

DISTRICT OF COLUMBIA OFFICE OF THE STATE SUPERINTENDENT
STATE ENFORCEMENT AND INVESTIGATION DIVISION

-----x
[REDACTED]

Petitioners,

- against -

District of Columbia Public Schools,
Respondent.

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HEARING OFFICER DECISION

SHO Case No. 2009-1164

Paul Ivers, Hearing Officer

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I. Introduction

The minor Petitioner (“Student”) is a resident of the Respondent school district and has been identified by Respondent as a child with a disability in accordance with the Individuals with Disabilities Education Act (“IDEA”) and as such is entitled to receive a Free Appropriate Public Education (“FAPE”). Respondent District of Columbia Public Schools (“DCPS”) was and is responsible for providing the Student with a FAPE during the 2008-2009 and 2009-2010 school years.

The Petitioner parent is afforded, and has exercised, her right under the IDEA to initiate a complaint with respect to any issue concerning the identification, evaluation and placement of the Student by requesting a due process hearing that alleges the denial of a FAPE for the above-described minor Petitioner, by the Respondent during the 2008-2009 and 2009-2010 school years.

II. Relevant Family, Medical and Educational History

The Student was born on December 25, 2001, and at the time of the due process hearing was [REDACTED] old. He resides with his mother and, during the week, his Grandmother. He has 3 siblings; two older sisters who attend full-time special education programs provided by DCPS, and a newborn younger sister. PE-5.¹

The Student’s medical history indicates that he has been hospitalized for asthma on several occasions, his last asthma attack occurring in August 2008. This condition is successfully managed by medication. PE-5, R-3.

¹ References to Petitioners’ Exhibits 1-15 are noted throughout as “PE-(applicable exhibit no. 1-15). References to Respondent’s Exhibits are noted throughout as “R-(applicable exhibit no. 1-15). References to Hearing Officer Exhibits are noted throughout as “HO-(applicable exhibit no. 1-15).

The Student was reported to have bed-wetting problems, attributed by the Petitioner parent to poor liquid management. It was also reported that he was recommended to receive medication to control hyperactivity, which Petitioner parent declined. He is also reported to have suffered a concussion as the result of a playground injury at age four. PE-5, R-3.

The Petitioner parent alleges that she presented as a student with mild mental retardation and had difficulties with peers and adults in school. PE-5.

The Student attended Head Start/pre-school at [REDACTED] Elementary School, and [REDACTED] Elementary School for kindergarten and 1st grade. He enrolled for 2nd grade at [REDACTED] for the 2008-2009 school year, and continues to [REDACTED] for his 3rd grade, the 2009-2010 school year. PE-5.

The Student has reportedly evidenced academic and behavioral difficulties since entering school. He was absent from pre-school for fourteen days and from kindergarten for 22 days. PE-5. There is no evidence of his 1st grade attendance, but the record indicates that he missed between 6 and 9 days in 2d grade. PE-3

In July 2008, Petitioner parent initiated due process proceedings alleging, in part, that Respondent had denied the Student a FAPE by failing to identify, evaluate and recommend an appropriate program for the Student. The parties reached a settlement and the matter was dismissed.² In accordance with the terms of the settlement, Respondent agreed to conduct an initial evaluation of the Student.

The initial evaluation was conducted in the summer of 2008. Respondent conducted a Social Work Evaluation, Physical Therapy Evaluation, Occupational Therapy Evaluation and a Comprehensive Psychological Evaluation. EXS PE-5, PE-11, PE-12, RE-3. A Speech and Language Evaluation was also completed, but the Evaluation was not admitted into evidence. PE-9.

A Multidisciplinary Team ("MDT") meeting was convened on September 18, 2009. It was attended by the Petitioner parent and her invited Educational Consultant, as well as the following DCPS staff, a social worker, a speech pathologist, a DCPS compliance staff member, an occupational therapist, a physical therapist, a regular education teacher, a special education teacher, an LEA representative and a designee. PE-9.

As a result an Individualized Education Program ("IEP") was developed ("September 2008 IEP"), which in significant part recommended that the Student be classified with a Specific Learning Disability ("SLD") and attend a part-time special education program at [REDACTED]. The program consisted of 17 hours of weekly services, comprised of 15 hours of specialized instruction, as well as 1 hour each per week of occupational therapy and psychological counseling. The program was to be provided in a location other than

² Student Hearing Officer Case No. 2008-046.

the general education classroom, and the IEP records that the Student would not be in a general education setting for 34% of the school day. PE-15.

Petitioner parent provided written consent for the initial provision of the recommended special education and related services on August 19, 2008, PE-7, and the Student attended [REDACTED] during the 2008-2009 school year. The evidence concerning that attendance and Respondent's provision of the recommended program are more fully discussed below.

On May 8, 2009, an MDT meeting was convened to develop an IEP for the 2009-2010 school year. PE-14. The notes of that meeting indicate the attendance of the Student's special education teacher, counseling provider, occupational therapist and an LEA representative.³ The Petitioner parent and her counsel attended via telephone.

The resulting IEP ("May 2009 IEP") continued the recommended classification of SLD and a part-time special education program with related services; 15 hours per week of specialized instruction and 1 hour per week each of occupational therapy and psychological counseling. Significantly, and unlike the September 2008 IEP, all services were to be provided in the general education setting. PE-15. Such service provision was consistent with [REDACTED] educational model.

Petitioner parent expressed her disagreement with DCPS' MDT participants' description of the Student's progress and ultimately with the May 2009 IEP and its recommendations by declining to sign the IEP and by subsequently initiating these proceedings.⁴ However, the Student continued his registration and attendance at [REDACTED] for the 2009-2010 school year.

III. Procedural History

Petitioners commenced this matter by filing a Due Process Complaint Notice ("DPCN") dated August 12, 2009, which alleged, in significant part, that Respondent had denied the Student a FAPE during the 2008 and 2009 school years and sought relief in the form of compensatory education, an independent evaluation and public funding for a private, full time special education program.

