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Student Hearing Office  
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STUDENT HEARING OFFICE  
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**Confidential**

STUDENT, through the legal guardian<sup>1</sup> )  
 )  
 Petitioner, )  
 )  
 v. ) Hearing Dates: December 4, 2009,  
 ) December 17, 2009, and  
 ) January 5, 2010  
 THE DISTRICT OF COLUMBIA )  
 PUBLIC SCHOOLS, )  
 )  
 Respondent. )  
 )

**HEARING OFFICER DETERMINATION**

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

## I. JURISDICTION

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Act ("IDEA"), as reauthorized in 2004 and codified at 20 U.S.C. Sections 1400 et seq., its implementing regulations at 34 C.F.R. § 300.1 et seq.; D.C. Code § 38-2561.01 et seq.; and D.C. Mun. Regs. ("DCMR") tit. 5, § 3000 et seq. (Nov. 27, 2009).

## II. BACKGROUND

Petitioner is the mother of a \_\_\_\_\_-year-old, special-education student ("Student") at a District of Columbia Public Schools ("DCPS") charter school. Both Petitioner and the Student are residents of the District of Columbia.

On September 30, 2009, Petitioner filed a Due Process Complaint Notice ("Complaint") alleging violations of the Individuals with Disabilities Education Improvement Act. Respondent District of Columbia Public Schools ("DCPS") filed a Response to Administrative Due Process Complaint ("Response") on October 14, 2009. The DCPS Response was four days late.<sup>2</sup>

The issues the Petitioner raised in her Complaint, including the relief requested resulted in the following issues and requested relief being presented for determination:

A. Whether DCPS failed to comply with a hearing officer determination ("HOD") issued on July 29, 2009, by failing to review the Student's independent psychiatric evaluation with a qualified reviewer (psychiatrist) within fifteen school days of its receipt of the evaluation. Petitioner alleges that the independent psychiatric evaluation was completed on or about December 18, 2008, and that counsel for Petitioner provided a copy of evaluation to DCPS on or about January 28, 2009.

B. Whether DCPS failed to provide the Student a free, appropriate, public education ("FAPE") by failing to provide her an individualized educational program ("IEP") reasonably

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<sup>2</sup> If DCPS has not sent a prior written notice under 34 C.F.R. § 300.503 to the parent regarding the subject matter contained in the parent's due process complaint, DCPS must, within 10 days of receiving the due process complaint, send to the parent a response that includes--

- (i) An explanation of why the agency proposed or refused to take the action raised in the due process complaint;
- (ii) A description of other options that the IEP Team considered and the reasons why those options were rejected;
- (iii) A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and
- (iv) A description of the other factors that are relevant to the agency's proposed or refused action.

34 C.F.R. 300.508(e).

calculated to provide a FAPE. Petitioner alleges that DCPS has not developed an IEP that incorporates the recommendations of the Student's educational evaluation.

C. Whether DCPS failed to provide the Student an appropriate educational placement. Petitioner alleges that DCPS cannot meet the Student's special education needs and that the Student requires a small classroom setting where she can receive specialized instruction to address her severe academic deficits.

Petitioner seeks relief including an order placing the Student at a non-public, special education school (Non-Public School), at DCPS expense, including transportation. Petitioner also seeks an order requiring DCPS to convene an MDT meeting within ten school days upon the Student's enrollment at the Non-Public School to review the Student's evaluations, including the independent psychiatric evaluation, and to review and revise the Student's IEP as appropriate. Finally, Petitioner seeks an order awarding the Student compensatory education.

In its Response, DCPS admits that it failed to review the Student's psychiatric evaluation with a qualified professional. DCPS asserts that the Student is making academic and behavioral progress at [redacted]. DCPS asserts that that Student's IEP was developed at an MDT meeting on or about September 15, 2009, and that Petitioner and the Student both participated in the discussion about the Student's IEP and possible interventions available to the Student. DCPS asserts that the Student has been provided a FAPE, the Student's IEP is reasonably calculated to provide the Student a FAPE, and that [redacted] is able to implement the Student's IEP. Finally, DCPS asserts that the Student is not entitled to compensatory education.

