

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

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

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<b>Parent, on behalf of STUDENT,<sup>1</sup></b>	)	
	)	Case Number:
<b>Petitioner,</b>	)	
	)	Hearing Date: April 14, 2011
<b>v.</b>	)	Room 2006
	)	
<b>DISTRICT OF COLUMBIA PREPARATORY PUBLIC CHARTER SCHOOL,</b>	)	
	)	
<b>Respondent.</b>	)	Hearing Officer: Frances Raskin

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2011 APR 25 AM 9:52  
STUDENT HEARING OFFICE

**HEARING OFFICER DETERMINATION**

**I. JURISDICTION**

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEA"), and its implementing regulations at 20 U.S.C. §§ 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and Title 5-E of the D.C. Municipal Regulations.

**II. BACKGROUND**

Petitioner is the parent of a twelve-year-old student ("Student") who attends an independent public charter school ("PCS") in the District of Columbia. On January 28, 2011, Petitioner filed a Due Process Complaint Notice ("Complaint") against the PCS alleging violations of IDEA.

This Hearing Officer was appointed to preside over this case on January 31, 2011. Respondent PCS filed a response to the Complaint on February 7, 2011. The parties participated in a resolution meeting on February 10, 2011. They were unable to resolve the Complaint and agreed to continue the resolution process until the thirtieth day of the resolution period. The resolution period ended on February 27, 2011.

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

On March 8, 2011, this Hearing Officer held a prehearing conference in which Nicholas Ostrem, counsel for Petitioner, and Lauren Baum, counsel for Respondent PCS, participated. During the prehearing conference counsel agreed that the forty-five-day, due-process-hearing timeline began on February 28, 2011. They also agreed that the due process hearing would take place on April 14, 2011.<sup>2</sup>

On March 14, 2011, this Hearing Officer issued a Prehearing Conference Summary and Order. In the prehearing order, this Hearing Officer certified two issues for adjudication at the due process hearing:

A. Whether the PCS denied the Student a free, appropriate, public education (“FAPE”) by failing to comply with its child find obligations pursuant to IDEA, i.e., identify the Student as a student with a suspected disability, evaluate her in all areas of suspected disability, determine her eligibility for special education, and, if eligible, develop an individualized educational program (“IEP”); and

B. Whether the PCS denied the Student a FAPE by failing to implement her last operative IEP, which Petitioner alleges she provided to the PCS in September 2009 upon enrolling the Student.

The due process hearing commenced on April 14, 2011. At the outset of the hearing, the parties informed this Hearing Officer that they had convened a meeting, found the Student eligible for specialized instruction and related services, and developed an IEP. The parties stipulated that Petitioner was satisfied with the eligibility determination and the Student’s IEP.

The parties agreed that the sole issue remaining for adjudication is whether the PCS denied the Student a FAPE between August 2009 and March 28, 2011, by failing to timely comply with its child find obligations pursuant to IDEA. Petitioner seeks relief in the form of compensatory education.

This Hearing Officer admitted into evidence Petitioner’s exhibits 1-17 and Respondent’s exhibits 1-27. Petitioner testified at the hearing and presented the testimony of one other witness, her educational advocate (“Educational Advocate”).

Respondent moved for directed verdict after Petitioner rested her case. For the reasons explained below, this Hearing Officer granted the motion for directed verdict only as to the 2009-2010 school year.

Respondent then presented the testimony of two witnesses, the school special education coordinator (“SEC”) and school counselor. Following oral closing arguments, the due process hearing concluded on April 14, 2011.

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<sup>2</sup> Petitioner requested, and this Hearing Officer granted, a continuance to allow the due process hearing to proceed on this date.

### III. DIRECTED VERDICT

A motion for directed verdict may be made at any time before the case is submitted to the fact-finder. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.<sup>3</sup>

If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable fact-finder would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may (a) resolve the issue against the party; and (b) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.<sup>4</sup>

The judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.<sup>5</sup> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.<sup>6</sup>

As explained in detail below, even viewing the facts in the light most favorable to Petitioner, this Hearing Officer found that Petitioner failed to introduce sufficient evidence to prove by a preponderance of the evidence that the PCS had denied the Student a FAPE during the 2009-2010 school year. While Petitioner proved that the Student had had behavioral difficulties during this school year, she failed to present any evidence to show that the Student's academic performance suffered as a result. Instead, all of the evidence in the record at the close of Petitioner's case in chief showed that the Student made academic progress during the 2009-2010 school year despite her behavioral difficulties.<sup>7</sup>

Additionally, Petitioner's own educational advocate admitted that the Student performed well academically during the 2009-2010 school year. She also admitted that, where a student's behaviors do not impede her academic progress, the appropriate course of action would be to provide behavioral services in the form of a Section 504 plan because the student does not require specialized instruction. This is exactly the course of action taken by the PCS during the 2009-2010 school year.