I was appointed to hear the matter on August 17, 2009, and by Order, dated August 19, 2009, the parties were required to advise the hearing officer of the termination, if any, of the scheduled date for, and/or any agreement reached at, the resolution meeting.

³ The documentary evidence of the meeting, PE-14, does not contain the signatures of all described participants. However, the IEP developed at the meeting does contain the signatures of such persons. PE-15.

⁴ The copy of the May 2009 IEP admitted into evidence contains the handwritten statement on page 1 that the "Attorney/Parent agreed to this IEP via telephone. 5/8/09." The author is unknown. This is obviously an incorrect statement, and not an accurate reflection of the Petitioner parent or counsel's opinions regarding the IEP.

Respondent filed a Response to the DPCN, dated August 24, 2009, which essentially denied the allegations in the DPCN and argued that Petitioners were not entitled to the requested relief.

On August 25, 2009, the parties held a resolution meeting. No agreement was reached. PE-2, R-4.

On September 11, 2009, a Pre-Hearing Conference was held. Counsel for the respective parties appeared by telephone. A Pre-Hearing Conference Summary and Order, dated September 15, 2009 was subsequently issued, which in significant part scheduled the due process hearing for September 30, 2009 and October 1, 2009. The Order also stated six issues to be addressed and determined at the due process hearing, which were based upon a discussion of, and drawn from, the allegations contained in the DPCN as well as Respondent's Response to the DPCN.

On September 23, 2009, the parties exchanged their respective five-day disclosures of proffered documentary evidence and prospective witnesses.

The due process hearing commenced and concluded on September 30, 2009.⁵ Counsel appeared on behalf of both parties.

In order to avoid duplication of exhibits the parties agreed to the introduction of Petitioners' Exhibits 1 through 15, and Respondent's Exhibits 1 through 4. Following the close of the hearing, I discovered that the parties had failed to discuss the introduction of a document that comprised the final page of what Respondent had offered as its then 10th numbered exhibit. I believe that that failure was inadvertent and have included it in the record as Hearing Officer Exhibit 1.⁶ The exhibits are listed on Appendix A.⁷

⁵ The parties rested their respective cases at the close of proceedings on the first day of hearing. Accordingly, the second scheduled date of October 1, 2009, was cancelled.

⁶ Respondent's 10th numbered exhibit was described as an Occupational Therapy Service Tracker and comprised 13 pages. Page 13, would have been admitted under the terms that applied to the admission of the rest of the proffered exhibit. Based on Petitioners' objection only pages 1 through 10 of this exhibit were admitted. Pages 11 and 12 were excluded on the grounds that the related service provider had not signed them. Respondent was afforded, but did not exercise, the opportunity to call the service provider as a witness in order to authenticate the excluded pages. The Provider signed Page 13.

⁷ For the purposes of clarity, I have listed the Exhibits in sequential numerical order, which required the renumbering of certain of the parties' Exhibits. For example, Respondent's Exhibit 4 was originally offered as Respondent's exhibit 12.

Appearing for Petitioners was the parent, the Director of Admissions for Petitioners' intended private school placement, and the student's maternal grandmother.⁸ Appearing for Respondent was a School Psychologist and the Student's Certified Special Education teacher for the 2009-2010 school year. The witnesses were sequestered in accordance with the Pre-Hearing Conference Summary and Order. All witnesses are identified by name and affiliation in Appendix B.

The parties did not submit any motions or briefs.

III. Discussion

As noted above, the Pre-Hearing Conference Summary and Order in this matter identified six issues to be addressed and determined at hearing. Issues 1, 2 and 3 essentially require findings of fact, based upon the available evidence. Issues 4, 5 and 6 essentially state Petitioners' specific requests for relief.

A. Issue 1

The first Issue was stated as follows.

Issue 1: Was the September 19, 2008 IEP appropriate to meet the student's needs during the 2008-2009 school year?

- a. Did Respondent recommend an appropriate classification – was the student properly classified as having only a significant learning disability (“SLD”)?
- b. Did Respondent recommend an appropriate program of special education and related services – did the student require a more restrictive program and/or placement than the recommended 17-hour program (15 hours of resource room supported by 1 hour of counseling and 1 hour of occupational therapy)?
- c. Did Respondent fail to provide the student with any or all of his recommended related services (counseling, occupational therapy) during the 2008-2009 school year?

Petitioners' stated position at hearing as well as the record evidence indicates that a determination of Sub-Issues a and b would in effect require the issuance of a declaratory judgment. A determination of Sub-Issue c does not require a similar result.

⁸ Petitioner offered the testimony of two additional persons, described as an Educational Advocate and an Associate Attorney. Respondent objected to the testimony of the Educational Advocate and I reserved a decision on the objection pending the completion of the testimony of Petitioner's other witnesses. However, Petitioner subsequently withdrew the offer of this witness. The testimony of the Associate was reserved as rebuttal witness with respect to the August 28, 2009 resolution meeting. Respondent did not present direct testimony concerning the meeting, thereby obviating the need for a rebuttal witness.

(1) Sub-Issues a & b.

Petitioners seek no relief in connection with any determination that the September 2008 IEP was inappropriate for reason of the recommended classification and/or program. With respect to the alleged denial of FAPE during the 2008-2009 school year, Petitioners seek only compensatory education services for Respondent's alleged failure to provide any or all of the Student's recommended related services of psychological counseling and occupational therapy.

This is largely because Petitioners' arguments regarding the appropriateness of the September 2008 IEP are based on hindsight. Petitioners allege of a lack of educational progress and behavioral issues during the course of the 2008-2009 school year from a vantage point near the close of the that school year. These allegations are more properly asserted in connection with the appropriateness of the May 2009 IEP and Petitioners' request for relief in the form of additional evaluations and a publicly funded full-time private school placement. C.f., D.F. v. Ramapo CSD, 430 F.3d 595 (2d Cir. 2005)(discussing Circuit Court opinions finding it improper to utilize retrospective evidence to judge the appropriateness of an IEP), discussing, Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir.1999)(program should not be judged in hindsight, but rather at the time it was implemented).

