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STUDENT HEARING OFFICE  
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**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

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STUDENT, <sup>1</sup>	)	
through the Parent,	)	
	)	Date Issued: September 14, 2011
Petitioner,	)	
	)	Hearing Officer: Virginia A. Dietrich
v.	)	
	)	
	)	School
	)	
Respondent.	)	
	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, the grandmother of \_\_\_\_\_ year old Student, filed a due process complaint notice on July 1, 2011 alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA"). At the time of the alleged violations, Student was a child with a Specific Learning Disability who was receiving special education services at \_\_\_\_\_ an independent local education agency ("LEA") located in the District of Columbia.

Petitioner alleged that in May 2011, \_\_\_\_\_ failed to provide Student with an Individualized Education Program ("IEP") with 100% specialized instruction outside of the general education setting and a placement that could implement such an IEP, and that \_\_\_\_\_ failed to include counseling services on Student's May 2011 IEP. Petitioner sought a full-time IEP with counseling services and placement at a private school.

\_\_\_\_\_ asserted that Student did require specialized instruction in her core content academic courses because her abilities on verbal tasks were in the Borderline range and her academic functioning in reading, writing and mathematics was very low; however, due to Student's Average ability on non-verbal tasks, Student could successfully participate in elective classes with her non-disabled peers. Moreover, \_\_\_\_\_ argued that when Student received a combination setting program of inclusion (inside general education) and resource room (outside

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

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general education) services during the 2009-2010 school year, Student's grades were better and she had no notable behavior problems. argued that the IEP developed on 05/09/11 was appropriate, that the placement at was appropriate and that Student did not require a full-time IEP with placement in a separate school for disabled peers in order to receive educational benefit.

### Subject Matter Jurisdiction

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, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

### Procedural History

The due process complaint was filed on 07/01/11. This Hearing Officer was assigned to the case on 07/06/11. A resolution meeting took place on 07/12/11 at which time the parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period expired on 07/31/11, the 45-day timeline to issue a final decision began on 08/01/11, and the final decision is due on 09/14/11.

The due process hearing was a closed hearing that took place on 08/31/11 and 09/01/11. Petitioner was represented by Alana Hecht, Esq. and DCPS was represented by Ellen Douglass Dalton, Esq. Neither party objected to the testimony of witnesses via telephone. Petitioner participated in the hearing in person.

Petitioner presented four witnesses: Petitioner; Psychologist; Student; and Acting Head of School at School. presented six witnesses: Lead Special Education Coordinator ("SEC") at SEC at Collegiate Campus; Principal at Assistant Principal at English teacher at and Director of Clinical Services at who qualified as an expert in clinical and school psychology with an expertise in programming for children with Learning Disabilities and Attention Deficit Hyperactivity Disorder ("ADHD").

Petitioner's disclosures dated 08/24/11, containing a witness list and Exhibits P-1 through P-23, were admitted into evidence without objection. disclosures were dated 08/24/11 and contained a witness list and Exhibits R-1 through R-32. Exhibits R-1 through R-3 and R-6 through R-32 were admitted into evidence without objection and Exhibits R-4 and R-5 were admitted into evidence over objection.

The two issues to be determined in this Hearing Officer Determination are as follows:<sup>2</sup>

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<sup>2</sup> Issue #1 of the complaint was withdrawn. Issue #1 was whether PFCS denied Student a FAPE (a) by failing to comprehensively evaluate Student in all areas of suspected disability, (b) by failing to conduct a reevaluation upon the request of Petitioner and (c) by failing to conduct a comprehensive Functional Behavioral Assessment. (a) was withdrawn and dismissed with prejudice. (b) and (c) were withdrawn and dismissed without prejudice.

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Whether denied Student a FAPE by failing to provide Student with an IEP on 05/09/11 that provided for 100% specialized instruction outside of general education and counseling services.

Whether denied Student a FAPE by failing to provide Student with a placement on 05/09/11 that could implement an IEP that provided for 100% specialized instruction outside of general education in a therapeutic setting.

For relief, Petitioner requested a finding that Student was denied a FAPE on each of the issues presented, that Respondent convene a Multidisciplinary Team ("MDT") meeting to revise Student's IEP to reflect 100% specialized instruction (at least 26.5 hours) outside of general education and 1 hour/week of direct counseling, and that Respondent fund a full time therapeutic private placement that services students with Learning Disabilities and behavioral issues.

### **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. is a public charter school in the District of Columbia that operates as its own independent local education agency. During the 2008-2009 school year, Student attended grade at the Chamberlain Campus. During the 2009-2010 school year, Student attended grade at the Campus. During the 2010-2011 school year, Student attended grade at the Collegiate Campus.<sup>3</sup>

#2. Student's most difficult subject is reading.<sup>4</sup> Student began the 2008-2009 school year at the Chamberlain Campus with a disability classification of Specific Learning Disability and an IEP of 15 hours/week of specialized instruction outside of general education.<sup>5</sup> When the IEP team met in May 2009 at the end of Student's grade year, the team which included Petitioner, agreed to a combination setting of 5 hours/week of specialized instruction in reading in the resource room, 2.5 hours/week of specialized instruction in reading inside of general education, and 7.5 hours/week of specialized instruction in math inside of general education. Student was able to do her work in a smaller group setting when the information was broken down.<sup>6</sup>

#3. While in the grade at Campus during the 2009-2010 school year, Student's reading improved and her grades were better due to the resource room instruction she received because the special education teacher worked with Student and made sure she understood the material.<sup>7</sup> Student's reading comprehension improved by 15% when a comparison of achievement testing scores from 2009 and 2011 was made.<sup>8</sup>

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<sup>3</sup> R-1, R-2, R-14.