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<sup>3</sup> Fed. R. Civ. P. 50 (a) (2).

<sup>4</sup> Fed. R. Civ. P. 50 (a) (1).

<sup>5</sup> *Anderson v. Liberty Lobby*, 477 U.S. 242, 250.

<sup>6</sup> *Id.* at 251. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict -- "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Id.* (citation omitted).

<sup>7</sup> See *C.B. v. Dep't of Educ. of the City of New York*, 322 Fed. Appx. 20; 52 IDELR 121 (2d Cir. 2009) (affirming decision that student with ADHD and bipolar disorder was not eligible under IDEA due to her successful educational performance).

Because Petitioner has the burden of proof on these issues, this Hearing Officer granted Respondent's motion for directed verdict on Petitioner's child find claim regarding the 2009-2010 school year.<sup>8</sup> This Hearing Officer denied the motion for directed verdict regarding Petitioner's child find claim for the 2010-2011 school year.

#### IV. ISSUE PRESENTED

By agreement of the parties, the sole issue for adjudication at the due process hearing is whether the PCS denied the Student a FAPE by failing to timely comply with its child find obligations pursuant to IDEA, i.e., identify the Student as a student with a suspected disability, evaluate her in all areas of suspected disability, and determine her eligibility for special education.

#### V. FINDINGS OF FACT

1. The Student first began exhibiting behavioral difficulties when she was four or five years old.<sup>9</sup> When she was in kindergarten, the Student engaged in fighting, throwing and breaking objects, hitting other students and teachers, and running around during class.<sup>10</sup> In 2005, the District of Columbia Public Schools ("DCPS") evaluated the Student, finding that she exhibited Attention Deficit, Hyperactivity Disorder ("ADHD"), emotional disturbance ("ED"), and oppositional defiance disorder ("ODD").<sup>11</sup> DCPS found that the Student was eligible for specialized instruction and related services and developed an IEP.<sup>12</sup>

2. In August 2005, when she was six years old, DCPS conducted a psycho-educational evaluation of the Student.<sup>13</sup> The school psychologist who conducted the evaluation found that the Student was performing in the average range of intellectual functioning.<sup>14</sup> Likewise, her academic achievement was average to above average when compared to her same-age peers.<sup>15</sup>

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<sup>8</sup> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. Fed. R. Civ. P. 52 (c). If a plaintiff fails to prosecute, a defendant may move to dismiss the action or any claim against it. Fed. R. Civ. P. 55 (b). Unless the dismissal order states otherwise, this dismissal operates as an adjudication on the merits. *Id.* A motion to dismiss (under Fed. R. Civ. P. 41) on the ground that plaintiff's evidence is legally insufficient should be treated as a motion for judgment on partial findings pursuant to Rule 52(c). Fed. R. Civ. P. 41, notes of Advisory Committee.

<sup>9</sup> Testimony of Petitioner; Petitioner Exhibit 8 at 2 (March 25, 2011, report of Psycho-Educational/Clinical Evaluation).

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

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

<sup>12</sup> *Id.*

<sup>13</sup> See Respondent Exhibit 2, pages 10, 14 (July 1, 2008, Psychological Triennial Re-Evaluation Report).

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.*

Her visual perceptual functioning also was in the average range.<sup>16</sup>

3. In the 2005 psycho-educational evaluation, the DCPS school psychologist found that the Student did not present with a learning disability.<sup>17</sup> However, he expressed concerns regarding her impulsivity, inattentiveness, and restlessness.<sup>18</sup> He opined that these difficulties may have impeded her ability to make educational progress.<sup>19</sup>

4. Shortly thereafter, a clinical evaluation of the Student found that she presented with feelings associated with low self-esteem and poor self-image.<sup>20</sup> The evaluator found that the Student met the criteria of ADHD, predominantly hyperactive/impulsive type.<sup>21</sup> The evaluator suggested that DCPS rule out disruptive behavior disorder.<sup>22</sup> The evaluator did not recommend that the Student be found eligible for special education services because these conditions did not hinder her ability to achieve academically.<sup>23</sup> She recommended individual counseling, a behavior contract, a small student-teacher ratio, and a medical evaluation to determine the viability of psychotropic therapy.<sup>24</sup>

5. DCPS conducted an educational evaluation of the Student in 2007 when she was in the third grade.<sup>25</sup> This evaluation found that the Student's academic skills were in the high average range compared to other students at her grade level.<sup>26</sup> Her fluency with academic tasks was average.<sup>27</sup> Her performance in broad reading, mathematics, and math calculations skills were in the average range of her same-age peers.<sup>28</sup>

6. On April 18, 2008, DCPS developed an IEP that provided the Student one hour per days of specialized instruction in mathematics in a combination general education/special education setting and one hour per week of psychological services.<sup>29</sup> The IEP prescribed accommodations to address the Student's behavioral challenges and included a behavior intervention plan ("BIP").<sup>30</sup> The BIP targeted the Student's impulsivity, problems with self-control, and low frustration tolerance.<sup>31</sup>

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

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

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

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

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

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

<sup>25</sup> Petitioner Exhibit 6 at 1 (Report of October 17, 2007, Educational Evaluation).