Further, petitioner parent testified at hearing that she did in fact agree with the September 2008 IEP recommendations at the time they were made, and that it was only after the school year commenced that she began to question those recommendations. The record also shows that although the Petitioner parent expressed her concerns regarding the Student's behaviors and educational progress during the 2008-2009 school year, it was not until the MDT meeting of May 8, 2009 that she expressed a formal disagreement with, at least, a part-time program of special education services by declining to sign the May 2009 IEP. Petitioners' specific requests for additional evaluations and a full-time program are not precisely documented in the record until the August 2009 resolution meeting. PE-14.

Regardless, an analysis of the September 2008 IEP is required as it necessarily informs a determination regarding the appropriateness of the May 2009 IEP, and Petitioners' requested relief.

As of September 2008, Respondent had conducted an initial evaluation of the student comprising Social Work, Psychological, Occupational Therapy, Physical Therapy and Speech and Language evaluations. EXS PE-5, PE-9, PE-11, PE-12, RE-3.

Thereafter, on September 19, 2009, an MDT was convened. The participants included the Petitioner parent and her Educational Consultant, where the results of the initial evaluations were discussed. PE-9. The notes describe the input of each of Respondent's MDT members regarding the results of the initial evaluation reports. The authors of the Social Work, Comprehensive Psychological, and Occupational Therapy Evaluations were present and provided first hand accounts of their respective evaluations. The results of

the Speech and Language and Physical Therapy Evaluations were summarized by a speech pathologist and a physical therapist, respectively. Neither of these evaluations recommended that the Student receive applicable related services. PE-9.

The occupational therapist, consistent with the results of the Occupational Therapy Evaluation, noted that the Student required therapy on a direct and consultative basis to address demonstrated deficits in visual motor skills, visual perception and letter and number formation. It was noted that direct intervention could be employed to address letter and number formation and to incorporate strategies into the classroom environment.

The MDT completed a Specific Learning Disability Eligibility Determination Form, which apparently reflected the results of the Psychological Evaluation; noting that the Student's psycho-educational profile resembles that of a student with an SLD and that his widely scattered cognitive scores⁹ and significant academic deficits¹⁰ may be perceptually based and adversely impact his ability to read, write and solve math problems. PE-9, PE-10.

With respect to the Student's social-emotional needs, the Psychological Evaluation yielded scores for cognitive problems, hyperactivity and attention deficits that fell in the atypical ranges. To gain additional insight, the evaluator administered the Devereaux Behavior Rating Scale and the Clinical Assessment of Behavior-Parent Extended to Petitioner parent. The results of these tests were relied on to rule out an attention deficit hyperactivity disorder ("ADHD") and to conclude that the Student required psychological counseling services focusing on his social skills.

The resulting September 2008 IEP recommended that the Student be classified with a SLD and receive a part-time program of special education and related services. The program consisted of 15 hours per week of specialized instruction and 1 hour per week of occupational therapy and psychological counseling. The program was to be provided in a location other than the general education classroom and the IEP records that the Student would not be in a general education setting for 34% of the school day. PE-8.

A review of the September 2008 IEP indicates that, although hardly perfect in its execution, it reflects and incorporates many of the results and recommendations made in the initial evaluations. For example, the IEP records the academic functioning levels that the Student achieved on the Woodcock Johnson III Tests of Achievement that were administered during the course of the Psychological Evaluation. PE-8, R-3. The IEP also incorporates short-term objectives that are consistent with his identified needs in reading, written expression, math, his social-emotional needs and the letter and number formation and fine motor skill problems identified by the Occupational Therapy Evaluation.

⁹ For example, the Student's intellectual ability was assessed to be in the very low average range while his verbal ability was assessed to be in the average range. R-3.

¹⁰ The following grade level scores were achieved: Academic Skills K.4, Academic Fluency K.8, Broad Math K.5, Broad Written Language K.5, Broad Reading, K.8. R-3.

Further, there is nothing in the record to indicate that Petitioner parent, who attended along with her Educational Consultant, was not afforded a full and fair opportunity to participate in the development of the IEP.

(2) Sub-Issue c.

Petitioners state a claim and request for relief that can be provided, should a determination be made that Respondent failed to provide all of the Student's recommended related services resulting in a denial of a FAPE.

The September 2008 IEP recommended that the Student receive the related services of occupational therapy and psychological counseling. Each related service was to be provided in weekly 1-hour sessions. PE-7. The evidence at hearing establishes that the Student did not receive all of his recommended related services during the 2008-2009 school year.

Petitioner parent testified credibly that the Student did not receive his recommended psychological counseling until January 2009 and that the services were only provided until April, leaving a second gap in services through June 2009. The basis for her knowledge was her personal interaction with school staff and visits to the school resulting from telephone calls regarding the Student's behavior.

Respondent's evidence did not contradict this testimony. On this issue, Respondent sought only to admit documentary evidence of the provision of psychological counseling services, comprising a single page of a document described as a Behavioral Support Service Tracker. The document reportedly described provider notes of counseling sessions, but only for the period May 13, 2009 through June 10, 2009. Based on Petitioners' objection, admission of the document was subject to the testimony authenticating provision of the described services. Respondent did not provide this testimony and the document was not admitted into evidence.

Accordingly, I find that Respondent failed to provide the Student with his recommended psychological counseling services during the period from September 2008 through January 2009 and during May and June 2009.

The evidence concerning the provision of and the Student's receipt of his recommended occupational therapy services establishes that the Student also did not receive all of these services, but to a different degree.

