DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
STUDENT HEARING OFFICE
2011 JAN 20 AM 10: 26

Parent, on behalf of the Student,[1]

Petitioner,

v.

The District of Columbia Public Schools ("DCPS"),

Respondent.

Date Issued: January 19, 2011
Hearing Officer: Ramona M. Justice
Case No:
Hearing Room: Room 2009

HEARING OFFICER DETERMINATION

I. INTRODUCTION

On October 20, 2010, the parent, through her Attorney, filed with the District of Columbia, Office of the State Superintendent of Education ("OSSE"), Student Hearing Office, an "Administrative Due Process Complaint Notice", on behalf of the student, alleging that the District of Columbia Public Schools, hereinafter referred to as "DCPS" or "Respondent", denied the student a free appropriate public education (FAPE), by failing to:

(1) Identify, locate, evaluate, and determine the student eligible for special education services under the "Child Find" provisions of the Individuals with Disabilities Education Act ("IDEA"); and
(2) Implement the student's 504 Rehabilitation Plan.

The Respondent was required to convene a resolution meeting within fifteen (15) calendar days from the date of the complaint, which expired on November 4, 2010. The thirty (30) day resolution period ended on November 20, 2010; and the forty-five (45) day timeline expired on January 4, 2011. The resolution meeting was not waived by the Petitioner in the due process complaint.

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[1] *Personal identification information is provided in Appendix A.*

On October 22, 2010, the Student Hearing Office assigned the due process complaint to this Hearing Officer. On October 22, 2010, the Hearing Officer issued to the parties a "Notice of Prehearing Conference", scheduling the prehearing conference for November 9, 2010 at 4:00 p.m.; and an Order, requiring the parties to notify the Hearing Officer of the date, time, and outcome of the resolution meeting.

On November 1, 2010, the Respondent filed a response to the due process complaint; and on November 8, 2010, filed "DCPS Resolution Waiver", agreeing to waive the resolution meeting, and proceed to a due process hearing on the October 20, 2010 due process complaint.

On November 5, 2010, the parent, through her Attorney, filed a second "Administrative Due Process Complaint Notice", on behalf of the student, alleging that the District of Columbia Public Schools, denied the student a free appropriate public education (FAPE), by failing to implement the student's August 18, 2010 Individualized Education Program ("IEP").

The Petitioner seeks relief in the form of an Order issued by the Hearing Officer finding that the DCPS denied the student a FAPE, by failing to identify, locate, evaluate, and determine the student eligible for special education services; and failing to implement the student's August 18, 2010 IEP. The Petitioner also requests that the Hearing Officer order the following relief:

- That the DCPS provide the student compensatory education services from November 8, 2008 through May 3, 2010, the date of the eligibility determination, to compensate the student for services he failed to receive during this period; with regard to the issue pertaining to failure to identify, locate, evaluate, and determine the student eligible for special education services[2]; and

- That the DCPS provide the student compensatory education services from August 23, 2010, the beginning of the 2010/2011 school year, through October 20, 2010, the date of the complaint, to compensate the student for services he failed to receive during this period; with regard to the issue pertaining to failure to implement the student's August 18, 2010 IEP.

On November 12, 2010, the Respondent filed its response to the November 5, 2010 due process complaint. The Respondent was required to convene a resolution meeting within fifteen (15) calendar days from the date of the second complaint, which expired on November 20, 2010. The thirty (30) day resolution period ended December 5, 2010; and the forty-five (45) day timeline expired on January 19, 2011. The resolution meeting was waived by both parties.

[2] The parties requested and were granted leave to submit a written brief regarding the statute of limitations governing claims for compensatory education services.

A prehearing conference was held on November 12, 2010, wherein the parties agreed that in the interest of judicial economy, the due process complaints filed on October 20, 2010 and November 5, 2010, should be consolidated. On November 15, 2010, the Petitioner, through her attorney, filed "Petitioner's Consent Motion to Consolidate Cases", requesting to consolidate the due process complaints filed on October 20, 2010, and November 5, 2010; and that the timeline established in the second complaint apply in administering the complaints.

On November 15, 2010, the Hearing Officer issued an order finding that "good cause" exited for granting the Petitioner's motion; the issues in the complaints were consolidated; and the timeline established in the second complaint was applied in administering the complaints.

On December 1, 2010, the Hearing Officer issued a second 'Notice of Prehearing Conference'; scheduling the prehearing conference for December 15, 2010 at 3:00 p.m.. The purpose of the second prehearing conference was to discuss the consolidated issues; and complaints. The Hearing Officer also issued another Order requiring the parties to notify the Hearing Officer of the date, time, and outcome of the resolution meeting.

The prehearing conference convened on December 15, 2010, as scheduled. During the prehearing conference, the Respondent challenged the Hearing Officers' authority to decide the issue regarding implementation of the student's 504 Rehabilitation Plan; and hearing arguments from both parties, the Hearing Officer determined that she lacks the authority under the IDEA, to decide the issue regarding the Respondent's alleged failure to implement the student's 504 Rehabilitation Plan.

There was also discussion regarding IDEA's two (2) year statute of limitations, and whether statute of limitations and/or a prior Settlement Agreement bars the Petitioner's Child Find claim dating back to the year 2006.

On December 15, 2010, the Hearing Officer issued a prehearing order scheduling the due process hearing for January 12, 2011; and requiring the parties to submit written briefs on this issue, no later than December 31, 2010. Briefs and supporting case law were submitted by the parties in a timely manner.

After a review of the issues raised by the parties and supporting documentation, the Hearing Officer rendered a preliminary determination that the Settlement Agreement did not bar the parent from pursuing violations allegedly occurring more than two (2) years prior to the date the parent learned of the problem serving as the basis of the complaint, as long as the parent filed the complaint within 2 years from when she knew or should have known of the violation. The Hearing Officer also held that if it is determined that there was a violation in 2006, the parent may be entitled to relief dating back to such time, and/or prospective compensatory education services, to compensate the parent for the past violation.

The due process hearing convened on January 11, 2011, at 9:00 a.m., as scheduled, at 810 First Street, N.E., 2nd Floor, Washington, D.C... The hearing was closed to the public, pursuant to the parents' request. Each party was represented by counsel; and both counsels provided opening statements.

The Petitioner offered into evidence Petitioner's Exhibits 1-29; and the Respondent offered into evidence Respondent's Exhibits 1-9. Receiving no objections, the Petitioner's Exhibits 1-29; and Respondent's Exhibits 1-9, were admitted into the record as evidence. Each party submitted witness lists.

Petitioner's witnesses included: the student's parents; Director, Newlen Educational Services, LLC; Psychologist, Parker Diagnostics Solutions; and the student's Education Advocate. The Respondent's witnesses included: District of Columbia Public School Psychologists; Special Education Coordinator; Math Teacher; 7th grade Social Studies Teacher; Life Science Teacher; and Special Education Teacher.

