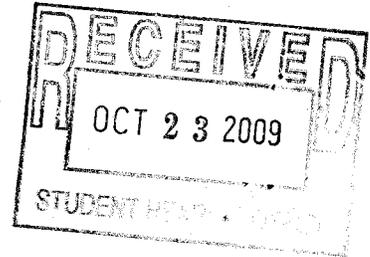


DC Office of the State Superintendent of Education  
Office of Compliance and Review  
Student Hearing Office

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Washington, DC 20003  
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**Confidential**

<p>STUDENT<sup>1</sup>, by and through Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>Respondent.</p>	<p><b>HEARING OFFICER'S DECISION</b></p> <p><b>Date: October 23, 2009</b></p> <p><b><u>Hearing Officer: Wanda I. Resto, Esquire</u></b></p>
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<sup>1</sup> Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

## I. PROCEDURAL BACKGROUND

On August 13, 2009, the Petitioner, through counsel, filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent") pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE").<sup>2</sup>

The Petitioner requested the Respondent be deemed to have denied the Student a FAPE and as a relief ordered to issue a prior written notice reflecting additional counseling, speech/language and one-on-one tutoring services. Additionally the Petitioner requested the Respondent fund the educational placement of the student at the [REDACTED] school chosen by the Petitioner.

The DCPS filed a Response to the Parent's Administrative Due Process Complaint on August 27<sup>th</sup> and amended September 10, 2009. The Respondent asserted the Student was incarcerated in March 2009. While the Student was incarcerated, his IEP team met in April 2009 to review the Student's IEP. At that time, his services were increased to 15 hours of specialized instruction and 30 minutes of speech/language therapy. The Respondent alleged the team reconvened shortly before he was released. The Respondent denies that the meeting notes, which were authored by parent's counsel, accurately reflect what the team discussed and agreed to.

The Respondent further asserted the parent has refused to meet to discuss anything but a private school placement. It asserted it has not issued a prior notice of placement, but it has offered the parent a placement at [REDACTED]. The Respondent contends that it reviewed the Student's file, and concluded that it is appropriate to place the Student at a school in which there are nondisabled students; and can provide the services on the Student's IEP.

On September 27, 2009, Attorney for the Petitioner was required to file a Motion by September 24, 2009, explaining what were the alleged MDT recommendations including their placement recommendation during May 2009 meetings. Counsel filed a Motion merely stating that the clarification would be provided during witness testimony during the Hearing.

A hearing was held on October 13, 2009. The Petitioner presented a disclosure letter dated October 5, 2009 to which twenty-two documents were attached, labeled P-1 through 22 and which listed seven witnesses; seven witnesses testified. The Respondent presented a disclosure letter dated October 6, 2009 identifying four witnesses and to which seven documents were attached, labeled DCPS 1 through 7; and two witnesses testified.<sup>3</sup>

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<sup>2</sup> 20 U.S.C. §1415(c)(2)(B)(i)(I)

<sup>3</sup> Prior to the Hearing Counsel filed various Motions (Appendix-A); all were disposed of during the preliminary matters. The Hearing Officer rejected the Respondent's request for a dismissal for lack of prosecution; Petitioner presented a good cause for the delay and the Respondent could not demonstrate any prejudice by the Petitioner's failure to file the requested Motion identifying the recommendation of the MDT. The Respondent's objection to Petitioner's document number 3, (notes taken by Counsel for the Petitioner during the May 2009 MDT meeting); was overruled; the Petitioner clarified that she asked her attorney to take the notes. However, they were not admitted to prove the veracity of its content. The record is corrected to reflect that the Petitioner did not stipulate in the prehearing conference; that the April 6, 2009 was signed by the parent.