On November 18, 2009, this Hearing Officer attempted to hold a pre-hearing conference by telephone with counsel for each party. Both counsel had previously confirmed the date and time of the pre-hearing conference, but counsel for Petitioner failed to appear. This Hearing Officer issued a pre-hearing order on November 21, 2009. Because DCPS admitted that it had not reviewed the Student's psychiatric evaluation, this Hearing Officer included in the pre-hearing order an order requiring DCPS to convene an IEP meeting on or before December 3, 2009, to review the psychiatric evaluation and review and revise the Student's IEP, as necessary, based on the team's review of psychiatric evaluation. This Hearing Officer further ordered DCPS to ensure that a psychiatrist was present at the meeting to review the psychiatric evaluation. Unbeknownst to this Hearing Officer, DCPS had convened an IEP meeting on October 20, 2009, at which a psychiatrist reviewed the Student's psychiatric evaluation.<sup>3</sup>

The due process hearing commenced on December 4, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.<sup>4</sup> Two witnesses, Petitioner's Educational Advocate and the Student, testified on this day.

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<sup>3</sup> Stipulation of parties.

<sup>4</sup> After an extended discussion at the outset of the due process hearing on December 4, 2009, Petitioner agreed to exclude Exhibits 15, 18-- 20, 31-32, 36 -43, 47-51, and 54. Petitioner's Exhibits 1-14, 16-17, 21-30, 33-35, 44-46, 52-53, and 55-59 were admitted into evidence. DCPS agreed to exclude its Exhibits 1-6, 8, and 10-21 because they were duplicative of Petitioner's exhibits. DCPS Exhibits 7 and 9 were admitted into evidence.

The due process hearing again convened on December 17, 2009, but was again continued after Petitioner's essential witness was unavailable. The last day of the due process hearing convened on January 5, 2010. Petitioner called one witness, the Associate Head of the Non-Public School. DCPS rested on the record. The parties submitted written closing arguments on January 8, 2010.

### III. RECORD

Due Process Complaint Notice, filed September 30, 2009;  
DCPS Response to Administrative Due Process Complaint, filed October 14, 2009;  
Prehearing Conference Order, issued November 21, 2009;  
Petitioner's Five-Day Disclosure Statement, listing ten witnesses and including fifty-nine proposed exhibits, filed November 27, 2009;  
DCPS Five-Day Disclosure Statement, listing six witnesses and including thirty-three proposed exhibits, filed November 27, 2009;  
DCPS Five-Day Disclosure; listing sixteen witnesses and including twenty-one proposed exhibits, filed November 27, 2009; and  
Petitioner Letter Motion for Continuance, filed December 4, 2009;  
Continuance Order, issued December 16, 2009;  
Petitioner Letter Motion for Continuance, filed December 17, 2009; and  
Continuance Order, issued December 29, 2009.

### IV. ISSUES PRESENTED

At the outset of the due process hearing on December 4, 2009, the parties agreed that Petitioner would proceed on only two of the claims in the Complaint:

A. Whether DCPS failed to provide the Student a free, appropriate, public education ("FAPE") by failing to provide her an individualized educational program ("IEP") reasonably calculated to provide a FAPE; and

B. Whether DCPS failed to provide the Student an appropriate educational placement.

### V. FINDINGS OF FACT

1. The Student is a \_\_\_\_\_-year-old, special-education student who attends a District of Columbia public charter school.<sup>5</sup> The Student has earned all but 1.5 Carnegie units required to earn a diploma.<sup>6</sup>

2. As early as May 2008, the Student was at risk of depression.<sup>7</sup> She was experiencing

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<sup>5</sup> Testimony of Student.

