

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

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

STUDENT,¹)
through the Parent,)
)
Petitioner,)
)
v.)
)
District of Columbia Public Schools)
)
Respondent.)
)

Date Issued: November 21, 2011

Hearing Officer: Virginia A. Dietrich

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of _____ year old Student, filed a due process complaint notice on September 1, 2011, alleging that the District of Columbia Public Schools ("DCPS") had denied Student 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 had attended a full-time DCPS special education school for students with learning disabilities for a three-year period prior to Student's enrollment at a full-time private school at the beginning of the 2011-2012 school year. Petitioner alleged that her unilateral enrollment of Student in a private school had been necessary for Student to receive meaningful educational benefit, and Petitioner sought funding for the private school placement retroactive to the beginning of the 2011-2012 school year. Petitioner also alleged that DCPS violated other IDEA regulations that included failure to conduct a Functional Behavioral Assessment ("FBA"), failure to provide Student with an Individualized Educational Program ("IEP") with appropriate IEP goals in core academic subjects, failure to provide Student with an IEP that included a dedicated aide, and failure to provide Student with a placement that could provide him with meaningful educational benefit during the 2010-2011 school year.

¹ Personal identification information is provided in Appendix A.

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DCPS asserted that the goals in Student's IEP were written to enable Student to make progress, the IEP was appropriate, Student had made progress towards his IEP goals as evidenced by his IEP progress reports, and that public school placement was appropriate.

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 09/01/11. This Hearing Officer was assigned to the case on 09/05/11. A resolution meeting took place on 09/16/11 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 10/01/11, the 45-day timeline to issue a final decision began on 10/02/11, and the final decision was originally due on 11/15/11. The final decision due date was extended to 11/21/11, upon the granting of the written motion of Petitioner, in order to allow for the submission of written closing arguments by 11/11/11.

Petitioner presented five witnesses: Petitioner; an expert in IEP and curriculum development; an expert in the administration and interpretation of psychological evaluations; an educational advocate; and the Associate Head of School at

DCPS presented one witness: a DCPS school psychologist.

Petitioner's disclosures dated 10/31/11, contained a witness list and Exhibits P-1 through P-27. P-1, and P-12 through P-27 were admitted into evidence without objection. P-2 through P-11 were admitted into evidence over objections of relevancy.

DCPS' disclosures dated 10/31/11, containing a witness list and Exhibits R-01 through R-13, were admitted into evidence without objection.

Parties agreed to the following stipulations of fact:

#1. DCPS agreed to conduct a Functional Behavioral Assessment ("FBA")/Behavior Intervention Plan ("BIP") at the Multidisciplinary Team ("MDT") meeting on 11/17/10.

#2. On 09/16/11, DCPS authorized funding for an independent FBA.

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The issue of whether DCPS denied Student a FAPE by failing to implement Student's 11/17/10 IEP; specifically, by failing to provide Student with 4 hours/month of behavioral support services and 45 minutes/week of occupational therapy services since 11/17/10, was withdrawn by Petitioner at the beginning of the due process hearing. That issue is dismissed without prejudice.

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

Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability; specifically, by failing to conduct a FBA as agreed upon at the MDT meeting on 11/17/10.

Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on 11/17/10; specifically, (a) by failing to provide Student with comprehensive and appropriate IEP goals in the areas of reading, writing and math, and (b) by failing to provide Student with a dedicated aide since 09/01/10 to address Student's behavior problems and need for academic assistance in class.

Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement since 09/01/10; specifically, by failing to provide Student with a program that would enable him to receive meaningful educational benefit as a child with Average cognitive ability who is falling further and further behind his peers and who has static or regressing standardized testing scores in reading and math.