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

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

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

<sup>29</sup> Petitioner Exhibit 1 at 1 (April 18, 2008, IEP).

<sup>30</sup> *Id.* at 2, 7.

<sup>31</sup> *Id.* at 7.

7. In June 2008, DCPS conducted a psychological evaluation of the Student.<sup>32</sup> By then, the Student had made gains in her interpersonal skills and no longer demonstrated aggressive, externalizing behaviors within the school setting.<sup>33</sup> She no longer exhibited internalizing behaviors such as anxiety and depression.<sup>34</sup> The psychologist who conducted the evaluation found that the Student was demonstrating average levels of social-emotional and behavioral functioning as compared to same-gendered and similarly functioning peers.<sup>35</sup> She found that the Student had adequate coping skills and that there was little likelihood that the Student had an emotional disturbance.<sup>36</sup> The psychologist also found that the Student's ADHD was not impeding her academic progress.<sup>37</sup>

8. On July 16, 2008, at the end of the Student's third-grade year, the IEP team reviewed the Student's June 2008 psychological evaluation.<sup>38</sup> Petitioner participated in the meeting.<sup>39</sup> The IEP team discussed the Student's achievement of her IEP goals and her good grades.<sup>40</sup> Based on the results of the psychological evaluation, the IEP team found that the Student was no longer eligible for special education services as a student with an emotional disturbance.<sup>41</sup> The team recommended that the Student be exited from special education.<sup>42</sup>

9. Petitioner did not agree with the team's decision that the Student was no longer eligible for special education.<sup>43</sup> Yet, Petitioner did not challenge this decision although she was aware of her procedural rights.

#### **The 2009-2010 School Year**

10. Petitioner enrolled the Student in the PCS as the Student entered fifth grade<sup>44</sup> at the beginning of the 2009-2010 school year.<sup>45</sup> Petitioner chose to enroll the Student in the PCS because of its small class sizes; she was concerned that the Student would have difficulty in the larger classes in which she would have been placed had she remained in a DCPS school.<sup>46</sup> When she enrolled the Student in the PCS, Petitioner submitted the standard required documents to the PCS, including a verification of her residency and the Student's health records.<sup>47</sup>

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<sup>32</sup> Respondent Exhibit 2, page 9.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at page 11.

<sup>36</sup> *Id.* at 14.

<sup>37</sup> *Id.*

<sup>38</sup> Respondent Exhibit 4 (July 16, 2008, Multidisciplinary Team ("MDT") notes).

<sup>39</sup> *Id.*

<sup>40</sup> Testimony of Petitioner.

<sup>41</sup> Respondent Exhibit 3 at 16 (July 16, 2008, MDT Prior to Action Notice).

<sup>42</sup> *Id.*

<sup>43</sup> Testimony of Petitioner.

<sup>44</sup> See Respondent Exhibit 9 (First Quarter Report Card, School Year 2009-2010).

<sup>45</sup> *Id.*

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

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

11. Soon after she started attending classes at the PCS, the Student had several behavioral infractions.<sup>48</sup> This was due to her the difficulties of adjusting to a new school.<sup>49</sup>

12. On September 25, 2009, the PCS convened a Student Evaluation Plan (“SEP”) team meeting.<sup>50</sup> Petitioner attended this meeting, as did the PCS SEC, general education teacher, and special education teacher.<sup>51</sup> The agenda of SEP meeting was to review the Student’s progress over the past few years, discuss any concerns the team may have about the Student’s progress, and to develop the SEP.<sup>52</sup> The PCS staff explained to Petitioner that the purpose of the meeting was to outline which evaluations the PCS should administer to determine whether the Student qualifies for special education services.<sup>53</sup> The PCS also wanted to discuss Petitioner’s concerns and the teacher’s observations of the Student’s progress.<sup>54</sup>

13. During the SEP meeting, Petitioner informed the SEP team that the Student was previously eligible for special education and related services and had previously received specialized instruction and related services pursuant to an IEP.<sup>55</sup> Petitioner provided the PCS staff documents from the Student’s former schools, including parts of a former IEP.<sup>56</sup>

14. Petitioner informed the SEP team that the Student had ADHD and oppositional defiant disorder (“ODD”).<sup>57</sup> Petitioner further informed the SEP team that, at the end of the Student’s third-grade year, DCPS decided that the Student had made so much progress that she was no longer eligible for specialized instruction and related services.<sup>58</sup>

15. Petitioner informed the team that the Student had stopped taking her ADHD medication because she had headaches.<sup>59</sup> Petitioner stated that she wanted the Student to resume taking her ADHD medication and to receive counseling.<sup>60</sup> The Student had been receiving thirty minutes per week of individual counseling since she enrolled at the PCS.<sup>61</sup>

16. The participants in the SEP meeting discussed the Student’s grades.<sup>62</sup> In reading, the Student was one year behind her grade level when she enrolled in the PCS.<sup>63</sup> The PCS had been

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

<sup>49</sup> *Id.*

<sup>50</sup> Testimony of Petitioner; Respondent Exhibit 6 at 22 (September 25, 2009, MDT Meeting Notes: SEP).