<sup>6</sup> *Id.*

<sup>7</sup> Petitioner Exhibit 11 (Report on Clinical Psychological Evaluation, May 11, 2008.).

at least mild depressive symptoms.<sup>8</sup> The Student also was experiencing significant trauma-related problems.<sup>9</sup> In particular, she was experiencing mild to moderate dissociative symptoms.<sup>10</sup> She also exhibited clinically significant inattention/hyperactivity symptoms that indicated a diagnosis of attention deficit hyperactivity disorder (“ADHD”).<sup>11</sup>

3. The Student has many psychosocial stressors, including her father’s death when she was eight years old.<sup>12</sup> The Student was in an abusive relationship with a boyfriend when she was fourteen years old.<sup>13</sup> At times, the Student’s boyfriend physically abused her.<sup>14</sup>

4. More recently, the Student lost a friend who was \_\_\_\_\_ The Student became depressed after her friend’s death, and began eating less, sleeping up to twelve hours a day, crying frequently, feeling irritable, and \_\_\_\_\_ and \_\_\_\_\_ frequently.<sup>16</sup> As a result, the Student missed sixty days of school during the 2008-2009 school year.<sup>17</sup>

5. She may have difficulty with social judgment that leads to many poor choices in her behaviors.<sup>18</sup> The Student may be unwittingly self-medicating with tobacco since she discontinued her medication for ADHD and tobacco is a stimulant.<sup>19</sup> As a result of her psychological profile, the Student requires school-based counseling services.<sup>20</sup> The Student also would benefit from rehabilitative therapy for \_\_\_\_\_ and \_\_\_\_\_ including group therapy for teens.<sup>21</sup>

6. The Student’s written language skills are in the average to very superior range.<sup>22</sup> Her reading comprehension is significantly delayed and is equivalent to the fourth-grade, third-month level.<sup>23</sup> As a result, the Student will struggle to keep up with eleventh-grade content material.<sup>24</sup> Even modified materials in a general education environment will prove too challenging unless

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Petitioner Exhibit 13 (Report of Psychiatric Evaluation, October 31, 2008,).

<sup>13</sup> Petitioner Exhibit 11.

<sup>14</sup> *Id.*

<sup>15</sup> Petitioner Exhibit 13.

<sup>16</sup> *Id.*

<sup>17</sup> Testimony of Student, DCPS Exhibit 9 (DCPS Student Attendance Report).

<sup>18</sup> Petitioner Exhibit 13.

<sup>19</sup> *Id.*

<sup>20</sup> Petitioner Exhibit 11, 13. *See also* Petitioner Exhibit 10 (Report on Social Work Evaluation, April 21, 2008,) (stating that Student requires tutoring in math, counseling, and medication management).

<sup>21</sup> Petitioner Exhibit 13.

<sup>22</sup> Petitioner Exhibit 16 (Report on Educational Evaluation, testing conducted on May 28 and June 1, 2009).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

they are modified to the third grade level.<sup>25</sup>

7. The Student's eight-year deficit in reading comprehension will impact her academic success across all subject areas.<sup>26</sup> This includes math where the Student will be expected to understand word problems and directions.<sup>27</sup> As a result, the Student requires significant modification and intensive, specific remediation to close the gap.<sup>28</sup>

8. The Student's broad math performance is at a fourth-grade, eighth month equivalent.<sup>29</sup> The Student performs at a fifth-grade, eighth-month, grade equivalent in numeration (place values, estimation, number sets, ordering numbers, odd/even numbers, less/greater than, fractions, decimals, integers, prime numbers, and expanded notation).<sup>30</sup> Although she has an average understanding of algebra, she performs below average in geometry, basic concepts, mental computation and estimation, and numerical operations.<sup>31</sup>

9. The Student's is in a math class taught by a general education teacher.<sup>32</sup> Although the Student is supposed to receive specialized instruction in math, the special education teacher arrives extremely late and has been absent since the end of October 2009.<sup>33</sup> The Student's math class was chaotic and the teacher did little to control the Students.<sup>34</sup> The distractions in this class impacted the Student's ability to concentrate.<sup>35</sup> However, in the proper educational setting, the Student could make great strides in math.<sup>36</sup>

10. On July 28, 2008, the DCPS multidisciplinary team ("MDT") recommended that the Student receive a psychiatric evaluation.<sup>37</sup> Petitioner gave consent for this evaluation the same day.<sup>38</sup> The psychiatric evaluation was completed on October 31, 2008, but the MDT did not review this evaluation for another twelve months.<sup>39</sup> Thus, the recommendations of this evaluation, including that the Student receive weekly therapy as well substance abuse counseling, were not timely incorporated into the Student's IEP.