The Petitioner offered a Psychologist from Parker Diagnostic Solutions, as an expert witness in the area of educational psychology, which Respondent objected. After hearing arguments from the parties and reviewing the witnesses curriculum vitae, the Hearing Officer sustained the Respondent's objection finding that: by virtue of the witnesses education, training, skill, and limited experience, it is believed that the witness lacked the expertise and specialized knowledge in psychology, with a particular emphasis in education, beyond that of the average person, sufficient that others may officially and legally rely upon the witness's specialized (scientific, technical or other) opinion about any evidence or factual issues, within the scope of her expertise, that would qualify her as an expert witness; and that would be of assistance to the Hearing Officer.

The due process hearing concluded, with the parties arguing their positions on the issues in the complaint; and on issues related to the IDEA, two (2) year statute of limitations (SOL) and settlement agreement (SA); requesting that the Hearing Officer find in each party's favor on all issues.

Upon further review and consideration of the parties written briefs and arguments on the SOL and SA issues, governing law, and information provided at the hearing, the Hearing Officer offers the following findings:

Statute of Limitations

The Respondent asserts that according to 20 U.S.C. §1415(b)(6)(B), and §1415 (F)(3)(C), a parent must file a complaint within 2 years of the alleged problem or within 2 years of learning of the problem; and if a parent does not learn about a problem when it occurs, the analysis may change wherein the parent must file a due process complaint within 2 years of learning of the alleged violation, and where the violation took place 6 months ago or 6 years ago is irrelevant.

The Petitioner asserts that the two (2) year statute of limitations in the IDEA, does not limit the claims that can be brought under the IDFEA or the subject matter of those claims; and does not restrict the amount of relief that a Petitioner can be awarded for a claim or how many years of relief a Petitioner can request.

The Petitioner further asserts that instead, the statute of limitations deals solely with one question, whether a claim is viable, or whether it should be dismissed as untimely because the Petitioner failed to file a complaint within two (2) years of learning of the violation complained of, citing *Draper v. Atlanta Independent School System, 518 F.3d 1275 (N.D. Ga. 2007).*

The Petitioner also asserts that the two (2) year statute of limitations does not start tolling, meaning that the two (2) years clock does not start ticking, until the parent "knew of should have known" of the injury that gives rise to the claim in the complaint; and in this instance it was not until August 18, 2010, after filing of the June 10, 2010 due process complaint, that the parent first became aware that the evaluation which served as the basis for the Respondent's 2006 ineligibility determination, may have been flawed, citing *Somoza v. New York City Department of Education, 475 F.Supp. 2d (2nd, Cir. 2008).*

According to the IDEA, a parent or public agency may file a due process complaint on any matters relating to the identification, evaluation, or educational placement of the child or the provision of a FAPE;[3] within two (2) years of the date the parent knew or should have known of the alleged action that forms the basis of the due process complaint.

Under federal law, an IDEA claim accrues "when the parents know or have reason to know of the injury or the event that is the basis of their claim"; *R.R. v. Fairfax County Sch. Bd., 338 F.3d 325, 332 (4th Cir. 2003); Dreher v. Amphitheater United Sch. Dist., 22 F.3d 228, 232 (9th Cir. 1994); Hall v. Knott County Bd. Of Educ., 941 F.2d 402, 408 (6th Cir. 1991).* The parents must be in possession of critical facts which indicate that the child has been harmed and the defendants are responsible for the harm. *K.P. v. Juzwic, 891 F. Supp. 703, 716 (D.Conn.1995)*. *Draper v. Atlanta Independent School System, 518 F.3d. 1275 (D. Ga. 2007).*

In this matter, the parents IDEA claim accrued on August 18, 2010, the date the parents knew or had reason to know of the injury or event that formed the basis of its IDEA claim; and the date the parents received the information necessary to know or have reason to know, that their son may have been denied a FAPE.

On August 18, 2010, the parents received information from the Respondent that since the year 2006 the Respondent had not evaluated the student for his suspected disability of ADHD, however evaluated the student for a learning disability; and that, if it had evaluated the student for ADHD in 2006, a proper diagnoses and eligibility determination may have been made at that time, and appropriate educational programming provided to the student. The parent's received critical information that the Respondent may have failed in fulfilling its Child Find obligations under the IDEA.

[3] 20 U.S.C. §1415 (b)(6).

In applying the IDEA's two (2) year statute of limitation, because the parents IDEA claim accrued on August 18, 2010, the parents are entitled to pursue claims of Child Find violations, occurring not more than two (2) years prior to August 18, 2010. Thus, the parents may pursue Child Find claims occurring from August 18, 2008 through August 18, 2010. However, the parents Child Find claim for a violation occurring prior to August 18, 2008, is barred by the IDEA's two (2) year statute of limitations, ***unless*** the parent demonstrates that she was prevented from filing a due process complaint due to—

1. Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or

2. The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

The Hearing Officer finds that the Petitioner successfully established that due to misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; and that the LEA withheld information from the parent, that it was required under this part to provide to the parent; the parents 2006 Child Find claim is not barred by the IDEA's two (2) year statute of limitations.

First, on May 10, 2006, the parent advised the Respondent that the Children's National Medical Center evaluated; and diagnosed the student with ADHD. The Respondent advised the parent, albeit in error, that ADHD is a medical issue, and not an academic issue; and because there was no evidence that the student's ADHD adversely impacted his learning, the student was ineligible for special education services. The information provided by the Respondent to the parent is a misrepresentation, on all accords.

Representations that there was no evidence that the symptoms of ADHD adversely impacted the student's learning is not accurate. In fact, at the time of the meeting, the student's educational record reflected that since pre-kindergarten the student struggled academically in the classroom, and exhibited symptoms consistent with ADHD, including difficulty with focusing, attention, staying on task, distractibility, organization, comprehension, and processing information; and since that time these symptoms had an adverse impact continued to have an adverse impact the student's learning and educational performance.

Representations that ADHD is a medical issue and not an academic issue, and therefore, the student is not eligible for special education services, is not accurate; and is not the criteria established by the IDEA in determining whether a student qualifies for special education services, under the disability classification of Other Health Impaired (OHI); specifically identified as ADHD.

Representations that it would develop and implement a 504 rehabilitation plan for the student and provide the student counseling services; that the student would benefit from the 504 plan; and that these measures would address the student's difficulties in the classroom with processing information, and anxiety; were inaccurate. In fact the 504 plan was not developed until three (3) years later; and as a result, the student was without any support during this period; and once the plan was developed in October, 2009, the student did not benefit, and actually regressed.

In addition, a 504 plan which falls under civil-rights law and is an attempt to remove barriers and allows students with disabilities to participate freely; however, is not designed to provide a student significant remediation and assistance received with an IEP. The student's 504 plan is not designed to address the student's difficulty with processing information and anxiety in the classroom; or the student's congenital encephalopathy; significant processing difficulties that affect his academics; slow processing speed; weakness in math and reading; and ADHD.