<sup>51</sup> *Id.* at 22-23.

<sup>52</sup> Respondent Exhibit 6 at 22.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 23.

<sup>55</sup> Testimony of Petitioner.

<sup>56</sup> *Id.*

<sup>57</sup> Respondent Exhibit 6 at 23.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

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

<sup>61</sup> Testimony of Petitioner; Respondent Exhibit 6 at 23.

<sup>62</sup> Respondent Exhibit 6 at 23.

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

providing her additional assistance in reading.<sup>64</sup> Although she struggled with turning in homework and some math concepts, she had earned an A in writing, Bs in math and art, and a C in social studies.<sup>65</sup>

17. The SEP team also discussed the Student's recent behavior.<sup>66</sup> Between August 26, 2009, and September 22, 2009, the Student had seven behavioral incidents including talking when the class was directed to work silently, talking back to teachers and using a disrespectful tone to adults, failing to follow directions or stay on task, getting out of her seat without permission, and throwing a piece of paper across the room.<sup>67</sup>

18. The SEP team found that the Student struggled with staying on task and with controlling her behavior in the classroom.<sup>68</sup> The team further found that, due to the Student's ADHD, she should receive modifications and accommodations in the general education classroom.<sup>69</sup> Petitioner did not request that the PCS evaluate the Student or develop an IEP.

19. The SEP team then decided that the Student would receive behavior interventions and individual counseling pursuant to a Section 504 plan.<sup>70</sup> Petitioner agreed with the team's decision to provide the Student a Section 504 plan.<sup>71</sup>

20. The SEP team decided that the modifications provided to the Student pursuant to her Section 504 plan would include providing her preferential seating near the teacher, making sure she understands directions provided to her, and ensuring her teachers stand near her when giving directions or presenting lessons.<sup>72</sup> The SEP team proposed that the Student receive assistance with organizational skills, receive praise for appropriate behaviors, use self-monitoring strategies, and receive thirty minutes per week of behavioral support (counseling).<sup>73</sup> The team also decided to implement a classroom behavioral management system for the Student.<sup>74</sup>

21. At the end of the first quarter of the 2009-2010 school year, the Student had earned

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<sup>64</sup> Respondent Exhibit 6 at 23.

<sup>65</sup> Respondent Exhibit 6 at 24. A student who earns a C has met grade-level standards. Testimony of SEC. Any grade above C is considered to be above grade-level standards. *Id.*

<sup>66</sup> Respondent Exhibit 6 at 24.

<sup>67</sup> *Id.*

<sup>68</sup> Petitioner Exhibit 2 at 1 (September 25, 2009, Section 504 Eligibility worksheet).

<sup>69</sup> *Id.*; testimony of SEC.

<sup>70</sup> *Id.* A "Section 504 plan" refers to the set of accommodations and/or modifications provided to a person with a disability under the Rehabilitation Act, 29 U.S.C. § 794, which is an antidiscrimination law. *See Walker v. District of Columbia*, 969 F. Supp. 794, 797 (D.D.C. 1997) (to state a claim under Section 504, generally a plaintiff must show that he or she was discriminated against "solely by reason of his [or her] handicap").

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

<sup>72</sup> Petitioner Exhibit 2 at 2.

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

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

above-average grades in all subjects.<sup>75</sup> The Student's reading teacher reported that she had adjusted very well to the PCS.<sup>76</sup> She had showed progress in reading, although she was still slightly below grade level, and her fluency and reading stamina had improved greatly since the beginning of the school year.<sup>77</sup> In social studies, the Student had mastered most of the standards that had been introduced.<sup>78</sup>

22. At the end of the second quarter of the 2009-2010 school year, the Student had earned Bs in math and reading, and Cs in writing and social studies.<sup>79</sup> She made major improvements in math, and was doing much better at responding to redirection.<sup>80</sup> In English, she turned in all of her classroom and homework assignments, but was still reading on a fourth-grade level.<sup>81</sup> Her writing grade declined from the previous quarter because she failed to follow instructions and turned in late or incomplete assignments.<sup>82</sup> In social studies, she made progress on some skills and concepts but struggled to grasp new main ideas and found it difficult to complete all class work and homework on time.<sup>83</sup>