<sup>4</sup> R-1-3, Student.

<sup>5</sup> Lead SEC at

<sup>6</sup> R-1, Lead SEC at

<sup>7</sup> Student.

<sup>8</sup> Psychologist.

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#4. When the IEP team met on 06/07/10 to discuss and determine Student's IEP for the upcoming 2010-2011 school year when Student would be attending the Collegiate Campus, recommended a small setting for core content classes, which was a resource class with a smaller number of students than the general education classroom because Student's achievement levels were low and she could use the extra support.<sup>9</sup> Student was struggling with a combination of behavior and academic problems and the inclusion setting precluded Student from moving forward with academics<sup>10</sup> At that time, Petitioner insisted that Student receive inclusion services only because Petitioner did not want Student to be teased or ostracized about receiving classes in a designated special education classroom at the Collegiate Campus.<sup>11</sup>

#5. During the 2010-2011 school year at Collegiate Campus, when Student received inclusion services only,<sup>12</sup> Student was disruptive in class by calling out a lot and exhibiting attention seeking behaviors. When Student did not understand the content of the course work, she was disruptive or got others off task, but when she understood the task, she assumed a leadership role. She was out of boundary on occasions. Her behavior infractions were many, but minor in nature and were not atypical of other 9<sup>th</sup> graders. Most of Student's in-school suspensions were in the morning and due to Student arriving late to school.<sup>13</sup> conducted a Functional Behavioral Assessment ("FBA") in December 2010 and developed a Behavior Intervention Plan ("BIP") in December 2010 to address Student's attention seeking behaviors, repetitive tardiness, and not consistently following teacher directives.<sup>14</sup>

#6. A psycho-educational evaluation conducted in April 2011 did not reveal anything new about Student's cognitive abilities and academic achievement scores. Student's reasoning abilities on verbal tasks were in the Borderline range and her nonverbal reasoning abilities were in the Average range. Student's academic performance scores were low in basic reading skills; very low in broad reading, reading comprehension, mathematics, math calculation skills, written language, and written expression.<sup>15</sup> These findings mirrored findings in a psycho-educational and clinical evaluation conducted in March 2009.<sup>16</sup> The April 2011 psycho-educational evaluation was reviewed at the MDT meeting on 05/09/11 and the data was used in formulating the IEP.<sup>17</sup>

#7. After a full year of inclusion services at the Collegiate Campus, the MDT met on 05/09/11 for an annual review of Student's IEP. recommended resource room instruction for core content courses because Student was scoring 4-5 grade levels below grade level.<sup>18</sup> At that time, Petitioner did not request a full-time therapeutic placement outside of general

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<sup>9</sup> Lead SEC at

<sup>10</sup> Principal.

<sup>11</sup> R-2-3, R-2-5, Petitioner,

<sup>12</sup> SEC at Collegiate Campus.

<sup>13</sup> R-8-3, R-29, P-4, P-29, Asst. Principal,

<sup>14</sup> R-6, R-7.

<sup>15</sup> R-10-6.

<sup>16</sup> P-19-9.

<sup>17</sup> R-14-2.

<sup>18</sup> Principal.

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education.<sup>19</sup> The MDT that included Petitioner, agreed to 6.5 hours/week of resource room services and 10 hours/week of inclusion services and that the services would be put into place for the next school year. <sup>20</sup> Petitioner was resistant to more resource room hours at that time, as she had been during the previous three years.<sup>21</sup> (Petitioner,

#8. In March 2011, Petitioner indicated that she would handle Student's behavioral outbursts and that counseling or other interventions were not necessary.<sup>22</sup> At the MDT meeting on 05/09/11, Petitioner would not agree to Student receiving any counseling services to address Student's calling out in class, as was recommended by because Petitioner felt that Student's behavioral outbursts were due to her reading difficulties and once Student learned to read, her behavior would improve.<sup>23</sup>

#9. The Collegiate Campus offers a variety of specialized instruction services: i.e., services in the inclusion setting, services in a combination of inclusion and resource room setting, and services in a self contained special education class for children functioning on a 1<sup>st</sup> to 2<sup>nd</sup> grade level. The resource room at the Collegiate Campus has a 1:8 teacher to student ratio with 2 teachers present at all times.<sup>24</sup> Based on Student's cognitive ability, reading, mathematics and language can be taught to her in the resource setting. Her cognitive strengths are in her non-verbal ability, which is in the Average range, which suggests that she could be successful outside the general education setting in art, music, dance, basketball and computers because these classes draw on her non-verbal ability. Student was able to grasp algebraic concepts very quickly due to the symbolic nature of algebra, but didn't do as well as she could have due to lateness to class.<sup>25</sup> Collegiate Campus can meet Student's educational needs, which are that Student receive resource room instruction for core subjects of reading, mathematics and language and general education classes with her non-disabled peers for elective courses and lunch.<sup>26</sup>

### Conclusions of Law

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

The overall purpose of the IDEA 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.