Petitioner parent's testimony regarding her knowledge of the Student's receipt of recommended occupational therapy services was confusing and, on objection, struck from the record. The only evidence that remains is Respondent's Exhibit 2, which is described as an Occupational Therapy Service Tracker, consisting of 10 pages of provider notes describing the provision of services from September 19, 2008 through

April 29, 2009.¹¹ No evidence was presented to contradict the information contained in this Exhibit. Accordingly, I find that the student did not receive his recommended occupational therapy services for the period from April 30, 2009 through June 2009.

I also find that Respondent's failure to provide these related services, in the above-described amounts constitutes the denial of a FAPE for the Student, who presents with significant cognitive and academic deficits. The implications of these findings are further discussed in the findings and Order made with respect to Issue 5 below.

B. Issue 2

The second Issue for determination was stated as follows.

Issue 2: Is the May 8, 2009 IEP appropriate to meet the Student's needs during the 2009-2010 school year?

- a. Did Respondent recommend an appropriate classification – was the student properly classified as having only a significant learning disability (“SLD”)?
- b. Did Respondent recommend an appropriate program of special education and related services – did the student require a more restrictive program and/or placement than the recommended 17-hour program (15 hours of resource room supported by 1 hour of counseling and 1 hour of occupational therapy)?

Generally a district provides a FAPE if it has (1) complied with all applicable procedural requirements in the development of its educational recommendations and (2) recommended a program of special education and related services that meets the child's unique educational needs and is reasonably calculated to confer meaningful educational benefit for the child in the least restrictive environment in which s/he may be educated. E.g., Board of Education of the Hendrick Hudson CSD v. Rowley, 458 U.S. 176, 200 (1982).

(1) IEP Development

On May 8, 2009 an MDT meeting was held in order to develop an IEP for the 2009-2010 school year. PE-14. The attendees for Respondent included the Student's general education and special education teachers, and his related service providers; the occupational therapy provider had also conducted the initial occupational therapy evaluation. Petitioner parent and her counsel appeared by telephone. No procedurally-based allegations have been raised regarding the meeting or the resulting IEP's development.

The record contains little information regarding this meeting, except for Petitioner parent's testimony that she disagreed with the reports of progress and declined to accept the IEP, and the transcribed notes of the meeting. PE-14.

¹¹ See footnote 6, supra.

No new or updated formal evaluations were conducted and the MDT would necessarily have to rely on the initial evaluations. The evidence indicates no challenges to the substantive results of those evaluations.

The MDT members should have also been aware of and considered information regarding the implementation of the initial September 2008 IEP and the Student's 2008-2009 school year performance. The record contains evidence of that performance. Consistent with the discussion above, the MDT should also have been aware that the Student had not received all of his related services, in particular his psychological counseling services.

The Petitioner parent credibly described the Student's academic and behavioral difficulties during the 2008-2009 school year, explaining how she was frequently contacted by school staff with complaints of the Student's behaviors, that she observed the Student's segregation from the rest of the students in the regular education class, and how she knew that he was not receiving his recommended counseling services. She further described her sense that the Student appeared to be making no academic progress and failed to either bring homework home or complete it. This testimony was corroborated by the testimony of the Student's Grandmother.

It was further supported by the informed and credible testimony of Respondent's School Psychologist. The School Psychologist had conducted the initial Psychological Evaluation, attended the initial MDT meeting and participated in the development of the September 2008 IEP. During the initial evaluation he developed a rapport with the Student that continued through the 2008-2009 school year, whereby he made intermittent bi-weekly visits to the Student's regular education class and permitted the Student to have informal visits, to afford him 20 minute breaks in his school day.

Tellingly, the School Psychologist testified that the Student was not engaged in his regular education class during the 2008-2009 school year. Notably, his classroom observation for the initial Psychological Evaluation described a child who was completely disengaged in that setting and basically slept for the half hour long visit. Granted that behavior occurred prior to the development of the September 2008 IEP, but the record contains evidence to indicate that it was permitted to continue well after the implementation of the IEP. E.g., PE-14.

The School Psychologist testified that the Student's lack of engagement continued throughout the school year, that he discussed the situation with the general education teacher and described her unwillingness to assume responsibility. Significantly, the evidence suggests that the Student's reported behavioral issues appear to have originated in the regular education portion of his school day.

The September 2008 IEP's integrated program recommendation includes education in both the regular and special education settings. These settings are not separable in terms of the recommended program, and Respondent is required to provide the Student with an appropriate program throughout the entirety of the school day.

Given the above-described deficiencies, I find that Respondent failed to appropriately implement the September 2008 IEP.

A review of the transcribed notes of the MDT meeting pertaining to the development of the May 2009 IEP contains references to the Student's sleeping in class, lack of motivation and failure to complete homework, but frankly leaves this hearing officer to speculate whether it also reflects an altered reality.

The regular education teacher's comments regarding the Student's need for motivation belie the fact that she likely did not provide any. The description of the occupational therapist's input is likewise inexplicable. A review of the May 2008 IEP indicates that it contains precisely the same therapy goals as the September 2008 IEP, which contradicts the statement that new goals were prepared to reflect the Student's progress.

The resulting May 2009 IEP contains similar disputable assessments and recommendations concerning the Student's needs.

For example, with respect to the Student's academic abilities in the subject area of math, the IEP states that the Student progressed from a K.5 GE in 11/08 to a 2.7 GE as of 3/09. Such growth is entirely inconsistent with: the Student's established cognitive ability; the inappropriate implementation of the September 2008 IEP, the Student's 2nd Grade Report Card, PE-3, which records that as of the 3rd marking period his 2nd grade level math skills were either at a beginning 2nd grade level and/or had not even been introduced; and fact that the May 2008 IEP records that he is only capable of 1 digit addition and subtraction. Additionally, the corresponding math related goal and objectives are likely too advanced for this Student's functional level. Compare PE-3 with PE-15.

In terms of the Student's reading skills, the May 2009 IEP indicates that the Student has experienced progress from a K.3 GE to a K.9 GE. This progress is described as having occurred between 11.08 and 0/09 [sic] and is accordingly not an accurate or useful description. More importantly, the IEP proposes short-term objectives that far exceed his stated ability. For example, given a knowledge base of only 20% of his pre-primer words, the Student is expected leap ahead to decode phonetically regular multi-syllabic words. PE-15.