23. By the end of the third quarter of the 2009-2010 school year, the Student had improved her grades in core classes to Bs in math, reading, and writing.<sup>84</sup> She had earned an A in science.<sup>85</sup> In math, she had mastered the concepts presented to her, matured as a student, and learned to refocus if she became upset.<sup>86</sup> In reading, she had performed quite well on most of the assessments, and was progressing toward proficiency on most of the fifth grade reading standards.<sup>87</sup> In science, she had mastered all of the required measurement standards.<sup>88</sup>

24. In April 2010, the Student scored in the proficient range in all subjects on the annual standardized testing administered to students in the District of Columbia.<sup>89</sup> Her scores on these tests, known as the DC-CAS, were consistently above the city averages; she excelled by more than twenty percentage points in some areas of math and reading.<sup>90</sup>

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<sup>75</sup> Respondent Exhibit 9 at 34. The first quarter report card covered the first forty-five days of the school year. *Id.* The Student earned an A in art and Bs in math, reading, writing, and social studies. *Id.* at 34.

<sup>76</sup> *Id.* at 35.

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

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

<sup>79</sup> *Id.* at 36.

<sup>80</sup> *Id.* at 37.

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

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

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

<sup>84</sup> *Id.* at 38.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 39.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Respondent Exhibit 8 at 31-32 (Student Report for April 2010 DC-CAS testing). The subjects tested were reading, mathematics,

<sup>90</sup> *Id.*

25. At the end of the 2009-2010 school year, the Student earned above-average grades in most of her core academic classes.<sup>91</sup> She earned Bs in math, writing, and science/social studies.<sup>92</sup> Although she earned a C in reading, she progressed to the fifth-grade reading level, which was the level of achievement required to begin the sixth grade.<sup>93</sup> Thus, the Student met her academic potential by the end of the 2009-2010 school year.<sup>94</sup>

26. The Student was suspended once in each quarter of the 2009-2010 school year.<sup>95</sup> She made a lot of progress and experienced a lot of growth.<sup>96</sup> However, toward the end of the 2009-10 school year, she became explosive and oppositional.<sup>97</sup> When she did not get her way, she tried to flee her surroundings.<sup>98</sup> The PCS then placed the Student on a pre-suspension behavioral contract.<sup>99</sup>

### **The 2010-2011 School Year**

27. From the beginning of the 2010-2011 school year, the Student exhibited behavioral difficulties.<sup>100</sup> On August 25, 2010, she was disruptive during the lesson.<sup>101</sup> On September 7, 2010, she did not return to her seat when requested and told the dean of student support that she got on her nerves.<sup>102</sup> Two days later, the Student earned a detention from a teacher and then yelled at a classmate.<sup>103</sup> After earning a reprimand, she stormed away.<sup>104</sup> The following week, she was constantly off-task and talking in class, despite being given several warnings.<sup>105</sup> On September 16, 2010, she earned a detention and refused to follow rules when given a silent lunch as a punishment.<sup>106</sup>

28. On September 20, 2010, the PCS reviewed the Student's Section 504 plan.<sup>107</sup> Present at the meeting were Petitioner, the Student's counselor, dean of students, assistant principal, and dean of academic support.<sup>108</sup> While she had received organizational support from the school

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<sup>91</sup> Respondent Exhibit 9 at 40; testimony of SEC.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Testimony of Educational Advocate.

<sup>95</sup> *Id.* at 34, 36, 38, 40. The parties stipulated that the Student was suspended four times during the 2009-2010 school year.

<sup>96</sup> Respondent Exhibits 10 at 43 (Notes from September 20, 2010, Section 504 Plan Annual Review), 11 at 45 (September 20, 2010, Section 504 Plan Annual Review sign in sheet).

<sup>97</sup> Respondent Exhibit 10 at 43.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Petitioner Exhibit 9 at 2 (Student Discipline Log); testimony of Petitioner.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Respondent Exhibits 10, 11.

<sup>108</sup> Respondent Exhibit 11 at 45.

social worker during the previous school year, the PCS staff found that she did not need this support.<sup>109</sup> The staff discussed the Student's behavioral issues, and Petitioner expressed concern about the number of detentions she had received.<sup>110</sup>

29. At the September 20, 2010 meeting, the PCS staff decided to implement additional interventions as part of the Student's Section 504 plan, including providing her support for the specific behaviors she struggles with, assisting her in using self-monitoring strategies as well as strategies to keep on task and control her impulsivity, and providing her privileges and rewards for good behavior.<sup>111</sup> The PCS staff also decided to implement her behavior management plan.<sup>112</sup> The school staff also agreed that the Student continued to require thirty minutes of behavioral support/counseling per week.<sup>113</sup>

30. The following day, the Student earned an in-class suspension.<sup>114</sup> As she walked out of class, she called her teacher stupid and a dummy.<sup>115</sup> She then told a school dean that she was "deaf."<sup>116</sup> On October 4, 2010, when instructed to go to the library and get a book, she responded that the books were "stupid." That same day, she was off-task throughout her class, playing with a toy, constantly laughing, and behaving badly when redirected.<sup>117</sup>