The hearing was conducted in accordance with the rights established under the IDEIA and the implementing federal and local regulations, and the SOP.<sup>4</sup>

## II. ISSUE(S)

1. Did the Respondent fail to issue a prior written notice to “reflect the MDT’s recommendation that Counseling be added to the Student’s IEP as a related service?”
2. Did the Respondent fail to issue a prior written notice to reflect the Speech & Language and One-on-One Tutoring related services?
3. Did Respondent failed to provide the Student with Extended Day School for 2009?
4. Did a MDT on May 13 and 21, 2009 recommend KT as the student’s placement?
5. Whether the Respondent failed to provide an appropriate educational placement for the student and was the student right to the least restrictive placement violated?
6. Whether the Respondent failed to provide the student with appropriate goals on his IEP?
7. Did the Respondent fail to provide the student with triennial evaluations?

## III. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. The Student was attending and is currently attending a DCPS during the 2008-2010 school year.<sup>5</sup>
2. The Student is a student with disabilities under the IDEIA. The Student’s most recent IEP is dated April 6, 2009 and provides 15 hours of specialized instruction, and 30 minutes of speech language pathology services weekly. The Student’s disability category is specific learning disability.<sup>6</sup>
3. The Petitioner asked for behavioral evaluations in December 2009. While at YSC, the student was evaluated in March 2009.<sup>7</sup>
4. On May 12, 2009 a Speech and Language Evaluation was completed. The Pathologist’s findings and recommendations, *inter alia*, included the following:

“Expressive One-Word Picture Vocabulary Test and Receptive One-Word Picture Vocabulary Test were administered; and the Student’s performance in the tests indicated that his receptive vocabulary is within the age equivalent of 9 years and 10 months; and an age equivalent of age 9

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<sup>4</sup> 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures (“SOP”).

<sup>5</sup> Testimony of the Petitioner.

<sup>6</sup> The Student’s draft IEP dated May 20, 2009; provides 27.5 hours of specialized instruction outside of general education; 1 hour of speech language pathology; and 1 hour of behavioral support services weekly ( DCPS 7).

<sup>7</sup> P #15; Psycho educational evaluation and Neuropsychological P #11.

years and 3 months in expressive vocabulary; the tests demonstrated the Student has a severe language disorder.”

The CELF<sup>8</sup> evaluation illustrates that the Student has significant problems in all areas of language especially with receptive and expressive vocabulary, with low functioning receptive language skills and Core Language Score in the borderline range. The evaluator indicated the student needs practice decoding and with his organizational skills; he does not engage; and needs encouragement. The student’s language problems impact negatively his social interaction; his executive functioning has suffered; his core language skills do not allow him to set goals or to consider options and therefore his understanding is poor. The student requires individual speech-language therapy at least 180 minutes weekly. She recommended the program at KT after speaking with staff during her hour and half visit to the school.<sup>9</sup>

5. At the MDT of May 13, 2009 the Psychological educational evaluation; the neuropsychological and the Speech and language evaluations were discussed; the team agreed to provide speech/language and counseling services.<sup>10</sup> The Mother participated in the MDT meeting in May 2009; he agreed with the evaluations and she asked her attorney to take notes for her. However, she does not want the student to attend Coolidge; because the student will be repeating 9th grade for the third time this year; and she does not believe the Respondent will not address the student’s behavior and academic needs. The parent testified that she refused any D.C. public school option for the student and did not want to discuss the school offered by the Respondent.<sup>11</sup>
6. The student with multiple repetitions is able to learn; he needs speech and language therapy; it can show him how to break down the information he receives; to categorize it and to manage communication effectively. The student is at the high school level however he cannot understand and it’s hard for him to find words; because he is in the second grade phonologically; other students realize that the student doesn’t quite get the information. The student needs an educational program that can address his significant language, memory, learning and motor speed deficits. The student’s language and social deficits have to be addressed within the school curriculum; as well as; in individual counseling sessions; along with a program to prevent bullying. The only school she recalls mentioned during the MDT meeting she attended in May 2009 was KT. The team reviewed the Psychological educational evaluation and the neuropsychological evaluation.<sup>12</sup>
7. The student has a specific learning disability and his programming requires a full time out of general education setting. The placement DCPS proposed, [REDACTED] can provide specialized instruction in a self-contained classroom of ten to twelve students per three adults. The student’s can obtain Carnegie units under this system as the general education teacher comes to the self-contained classroom or the class moves, for example, to the science lab where they are the only students in the class. The school can also provide speech/language supports in pull-out or group setting, within the class, or outside, and in collaboration with the general education teachers. The school program has

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<sup>8</sup> Clinical Evaluation of Language Function 4.