For relief², Petitioner requested a finding that Student was denied a FAPE on each of the issues to be determined; that DCPS fund Student's placement at retroactive to 08/29/11; that DCPS convene a meeting to review the independent FBA within 10 business days of its receipt and review and revise Student's IEP, as necessary; and an award of compensatory education in the form of tutoring for DCPS' failure to provide Student with an appropriate IEP and placement from 11/17/10 until Student's enrollment at

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. Student, age attended for the 2008-2009, 2009-2010 and 2010-2011 school years.³ is a full-time special education public school for students with learning disabilities.⁴ During all three years at Student had a full-time IEP.⁵ Student's 06/14/10 IEP classified him with a Specific Learning Disability and prescribed 26 hours/week of specialized instruction, 1 hour/week of speech-

² Petitioner withdrew her request for compensatory education for DCPS' failure to provide Student with related occupational therapy and behavioral support services since 11/17/10.

³ Petitioner, P-12, P-16.

⁴ DCPS psychologist.

⁵ Petitioner.

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language services and 30 minutes/week of behavioral support services, with all services to be provided outside of the general education curriculum. Classroom accommodations for all academic subjects included repetition of directions, simplification and interpretation of oral directions, reading of test questions, translation of words and phrases, calculators, preferential seating, small group testing, location with minimal distractions, breaks during and between subtests and extended time on subtests.⁶ Student's 06/14/10 IEP referenced Student's non-compliant and disruptive behavior 50% of the time, which prevented him from successfully accessing the general education curriculum, and recommended that Student be provided with behavior support services to include counseling behavior management and consultation with teacher and parent to ensure that interventions are consistently implemented in the classroom.⁷ Student's 11/17/10 IEP classified Student with Multiple Disabilities that included Learning Disability and Other Health Impairment, and prescribed 24.45 hours/week of specialized instruction, 1 hour/week of speech-language services, 45 minutes/week of occupational therapy services and 1 hour/week of behavioral support services, with all services to be provided outside of the general education curriculum. Classroom accommodations for all academic subjects were identical to those found in Student's 06/14/10 IEP.⁸

#2. Student had a documented history of Attention Deficit Hyperactivity Disorder ("ADHD"), dating back at least to 2008.⁹ Student's ADHD significantly impaired his ability to attend to tasks and regulate his own physical activity, to independently initiate a task or activity or generate strategies to solve problems without excessive prompting, cues, or directions; all of which slowed Student's overall rate of learning even when instruction was individually provided, inhibited his language development and social growth, and impeded Student's ability to hold directions in his mind long enough to implement them and hold information in his mind long enough to manipulate it. Clinically, Student's difficulties were most significantly resulting from, and impacted by, ADHD and the related symptomatology. Student's ADHD resulted in Student having a difficult time managing his feelings and behaviors; therefore, a Functional Behavioral Assessment and Behavior Intervention Plan were both necessary in order to address and help regulate Student's behaviors in school.¹⁰ In November 2010, Student's ADHD and low academics were both impacting his access to the curriculum and he was continuing to display behavioral difficulties in school.¹¹ In November 2010, Student was not taking medication for ADHD on a consistent basis, and in March 2011, Student was not taking any medication to control his ADHD symptoms.¹² An independent clinical evaluation strongly recommended that Petitioner be educated about the benefits of pharmacological intervention and recommended pharmacological intervention if Petitioner consented, as well as intensive behavioral modifications via a behavior intervention plan.

#3. In March 2010, the MDT felt that a male aide along with medication to control ADHD symptoms (Student was not currently on medication at that time) would help Student focus on school work, reduce his disruptive behaviors in class and assist him with his resistance

⁶ P-12-8, P-12-10.

⁷ P-12-6, P-12-7.

⁸ R-02, R-03.

⁹ P-15-2, Expert in psychological assessments.

¹⁰ P-15-7,

¹¹ P-16-3.

¹² P-16-6, P-10-3.

