #16). Student's current IEP can be implemented there and [redacted] can provide direct speech and language services. (Finding #15).

At [redacted] Student will also have the benefit of having a neuropsychologist help with the development of his BIP, and he will have the opportunity to

## Hearing Officer Determination

work with an adaptive physical therapy provider who can provide instruction in how to harness movement in a way that facilitates learning. These educational enhancements that are available at \_\_\_\_\_ weren't available to Student at \_\_\_\_\_ and the availability of these enhancements will theoretically make all the difference in offering Student the "basic floor of opportunity" as defined in *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982): "Providing access to a free appropriate public education is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. The "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."

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. 300.513(a).

At \_\_\_\_\_ Student did not achieve any measurable academic progress because he was unable to access the curriculum due to his emotional and learning disabilities. The small amount of academic and behavioral improvement that Student experienced at Hamilton Academy was not enough to satisfy the requirement that Student receive educational benefit. Therefore, the Hearing Officer concludes that \_\_\_\_\_ was an inappropriate placement for Student, at least from March 2009 until the time the complaint was filed. Student's failure to make progress and regression in some areas began more or less one year ago when Petitioner discontinued the use of medication that controlled Student's ADHD and ODD symptoms and made his behavior manageable in school.

In this case, DCPS' failure to provide Student with an appropriate placement caused a deprivation of educational benefit for Student. Student realized zero growth in the academic areas of reading and mathematics, and regressed by a full grade level in the area of written expression from March 2009 to April 2010. Student's chronic and worsening behaviors in school that negatively impacted learning were directly related to his ADHD and ODD, and the behavior modification program in place at \_\_\_\_\_ was insufficient for Student to make progress towards achieving socio-emotional goals. Additionally, the placement at \_\_\_\_\_ lacked the necessary accommodations that would help Student structure his constant need for movement, that would in turn free him to pay attention to academic instruction. Student needed a more intensively therapeutic program that what could be offered at \_\_\_\_\_ and the Hearing Officer concludes that \_\_\_\_\_ is an appropriate placement that can meet Student's educational needs.

### **ORDER**

Based upon the above Findings of Fact and Conclusions of Law, this Hearing Officer orders:

Hearing Officer Determination

(1) DCPS shall fund and place Student at \_\_\_\_\_ with transportation, no later than 10 business days from the date of this Order; and

(2) The IEP Team shall convene within 30 days of the day that Student begins attending \_\_\_\_\_ to review all of Student's evaluations, and review and revise Student's IEP as appropriate.

**NOTICE OF RIGHT TO APPEAL**

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

Date: August 1, 2010

*/s/ Virginia A. Dietrich*  
Hearing Officer

Copies to:

Petitioner (via U.S. mail)  
Petitioner's Attorney: Nina Isaacson, Esq. (electronically)  
DCPS' Attorney: Linda Smalls, Esq. (electronically)  
DCPS (electronically)  
SHO (electronically)