<sup>9</sup> Speech and language pathologist testimony; and P #9.

<sup>10</sup> Petitioner’s # 3 notes dated 5/21/09.

<sup>11</sup> Parent and student’s testimony.

<sup>12</sup> Testimony of the school psychologist and P 11.

special education teachers certified in Reading skills building program; the program focuses on integrating reading skills into the daily life and academic work. The school can also provide occupational therapy. The school also has a full-time social worker who only works with the special education students. The school can provide access to nondisabled peers at lunch and to some extent in the hallways. <sup>13</sup>

8. The student had a violent incident in school in February 2009. In a conversation through the telephone with the student it is difficult to comprehend what the student is saying. The student needs structured guidance; redirection and has to be reminded of meeting times.<sup>14</sup>
9. The student requires individual and group counseling that focuses on social interaction; anxiety reduction; and that helps built coping skills. According to the EA; the student requires a program with a special education teacher and speech/language pathologist working in a team approach to address the student's need. She was not able to visit [REDACTED] the school proposed by the Respondent because she did not make an appointment first.<sup>15</sup>
10. Parent's counsel proposed [REDACTED] as a placement for the student at the May 2009 meeting. However, no one from [REDACTED] participated in the meeting to describe the program. There was not a determination that the student would be placed at KT. DCPS central office staff reviewed the student's records and identified [REDACTED] as a potential placement.<sup>16</sup>
11. The student testified that, while at [REDACTED] he meets with his special education teacher every day in a class of about 8 students; where he works on Reading and Math. He testified that he has been able to make some progress in that class and acknowledged writing a good essay "about life." <sup>17</sup>
12. The proposed placement [REDACTED] in [REDACTED] provides small group instruction in classrooms with a maximum of eight to ten students with a certified special education teacher and a teacher assistant. The High School program is graded and diploma-based with a vocational option. A reading specialist consults and models effective reading instruction for all staff, provides staff development and training, conducts reading assessments as required, works with individual students, and manages the school reading program. The Licensed speech-language pathologist provides instruction in phonics, as well as reading/listening comprehension and employs a variety of multi-sensory methods and specialized language strategies. The School integrates the services of speech-language pathologists, occupational therapists, physical therapists and counselors into overall learning with each classroom teacher. The student was accepted into the program; a prior IEP and the May 2009 draft were used as guidance for the admission process. The School will provide no access to non disabled peers. <sup>18</sup>

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<sup>13</sup> Testimony of the special education coordinator.

<sup>14</sup> Testimony of the probation officer.

<sup>15</sup> Testimony of the Education Advocate, P#9 and, P#11.

<sup>16</sup> Testimony of the student's special education teacher and DCPS #6.

<sup>17</sup> Testimony of the student.

<sup>18</sup> Testimony of the School Administrator.

## IV. CONCLUSIONS OF LAW

### FAPE Determination

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The IDEIA regulations define a FAPE as “special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP).”<sup>19</sup>

### Burden of Proof

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that based solely upon the 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 a FAPE.

In assessing whether a FAPE has been provided, a court must determine whether (1) the school complied with the IDEIA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982); *Jalloh v. District of Columbia*, 535 F. Supp. 2d 13, 16 (D.D.C. 2008). In considering the substantive validity of an IEP pursuant to the second part of this test, a number of circuits have held that a court must judge prospectively.

### Evaluations

The IDEIA requires the Respondent, as the local education agency to ensure there are evaluations in all areas of suspected disability, of each child with a disability, occur at least once every three years, unless the parent and the local educational agency agree that a reevaluation is unnecessary. The local educational agency shall ensure that a re-evaluation is done upon the request of the parent and/or the recommendations of teachers or service providers and/or not less than once every three years.<sup>20</sup>

The parent testified that she asked for behavioral evaluations in December 2009. The student was evaluated in March 2009 and the evaluations were reviewed by the IEP team at YSC, which agreed to include behavioral supports on the student's IEP and increased the service to one hour a week in the draft May 2009 IEP. The Petitioner did not prevail on the failure to evaluate issue.