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to following instruction from female teachers, and a request for a dedicated aide was made to the DCPS central office on 03/11/10.¹³ At the MDT meeting on 06/14/10, DCPS determined that Student would not receive the services of a dedicated aide, as was reflected in Student's 06/14/10 IEP.¹⁴ At the 11/17/10 MDT meeting, Petitioner's advocate inquired about the services of a dedicated aide and was informed by DCPS personnel that the request for a dedicated aide had been denied.¹⁵

#4. Since Student had Average intelligence, Student had the cognitive ability to achieve average academic performance, but Student functioned far below age expectation for many years.¹⁶ In October 2008, when Student was 10 years old and in the 5th grade, Student's broad reading and written language skills were at the kindergarten level and his math skills were at the 2nd grade level.¹⁷ In January 2009, Student had language skills that fell in the very low severe range to borderline/mild range with difficulties in following directions, recalling sentences, assembling sentences, semantic relationships, number repetition, familiar sequences, expressive vocabulary and phonological awareness skills.¹⁸ In May 2010, when Student was 12 years old and in the 6th grade and tested by DCPS, Student's broad reading and written language skills had advanced to the first grade level and his math skills had advanced to the 3rd grade level.¹⁹ And, in September 2010, when Student was 12 years old and in the 7th grade, Student's broad reading and written language skills were still at the 1st grade level and his broad math skills had regressed to the 2nd grade level.²⁰ In May 2011, when Student was 13 years old, in the 7th grade and again tested by DCPS, Student's broad reading, written language skills and broad math skills had remained the same.²¹ In May 2011, when tested by an independent evaluator without any prompts or teacher assistance, Student's broad reading skills were assessed to be at the kindergarten level and his broad math skills were assessed to be at the 1st grade level.²²

#5. In September 2010, Student's severe deficits in reading and written expression were having a negative impact on his behavior.²³ Student's 11/17/10 IEP indicated that Student was significantly delayed in all areas associated with the acquisition and development of those skills necessary for basic reading to occur and his deficits in reading impacted higher level skill performance and often resulted in off-task behaviors in class despite receiving individualized instruction and/or small group instruction of no more than three students.²⁴ Student needed intensive phonics and phonemic awareness instruction in order to learn to read,²⁵ and the need for this type of instruction was addressed not only as part of Student's speech-language services in his 11/17/10 IEP, it was also addressed as part of his 11/17/10 IEP reading goals.²⁶

¹³ P-10-3.

¹⁴ Advocate, P-12-8.

¹⁵ Advocate.

¹⁶ P-7-2, Expert in psychological assessments.

¹⁷ P-5-1.

¹⁸ P-6-9.

¹⁹ P-11-1.

²⁰ R-12.

²¹ R-11.

²² P-18-5.

²³ R-04.

²⁴ P-16-13.

²⁵ Expert in IEP and curriculum development.

²⁶ P-16-13, P-16-16).

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#6. When the IEP was developed on 11/17/10, the information before the MDT about Student's class performance was that Student was reading on a 1st grade level and was having a hard time understanding despite interventions being put into place, scaffolding of the material and Student working in a small group of three students or less.²⁷ At that time, Student was also having trouble with organization in his math class and his writing skills were impacting him as well. The MDT was aware that Student's ADHD impacted his ability to access the curriculum and caused him to act out; however, Student's low academic functioning and inability to understand the schoolwork also contributed to Student's acting out.²⁸ Student's overall avoidant behavior in all academic courses meant that he was not available to access the grade-level standards being taught in class and his attention deficits were having a negative impact on his ability to complete class work and regulate his behavior without redirection.²⁹

#7. At the MDT meeting on 11/17/10, DCPS agreed to conduct a FBA/BIP³⁰ in order to address Student's continuing behavior problems that consisted of talking, playing around in class, touching girls, making jokes and laughing out loud, difficulty completing assignments, and difficulty listening attentively and focusing on class work.³¹ At that time, Student's emotionality was clinically significant, he exhibited non-compliant and disruptive behavior in class 50% of the time and his disruptive behaviors were preventing him from successfully accessing the general education curriculum.³² Ten months later, on 09/16/11, DCPS authorized funding for an independent FBA.³³