In terms of writing, the IEP states that the Student writes in complete sentences with no more than three to four word sentences. This is misleading, no qualitative explanation of the Student's "sentences" is described. As expressed in the proposed, and repeated, occupational therapy goal and objectives, the Student still exhibits difficulty forming upper case and lower case letters as well as numbers 0-9. Pe-15. Testimony at hearing established that he still reverses letters. No indication of his ability to spell is provided.

A similar analysis may be applied to other objectives stated in the IEP.

The behavioral plan that is included in the May 2008 IEP is also inadequate. It contains only general terms for Intervention Strategies (“Re-focus, Re-direct”), Rewards/Reinforcement (“Computer Time Free Choice Time”) and Consequences (“Timed Isolation No choice time Delayed Resecc” [sic]). It does not describe antecedents, specific target behaviors and the context in which they occur or the frequency with which they occur, persons responsible for intervention, descriptions of the proposed interventions, measurable benchmarks for reducing and eventually extinguishing the target behaviors, etc. PE-15.

The IDEA specifies the basic contents of an IEP to include, in part, (1) a statement of the child’s present levels of academic achievement and functional performance...(2) a statement of measurable annual goals, including academic and functional goals designed to meet the child’s needs...make progress in the general education curriculum... 34 C.F.R. §300.320(a); D.C. Mun. Regs. Title 5, Chapter 30, §5-3009.1. The IEP team must also consider the use of positive behavioral interventions and strategies for any child whose behavior impedes his learning. 34 C.F.R. §300.324(a)(2)(i); D.C. Mun. Regs. Title 5, Chapter 30, §5-3007.3.

Accordingly, I find that the May 2009 IEP fails to meet the specified regulatory requirements. The implications of this finding are further discussed in the determinations and Order made with respect to Issue 5 below.

(2) Classification

The May 2008 IEP continues to recommend the classification of SLD and Petitioners raise a challenge to that classification,

However, as noted in the discussion and determination with respect to Issue 4 below, Petitioners do not truly seek to undermine or replace the recommended classification of SLD, but instead seek to augment it, such that the Student would receive a recommendation for multiple classifications, which Petitioners assert might be based on the presence of an ADHD and/or an emotional disturbance.

Petitioners support the request for evaluation to determine the appropriateness of additional classifications on the evidence of the Student’s performance during the 2008-2009 school year, including the demonstrated behavior problems and allegations of lack of educational progress.

I find that the evidence indicates that the behavioral problems that plagued the Student during the last school year were more likely the result of Respondent’s failure to implement the September 2008 IEP program recommendations. It does not take a stretch of the imagination to expect that the Student’s lack of engagement in the regular education setting coupled with the non-receipt of mandated psychological counseling services could lead to the described behaviors. There is testimony and evidence to indicate that the Student’s attention-related issues were evident only in the regular education setting and not in his smaller special education classes. PE-2.

Additionally, I reiterate my findings concerning the recommendation of the SLD classification that are stated in the discussion of Issue 1 above, which essentially find no reason to suspect that it was inappropriate at the time the September 2008 IEP was developed.

Based on the available evidence, I find that the SLD classification is appropriate. The implications of this finding are further discussed in the findings and Order made with respect to Issue 5 below.

(3) Recommended Program

The May 2008 IEP also continues the recommendation of a part-time program of special education and related services, comprised of 15 hours per week of specialized instruction and 1 hour per week each of occupational therapy and Behavioral Support Services. This 17-hour program appears to be a repetition of the September 2008 program, but there is a significant difference. The IEP specifies that the specialized instruction and related services are provided in the general education setting in accordance with an instructional model that [REDACTED] implements.

The record does not contain evidence that Respondent's MDT members discussed or considered the import of the instructional model. But, more importantly, the record does not contain evidence that establishes that the Student can only receive a FAPE in a full time special education program. Although, if he falls any farther behind academically such a program would be inevitable, given his cognitive abilities.

The testimony of the School Psychologist and the Student's current Special Education Teacher is important with regard to the effect of the new instructional model.

The Special Education Teacher offered guarded and occasionally non-probative testimony. For example, he could not accurately specify or recall the Student's current functional academic levels although he provides 15 hours of direct instruction for the Student and recently tested the Student to determine those levels. Further, he stated that he had completed only a cursory review of the May 2009 IEP. This hearing officer would expect that the witness take efforts to fresh his recollection about such germane issues in preparation for his testimony.

However, the Special Education Teacher did provide testimony that described the implementation of the recommended program at [REDACTED] during the current school year. He provides specialized instruction for the Student in the general education class 2 days per week, Tuesday and Thursday, for the entire class day. The class contains 28 students, of which 5 or 6 are disabled and his responsibility. On Friday, the Student receives his specialized instruction in a segregated class with up to 10 other students with

disabilities. The Special Education Teacher provided some details regarding the way in which he groups and instructs the disabled students in the general education class.¹²

The Special Education Teacher also described accommodations that have been implemented for the Student in the classroom, including allowing him to sit closer to the blackboard, and implementing strategies supplied by the occupational therapist to support the Student's writing and letter reversals.

He also testified that he and the general education teacher suspected that the Student has eyesight related difficulties and referred him to the school nurse, who felt that the student required glasses. Petitioner parent was so advised. However, Petitioner parent apparently disagrees with this assessment. Neither party presented probative evidence on this issue.

Importantly, the Special Education Teacher testified that he found the Student eager to learn, enthusiastic and able to get along with his peers. Unfortunately, he was extremely guarded when questioned about the only documented behavior-related incident that has occurred in the, albeit young, 2009-2010 school year; the first day of school was August 24, 2009.