The parent relied on the information provided by the Respondent, trusting that after the May 10, 2006 meeting, the Respondent developed and was implementing the 504 plan; and that the plan would benefit the student, and address the student's inattentiveness, anxiety, processing, and other ADHD symptoms. At that time, the parent had no reason to know that the 504 plan would not be developed for 3 years later, and once developed, the plan failed to address the student's ADHD symptoms, as stated by the Respondent.

The parent relied on the representations of the Respondent from May 10, 2006 until August 18, 2010, and it was not until August 18, 2010, that the parent first became aware that the April 23, 2006 Psycho-Educational Evaluation upon which the Respondent relied in rendering the ineligibility determination was designed to assess the student's academic functioning and eligibility for services as a student with a learning disability; however, was not designed to assess the student's cognitive functioning, or address parent and teacher concerns; and the impact that these behaviors had on the student's learning and educational performance in the classroom, since pre-kindergarten. The parent also received information from the Respondent in May, 2006 suggesting that the eligibility decision was final.

At the time of the May 10, 2006 ineligibility determination the parent had no reason to know that the information she received from the Respondent was inaccurate, that the student was in fact eligible to receive special education services at that time, or that the Respondent failed to fulfill its Child Find obligations to the student. Therefore, the parent acting in reliance upon representations of the Respondent, was precluded from filing a due process complaint on the Child Find claim, until August 18, 2010, when she received information from the Respondent, that a problem may have occurred during the 2006 evaluation, and the student may have been harmed.

Second, the Respondent withheld information from the parent that was required under the IDEA. The Respondent failed to inform the parent that the parent must be afforded an opportunity to provide "meaningful" participation in meetings and decisions, with respect to the identification, evaluation, and educational placement of a child, and the provision of a FAPE; and that the ineligibility determination is not final and the parent may request reconsideration of the eligibility decision.

The Respondent also failed to inform the parent that she has the right to request that the Respondent carefully consider and draw upon information from a variety of sources, including the independent evaluations and diagnoses rendered by the Children's National Medical Center; and the parent has a right to request information regarding the eligibility criteria utilized by the Respondent in determining that the student was ineligible for services, under the disability classification of OHI, specifically identified as ADHD.

For these reasons, the Hearing Officer finds that both exceptions to IDEA's two (2) year statute of limitations apply in this matter; and therefore, the Petitioner's Child Find claim dating back to the year 2006, is not barred by the IDEA's two (2) year statute of limitations.

Settlement Agreement

The Respondent asserts that on June 10, 2010, the Petitioner filed a due process complaint, challenging the appropriateness of the student's May 3, 2010 Individualized Education Program (IEP); and on June 22, 2010, the parties executed a Settlement Agreement (SA) that satisfies all claims that were brought in the June 10, 2010 complaint, or that could have been brought in that complaint. The Respondent relies upon the following language in the June 22, 2010 SA:

"This Settlement Agreement is in full satisfaction and settlement of all the claims contained in the pending complaint, including those claims under the IDEA and §504 the parent now asserts or could have asserted within the statute of limitations as of the date of the signed Settlement Agreement"; and "Parent is unaware of any other issues that DCPS could immediately address for the benefit of the child including, but not limited to compensatory education".[4]

The Respondent also asserts that at the time of the June 22, 2010 SA, the parent was aware that the student struggled academically and suspected that he had a disability in the year 2006, however, failed to raise this issue as a Child Find issue in the June 10, 2010 complaint, therefore, the parent is precluded by the SA from litigating the Child Find issue at this time, or receiving relief for the past violation. The Respondent cites *Welsing v. District of Columbia, 784 F. Supp. 917 (D.D.C. 1992)* and 20 U.S.C. §1415(b)(6)(B), 1415(f)(3)(C).

[4] Id.

The Petitioner asserts that the SA in this case provides that the parent waives any argument the "knew" or "should have known" as of that date; and the parent did not know about the Child Find claim and could not have been expected to know about this claim, until August 18, 2010; and therefore, the Respondent's argument that the SA bar the Petitioner's Child Find claim, fails.

In addressing the issue of whether the June 22, 2010 Settlement Agreement satisfies all claims that were brought in the June 10, 2010 complaint or that could have been brought in the complaint, including the Child Find issue, the Hearing Officer finds that: although the parent was aware that since pre-kindergarten the student struggled academically, and suspected that the student may be eligible to receive special education services under the IDEA, the parent was not in possession of critical facts indicating that the Respondent may have failed in its Child Find obligations, and the student was harmed as a result of such failure, until August 18, 2010, after the parties entered into the June 22, 2010 SA. Therefore, the Petitioner could not have included the Child Find claim in the June 10, 2010 due process complaint.

Furthermore, the language in the SA barring the Petitioner from pursing claims which she is legally entitled to pursue under the law, is contrary to the IDEA and public policy. For these reasons, it is the decision of the Hearing Officer that the language in the June 22, 2010 SA purportedly barring the Petitioner from pursing claims which she is legally entitled to pursue under the law, cannot be upheld in this forum. It is also the Hearing Officer's decision that the SA does not represent a knowing and voluntary waiver of Petitioner's rights under the IDEA; and therefore the Petitioner's Child Find claim is not barred by the June 22, 2010 Settlement Agreement, and remains a viable issue for the Hearing Officer to decide.

II. JURISDICTION

The due process hearing was held; and the Hearing Officers' decision is written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17; reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), Public Law 108-446 and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; Title 38 of the D.C. Code, Subtitle VII, Chapter 25; and Chapter 30, Title 5-E of the District of Columbia Municipal Regulations ("DCMR").

III. BACKGROUND

The student is years of age; and a grade student at a District of Columbia public middle school. On May 10, 2006, the Respondent determined the student ineligible for special education services, under the disability classifications of specific learning disabled (SLD); and Other Health Impaired (OHI), specifically identified as ADHD.

The student was reevaluated on March 15, 2010; and on April 28, 2010 the Respondent determined the student eligible to receive special education services under the disability classification of Multiple Disabilities (MD), including, specific learning disabled (SLD), in math and reading; and Other Health Impaired (OHI), specifically identified as ADHD. On May 3, 2010 a "Draft" IEP was developed for the student.

On August 18, 2010, an IEP was developed for the student providing for 2.5 hour per week of reading and math in the general education setting; and 4 hours of specialized instruction, outside the general education setting.

On October 20, 2010 and November 5, 2010, the parent, through her Attorney, filed the due process complaints on behalf of the student; alleging that the Respondent failed to identify, locate, evaluate, and determine the student eligible for special education services under the Child Find provisions of the IDEA; and failed to implement the student's August 18, 2010 IEP, by providing the student the services, as recommended in the IEP.

IV. ISSUES

The following issues are before the Hearing Officer:

(1) Whether the District of Columbia Public Schools denied the student a free appropriate public education, by failing to identify, locate, evaluate; and determine the student eligible for special education services, from May 10, 2006 through April 28, 2010, in violation of the "Child Find" provisions of the IDEA, at 34 C.F.R. §300.111 and §300.304(c)(4) and (6)?