11. The Student's March 3, 2009, IEP required her to receive 1.5 hours of therapy weekly.<sup>40</sup> On April 9, 2009, the MDT reviewed and revised the social emotional goals on the

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<sup>25</sup> *Id.*

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

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; Testimony of Student.

<sup>34</sup> Petitioner Exhibit 16.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Petitioner Exhibit 23.

<sup>38</sup> Petitioner Exhibit 24.

<sup>39</sup> Stipulation of parties.

<sup>40</sup> Petitioner Exhibit 26 (March 3, 2009, IEP).

IEP to address substance abuse, grief counseling, and coping skills.<sup>41</sup> However, the team developed the Student's social emotional goals without the input of the Student's therapist because the therapist did not attend the IEP meeting.<sup>42</sup> Because the MDT had not yet reviewed the psychiatric evaluation, the IEP did not contain its recommendations.<sup>43</sup> Petitioner disagreed with the contents of this IEP.<sup>44</sup>

12. The Student's March 3, 2009, IEP required DCPS to provide the Student seven hours of specialized instruction.<sup>45</sup> Despite the Student's low math broad proficiency, the Student's annual goal on the IEP was to "improve her math skills and be able to function at 10th grade level and above."<sup>46</sup> This would have required the Student to master at least five grade levels in math in six months.

13. Although March 3, 2009, IEP purported to reflect the Student's math calculation and reasoning scores, it contained no present levels of performance for her math goals in algebra 1, number sense and operations.<sup>47</sup> The IEP also provided no present levels of performance for the Student's goals in geometry.<sup>48</sup>

14. DCPS developed another IEP for the Student on September 15, 2009.<sup>49</sup> The math annual goal called for the Student to "improve her math skills by at least two grade levels with 80 percent accuracy . . . by September 10."<sup>50</sup> Again, the IEP contained no present levels of performance and indicated that the Student would be in an inclusion classroom.<sup>51</sup> However, the Student currently receives no individualized instruction in math.<sup>52</sup>

15. The Student's Reading/Comprehension annual goal on the September 15, 2009, IEP, simply stated that the Student "will improve her reading comprehension, fluency and writing skills by two grade levels with 90 percent accuracy by September 2009."<sup>53</sup> The IEP contained no present levels of performance.<sup>54</sup> The short-term objective was: "using a reading chart to record her reading rate per minute, [the Student] will read two hundred words grade level text with less than 10 mispronounced words with 90 percent accuracy, and be able to write a summary of the

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<sup>41</sup> Petitioner 28 (Advocate meeting notes, April 9, 2009).

<sup>42</sup> Petitioner Exhibit 27 (Educational Advocate Notes, March 2, 2009).

<sup>43</sup> The IEP did include the following social/emotional goal: "Identify ways in which substance abuse (sic) are interfer[ing] with academic, emotional, and social functioning." This is hardly the counseling and peer group therapy recommended by the psychiatric evaluation.

<sup>44</sup> *Id.*

<sup>45</sup> Petitioner Exhibit 26.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Petitioner Exhibit 29 (September 15, 2009, IEP).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Testimony of Student.

<sup>53</sup> Petitioner Exhibit 29. Presumably, the IEP team meant for the Student to achieve this goal by September 2010.