31. On October 20, 2010, her behavior escalated.<sup>118</sup> During a lunch penalty in which she was to remain silent and not interact with peers, she continued to talk to her peers for which she earned a detention.<sup>119</sup> The Student then became rude and disruptive and yelled that the PCS was "stupid."<sup>120</sup> During the first quarter of the 2010-2011 school year, the Student was suspended from school twice.<sup>121</sup>

32. Nonetheless, at the end of the first quarter of the 2010-2011 school year, the Student's grades in core academic classes were in the average to above average range.<sup>122</sup> She earned Bs in math and writing, and Cs in reading and science.<sup>123</sup> In math, she demonstrated mastery of many of the standards covered that quarter.<sup>124</sup> In reading, she demonstrated mastery of determining character traits but struggled with determining the meaning of unfamiliar

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<sup>109</sup> Respondent Exhibit 10 at 43.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Respondent Exhibit 11 at 47. The PCS had not yet implemented the behavior management plan because it did not believe she needed prizes every day. Respondent Exhibit 10 at 43.

<sup>113</sup> Respondent Exhibit 11 at 47.

<sup>114</sup> Petitioner Exhibit 9 at 2.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Petitioner Exhibit 9 at 1.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Respondent Exhibit 14 at 64 (First Quarter Report Card, School Year 2010-2011).

<sup>122</sup> Respondent Exhibit 14 at 64.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 65.

words.<sup>125</sup> She showed proficiency with several science standards as well.<sup>126</sup>

33. On November 3, 2010, she slapped another student with a jump rope across the leg, and then used profanity. By November 12, 2010, she struggled to meet her behavioral expectations.<sup>127</sup> She repeatedly talked and left her seat during class.<sup>128</sup> She became argumentative when adults attempted to redirect her.<sup>129</sup>

34. On November 17, 2011, the school counselor and dean of students met with Petitioner to discuss the Student's behavior and set up a behavior incentive plan.<sup>130</sup> For the next month, however, the Student often was disruptive, dishonest, and oppositional.<sup>131</sup> On December 7, 2010, the Student was suspended after threatening to slap the dean of students.<sup>132</sup>

35. In January 2011, shortly after returning from the winter break, the student received in-school suspension for three days in a row.<sup>133</sup> Her counselor reminded her that she had to improve or else she would be suspended.<sup>134</sup>

36. The following week, the Student was again disciplined.<sup>135</sup> She then went to the front desk and started banging around chairs.<sup>136</sup> The PCS then notified Petitioner that the Student would be expelled for violating her pre-expulsion contract.<sup>137</sup>

37. By mid-January 2011, the Student's grades had declined dramatically.<sup>138</sup> At mid-term, she was earning Fs in reading and science, a C in writing, and a B in math.<sup>139</sup>

38. At the end of the second quarter, the Student had received a C in math, and Fs in her reading, writing, and science courses.<sup>140</sup> These were the first failing grades the Student had earned at the PCS.<sup>141</sup>

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Petitioner Exhibit 9 at 1.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Respondent Exhibit 23 at 182 (January 6, 2011, Confidential Student Counseling Documentation). To date, during the 2010-2011 school year, the Student has been suspended for nine days. Stipulation of parties.

<sup>134</sup> *Id.*

<sup>135</sup> Petitioner Exhibit 9 at 1.

<sup>136</sup> *Id.*

<sup>137</sup> Testimony of Petitioner.

<sup>138</sup> Petitioner Exhibit 10 at 1 (Second Quarter Mid-Term Progress Report 2010-2011).

<sup>139</sup> *Id.*

<sup>140</sup> Respondent Exhibit 14 at 62.

<sup>141</sup> Testimony of Educational Advocate.

39. On January 25, 2011, Petitioner, through a letter from her attorney, requested that the Student be evaluated for special education and related services.<sup>142</sup> With this letter, Petitioner provided written consent for the PCS to evaluate the Student.<sup>143</sup>

40. On January 28, 2011, the PCS agreed to conduct psychological, educational, and clinical evaluations of the Student.<sup>144</sup> The PCS had not previously conducted any formal evaluations of the Student.<sup>145</sup>

41. The PCS psychological evaluation revealed that the Student's overall cognitive abilities are in the average range.<sup>146</sup> Her overall thinking and reasoning abilities, as reflected in her full-scale IQ of 92, exceed those of about thirty percent of children her age.<sup>147</sup>

42. The Student's verbal comprehension and verbal reasoning abilities are in the sixteenth percentile, which is in the low average range.<sup>148</sup> Her nonverbal reasoning abilities exceed those of about sixty-six percent of her peers and are at the high end of the average range.<sup>149</sup> Her working memory, i.e., her ability to sustain attention, concentrate, and exert mental control, is in the average range.<sup>150</sup> Her processing speed, i.e., her ability to process simple or routine material without making errors, is at the low end of the average range.<sup>151</sup>