(2) Whether the District of Columbia Public Schools denied the student a free appropriate public education, because it failed to implement the student's August 18, 2010 Individualized Education Program (IEP), by failing to provide the student 2.5 hours per week of reading and math, in the general education setting; and 4 hours per week of specialized instruction, outside the general education setting; as recommended in the IEP; in violation of the D.C. Municipal Regulations, Title 5, §3010.2 (2003), and the IDEA, at 34 C.F.R. §300.323(c)(2)?

V. CREDIBILITY DETERMINATIONS

The testimony of all witnesses at the hearing was credible. The Respondent presented no witness testimony that contradicted the testimony of Petitioner's witnesses; or countered Petitioner's evidence at the hearing on the issues in the complaint.

VI. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The student is eleven (11) years of age, and a 7th grade student at a District of Columbia public middle school.[5] Prior to attending the middle school, the student attended a DCPS pre-kindergarten; and elementary school.[6] The student resides in the District of Columbia with his parents.[7]

2. The student is disabled and eligible to receive special education and related services under the Individuals with Disabilities Education Act (IDEA).[8] The student's disability classification of Multiple Disabilities (MD), including, specific learning disabled (SLD), in math and reading; and Other Health Impaired (OHI), specifically identified as ADHD.[9]

3. Since pre-kindergarten, the student exhibited symptoms of ADHD in the classroom and at home, including difficulty with focusing, attention, memory, staying on task, distractibility, organization, comprehension, and processing information; and over the years these symptoms continued to have an adverse impact the student's learning and educational performance.[10] These concerns were shared by the student's teachers and parents.[11]

   The student continued to regress academically; and during his grade year, the student's teacher recommended the student's retention, because of academic difficulties in the classroom, and failing grades.[12] The parent opposed the retention, and during the Spring of 2006, requested that the DCPS evaluate the student to determine his eligibility for special education services.[13] During this period, the parents obtained independent evaluations from the Children's National Medical Center, Neurodevelopmental Pediatric Program; and agreed to medication to treat the student for ADHD.[14]

4. On ***April 23, 2006***, pursuant to the parent's request, the Respondent completed an independent "Confidential Psycho-Educational Evaluation", to determine the student's eligibility for special education services.[15]

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[5] Testimony of parents, and Petitioner's Exhibit 1.
[6] Testimony of parents, and Petitioner's Exhibit 1.
[7] Testimony of parents.
[8] Respondent's Exhibit 7and Petitioner's Exhibit 5.
[9] Id.
[10] Respondent's Exhibit 3, page 14 of 40, Testimony of parent, Respondent's Exhibit 3, pages 7 of 40, 8 of 40, 10 of 40, and 14 of 40, Petitioner's Exhibits 15-21, Testimony of DCPS Psychologist.
[11] Id.
[12] Testimony of parent.
[13] Id.
[14] Testimony of parent, and Petitioner's Exhibits 11, 12, and 13.
[15] Testimony of parent, Petitioner's Exhibit 14, and Respondent's Exhibit 1.

Although the evaluator expressed great concern regarding the student's scores in the Processing Speed indices; and indicated that the student cannot presently process visual motor and perceptually organize stimuli at nearly the same levels as he can process verbal conceptual material, the evaluator determined that according to the IDEA criteria and current psycho-educational measures, the student did not present with a learning disability. The evaluator did not assess the student to address symptoms of ADHD.

5. On ***May 1, 2006***, the Children's National Medical Center, Neurodevelopmental Pediatric Program, conducted an independent evaluation of the student to address parent and teacher concerns regarding the student's distractibility, attention, organization, completion of tasks, memory, processing speed; and learning in the classroom, and at home.[16]

   The student was diagnosed with congenital encephalopathy[17]; significant processing difficulties that affect his academics; slow processing speed; weakness in math and reading; and his profile from parent report was consistent with attention deficit disorder (ADD).[18]

6. On ***May 10, 2006***, the Respondent reviewed its April 23, 2006 Psycho-Educational Evaluation, and determined that based on the cognitive and academic scores in the "Confidential Psycho-Educational Evaluation" evaluation, the student failed to qualify for special education services, as a student with a *learning disability*; because the student's was functioning at or above his age expectancy.[19]

   The parent advised the Respondent of the May 1, 2006 medical diagnoses rendered by the Children's National Medical Center, including the ADD diagnosis.[20] The Respondent advised the parent that Attention Deficit Hyperactivity Disorder (ADHD) was a medical issue, and not an academic issue; and because there was no indication that the ADHD had an adverse impact on the student's learning, the student did not qualify for special education services.[21] The Respondent advised the parent that student would benefit from a 504 rehabilitation plan; and that the plan would be developed to address the student's processing speed and anxiety.[22]

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[16] Petitioner's Exhibit 13.

[17] In general, encephalopathy is manifested by an altered mental state that is sometimes accompanied by physical manifestations (for example, poor coordination of limb movements). Congenital Encephalopathy is a term referring to brain disease, damage, or malfunction, since birth. Encephalopathy can present a very broad spectrum of symptoms that range from mild, such as some memory loss or subtle personality changes, to severe, such as dementia, seizures, coma, or death.

[18] Petitioner's Exhibit 13.
[19] Petitioner's Exhibit 8.
[20] Testimony of parent.
[21] Testimony of parent.
[22] Id.

On May 28, 2009, approximately three (3) years later, the Respondent developed a 504 plan for the student.[23] During this period, the student received no interventions, modifications, or support, in the classroom; or during testing; and regressed academically.[24]

7. On ***January 28, 2009***, the Children's National Medical Center, Neurodevelopmental Pediatric Program, reevaluated the student.[25] The student was diagnosed with mild attention deficit hyperactivity disorder (ADHD), weak processing speed and memory, which impacted his learning; and was placed on medication for the treatment of attention deficit disorder (ADD).[26]

8. On ***October 5, 2009***, the Children's National Medical Center, Neurodevelopmental Pediatric Program, reevaluated the student.[27] The Center reported that it would continue to monitor the student's ADHD; documenting that the student continued to exhibit some processing weakness, with decreased organization, memory and slow processing speed; and recommended an increase in the student's ADHD medication.[28]

9. On ***February 2, 2010***, the Respondent completed a Woodcock Johnson (WJ) III Test, to assess the student's academic functioning.[29] The student's academic skills were within the average range compared to others at his grade level; his fluency with academic tasks is low average; and his ability to apply academic skills is low.[30] When compared to others at his grade level, the student's performance was average in math calculation skills, written language, and written expression; *low average in broad reading; and very low in mathematics*.[31]

10. On ***March 15, 2010***, pursuant to the parent's request, and in response to parent and concerns of the student's math teacher that the student had significant difficulties with processing information and organization skills, which impacted his learning; and concerns that the student continued to struggle in the classroom, despite the 504 plan, interventions, and ADHD medication; the Respondent reevaluated the student by completing a "Confidential Psychological Evaluation".[32]

11. On ***April 14, 2010***, the Respondent convened a second eligibility determination meeting.[33] The DCPS Psychologist reviewed the March 15, 2010 Confidential Psychological Evaluation.