While the witness obviously refused to offer details regarding the incident, the salient fact is that only a single behavior incident has occurred as of the date of the hearing. This fact was corroborated by the testimony of the Student's Grandmother. The evidence concerning the 2008-2009 school year would reasonably raise an expectation that the Student would have experienced more than a single behavioral incident.

The School Psychologist provided additional testimony, which afforded some level of corroboration of the Special Education Teacher's testimony, and which indicated that the Student's engagement in the general education class was improved from last year, based on his observation of the Student and conversations with his current and previous special education teachers. These interactions were admittedly limited, but I find that the School Psychologist demonstrated not only insight regarding the Student's needs, but a genuine professional concern as well.

I am, however, unable to find that the recommended program is appropriate, essentially because it does not fully take into account the need to provide some level of compensation for the inappropriate implementation of last year's program. I would likely have found the recommended program to be appropriate if it had included additional services and supports for the Student in the regular education setting, appropriate to address this Student's significant cognitive and academic deficits.

¹² Aside from general and special education teachers, there are at least 2 other adults present in the general education classroom to assist with the instruction. Identified as grandparent volunteers, their assistance was described in general but their qualifications were not explained. A social worker was also mentioned as being available for the class, but no details regarding this person or his/her functions or responsibilities were provided.

The implications of this finding are further discussed in the determinations and Order made with respect to Issue 5 below.

C. Issue 3

The third Issue for determination was stated as follows.

Issue 3: If Respondent failed to offer the Student a FAPE for the 2009-2010 school year, will Petitioners' chosen full-time private program of special education and related services, to be provided by Children's Guild, be appropriate to meet his needs?

Petitioner offered only the testimony of the Director of Admissions in support of the appropriateness of the Student's placement in the full-time program offered by [REDACTED]. The Director testified credibly about the program and, in general, its structure.

In part, the Admissions Director stated that the program primarily served a population of students with the classifications of emotional disturbance, autism, mental retardation and learning disability, and that the school offered a full-time, 27.5 hour, program of special education and related services in classrooms with a 12:1:2 student to teacher ratio. The school would be able to address the needs of a student with a learning disability and an attention deficit disorder through constant support and a smaller class size. She described the schools use of technology to provide instruction and address off-task behaviors, through the use of individual student computers that are linked to the classroom teacher's computer. The students receive instruction in class, but move for art, music and library science.

The Admissions Director testified that the program had a school psychologist and registered nurse on staff, and also offered speech and language therapy, occupational therapy as well as group and individual counseling. Additionally, the program offered tutoring during the day. No extracurricular activities are available, but the students have the opportunity to participate on basketball and football teams that play during the school day.

With respect to the Student, the Director of Admissions testified that he would be placed in a class that currently contains 9 students, staffed by a certified special education teacher, a teacher assistant with a B.A. degree, a therapist and a licensed social worker. The current students were described as having classifications of emotional disturbance, emotional disturbance/learning disabled, other health impaired and attention deficit hyperactivity disorder. Seven of the students were functioning on a 3rd grade equivalent level and 2 students were functioning on a 2nd grade equivalent level. The Student would be admitted and after 30 days he would be evaluated for the purposes of updating his IEP.

While the Director of Admissions' testimony was credible, much of what she provided was general in nature. No evidence was provided regarding how any of the Student's specific needs would be specifically addressed by the program. Significantly, she also offered no insight as to how she came to determine that the Student required placement in the described full-time program.

The Director of Admissions testified that the Student was accepted into the program based upon her review of the September 2008 IEP, the initial evaluations conducted by Respondent and a 1 hour interview of the Petitioners at [REDACTED]. The acceptance was communicated in a letter to Petitioners dated August 13, 2009. However, such a basis, without additional explanation, is insufficient. The initial evaluations and the September 2008 IEP support and recommend a classification of specific learning disability and a part-time program of special education and related services.

The Director of Admissions did not describe any particular needs or characteristics of the Student that would necessitate his attendance in a program that is geared for a population of students that present with significant behavioral needs, as reflected in their classifications, and which require such a restrictive program in order to receive a FAPE.

Accordingly, I find that the evidence does not establish the appropriateness of the described full-time program at [REDACTED] for the Student during the 2009-2010 school year.

The effect of this finding is further discussed in the determination made with respect to Issue 6 below.

D. Issue 4

The fourth Issue to be determined was stated as follows.

Issue 4: Should an Order be issued requiring Respondent to fund an independent evaluation of the student in order to determine if the student should be classified with either an Other Health Impairment, based on the existence of an attention deficit hyperactivity disorder, or an emotional disturbance?

Petitioners assumed the burden of proof on this Issue in accordance with the terms of the Pre-Hearing Conference Summary and Order. The basis for the assignment of that burden was that Petitioners have never directly challenged or asserted, either before or at hearing, any disagreement with the initial evaluations that DCPS conducted in preparation for the Student's September 2008 IEP and the concomitant remedy of an Independent Educational Evaluation at public expense. See 34 C.F.R. §300.502(b).

Petitioners do not dispute the initial evaluation results but only their interpretation and application. In fact, Petitioners rely on the results of the psychological evaluation to support the claim that the Student should be further evaluated through the use of the long form version of the Connors Rating Scale. The School Psychologist administered and the

parties relied on the results of the short form version for the development of the September 2008 IEP.

Additionally, the evidence and positions stated at hearing confirm that Petitioners did not undermine or replace the recommended classification of SLD, but instead so augment it, such that the Student would receive a recommendation for multiple classifications, which Petitioners assert might be based on the presence of an ADHD and/or an emotional disturbance.

Based on Petitioners' basic acceptance of the initial evaluation results and my determination with respect to the appropriateness of the recommended SLD classification, made above in connection with Issue 2, Petitioners' request for this Order is denied.

However, based on my determinations regarding Respondent's failure to appropriately implement the September 2008 IEP, the development of the May 2009 IEP, including the lack of any credible evidence to establish the Student's current educational abilities, as described in the discussion and findings made with respect to Issues 1 and Issue 2 above, I find that Student must be evaluated as follows.