#8. DCPS is responsible for implementing state standards, and the general education curriculum is reflected in the state standards in the District of Columbia.³⁴ There is now a trend towards incorporating national educational content standards into an IEP; however, an IEP still must be individualized for the particular student.³⁵ Student's 06/14/10 IEP did not reference national content standards, but Student's 11/17/10 IEP goals in the academic areas of reading, written expression and mathematics were based on and referenced 7th grade content standards.³⁶

#9. Student's 11/17/10 IEP reflected Student's level of performance in reading to be at the kindergarten and first grade levels and the IEP indicated that Student should be given reading level appropriate texts with differentiated instruction along with prompts and direct teacher assistance. Student's needs in the area of reading included developing his ability to read and interpret passages on his present level of functioning. At the time the IEP was developed, Student was being given accommodations and modifications to help him move towards mastery of the goals that included the chunking of reading assignments into smaller units, the use of audiotapes and graphic organizers, the use of scaffolding strategies, and the use of decoding

²⁷ P-16-2.

²⁸ P-16-3.

²⁹ R-04.

³⁰ Stipulation #1.

³¹ R-03.

³² P-16-16.

³³ Stipulation #2.

³⁴ Expert in IEP and curriculum development.

³⁵ Expert in IEP and curriculum development.

³⁶ P-12, P-16, expert in IEP and curriculum development.

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strategies that include phonemic and phonological awareness, and these accommodations and modifications were made part of Student's 11/17/10 IEP.³⁷

#10. Student's 11/17/10 IEP indicated that Student's present level of performance in written expression was at the kindergarten and first grade level. At the time the IEP was developed, Student was struggling with the most basic concepts of writing and had made minimal progress in reaching his IEP goals.³⁸ The IEP indicated that Student had difficulty processing information to translate it to the written form and had extreme difficulty focusing on written tasks without redirection. The IEP also indicated that to assist Student with mastery of his deficit areas, he had been and would be provided accommodations/modifications that consisted of scaffolding, peer tutoring, one-on-one teacher assistance, tutoring, small group instruction and graphic representation to assist him with writing and help him move towards mastery of grade level standards.³⁹

#11. Student's 11/17/10 IEP reflected Student's present level of educational performance in mathematics to be at the 4th-6th grade levels. However, Student's broad reading at the first grade level and his reading comprehension skills at the kindergarten level, made it difficult for him to solve word problems and understand the concepts being presented. At the time the IEP was developed, Student was being presented with standard base 7th grade math concepts which included pre algebra math and he was given accommodations and supports to help him reach the attainable level of mastery of his goals, and he was making relative progress based on his math strengths.⁴⁰ The IEP provided for accommodations that consisted of teacher assistance, small group instruction, and academic aides such as manipulatives, calculator and work samples.⁴¹

#12. At the end of the 2010-2011 school year, Student's performance in his 7th grade classroom at the full-time special education public school he was attending was best described as him requiring a great deal of reading and writing support.⁴² However, IEP progress reports from January 2011 through June 2011 reflected that Student made progress towards mastery of his IEP goals in reading, writing and math with teacher assistance, prompts and accommodations. From January to March 2011, Student made progress towards mastery of his speech-language goal of developing phonological awareness skills. And, from March to June 2011, Student again made progress towards mastery of his speech-language goal of developing phonological awareness skills; however, Student was unable to make significant progress because he was silly and unfocused during instruction.⁴³ From March to June 2011, Student had either regressed or made no progress towards his emotional, social, and behavioral development goals although he made progress towards or had mastered the same goals during the previous quarter.⁴⁴

³⁷ P-16-13.

³⁸ P-16-5.

³⁹ P-16-14.

⁴⁰ P-16-6.

⁴¹ P-16-11.

⁴² Expert in IEP and curriculum development.