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[23] Petitioner's Exhibit 22, pages 22-5 through 22-9.
[24] Testimony of parent.
[25] Petitioner's Exhibit 12.
[26] Id.
[27] Petitioner's Exhibit 11.
[28] Id.
[29] Respondent's Exhibit 2.
[30] Id.
[31] Respondent's Exhibit 3, page R-2.
[32] Respondent's Exhibit 3, and Respondent's Exhibit 3, page R-3.
[33] Petitioner's Exhibit 7.

The team discussed the disability classifications of Other Health Impaired (OHI), specifically identified as ADHD, and learning disabled (LD); and agreed to reconvene on April 28, 2010, to finalize the eligibility determination, and develop an initial IEP for the student.[34]

12. On ***April 28, 2010***, the Respondent determined the student eligible to receive special education services, under the disability classification of multiple disabilities (MD), including Other Health Impaired (OHI), and Learning Disabled (LD).[35]

13. On ***May 3, 2010***, the Respondent drafted an IEP for the student, recommending 2.5 hours per week of special education services, in reading and 2.5 hours per week of special education services in mathematics, in the general education setting; and 4 hours per week of specialized instruction, outside the general education setting.[36]

14. On ***May 28, 2009***, the Respondent developed a 504 Plan for the student, to include classroom accommodations and assignment modifications.[37]

15. On ***October 2, 2009***, the Children's National Medical Center, Neurodevelopmental Pediatric Program, reevaluated the student documenting that it continued to monitor the student for ADHD; and recommended an increase in the student's medication for the treatment of ADHD.

16. On ***August 18, 2010***, the Respondent convened an IEP team meeting, to review and revise the student's IEP, if necessary; discuss site location of services; and discuss compensatory education, if warranted.[38] An IEP was developed for the student providing for 2.5 hour per week of reading and math in the general education setting; and 4 hours of specialized instruction, outside the general education setting.

    During discussion of the April 23, 2006 Psycho-Educational and March 15, 2010 Psychological evaluations, the DCPS Psychologist stated that the April 23, 2006 evaluation which served as the basis for the 2006 ineligibility determination, was inappropriate because it represented an outdated version of the test; and was not normed for the population for which it was used, including the student.[39]

    At the hearing, the DCPS Psychologist testified that although this statement was made at the August 18, 2010 IEP team meeting, at the October 5, 2010 resolution meeting, she informed the team that she erred in her opinion regarding the tests administered as part of the 2006 Psycho-Educational Evaluation; and that the WISC used for the student in the 2006 evaluation, was appropriate and a current version of the test.

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[34] Respondent's Exhibit 4 and Petitioner's Exhibit 7.
[35] Petitioner's Exhibit 6.
[36] Petitioner's Exhibit 3.
[37] Petitioner's Exhibit 22.
[38] Petitioner's Exhibit 5, Petitioner's Exhibit 2, Respondent's Exhibit 8.
[39] Testimony of parent, and DCPS Psychologist.

17. The student satisfies the eligibility criteria for Specific Learning Disabled (SLD);[40] in mathematics and reading.[41]

On May 1, 2006, the Children's National Medical Center diagnosed the student with congenital encephalopathy,[42]which is a *brain disorder* affecting one or more of the basic psychological processes involved in the student's understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do *mathematical calculations*, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia; and this disorder has had a significant adverse impact on the student's learning and educational performance.[43]

The Children's Center also determined that the student exhibits significant processing difficulties which affect his academics; slow processing speed; and weakness in math and reading. The evaluator in the 2006 Psycho-Educational Evaluation expressed greater concern regarding the student's scores in the Processing Speed indices; and indicated that the student cannot presently process visual motor and perceptually organize stimuli at nearly the same levels as he can process verbal conceptual material. The Respondent disregarded this information; and the impact that these diagnoses have on the student's learning and educational performance, particularly in math and reading.

The student does not achieve adequately for the child's age or to meet State approved grade-level standards, in reading and mathematics, when provided with learning experiences and instruction appropriate for his age; and since pre-kindergarten has not made sufficient progress to meet age level standards in reading and mathematics, when using a process based on the child's response to scientific, research-based intervention.[44]

The student exhibits patterns of weaknesses in performance and achievement, relative to age, or State approved grade level standards, and intellectual development, that is determined by a group to be relevant to the identification of a specific learning disability, using appropriate assessments.[45]

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[40] IDEA, at 34 C.F.R. §300.8 (c)(10)(i). Petitioner's Exhibits 11-13, Respondent's Exhibit 3, Respondent's Exhibit 2, Testimony of Psychologists.

[41] Petitioner's Exhibits 11-13, Respondent's Exhibit 3, Respondent's Exhibit 2, Testimony of Psychologists.

[42] In general, encephalopathy is manifested by an altered mental state that is sometimes accompanied by physical manifestations (for example, poor coordination of limb movements). Congenital Encephalopathy is a term referring to brain disease, damage, or malfunction, since birth. Encephalopathy can present a very broad spectrum of symptoms that range from mild, such as some memory loss or subtle personality changes, to severe, such as dementia, seizures, coma, or death.

[43] IDEA, 34 C.F.R. §300.8(10).

[44] Petitioner's Exhibits 11-13, Respondent's Exhibit 3, Respondent's Exhibit 2, Testimony of Psychologists, Testimony of student's teachers.

[45] Petitioner's Exhibits 11-13, Respondent's Exhibit 3, Respondent's Exhibit 2, Testimony of Psychologists, testimony of student's teachers.

The Respondent also disregarded the diagnoses of congenital encephalopathy, rendered by the Children's National Medical Center in 2006; and it was only due to the parents' persistence in 2006 and in 2010 that the Respondent evaluated the student; and in 2010 identified and determined eligible to receive special education services.

The Respondent erred in its 2006 determination that the student was ineligible to receive special education services under the disability classification of Specific Learning Disability in mathematics and reading; and failed in its Child Find obligations under the IDEA, by failing to determine the student eligible for special education services from May 10, 2006, until April 28, 2010.