<sup>54</sup> *Id.*

text in not more than 50 words.”<sup>55</sup> This would require significant progress over the school year as the Student is in the twelfth grade and her reading comprehension is equivalent to the fourth-grade, third-month level.<sup>56</sup> Thus, the Student was expected to gain eight grades progress in a single year while in an inclusion classroom.<sup>57</sup> However, the Student currently receives no individualized instruction in English.<sup>58</sup>

16. At the September 15, 2009, IEP meeting, the IEP team discussed the fact that the Student requires more specialized instruction.<sup>59</sup> The Student’s general education math teacher also recommended that the Student receive more specialized instruction.<sup>60</sup> Yet, the team declined to change the number of hours of specialized instruction the Student was entitled to receive because it could not arrive at a specific number of additional hours.<sup>61</sup>

17. The Student failed geometry in her tenth grade year (2007-2008).<sup>62</sup> She received a D in English II and an F in word history and geography.<sup>63</sup> In the 2008-2009 school year, the Student received an A for the first advisory in her algebra II class, and Fs in the second and third advisories.<sup>64</sup> However, on the final report card for the 2008-2009 school year, the Student’s algebra II grade for the third advisory was changed to a C.<sup>65</sup> Both Petitioner and the Student raised questions about the changed grade, but DCPS could not provide an explanation.<sup>66</sup>

18. The Student was promoted to the twelfth grade at the end of the 2008-2009 school year.<sup>67</sup> Both Petitioner and the Advocate raised concerns at the September 15, 2009, meeting regarding the number of Carnegie units the Student had accumulated.<sup>68</sup> They could not understand how the Student was within 1.5 credits of graduation considering her deficits in math and English and her excessive absences in the 2008-2009 school year.<sup>69</sup> DCPS did not provide Petitioner and the Advocate an explanation.<sup>70</sup>

19. The Student wants to attend college and obtain a business degree.<sup>71</sup> However, she is not academically prepared for college because she does not have the math or comprehension

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<sup>55</sup> *Id.*

<sup>56</sup> See Petitioner Exhibit 16.

<sup>57</sup> See Petitioner Exhibit 29.

<sup>58</sup> Testimony of Student.

<sup>59</sup> Testimony of Educational Advocate.

<sup>60</sup> *Id.*

<sup>61</sup> Petitioner Exhibit 29; testimony of Educational Advocate.

<sup>62</sup> Petitioner Exhibit 57.

<sup>63</sup> *Id.*

<sup>64</sup> Petitioner Exhibit 58; Testimony of Student.

<sup>65</sup> *Id.*

<sup>66</sup> Testimony of Advocate, Student.

<sup>67</sup> Petitioner Exhibit 29.

<sup>68</sup> Testimony of Advocate.

<sup>69</sup> *Id.* The Student’s attendance has improved in the 2009-2010 school year. Testimony of Student.

<sup>70</sup> Testimony of Advocate.

<sup>71</sup> Testimony of Student.

skills she needs.<sup>72</sup> The Student wants to obtain a master's in business administration because she wants to own her own business.<sup>73</sup> The Student is not opposed to staying in high school for the time it takes to develop the academic skills she needs to be successful in college.<sup>74</sup>

20. The Non-Public School follows District of Columbia academic standards, which require high school students to take four years of math, four years of English, social sciences, and science.<sup>75</sup> The Non-Public School is approved by the Office of the State Superintendent of Education.<sup>76</sup> Most of the Non-Public School Students are placed there by DCPS.<sup>77</sup>

21. At the Non-Public School, math and science programs are calibrated so that the math instruction is supported in science.<sup>78</sup> English and history classes are similarly integrated.<sup>79</sup> The Student would make academic progress at the Non-Public School because, the Student would receive intensive individualized instruction tailored to address her deficits.<sup>80</sup> The Student would be educated in a therapeutic environment with minimal distractions.<sup>81</sup> She also would receive individual therapy to address her social emotional needs.<sup>82</sup>

22. The Non-Public School admits only special education students.<sup>83</sup> The Student would have a full-time IEP and no access to non-disabled peers.<sup>84</sup>

## VI. CREDIBILITY DETERMINATIONS

The testimony of all the witnesses at the hearing was credible. DCPS presented no testimony that contradicted the testimony of Petitioner's witnesses.