⁴³ R-10.

⁴⁴ R-10.

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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.

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).

"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. 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).

The first issue to be determined is whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability; specifically, by failing to conduct a Functional Behavioral Assessment ("FBA") as agreed upon at the MDT meeting on 11/17/10.

"Evaluation" means procedures to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. 34 C.F.R. 300.15. And, an FBA qualifies as an "educational evaluation." *Harris v. District of Columbia*, 561 F. Supp 2d 63 (D.D.C. 2008), 50 IDELR 194.

Once a child has been fully evaluated, a decision has been rendered that a child is eligible for services and the required services have been determined, any subsequent evaluation constitutes a reevaluation. *Comments to Federal Register*, Vol. 71, No. 156, page 46640. Under the IDEA, DCPS must ensure that a reevaluation of Student is conducted if DCPS determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation. 34 C.F.R. 300.303(a)(1). In the present case, DCPS determined that Student needed a FBA on 11/17/10. The IDEA includes no specific deadline for conducting a reevaluation. In the absence of an applicable state deadline, the issue comes down to what is reasonable under the circumstances. *Smith v. District of Columbia*, 55 IDELR 291 (D.D.C. 2010).

The FBA is essential to addressing a child's behavioral difficulties, and as such, it plays an integral role in the development of an IEP. *Harris v. District of Columbia*, 561 F. Supp 2d 63

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(D.D.C. 2008), 50 IDELR 194. When the MDT developed an IEP for Student on 11/17/10, DCPS agreed that Student needed a FBA and BIP to address Student's off task and avoidant behaviors and his inability to listen attentively and focus on schoolwork; all of which impeded Student's ability to access the curriculum.⁴⁵

DCPS took no action for 10 months to complete the FBA and develop a BIP, and finally provided funding for an independent FBA after litigation was initiated.⁴⁶ This length of time was unreasonable for the following reasons: (1) As early as 06/14/10, Student's IEP identified the need for a behavior intervention plan; (2) On 11/17/10, DCPS agreed that a FBA and BIP were necessary to address Student's behaviors, and at the end of the 2010-2011 school year, Student was still engaged in the same disruptive and avoidant behaviors that interfered with learning and prevented his access to the curriculum,⁴⁷ (3) The IEP is the centerpiece of the delivery of services to the disabled child (*D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010)) and the centerpiece for the implementation of FAPE is the IEP (*S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003)), and it is certain that the BIP, when developed, would have become part of Student's IEP; and as such, (4) Student's IEP was not individually tailored to meet his unique needs until the FBA was completed and a BIP developed that would address Student's non-compliant and disruptive behaviors and help him to meet his social, emotional and behavioral development IEP goals⁴⁸ and participate in the general education curriculum.

DCPS' failure to conduct the FBA and complete a BIP constituted a procedural violation of the IDEA. This procedural violation resulted in the denial of a FAPE because Student was deprived of a free appropriate education. *See Harris*. Student was also deprived of the educational benefit of having interventions and supports in place to address his well-documented and persistent avoidant behaviors that prevented him from accessing the curriculum. Petitioner met her burden of proof on this issue.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on 11/17/10; specifically, (a) by failing to provide Student with comprehensive and appropriate IEP goals in the areas of reading, writing and math, and (b) by failing to provide Student with a dedicated aide since 09/01/10 to address Student's behavior problems and need for academic assistance in class.

Pursuant to 34 C.F.R. 300.320(a), an IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting, and must include...a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum and meet the child's needs that result from the disability...and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately towards attaining the annual goals and to be involved in and make progress in the general education curriculum.

⁴⁵ Finding #7.

⁴⁶ *Id.*

⁴⁷ Finding #12.