"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

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<sup>19</sup> Lead SEC at

<sup>20</sup> R-14, R-16-6, SEC at Collegiate Campus.

<sup>21</sup> Petitioner, Lead SEC at

<sup>22</sup> SEC at Collegiate Campus.

<sup>23</sup> Petitioner, Lead SEC at

<sup>24</sup> Principal.

<sup>25</sup> Clinical Services Director.

<sup>26</sup> *Id.*

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the student with a FAPE.” 5 D.C.M.R. E-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).

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).

The first issue to be determined is whether [redacted] denied Student a FAPE by failing to provide Student with an IEP on 05/09/11 that provided for 100% specialized instruction outside of general education and counseling services. Petitioner alleged that Student was not making educational progress with the part-time IEP of 10 hours/week of specialized instruction in the general education setting since June 2010.

The evidence was clear and Petitioner herself admitted that she expressly forbade resource room services for Student during the 2010-2011 school year even though Petitioner was in favor of and allowed limited resource room services during previous years. Evidence was presented that revealed that Student made progress during the 2009-2010 school year, her grades were better and her reading improved when she received resource room services.

Pursuant to 34 C.F.R. 300.17, 300.39, 300.320, the local education agency must provide Student with special education services as prescribed by an IEP that meets the unique needs of Student and appropriately addresses the special education and related services Student needs to be involved in and make progress in the general education curriculum. Additionally, pursuant to 34 C.F.R. 300.114, 5 D.C.M.R. E-3019.3, the LEA must ensure to the maximum extent appropriate, that children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

There was evidence in the record that Student had benefitted in the past from an IEP that included both resource room and inclusion services, and when the team at [redacted] developed an IEP on 05/09/11 that prescribed a combination setting of resource and inclusion services that resembled the IEP that Student had during the 2009-2010 school year, [redacted] was in compliance with the least restrictive environment mandates of 34 C.F.R. 300.114 and had developed an IEP that would enable Student to be involved in and make progress towards the general education curriculum. Arguably, the evidence could support an IEP of 16.5 hours/week of specialized instruction outside of general education; however, there was no evidence in the record that supported Petitioner’s contention that Student required an IEP with 100% specialized instruction outside of general education. Student’s academic difficulties in a strictly inclusion setting could be addressed by the addition of resource room services and if the resource room services did not ameliorate Student’s difficulties, at least all possible combinations of resources and

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accommodations would have been exhausted prior to a removal of Student from education with her non-disabled peers. The evidence was overwhelming that the only impediment to Student receiving more intensive services during the 2010-2011 school year was that Petitioner refused to subscribe to the idea of any resource room services or counseling services. Petitioner failed to meet her burden of proof that on 05/19/11, Student required an IEP with 100% specialized instruction.

Petitioner also alleged that Student's 05/09/11 IEP should have included counseling services. There was evidence in the record that Student's behavior problems, although numerous, were minor in nature and not atypical of other youths her age.        did take measures to address Student's behavior problems by conducting a FBA in December 2010 and developing a BIP. There was no evidence in the record about the effectiveness or lack of effectiveness of the BIP. On 05/19/11, Petitioner was opposed to counseling services, believing that Student's outbursts were tied to Student's difficulties with reading. On 05/19/11, the services that could help Student to improve her reading, i.e., resource room services, were added to Student's IEP. If, after implementation of the resource services for a reasonable amount of time, Student's behavioral outbursts in class did not subside, then it would be a team decision whether or not to add counseling to Student's IEP. Petitioner failed to meet her burden of proof that Student was denied a FAPE by        failure to add counseling to Student's 05/09/11 IEP.

The second and last issue to be determined is whether        denied Student a FAPE by failing to provide Student with a placement on 05/09/11 that could implement an IEP that provided for 100% specialized instruction outside of general education in a therapeutic setting.

Pursuant to 34 C.F.R. 300.116, the local education agency shall ensure that the education placement decision for a child with a disability is made in conformity with the Least Restrictive Environment ("LRE") provision of the IDEA and that the child's placement be based on the child's IEP.

Petitioner failed to meet her burden of proof on this issue. The Hearing Officer determined in the first issue that Student did not require an IEP with 100% specialized instruction; therefore, Student did not require a placement that could implement a 100% specialized instruction IEP.        was able to provide a continuum of services that would enable Student to receive resource room services while being educated in a school with her non-disabled peers.

### ORDER

The complaint is **DISMISSED** with prejudice. Petitioner failed to meet her burden of proof on any of the issues presented.

All relief requested by Petitioner is **DENIED**.

**IT IS SO ORDERED.**

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**NOTICE OF RIGHT TO APPEAL**

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

Date: September 14, 2011

*/s/ Virginia A. Dietrich*  
Hearing Officer