## VII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.<sup>85</sup> Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.<sup>86</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Testimony of Associate Head of Non-Public School.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

<sup>86</sup> 20 U.S.C. § 1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.<sup>87</sup> FAPE is defined as:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...<sup>88</sup>

Special education is defined as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.”<sup>89</sup> FAPE “consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.”<sup>90</sup>

DCPS is obligated to provide a FAPE “for all children residing in the state between the ages of 3 and 21, inclusive.”<sup>91</sup> The Hearing Officer’s inquiry in this case is twofold. First, has the State complied with the procedures set forth in the Act?<sup>92</sup> Second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?<sup>93</sup>

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.<sup>94</sup> In other words, an IDEA claim is viable only if those procedural violations affected the student’s *substantive* rights.<sup>95</sup>

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<sup>87</sup> 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1).

<sup>88</sup> 20 U.S.C. § 1401(9), 34 C.F.R. § 300.17, 30 DCMR Sec. § 3001.1.

<sup>89</sup> 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1.

<sup>90</sup> *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

<sup>91</sup> 34 C.F.R. § 300.101.

<sup>92</sup> *Rowley*, 458 U.S. at 206.

<sup>93</sup> *Id.* at 207-07.

<sup>94</sup> 20 U.S.C. § 1415 (f)(3)(E)(ii).

<sup>95</sup> *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Krivant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because “although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents’ request, the [parents] have not shown that any harm resulted from that error”).

## VIII. DISCUSSION

### A. DCPS Failed to Develop an Appropriate IEP for the Student for the 2009-2010 School Year.

Petitioner proved by a preponderance of the evidence that DCPS failed to develop an appropriate IEP for the Student for the 2009-2010 school year. For the reasons explained below, this Hearing Officer finds that Petitioner prevailed on this claim.

The adequacy of the student's IEP is determined by whether the student has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."<sup>96</sup> IDEIA does not require that the services provided maximize each child's potential.<sup>97</sup>

In developing an IEP, the IEP team must consider the strengths of the child; concerns of the parents for enhancing the education of the child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child.<sup>98</sup> An IEP must include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum.<sup>99</sup> An IEP also must include a statement of measurable annual goals.<sup>100</sup>

Here, the Student's 2008-2009 and 2009-2010 IEPs contain no present levels of performance. Without a baseline, it is not possible to measure a student's progress. The English annual goal on the Student's September 15, 2009, IEP was unrealistic considering that the Student was receiving no individualized instruction. The short-term objective, which required the Student to perform on grade level with 90 percent accuracy, was ludicrous, considering that the Student was performing eight grades below her current grade level. The math goals and objectives were similarly flawed.

Moreover, DCPS failed to incorporate the findings of the Student's educational evaluation when it drafted the Student's September 15, 2009, IEP. As a result, DCPS developed goals and objectives on the Student's 2009-2010 IEP that were not specifically tailored to the Student's abilities.

DCPS also failed to review the Student's psychiatric evaluation for almost twelve months, which encompassed an entire school year. During this school year, the Student struggled in school and was absent for sixty days. By failing to review the psychiatric evaluation and incorporate its recommendations into the Student's IEP, DCPS developed IEPs in

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<sup>96</sup> *Rowley*, 458 U.S. at 201 (1982).

<sup>97</sup> *Id.* at 198.

<sup>98</sup> 34 C.F.R. § 300.324 (a).

<sup>99</sup> 34 C.F.R. § 300.320 (a) (1); 5 D.C.M.R. § 3007.2 (a).

<sup>100</sup> 34 C.F.R. § 300.320 (a) (2) (i); 5 D.C.M.R. § 3007.2 (b) (annual goals must include short-term instructional objectives).

the 2008-2009 or 2009-2010 school years that were not reasonably calculated to enable the Student to receive educational benefits.

Thus, Petitioner established by a preponderance of the evidence that DCPS denied the Student a FAPE.