18. The student satisfies the eligibility criteria for Other Health Impaired (OHI), specifically identified Attention Deficit Hyperactivity Disorder (ADHD).[46]

Since prekindergarten the student exhibited limited alertness, including a heightened alertness to external stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as attention deficit hyperactivity disorder, and
(ii) This limited alertness adversely affects the student's learning and educational performance.[47]

Throughout the student's education, the Respondent was privy to information in the student's educational records that the student struggled academically, and had difficulties in the classroom with inattentiveness, focusing, distractibility, lack of organization, processing information, memory, and related behaviors, which adversely impacted the student's learning and educational performance, however, the Respondent failed to identify, locate, evaluate, and determine the student eligible for special education services, under OHI, specifically identified as ADHD.[48]

The Respondent also disregarded independent evaluations and diagnoses of ADD and ADHD, rendered by the Children's National Medical Center from 2006 through 2009; and it was only due to the parents' persistence in 2006 and in 2010 that the Respondent evaluated the student; and in 2010 identified and determined eligible to receive special education service.[49]

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[46] IDEA, at 34 C.F.R. §300.8(c)(9). Petitioner's Exhibits 11-13, Respondent's Exhibit 3, Respondent's Exhibit 2, Testimony of Psychologists.
[47] Testimony of parents, Testimony and reports of student's teachers, and Petitioner's exhibits 11-13.
[48] Testimony of parents, student's teachers, DCPS Psychologist, and Special Education Coordinator.
[49] Testimony of parents, SEC, DCPS Psychologist, and Petitioner's Exhibits 5-8.

The Respondent erred in its 2006 determination that the student was ineligible to receive special education services under the disability classification of Other Health Impaired (OHI), specifically identified as ADHD; and erred by failing to determine student eligible for services from May 10, 2006, until April 28, 2010. [50]

19. The Respondent failed to implement the student's August 18, 2010 Individualized Education Program (IEP), by failing to ensure that the student receives 2.5 hours per week of ***1:1*** reading and math instruction, in the general education setting; and 4 hours per week of ***1:1*** specialized instruction, outside the general education setting; as intended and recommended in the student's IEP.[51]

    The student's teachers are implementing the student's 504 Plan, and some of the teachers are of the opinion, albeit in error, that the teacher's responsibility is limited to providing the student classroom accommodations and modifications.[52]

    The student's teacher received a copy of the student's August 18, 2010 IEP at the beginning of the 2010/11 school year. However, the student's teachers are of the opinion, albeit in error, that they have no responsibility for implementing the student's IEP, and implementation of the student's IEP is solely the responsibility of the student's special education teacher.[53]

    The student's special education teacher provides classroom support to students with IEPs and students without IEPs, and during the provision of support to students in the student's class, the special education teacher's time is divided among several students, as a result, the student does not receive the 1:1 specialized instruction from a special education a teacher, as intended and recommended in his August 18, 2010 IEP. Additionally, the student's teachers have placed responsibility for the student to visit teachers during lunch and recess, to receive some of the specialized instruction recommended in his IEP.

VII. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as the Hearing Officer's review of governing legal authority and case law, the Conclusions of Law of this Hearing Officer are as follows:

1. The burden of proof is properly placed on the Petitioner, the party seeking relief in this matter.[54] Under the IDEA, the Petitioner must prove the allegations in the due process complaint, by a preponderance of the evidence.[55]

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[50] Petitioner's Exhibits 11-13, Respondent's Exhibit 1, page 3 of 40, Respondent's Exhibit 3, pages 7-14 of 40, Petitioner's Exhibit 9, Testimony of student's teachers, DCPS Psychologist, and SEC..

[51] Testimony of parent; and student's teachers.

[52] Testimony of student's Math Teacher. Testimony of student's Life Science Teacher, Special Education Teacher, and Social Studies Teacher.

[53] Testimony of student's Life Science Teacher, Special Education Teacher, Social Studies Teacher, Math Teacher.

[54] *Shaffer v.1 Weast*, 546 U.S. 49, 56-057 (2005) and 5 D.C.M.R. §3030.3.

2. The Individuals with Disabilities Education Act ("IDEA")[56] is the federal statute governing the education of students with disabilities.[57] The IDEA ensures that all children with disabilities have available to them a free appropriate public education ("FAPE"), that emphasizes special education and related services specifically designed to meet their unique needs and prepare them for further education, employment, and independent living. *See, 20 U.S.C. §1400(d)(I)(A)*.

3. The IDEA defines a free appropriate public education (FAPE) as special education and related services provided at public expense, under public supervision and direction, and without charge; meet the school standards of the State educational agency; includes an appropriate preschool, elementary school, or secondary school education in the State-involved; and the special education and related services must be provided in conformity with an Individualized Education Program (IEP) that meets the requirements of §§300.321 through 300.324.[58]

   In the District of Columbia, the local education agency (LEA) must ensure that all children with disabilities, between the ages of 3 and 21, have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. This student is a child with disabilities entitled to receive special education and related services, pursuant to the IDEA.

4. **Failure to Identify, Locate, Evaluate, and Determine the Student Eligible for Special Education Services under the Child Find Provisions of the IDEA**

   The Petitioner satisfied its burden of proof by presenting evidence that the Respondent failed to identify, locate, evaluate, and determine the student eligible for special education services, in violation of the Child Find provisions of the IDEA.

   According to the "Child Find" provisions of the IDEA, the State must have in effect policies and procedures to ensure that all children with disabilities residing in the State, and who are in need of special education and related services, are ***identified, located, and evaluated***.[59] Subparagraph (c) of this provision provides that ***"Child find"*** must also include children who are ***suspected*** of being a child with a disability under Section 300.8, or has reason to suspect that the child has a disability and needs special education services, even though the child is advancing from grade to grade.[60]

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[55] 20 U.S.C. §14115(i)(2)(c). See also *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir.2005) (standard of review)

[56] The IDEA is reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) Public Law 108-446 and 20 U.S.C. §1400 et seq..

[57] The Federal regulations promulgated under the IDEA, are codified at 34 C.F.R. Part 300.

[58] IDEA, 34 C.F.R. §300.17(d).

[59] IDEA, at 34 C.F.R. Section 300.111.

[60] IDEA, 34 CFR 300.111.

To ensure that all children residing in the State Before the initial provision of special education services to a child, the agency must conduct full and individual initial evaluations. Evaluations consist of a series of tests designed to determine whether a child has a disability and the nature and extent of the special education and related services the child needs. *See, IDEIA, 34 C.F.R. §300.15.*

A full and comprehensive initial evaluation of a child is an integral part of developing an IEP for a student, which is the reason the IDEA at 34 C.F.R. §300.301(a) requires public education providers to conduct a full and individual initial evaluation of a child. *See, T.X. ex rel. Skrine v. District of Columbia, 2007 WL 915227 (D.D.C.).*

It is also the reason that IDEA, 34 C.F.R. §300.304(c) (4) and (6) provides that in evaluating a child, the public agency must ensure that the child is assessed in ***all*** areas related to the ***suspected*** disability; and that the evaluations are ***sufficiently comprehensive*** to identify ***all*** of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified; which failed to occur in this matter.

Failure to Identify, Locate, Evaluate, and Determine the Student Eligible for Services

The Respondent failed to identify, locate, and evaluate the student for special education services; although aware that the student was suspected of having a disability; and diagnosed with a disabilities.

As soon as a student is identified as a potential candidate for special education services, DCPS has duty to locate the student and initiate the eligibility process, by comprehensively evaluating the student; which failed to occur in this matter.