Required Evaluation

A complete Educational Evaluation to establish the Student's current level of academic achievement.

An updated Occupational Therapy evaluation to determine 1) whether the interventions provided to date have resulted in measurable improvements in the Student's fine motor, visual-motor integration, visual perception, spatial organization, and functional reading and writing skills, and 2) whether additional interventions and/or techniques should be incorporated into the Student's instructional day to address identified delays.

Classroom observations of the Student in the general education environment both while he is participating in push in services and while he is without special education teacher supports.

An eye exam to clarify whether the Student requires glasses. Petitioners shall furnish Respondent with a copy of any current examination in their possession and Respondent may request and rely upon such examination.

Any additional assessments that the evaluators recommend based upon the results of the above-listed evaluations.

Respondent is accorded 30 calendar days from the date of this HOD within which to conduct the evaluations. Respondent may choose to have the evaluations conducted privately at public expense. If Respondent fails to conduct the evaluations within 30

calendar days, Petitioners may arrange to have the evaluations conducted privately at public expense.

E. Issue 5

The fifth Issue to be determined was stated as follows.

Issue 5: Should an Order be issued requiring Respondent to provide the Student with compensatory education services in the form of counseling and/or occupational therapy?

Compensatory education is an equitable remedy that provides discretionary, prospective and injunctive relief to craft a remedy to address an educational deficit created by a school district's failure to provide appropriate services. Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005).

I find that the Student should receive compensatory services. This finding is based on my determinations regarding Respondent's failure to appropriately implement the September 2008 IEP, including the failure to provide all of the Student's recommended related services, as well as my determinations regarding the appropriateness of current recommended program.

As noted above, I am unable to find that the part-time program of special education and related services recommended by the May 2009 IEP is appropriate for reason that it fails to offer an adequate amount of services and supports for the Student in the regular educational setting. Rowley, 458 U.S. 176, 102 (the IEP must at a minimum (1) provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction, (2) be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade).

The Student requires additional services and supports based upon his significant cognitive and academic deficits, which were not appropriately addressed during the prior school year. Although the record does not contain evidence to adequately establish the Student's current academic and functional levels, the available evidence indicates that the Student likely made almost no academic progress and is at great risk for falling far behind in terms of his academic abilities.

I find that the results of the Woodcock Johnson III Tests of Cognitive Abilities indicate that the Student presents with serious processing delays. His deficient scores on the Concept Formation and Visual-Auditory Learning subtests indicate that he experiences great difficulty processing and utilizing information presented in a large classroom setting. He will have difficulty with higher order reasoning and problem solving, and

with discriminating meaningful information presented verbally at a typical general education pace.¹³

The direct implication of this finding is that the Student requires additional special instruction in the general education setting. The evidence does not support the Student's placement in a full time program, but there can be little doubt that such a program will be inevitable if he does not receive appropriate and sustained individualized instruction.

I find that the Student requires significant small group or individualized instruction that includes the use of adaptive instructional techniques and tools, as well as multisensory manipulatives in order to begin to address his deficits.

Examples of adaptive instructional techniques and tools include ensuring that the Student has a manuscript desk strip and numeric desk strip affixed to his desk. Both the general education and special education teacher can prompt the Student to use this visual guide to improve his letter-formation and number-formation skills, and as a tool for improving letter recognition. Multisensory manipulatives that incorporate visual, auditory, and tactile cues should be utilized to improve the Student's letter-word recognition, understanding of numeric concepts and problem-solving skills in mathematics.

The parties appeared to mutually understand the Student's need for additional special education services over and above those that had been recommended by the September 2008 IEP. A review of the information contained in the respective written accounts of the resolution meeting held on August 25, 2009 indicate that the parties engaged in discussions ranging from the provision of full time services to increases of an additional hour of specialized instruction with 2 hours of compensatory education. PE-2; DCPS-4. Unfortunately, the settlement discussions did not result in a consensus and the parties apparently hardened their positions leading to these proceedings. But, the discussions, do still provide a basis for moving forward in that the parties, and in particular the School Psychologist, who demonstrated significant knowledge of the student, were actively engaged in discussing the Student's need for increased services. Additionally, the School Psychologist's ultimate support for the May 2009 IEP was highly influenced by the fact that the specialized instruction and related services were to be provided in the general education setting.¹⁴

Required Program and Compensatory Services

Accordingly, I find that for the 2009-2010 school year, Respondent must provide and the Student must receive:

¹³ His overall cognitive score of 66 (very low range) is due to the relative weight that these subtests are accorded in the assessment.

¹⁴ Petitioners argued that 2 of Respondent's attendees, including the School Psychologist, supported a full-time program. However, the School Psychologist explained that he changed his mind on this issue and supported a part-time program based on the push in quality of the recommended 2009-2010 program.

- Additional specialized instruction, 2 times per week, provided in the general education class. The services must be provided on the 2 school days that he currently attends his general education class without such in class support. The testimony of the Special Education Teacher indicates that this would currently be on Mondays and Wednesdays. This specialized instruction must also coincide with Student's language arts and mathematics instruction, as he requires significant support in these fundamental academic areas.

The record does not indicate the times of day or the length of time that the Student receives such academic instruction, which makes it difficult to prescribe a specific measure of time that the specialized instruction must be provided for. Rather than prescribe a specific hourly amount of specialized instruction that may not comport with the actual operation of the Student's general education class, I find that the specialized instruction should be provided during the entirety of the time that the Student receives academic instruction in the language arts and mathematics in the general education setting on Mondays and Wednesdays.

- Adaptive instructional techniques and tools, and manipulative materials, as described above and in the Occupational Therapy Evaluation of August, 2008. The special education teacher and/or the general education teacher and other available adults must take all appropriate steps to ensure that the Student is able to utilize these materials to assist in his instruction, as may be educationally necessary, throughout the entirety of his school day.

- All other recommended specialized instruction, occupational therapy, and behavioral support services recommended by and in strict accordance with the May 2009 IEP.