⁴⁸ *Id.*

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At a minimum, the IEP must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Chambers v. Philadelphia Bd. of Educ.*, 587 F.3d 176, 182 (3rd Cir. 2009)). And, the adequacy of an IEP is determined based on the information available to the IEP team at the time it is written. An offer of FAPE is not meant to be judged from some point in the future with the benefit of hindsight. *R.R. v. Manheim Twp. Sch. Distr.*, 56 IDELR 63 (3rd Cir. 2011).

The IDEA provides for a "basic floor of opportunity" which consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176, 201 (1982). An IEP is reasonably calculated to confer educational benefits when it is "likely to produce progress, not regression or trivial educational advancement." And, the degree of progress required by the IDEA depends on the student's abilities. *Jaccari.J. by Sandra J. v. Board of Educ. of Chicago, District No. 299*, 690 F. Supp 2d 687 (Northern Distr. of Illinois 2010), 54 IDELR 53. The school district is not required to maximize or provide the best program; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit the child to benefit from the instruction. *See Rowley*.

To determine whether a district has complied with the IDEA's substantive requirement, the educational benefit provided to the child "must be gauged in relation to the child's potential." *Jaccari, citing Nein v. Greater Clark County Sch. Corp.*, 95 F. Supp 2d 961, 973 (S.D. Ind. 2000).

The Hearing Officer determines that the 11/17/10 IEP goals in math, reading and writing were appropriate and calculated to provide Student with educational benefit. Although the goals were based on 7th grade content standards, Student's IEP was still tailored to meet Student's unique needs. The IEP accurately established Student's needs in all academic areas, it correctly identified Student's present levels of performance, and the IEP listed accommodations and modifications that were being used and would continue to be used to enable Student to meet his goals and access the curriculum to the best of his ability, given his deficits and encumbrances attributable to ADHD.⁴⁹ And, there was evidence in the record that Student was able to make progress towards achieving his reading, writing and math goals from January through June 2011.⁵⁰

Student's academic achievement scores remained static from 2008-2011;⁵¹ however, static performance or regression in test scores is not dispositive of whether or not a child is denied a FAPE. The results of the standardized tests must be considered in the context of the child's intellectual and emotional components. *Jaccari J. v. Board of Education of the City of Chicago, District No. 299*, 690 F. Supp. 2d 687 (2010), 54 IDELR 53.

⁴⁹ Findings #5, #9, #10, #11.

⁵⁰ Finding #12.

⁵¹ Finding #4.

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In the present case, Student has Average cognitive ability⁵² and under ordinary circumstances, Student should be able to demonstrate average academic achievement with a proper program and supports. However, Student had great difficulty grasping concepts and retaining and manipulating information in his memory due to his ADHD symptoms, and his ADHD was not being addressed with pharmacological intervention.⁵³ In view of the overbearing effects of ADHD, Student's potential was not average even though his cognitive ability was average. Student's ADHD is the significant contributor to his inability to focus and access the curriculum. Despite Student's Average cognitive ability, it will be extremely difficult for Student to close the gap in his academic functioning even with intensive tutoring and phonics instruction, as was suggested by Petitioner, unless Student's ADHD is addressed through pharmacological intervention. The Hearing Officer determines that without pharmacological intervention, Student's achievement potential has maximized at the 1st and 2nd grade levels in reading, written expression and mathematics, despite a full-time specialized instruction program accompanied by appropriate modifications and accommodations for the past several years.

Petitioner failed to meet her burden of proof with respect to her claim that the reading, writing and math goals in Student's IEP were not designed to meet Student's needs and would not enable him to access the curriculum and receive meaningful educational benefit. The only thing that would truly help Student make the progress that was commensurate with his ability was the infusion of pharmacological interventions and that was not something that could be written into an IEP; pharmacological intervention was at the sole discretion of Petitioner. Student's 11/17/10 academic IEP goals were written to reflect 7th grade content standards;⁵⁴ however, when the IEP is read together as a whole, it is clear that the MDT recognized that Student was functioning at the kindergarten to 2nd grade levels and that instruction had to be modified to meet his ability level, with accommodations and modifications that were spelled out in the IEP. There was no evidence in the record that as of the time of the development of the 11/17/10 IEP, DCPS could not or had not in the past, provided the necessary modifications and accommodations to enable Student to progress towards his IEP goals.