43. The Student does not display any difficulty with visual-motor tasks, and experiences no difficulty with accurately perceiving what she sees.<sup>152</sup> She has difficulty with connecting shapes and may have difficulty with seeing the total picture.<sup>153</sup>

44. In most subjects, the Student's academic performance is in the average range.<sup>154</sup> In reading and reading comprehension, she performs above 53 percent of her peers.<sup>155</sup> Her ability to decode nonsense words is at the fiftieth percentile.<sup>156</sup> In math, she performs at the seventy-fifth percentile.<sup>157</sup> In written expression, she performs at the seventy-third percentile.<sup>158</sup> She

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<sup>142</sup> Respondent Exhibit 12 at 50 (January 25, 2011, Letter from Nicholas Ostrem to PCS). Although the letter was addressed to the PCS, it repeatedly referred to DCPS in discussing the request for evaluations. *Id.*

<sup>143</sup> *Id.* at 54.

<sup>144</sup> Respondent Exhibit 13 at 57 (January 28, 2011, email from PCS SEC to Nicholas Ostrem, Lauren Baum, etc.), 59 (January 28, 2011, Prior Written Notice).

<sup>145</sup> Stipulation of parties.

<sup>146</sup> Petitioner Exhibit 8 at 7.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 8.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 9.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 10.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 11.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

performs above average in sentence composition.<sup>159</sup>

45. The Student performs at the eighteenth percentile in oral language, which is at the low end of the average range.<sup>160</sup> Her oral expression performance varies with the task at hand.<sup>161</sup> When asked to perform structured, concrete tasks, she performs well.<sup>162</sup> She has difficulty with holding information in short-term memory, which is consistent with her diagnosis of ADHD.<sup>163</sup>

46. Emotionally, the Student experiences difficulties with interpersonal interactions.<sup>164</sup> She feels vulnerable, especially to rejection, and may often feel dissatisfied or confused with life and social situations.<sup>165</sup> She can be preoccupied with how she is seen by others and thoughts of failure.<sup>166</sup> However, this state of self-involvement is typical of the adolescent development stage.<sup>167</sup>

47. The Student seems to cope with her difficulties by externalizing behaviors.<sup>168</sup> She may act out.<sup>169</sup> Her difficulty with regulating and modulating her emotions effectively may make her vulnerable to adjustment problems.<sup>170</sup> Additionally, she seems to handle her emotions in an inconsistent manner, creating a deficit in adaptive behaviors for long periods of time.<sup>171</sup> Her reality testing also seems to be impaired.<sup>172</sup>

48. The evaluator who conducted the Student's March 2011 psycho-educational/clinical evaluation diagnosed her with ADHD, ODD, mood disorder not otherwise specified, and learning disorder not otherwise specified.<sup>173</sup>

49. The PCS convened a meeting of the Student's IEP team on March 28, 2011.<sup>174</sup> Petitioner and her Educational Advocate participated in the meeting, as did a PCS clinical psychologist, special education teacher in reading, school counselor, speech-language pathologist, and general education teacher.<sup>175</sup> Also present was counsel for the PCS.<sup>176</sup>

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 12.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 13.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 14.

<sup>174</sup> Respondent Exhibit 18 at 93 (March 28, 2011, MDT Meeting Notes).

<sup>175</sup> *Id.*

50. At the March 28, 2011, IEP meeting, the Student's IEP team discussed the Student's academic progress and determined that she was eligible for specialized instruction and related services as a student with multiple disabilities, i.e., emotional disturbance,<sup>177</sup> and other health impairment due to her ADHD.<sup>178</sup> The IEP team found that the Student's disability impacts her participation in the general education curriculum in mathematics, reading, and emotional, social, and behavioral development.<sup>179</sup>

51. The IEP team developed a draft IEP for the Student that provides five hours per week of inclusion support in reading, writing, and math to address work completion, classroom behavior, and her grades.<sup>180</sup> The team decided that the Student would receive ninety minutes per week of counseling, including thirty minutes of individual and thirty minutes of group counseling.<sup>181</sup> The Social Worker had been providing this level of service to the Student throughout the 2010-2011 school year, including checking in with her at the beginning and end of each school day, setting behavioral goals and discussing the Student's performance on these goals, providing individualized counseling, and providing crisis management.<sup>182</sup>

52. Petitioner agreed with the contents of the draft IEP and is satisfied that it will address the Student's educational and behavioral needs.<sup>183</sup>

53. All of the witnesses at the due process hearing provided credible testimony. There appeared to be little dispute about the facts underlying this case as the witnesses each testified consistently with the other witnesses at the hearing.

## VI. CONCLUSIONS OF LAW

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.<sup>184</sup> FAPE is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."<sup>185</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>186</sup>

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<sup>176</sup> *Id.*

<sup>177</sup> Petitioner Exhibit 3 at 1 (March 28, 2011, Disability Worksheet), 13 (March 28, 2011, Prior Written Notice – Identification).