F. Issue 6

The sixth Issue to be determined was stated as follows.

Issue 6: Should an Order be issued, in accordance with applicable law, requiring Respondent to fund the Student's placement at Children's Guild for the 2009-2010 school year?

The IDEA affords parents the right to seek public funding for a private unilateral placement under circumstances where it is determined that (a) the school district failed to provide a FAPE for a student, (b) the parents' unilateral placement is appropriate to meet the needs of the student, and (c) equity supports such reimbursement award. School Comm. of Town of Burlington, Mass. v. DOE, 471 U.S. 359 (1985). The fact that the unilateral placement has not been approved by the state educational authority for the provision of special education services is not a bar to an award. Florence County SD Four v. Carter, 510 U.S. 7 (1993). Petitioners bear the burden of proof on this three-part evidentiary test. Shaffer v. Weast, 546 U.S. 49 (2005); D.C. Mun. Regs. Title 5, Chapter 30, §3030.3.

In this matter Petitioners do not seek reimbursement of incurred tuition costs, prospective placement and funding for the Student at [REDACTED]. However, such relief would necessitate application of the above-described evidentiary test. In Burlington, the Court made clear that –

In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, *it seems clear beyond cavil* that ‘appropriate’ relief would include a *prospective injunction* directing the school officials to develop and implement at public expense an IEP placing the child in a private school. 471 U.S. at 370.¹⁵

Regardless, based on the findings made with respect to Issue 3 above, Petitioners’ request for this Order must be denied for reason that Petitioners failed to demonstrate the appropriateness of the self-contained full-time program offered by [REDACTED].

V. Order

It is ORDERED that Respondent

- A. Conduct an evaluation of the Student in strict accordance with the terms specified with respect to Issue 4 in section III, D above under the heading “Required Evaluation”.
- B. Provide compensatory education for the Student in the form of specialized instruction in strict accordance with the findings and terms specified with respect to Issue 5 in section III, E above under the heading “Required Program and Compensatory Services”.
- C. Within 15 school days of its receipt of the results of the evaluations performed under A immediately above, convene an MDT, with all required members, for the purposes of considering the evaluation results and develop an IEP for the Student that accurately states his academic strengths, weakness and academic abilities, recommends appropriate and measurable annual goals and short term objectives, incorporates the programmatic changes described in B above, and includes all other information as may be required by applicable law.
- D. Provided however, that Respondent shall provide and Petitioner Student shall receive, as of the date of this ORDER, the compensatory specialized instruction referenced in B above, as well as all other specialized instruction and related services and general education instruction recommended by the May 2008 IEP, and Respondent’s obligations and Petitioner Student’s rights in this regard shall not be conditioned upon the

¹⁵ Although the question presented to the Burlington Court was whether retroactive reimbursement was an available and appropriate relief that a court could award, the Court’s holding is anchored in the Act’s granting to the courts broad equitable power, which permits both tuition reimbursement and a “prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.” Burlington, 471 U.S. at 370. The mere fact that the Court’s discussion centered on reimbursement is not to the exclusion of the other.

completion of the evaluations and/or the development of an IEP as otherwise required by this ORDER.

It is further ORDERED that Petitioners'

E. Provide written consent to enable Respondent to conduct the required evaluations. Petitioners' shall also provide Respondent with the results of any eye exam an/or screening of the Student that is in their possession within 15 calendar days of the date of this ORDER.

All other requests for relief are DENIED.

IT IS SO ORDERED.

DATED: October 9, 2009

/s/ Paul Ivers
Hearing Officer

3235 SW 326th Street
Federal Way, WA 98023
(253) 266-9982
(206) 577-4587 fax
paul.ivers@dc.gov

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 90 days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. § 1415(i)(2)(B).

Appendix A

EXHIBIT LIST

Petitioners' Exhibits

<u>No.</u>	<u>Document</u>	<u>Date</u>	<u>Pages</u>
1.	Due Process Complaint Notice	8/12/09	10
2.	Resolution Meeting Notes (handwritten)	8/25/09	2
3.	DCPS, 2 nd Grade Report Card, SY 2008-2009	undated	4
4.	Acceptance Letter, [REDACTED]	8/13/09	1
5.	Social Work Evaluation Report, DCPS	9/18/08	4
6.	Multidisciplinary Team (MDT) Prior Action Notice	9/18/08	1
7.	Initial Placement Letter, DCPS	9/19/08	1
8.	Individualized Education Program	9/19/08	8
9.	Multidisciplinary Team Meeting Notes	9/19/08	3
10.	Specific Learning Disability Eligibility Determination Form	9/18/08	3
11.	Physical Therapy Evaluation, DCPS	8/1/08	3
12.	Occupational Therapy Evaluation, DCPS	8/29/08	5
13.	Class work Examples	various	6
14.	Multidisciplinary Team Meeting Notes	5/8/09	3
15.	Individualized Education Program	5/8/09	8

Appendix A

Respondent's Exhibits

<u>No.</u>	<u>Document</u>	<u>Date</u>	<u>Pages</u>
1.	DCPS Response	8/24/09	3
2.	Occupational Therapy Service Tracker	various 9/08-4/09	10
3.	Comprehensive Psychological Evaluation, DCPS	9/18/08	11
4.	DPC Disposition & Meeting Notes	8/26/09	4

Hearing Officer Exhibits

<u>No.</u>	<u>Document</u>	<u>Date</u>	<u>Pages</u>
1.	Occupational Therapy Service Tracker	8/31/09	1

Appendix B

WITNESS LIST

Appearing for Petitioners

<u>Described in Text</u>	<u>Name & Affiliation</u>
Parent:	[REDACTED]
Grandparent:	[REDACTED]
Admissions Director	[REDACTED]

Appearing for Respondent

<u>Described in Text</u>	<u>Name & Affiliation</u>
Special Education Teacher	[REDACTED]
School Psychologist	[REDACTED]