Once a child is referred to an IEP team for an eligibility determination, DCPS must conduct an initial evaluation of the student within 120 days from the date the student is referred for evaluation.[61]

Here, the parent referred the student for evaluation in the Spring, 2006, requesting the DCPS evaluate the student to determine his eligibility for special education services. The DCPS completed a Psycho-Educational Evaluation on April 23, 2006, in a timely manner.

[61] *See, District of Columbia v. Abramson, 493 F.Supp. 2d. 80, 85 (D.D.C. 2007)* (explaining that once a child is identified the local education agency "is then obligated to move forward with the requirement of IDEA §1414(a0(10) and determine whether the student is in fact a child with a disability). *See also Hawkins v. District of Columbia, 539 F.Supp. 2d 108, 114 (D.D.C. 2008).*

Failure to Comprehensively Evaluate the Student

The Respondent evaluated the student within 120 days of the parent's referral of the student for evaluation, however, failed to ensure that the initial evaluations were sufficiently comprehensive to identify all of the student's special education and related service needs; or during an annual review of the student's IEP, recommend additional evaluations to address or "rule out" the Mild Attention Deficit Hyperactivity Disorder (ADHD) diagnosis, rendered by the Children's Medical Center.[62]

The tests administered during the evaluation were appropriate to assess the student's cognitive and academic functioning; and visual motor integration.[63] However, the evaluator failed to administer tests specifically designed to address the student for ADHD (i.e. Conners, Behavioral Assessment System for Children (BASC), Attention Deficit-Hyperactivity Test (ADHT), and interviews with the parents and student's teachers); although aware that since pre-kindergarten the student had significant difficulty with processing information, focusing, attention, staying on task, distractibility, organization, and comprehension; adversely impacting his educational performance.[64]

Failure to Carefully Consider the Evaluation Data and Information

In interpreting the evaluation data, the MDT failed to draw upon and carefully consider information obtained from a variety of sources, including evaluations and diagnoses of Congenital Encephalopathy, ADHD, and weaknesses in math and reading, rendered by the Children's National Medical Center, Neurodevelopmental Pediatric Program, from May 1, 2006 through October 5, 2009; and information provided by the student's parents and teachers regarding the student's academic deficits in the classroom.

The parent, through an Attorney, referred the student for reevaluation; and on March 15, 2010, the Respondent reevaluated the student by conducting a Psychological Evaluation. This evaluation also failed to include tests specifically designed to address the parent and teacher's concerns, or the student's ADHD; although the evaluation reflects that the evaluator was aware that on ***May 1, 2006*** the student was diagnosed with ADHD.[65]

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[62] Respondent's Exhibit 1, page 1-6 of 40; and Petitioner's Exhibit 9, page 2.

[63] Testimony of Psychologist, Parker Diagnostics Solutions; Director, Newlen Educational Services, LLC, DCPS Psychologist, and Petitioner's Exhibit 9.

[64] Testimony of Special Education Coordinator, Petitioner's Exhibits 15-21, Respondent's Exhibit 3, Petitioner's Exhibit 7, pages 7-2, 7-3, 7-4, Petitioner's 8-1, Petitioner's Exhibit 11-1, Petitioner's Exhibit 12-2, Petitioner's Exhibit 13-2, Respondent's Exhibit 1, page 1 of 40, 2 of 40, 3 of 40, and page 4 of 40, Respondent's Exhibit 3, page 7 of 40, 8 of 40, 10 of 40, 14 of 40, Petitioner's Exhibit 15-1 through 15-6, Petitioner's Exhibit 16-1 and 16-2, Petitioner's Exhibit 17-1 and 17-2, 17-6, Petitioner's Exhibit 18-2, 18-5, 18-7, 18-8, 18-9, 18-10, 18-11, 18-12, 18-13, 18-14, 18-15, Petitioner's Exhibit 19-1, 19-2, 19-3, 19-4, 19-5, Petitioner's Exhibit 20-1, 20-1, Petitioner's Exhibit 20-3, 20-4, 20-5, 20-6, 20-7, Petitioner's Exhibit 21-1, 21-2, Petitioner's Exhibits 22-27.

[65] Respondent's Exhibit 3, page 7 of 40, 8 of 40, 10 of 40, and 14 of 40.

The evaluator noted that the student was consistently reported by his parents and teachers to display significant difficulty with school problems, developmental social disorder, and learning problems. The student's teacher rated him to have significant difficulty with Atypicality, attention problems, and behavioral symptoms. Although all students with ADHD do not qualify for special education services, if there is no adverse impact on the student's learning or educational performance. However, in this complaint, there is no dispute that since pre-kindergarten this student struggled academically because of his ADHD, and learning difficulties. This March 15, 2010 evaluation confirms the diagnoses initially rendered by the Children's Medical Center, as early as the year 2006, that the student satisfies the eligibility criteria for OHI, and SLD.

In summary, the DCPS was knew or had reason to know that since pre-kindergarten the student struggled in the classroom, and was suspected of having a disability, that the ADHD would likely harm his ability to learn, and repeatedly failed to identify the student as a candidate for special education services. The DCPS should have acted upon the likelihood that the student had a disability, and was entitled to special education services. The DCPS acted with deliberate indifference.

6. **Failure to Implement the Student's August 18, 2010 IEP**

The Petitioner satisfied its burden of proof by presenting evidence that the DCPS failed to implement the Student August 18, 2010 IEP.

To ensure that each eligible student receives a FAPE, the IDEA requires that an Individualized Educational Program (IEP) be developed for children with disabilities; to provide each disabled student with a plan for educational services tailored to that student's unique needs. 20 U.S.C. §1414(d); 34 C.F.R. §300.300(a)(3)(ii). The services included in the student's IEP must be specifically tailored to the needs of students, to ensure that students are able to make functional use of what they learn, in addition to ensuring academic growth.

Evaluations are testing instruments designed to determine whether a child has a disability; and the nature and extent of the special education and related services the student requires.[66] Upon completion and administration of assessments and other evaluation measures a group of qualified professionals and the parents of the child must meet to determine whether the child is a child with a disability, as defined in §300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and…[67]

Once a student is determined disabled and eligible to receive special education services, the public agency must ensure that—

(1) A meeting to develop an IEP for a child is conducted within ***30 days*** of a determination that the child needs special education and related services; and

[66] IDEA, at 34 C.F.R. §300.15.
[67] IDEA, at 34 C.F.R. §300.306(a).

(2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. See, IDEA, 34 C.F.R. §300.323 (c)(1). Related services includes transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, ...and training. See, 34 C.F.R. Section 300.34 and 30 DCMR Section 3001.1.

Additionally, the D.C. Code of Municipal Regulations, Title 5, §3010.2 (2003), provides that DCPS *shall* implement an IEP *as soon as possible after the meeting where the IEP is developed....*

Here, the Petitioner failed to ensure that as soon as possible following development of the IEP, the student received the 2.5 hours per week of 1:1 reading and math instruction, in the general education setting; and 4 hours per week of 1:1 specialized instruction, outside the general education setting, as recommended in the IEP.