With respect to Petitioner's claim that DCPS failed to provide Student with a dedicated aide since 09/01/10 to address Student's behavior problems and need for academic assistance in class, the Hearing Officer concludes that Petitioner met her burden of proof.

The evidence was clear and uncontroverted that in March 2011, the MDT, which included DCPS, felt that a dedicated aide would help Student control his behavior and provide one to one academic assistance to Student, particularly in view of the fact that Student was not taking medication to control his ADHD symptoms and his ADHD symptoms interfered with learning and impeded his access to the curriculum. For a reason that is not in the record, the request for a dedicated aide was denied by DCPS.⁵⁵

The Hearing Officer concludes that DCPS should have provided Student with a dedicated aide as a supportive measure, since 09/01/10. Increasing behavioral support services from 30

⁵² Finding #4.

⁵³ Finding #2.

⁵⁴ Finding #8.

⁵⁵ Finding #3.

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minutes/week to 1 hour/week on 11/17/10 was not enough.⁵⁶ Related services include supportive services as are required to assist a child with a disability to benefit from special education. See 34 C.F.R. 300.43. Student struggled mightily with behavior and academics in the classroom,⁵⁷ and this ameliorative step should have been taken, as was recommended by the MDT in March 2011, so that all supports and accommodations could have been put into place as part of Student's IEP in order to help Student access the curriculum, pursuant to 34 C.F.R. 300.320(a)(4). Student was denied a FAPE; he was deprived of the right to the educational benefit derived from having the appropriate services to meet his unique educational needs.

Adding a dedicated aide to Student's IEP will provide him with the one to one assistance he needs in behavior and academics, both as compensatory education for DCPS' failure to provide Student with a dedicated aide and a BIP, and as a prospective service that meets Student's current educational needs. Intensive tutoring and intensive phonics instruction, as requested by Petitioner, will not be effective to bridge the gap between Student's cognitive ability and his academic achievement level, until he no longer suffers from the gross distractibility and poor working memory caused by his ADHD.

The third issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement since 09/01/10; specifically, by failing to provide Student with a program that would enable him to receive meaningful educational benefit as a child with Average cognitive ability who is falling further and further behind his peers and who has static or regressing standard scores in reading and math.

The placement is the setting and the location where the IEP is implemented. 34 C.F.R. 300.116. DCPS is required to provide Student with a FAPE; i.e., an appropriate school where services can be provided in conformity with Student's IEP. 34 C.F.R. 300.17.

Petitioner failed to meet her burden of proof on this issue. There was no evidence in the record that DCPS failed to implement Student's 06/14/10 IEP or 11/17/10 IEP. Therefore, the Hearing Officer concludes that Student's placement at Prospect LC during the 2010-2011 school year was appropriate.

ORDER

(1) Within 30 calendar days of the date of this Order, DCPS shall amend Student's IEP to include the services of a dedicated aide and have a dedicated aide in place who can assist Student with behavior management and provide 1:1 academic assistance to Student in the classroom;

(2) Within 30 calendar days of receipt of the independent Functional Behavioral Assessment ("FBA"), DCPS shall convene a proper Multidisciplinary Team to review the FBA, develop a behavior intervention plan ("BIP"), and review and revise Student's IEP as necessary based on the FBA and BIP; and

⁵⁶ Finding #1.

⁵⁷ Findings #5, #6, #7.

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(3) Any delay caused by Petitioner or any of Petitioner's representatives, shall extend the deadline for DCPS' performance, day for day.

All other relief is denied.

IT IS SO ORDERED.

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: November 21, 2011

/s/ Virginia A. Dietrich
Hearing Officer