**B. DCPS Denied the Student FAPE by Failing to Provide an Appropriate Educational Placement.**

The IDEIA requires that unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.<sup>101</sup> In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs.<sup>102</sup> A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.<sup>103</sup>

Placement decisions must be made in conformity with the child's IEP.<sup>104</sup> Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate.<sup>105</sup> In the District of Columbia, special education placements shall be made in the following order or priority, provided, that the placement is appropriate for the student and made in accordance with IDEIA:

- (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
- (2) Private or residential District of Columbia facilities; and
- (3) Facilities outside of the District of Columbia.<sup>106</sup>

The Student's test scores show that her academic functioning is anywhere from four to eight years behind her grade level. Despite the Student's low functioning and inability to grasp basic math concepts, the IEP team provided the Student a minimal amount of specialized instruction and placed her in inclusion classes year after year. As a result, the Student fell further and further behind academically.<sup>107</sup>

DCPS also failed to implement the Student's IEP. Despite that the Student's IEP requires DCPS to provide the Student specialized instruction in math and English, the Student has received no individualized instruction in English and no specialized instruction in math since late October 2009 in math.

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<sup>101</sup> 34 C.F.R. § 300.116 (c).

<sup>102</sup> 34 C.F.R. § 300.116 (d).

<sup>103</sup> *Id.* at (e).

<sup>104</sup> 34 C.F.R. § 300.116 (a)(2)(b), 5 D.C.M.R. § 3013 (2006).

<sup>105</sup> *See, Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006).

<sup>106</sup> D.C. Code § 38-2561.02.

<sup>107</sup> Testimony of Educational Advocate.

Moreover, the Student is unable to perform in her current classroom.<sup>108</sup> The Student's math classroom has abundant visual stimuli. Although the students are constantly disruptive and prevent the Student from working on her assignments, the math teacher makes no effort to control the disruptive students.<sup>109</sup>

Petitioner proved by a preponderance of the evidence that the inclusion setting is inappropriate for the Student. Petitioner further proved that DCPS has failed to provide the Student the small, therapeutic, special education setting with intensive, individualized special education instruction that she requires. Thus, Petitioner proved that DCPS failed to place the Student in educational settings were reasonably calculated to enable the Student to receive educational benefits.

Thus, Petitioner proved by a preponderance of the evidence that DCPS denied the Student a FAPE. Petitioner further proved that the Non-Public School will provide the Student an educational setting that will enable her to receive educational benefit.<sup>110</sup>

### **ORDER**

Upon consideration of Petitioner's request for a due process hearing, the exhibits and the testimony admitted at the hearing, this 15th day of January 2010 it is hereby:

**ORDERED** that that, within 10 school days, DCPS shall revise the Student's IEP to reflect that she is to receive full-time specialized instruction in a small, therapeutic setting, provide her independent and group psychological counseling, include present levels of performance and meaningful goals and objectives, and reflect the recommendations of the Student's psychological, psychiatric, and educational evaluations;

**IT IS FURTHER ORDERED** that the Student shall attend the Non-Public School at DCPS expense for the 2009-2010 school year;

**IT IS FURTHER ORDERED** that DCPS shall fund all of the Student's related services at the Non-Public School throughout the 2009-2010 school year;

**IT IS FURTHER ORDERED** that DCPS shall provide the Student transportation services to and from the Non-Public School;

**IT IS FURTHER ORDERED** that DCPS shall ensure that the Student is present at all future IEP/MDT meetings before proceeding with any meeting regarding the Student's IEP; and

**IT IS FURTHER ORDERED** that this Order is effective immediately.

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<sup>108</sup> Petitioner Exhibit 13.

<sup>109</sup> *Id.*

<sup>110</sup> DCPS presented no evidence to show that this school is not the least restrictive environment for the Student.

/s/ Frances Raskin

Frances Raskin  
Hearing Officer

#### **NOTICE OF APPEAL RIGHTS**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).

Distributed to:

Domiento Hill, Attorney at Law  
Daniel Kim, Attorney at Law  
Hearing Office  
DCPS