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<sup>19</sup> 34 C.F.R. § 300.17

<sup>20</sup> 20 USC. §§ 1414(2)(a)(b), 1414(b)(1)(3), 1412 (a)(6)(B) and § 1414(b)(3)(B).

## Placement

The IDEIA require when determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that— (a) The placement decision— (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. It also states that the determination of the educational placement of a child with a disability should be done annually and must be based on a child's IEP.<sup>21</sup>

Pursuant to 5 D.C.M.R. § 3013.1(e), Placement, "[t]he LEA shall ensure that the educational placement decision for a child with a disability is ...based on the child's IEP."

The Petitioner alleged the student requires the KT school program and that the MDT recommended the student be placed and funded there. However, the IEP does not indicate the KT program is required and there was no credible evidence that the MDT made a recommendation to place and fund the student at the school chosen by the Petitioner. Additionally, the student's IEP paramount to identifying the placement has not been finalized. Furthermore, the Petitioner testified that she would not have entertained any D.C. public school option for her son and would not have met with DCPS to discuss any other D.C. school. Under these circumstances, the Respondent did not fail to provide an appropriate placement or to place and fund the Student at the KT.

The student needs an educational program that can address his significant language, memory, learning and motor speed deficits. The Respondent offered Coolidge SHS as a placement for the student; however there was no opportunity to discuss its appropriateness and whether it can meet the student unique needs.

Furthermore, the IDEIA supports a strong preference in educating children with disabilities in regular classes with appropriate aids and supports. Specifically, Section 300.114, requires each public agency to ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. Further, a student or parent must have an opportunity to demonstrate that a disability requires some other arrangement, the child is educated in the school that he or she would attend if non-disabled; and in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that the students needs.

In addition, the District of Columbia Code imposes a strict order of priority for special-education placement: "(1) DCPS schools or District of Columbia public charter schools; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia." <sup>22</sup> A local government meets its federal and local statutory obligations to implement a student's IEP -- and thus provide a FAPE -- where public placement is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207. <sup>23</sup>

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<sup>21</sup> 20 U.S.C. 1412(a)(5); and regulations at 34 C.F.R. § 300.116.

<sup>22</sup> IDEIA 20 U.S.C. 1412(a)(5) and its regulation at Sections 300.114 through 300.118, D.C. Code § 38-2561.02(c) (2007).

<sup>23</sup> *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982)

The school chosen by the Petitioner does not allow any interaction with the general education population; and is outside the District of Columbia. While the Petitioner has a desire for the student to be placed at KT there was no evidence that it is the only school program that can meet the student's need; the option offered by DCPS was not discussed or considered by the Petitioner.

Moreover, in designing an appropriate education for students with disabilities, the child's parents, teachers, school officials, and other professionals collaborate to develop an individualized education program ("IEP") to meet the child's unique needs. 20 U.S.C. § 1414(d)(1)(B). While the District of Columbia is required to provide [REDACTED] with a public education, it does not "guarantee any particular level of education." *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982).

The Petitioner cannot unilaterally chose the program for the student and then insist that the it be funded; without considering options offered by the Respondent.

### **Appropriateness of the IEP**

The Petitioner did not offer any evidence whatsoever that the draft services and speech/language goals were not proper. The Petitioner testified she had no concerns with the services provided in the draft IEP; she was objecting to the location of the services. Furthermore, the Petitioner did not put forth evidence to establish the May 2009 IEP as drafted is inappropriate.

The Respondent correctly asserted that the student's IEP must be finalized and the services prescribed on that IEP should be provided to the student with a review of his progress after a time. As drafted the May 20, 2009 appears to be calculated to provide the student with educational benefit. The Petitioner did not prove the IEP is inappropriate; the Respondent prevailed on the issue.