VIII. DECISION

For the foregoing reasons, it is the decision of this Hearing Officer that the Respondent denied the student a free appropriate public education, by failing to identify, locate, evaluate, and determine the student eligible for special education services, in violation of the "Child Find" provisions of the IDEA, at 34 C.F.R. §300.111 and §300.304(c)(4) and (6); entitling the student to compensatory education services.

For the foregoing reasons, it is the decision of this Hearing Officer that the Respondent denied the student a free appropriate public education, by failing to implement the student's August 18, 2010 Individualized Education Program (IEP), in violation of the D.C. Municipal Regulations, Title 5, §3010.2 (2003), and the IDEA, at 34 C.F.R. §300.323(c)(2); entitling the student to compensatory education services.

Compensatory Education Services

Under the theory of compensatory education, courts and hearing officers may award "educational services...to be provided prospectively to compensate for a past deficient program." *See G. ex rel. RG v. Fort Bragg Dependent Schs. 343 F.3d 295, 308 (4th Cir. 2003)*. Its purpose is to help the child make the progress that he/she would have made if an appropriate program had been available. The specific services provided must be tailored to the child's needs. Compensatory education can mean extra instruction or related services (such as therapies) provided during the school year or summer.

The IDEA empowers Hearing Officers with considerable discretion when fashioning a remedy. 20 U.S.C. § 1415(i)(2)(C)(iii) (the Hearing Officer "shall grant such relief as the Hearing Officer determines is appropriate.")

Compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that she is receiving only a de minimis benefit and fails to correct the situation, as in this case. *M.C. on behalf of J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996).

However, a Hearing Officer cannot determine the amount of compensatory education that a student requires unless the record provides him with "insight about the precise types of education services [the student] needs to progress." *Branham, 427 F.3d at 12*. Relevant evidence includes "the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive environment." Id. In *Nesbitt*, the Court found that an "award was not adequately individualized or supported by the record", when the Hearing Officer was not provided with any information regarding the student's current grade level of functioning.

According to *Mary McLeod Bethune Day Academy PCS v. Terri Bland, Civil Action No. 07-1223 (2008)*, a compensatory education award is an equitable remedy that "should aim to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA." *Reid*, 401 F.3d at 518, 523. Compensatory education is not a contractual remedy, but an equitable remedy that is part of the court's resources in crafting appropriate relief. *Reid v. District of Columbia, 401 F.3d 516.523 (D.C. Cir. 2005)*.

Reid provides that a compensatory education "award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Reid, 401 F.,33d at 524. This standard "carries a qualitative rather than quantitative focus," and must be applied with "[f]lexibility rather than rigidity." According to *Reid*, in crafting an appropriate remedy for denial of FAPE, the Hearing Officer must engage in a fact intensive analysis that is qualitative rather than quantitative. *Branham v. D.C., 427 F.3d 7, 11 (D.C. Cir 2005); Reid, 401 F.4d at 524*.

Reid also stresses that the Hearing Officer must take into account individual individualized assessments of the student so that the ultimate award is tailored to the student's unique needs; and must be reasonably calculated to provide the student the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. The crafting of an award of compensatory education under IDEA simply cannot be nebulous; and an arbitrary compensatory education award will never pass muster under the *Reid* standard.

In *Reid*, the Court rejected the "cookie-cutter" or mechanical remedies, such as awarding one hour of compensatory instruction for each hour that the student was denied FAPE. As the D.C. Circuit recognized in Reid: "Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies.

Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE." *Reid*, 401 F.3d at 524. *Reid*, explicitly rejects the "cookie-cutter approach[es]," such as "a presumption that each hour without FAPE entitles the student to one hour of compensatory instruction."

The court explains further that there is no obligation to provide a day for day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. A compensatory award constructed with the aid of a formula is not per se invalid, and a formula-based award may in some circumstances be acceptable if it represents an individually tailored approach to meet the student's unique prospective needs.

Compensatory education is designed to provide eligible students with the services they should have received pursuant to a FAPE. *Lester H. V. Gilhool,* 916 F.2d 865, 873 (3d Cir. 1990) (holding that an award of compensatory education merely compensated the student for an inappropriate placement, belatedly allowing him to receive the remainder of his FAPE). The amount of compensatory education is calculated by finding the period of deprivation of special education services and excluding the time reasonably required for the school district to rectify the problem. *M.C. v. Cent. Reg'l Sch. Dist.,* 81 F.3d at 397.

At a minimum, *Reid* demands that an award not be based on an arbitrary number, however, the number of hours proposed in the Petitioner's compensatory education plan, and as offered by Petitioner's compensatory education witness appear to be arbitrary, without any basis or foundation for the requested number of hours of tutoring.

In this matter, since pre-kindergarten the Respondent was aware that the student had significant difficulty with processing information, memory, focusing, attention, staying on task, distractibility, organization, and comprehension; and that these symptoms adversely impacted the student's learning and educational performance; however, the Respondent failed in its responsibility to the child, under the Child Find provisions of the IDEA.

Considering the significant period of time the student failed to receive the services he was entitled to receive under the IDEA, the Respondent's consistent disregard for the needs of the student, and the potential impact on the student's learning and education, and the fact the violations continued over such an extended period of time, equity dictates that the Hearing Officer grant the relief which it deems just and proper to compensate the student for the past violation. *Heather D. v. Northampton Area Sch. Dist., 48 IDELR 67 (E.D. Pa. 2007).*

The following services are intended to mitigate any harm the student may have suffered as a result of this violation:

Compensatory Education Services Plan

(1) Dedicated Aide

The student shall receive the support of a dedicated aide to provide the student specialized instruction *outside* the general education setting, for 4 hours a day, for the remainder of the 2010/11 school year, effective February 3, 2011; and for the 2011/12 school year.

(2) Independent Tutoring

- 152 hours math instruction tutoring, to be provided by an independent provider of the parent's choice, after school, not to exceed per hour (1 hour to make up for each of the 152 weeks missed from 2006 through the present); and

- 152 hours reading instruction tutoring, to be provided by an independent provider of the parent's choice, after school, not to exceed per hour (1 hour to make up for each of the 152 weeks missed from 2006 through the present).

IX. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby:

1. **ORDERED**, that no later than February 3, 2011, the DCPS shall revise the student's August 18, 2010 IEP to include a dedicated aide for the student, consistent with the compensatory education services plan on page 24 of this decision; and ensure that the student receives the services of the dedicated aide consistent with this decision and order; and it is further

2. **ORDERED**, that the DCPS shall ensure that the student's IEP for the 2011/12 school year includes; and the student receives a dedicated aide for four (4) hours a day, for the entire school year; consistent with this decision and order; and it is further

3. **ORDERED**, that DCPS shall fund the student's compensatory education plan provided on page 24 of this decision; and it is further

4. **ORDERED**, that that this decision and order are effective immediately

X. NOTICE OF RIGHT TO APPEAL

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

Date: *January 19, 2011*

Ramona M. Justice
Attorney Ramona M. Justice, Hearing Officer