### **Extended Day School for 2009**

The Petitioner did not provide any credible evidence that the student required an Extended Day School or that it was recommended by the MDT on May 13, 2009.

### **Prior Written Notice**

The Petitioner also claimed that Respondent violated the IDEIA requirements by not issuing a written notice to reflect the speech/language services; counseling, and one-on-one tutoring as agreed by the MDT.

The IDEIA and regulations require the LEA to provide written notice to parents before they initiate or refuse a change in a student's identification, evaluation, or educational placement.<sup>24</sup> Specifically, the written notice must contain:

- (A) a description of the action proposed or refused by the agency;

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<sup>24</sup> 20 U.S.C. § 1415(b)(3); § 1415(c)(1); 34 C.F.R. § 300.503(a); § 300.503(b).

- (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;
- (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and
- (F) a description of the factors that are relevant to the agency's proposal or refusal.

The Respondent failed to prove that it provided a PWN; it failed to supply a description of the services to be provided, and a statement that placement was being offered. It also failed to provide in writing an explanation of the action proposed or refused; and a description of the documentary basis for that decision. These procedural failings, however, do not necessarily entitle the Petitioner to relief. The Petitioner must show that the procedural violations affected the Student's substantive rights. In the present case; the record indicates that the parent would not participate in a meeting to discuss services; placement and finalize the IEP.

The Respondent did not meet its statutory obligation; it failed to provide the Petitioner with a prior written notice of action. However, the Petitioner chose not to continue conversations with the Respondent; expressed her demand for a non-public school to the Respondent and no desire to consider a DCPS or the services. The failure to finalize the IEP and to issue proper prior written notice was by no fault of the Respondent.

The Respondent failed to perform a procedural requirement of the IDEIA; by not providing the Petitioner a PWN. The IDEIA provides at 20 U.S.C. § 1414 (E) (ii), and as provided in 34 C.F.R. § 300.513(a) regarding hearing officer decisions on procedural issues, —[I]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education [FAPE] only if the procedural inadequacies—

- i. impeded the child's right to a free appropriate public education;
- ii. significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or
- iii. caused a deprivation of educational benefits.

The Petitioner did not demonstrate that the Student suffered an educational harm or was affected by the Respondent's failure to issue a PWN. The IDEIA provides that, in general, a decision made by a hearing officer must be made on substantive grounds based on a determination of whether the child received FAPE. In this case, the record is void of evidence that the procedural failure impeded the student's right to a FAPE, caused a denial of an education benefit or that the parent was not allow an opportunity to participate in the decision. In the present matter, it is of particular

significance that the student's mother; stated she did not want a DCPS and would not participate in any placement discussion.

Moreover, the D.C. Circuit Court has held that: —only those procedural violations of the IDEIA which result in a loss of educational opportunity or seriously deprive parents of their participation rights are actionable.<sup>25</sup>

While the Petitioner has established the Respondent committed a procedural violation of the IDEIA, the Petitioner has not established that that violation caused harm to the Student.

## V. SUMMARY OF DECISION

The Petitioners must allow the IEP team and the educational review process to proceed to its completion. The Petitioners, by their own conduct, delayed the commencement of an appropriate educational placement for the student; by failing to allow the IEP to be finalized and a final offer of placement to be made by the Respondent.

The Respondent failed to comply with the IDEIA's procedures when it did not issue a prior written notice; however the failure did not cause harm to the student or the Petitioner. The draft IEP developed was reasonably calculated to enable the student to receive educational benefits and the petitioner agreed with the services. The Respondent prevailed on all issues.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the DCPS has not denied the Student a FAPE and issues the following:

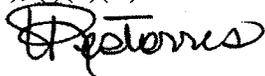
## VI. ORDER

**ORDERED, the Complaint is Dismissed.**

This Order resolves all matters presented in the Petitioner's August 13, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

## NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)



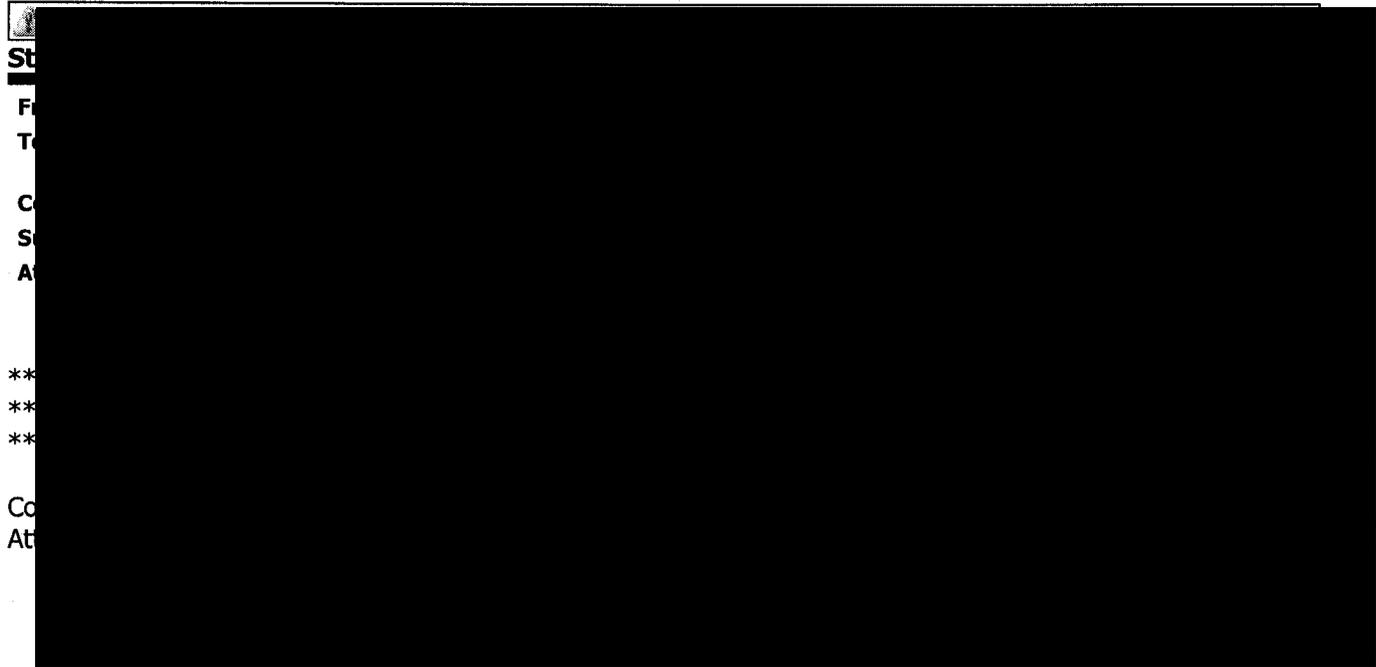
Signed: October 23, 2009

**Wanda Iris Resto - Hearing Officer**

<sup>25</sup> Section 615(f)(3)(E) of the IDEIA; and 34 C.F.R. 300.513(a)(1). *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (citing *Kruvant v. District of Columbia*, 99 F. App'x 232, 233 (D.C. Cir. 2004) (holding that although DCPS admits it failed to satisfy its responsibility to assess the student within 120 days of the parents' request, the parents have not shown harm resulted from that error).

**APPENDIX A**  
**INDEX OF NAMES**  
**In the MATTER OF "Student" V. DCPS**

Student Name: [REDACTED]	[REDACTED]
Child's Parent(s)	[REDACTED]
Child/Parent's Representative	[REDACTED]
School System's Representative	[REDACTED]
Probation Officer	[REDACTED]
Educational Advocate	[REDACTED]
Special Education Coordinator	[REDACTED]
School Psychologist	[REDACTED]
Special Education Teacher	[REDACTED]
Speech/Language Pathologist	[REDACTED]
Occupational Therapist	[REDACTED]
High School [REDACTED]	[REDACTED]
Attending School	[REDACTED]



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