<sup>178</sup> *Id.* at 4.

<sup>179</sup> *Id.* at 7.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Testimony of Social Worker.

<sup>183</sup> Stipulation of parties; testimony of Petitioner; Petitioner Exhibit 15 at 1 (April 7, 2011, email from Educational Advocate to counsel for Respondent, counsel for Petitioner, PCS SEC).

<sup>184</sup> 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1).

<sup>185</sup> 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, D.C. Mun. Reg. tit. 30 § 3001.1.

<sup>186</sup> *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

Each local education agency ("LEA") is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."<sup>187</sup> In deciding whether an LEA provided a FAPE to a student, the inquiry is limited to (a) whether the LEA complied with the procedures set forth in IDEIA; and (b) whether the student's IEP is reasonably calculated to enable him/her to receive educational benefits.<sup>188</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>189</sup> In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.<sup>190</sup>

The burden of proof is properly placed upon the party seeking relief.<sup>191</sup> A petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.<sup>192</sup> The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence.<sup>193</sup> In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.<sup>194</sup> Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk

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<sup>187</sup> 34 C.F.R. § 300.101.

<sup>188</sup> *Rowley* at 206-207.

<sup>189</sup> 20 U.S.C. § 1415 (f)(3)(E)(ii).

<sup>190</sup> *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). See also *C.M. v. Bd. of Educ.*, 128 Fed. Appx. 876, 881 (3d Cir. 2005) (per curiam) ("[O]nly those procedural violations that result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable."); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc) ("[P]rocedural flaws do not automatically render an IEP legally defective") (citations omitted); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) (rejecting the proposition that procedural flaws "automatically require a finding of a denial of a FAPE"); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) (rejecting an IDEA claim for technical noncompliance with procedural requirements because the alleged violations did not result in a "substantive deprivation" of student's rights); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education because procedural faults did not cause the child to lose any educational opportunity).

<sup>191</sup> *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

<sup>192</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).

<sup>193</sup> *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).

<sup>194</sup> *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *aff'd*, 512 U.S. 246 (1994).

of error in roughly equal fashion,<sup>195</sup> except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.<sup>196</sup>

## VII. DISCUSSION

Among the specific conditions a state must satisfy is the requirement that it demonstrate that "all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated."<sup>197</sup> This child-find obligation extends to all children suspected of having a disability, not just children who are ultimately found to have disabilities.<sup>198</sup> The scope of the child-find duty includes children who are suspected of having a disability even though they are advancing from grade to grade.<sup>199</sup>

The duty to locate and complete the evaluation of a student starts "as soon as a student is identified as a potential candidate for special education services."<sup>200</sup> Once a child is identified, the LEA is then obligated to determine whether the student is in fact a child with a disability.<sup>201</sup> The IEP team must conduct an initial evaluation to determine whether a child is a child with a disability and to determine the educational needs of the child.<sup>202</sup>

In the District of Columbia, LEAs shall evaluate a child suspected of having a disability within 120 days from the date the student was referred for an evaluation.<sup>203</sup> As part of an initial evaluation, the IEP team and other qualified professionals, as appropriate, must (1) review existing evaluation data on the child, including evaluations and information provided by the parents of the child.<sup>204</sup> On the basis of that review, and input from the child's parents, the IEP team must identify what additional data, if any, are needed to determine whether the child is a child with a disability and the educational needs of the child.<sup>205</sup>

An LEA's failure to comply with its child-find obligation may constitute a denial of

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<sup>195</sup> *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).

<sup>196</sup> *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

<sup>197</sup> 20 U.S.C. §§ 1412(2)(C); 1414(a)(1)(A); *Integrated Design & Elecs. Acad. Pub. Charter Sch. v. McKinley*, 570 F. Supp. 2d 28, 30 (D.D.C. 2008).

<sup>198</sup> *McKinley*, 570 F. Supp. 2d at 34-35 (citing 34 C.F.R. § 300.111(c)(1); *N.G. v District of Columbia*, 556 F. Supp. 2d 11, 25 (D.D.C. 2008)).

<sup>199</sup> *Krivan v. District of Columbia*, 2005 U.S. Dist. LEXIS 34045, 25-26 (D.D.C. Aug. 10, 2005).

<sup>200</sup> *McKinley*, 570 F. Supp. 2d at 28-30 (citing, e.g., *Hawkins*, 539 F. Supp. 2d 108; *Abramson*, 493 F. Supp. 2d at 85).

<sup>201</sup> *Abramson*, 493 F. Supp. 2d at 85).

<sup>202</sup> 20 U.S.C. § 1414(a)(1)(C)(i).

<sup>203</sup> D.C. Code § 38-2561.02.

<sup>204</sup> 34 C.F.R. § 300.305.

<sup>205</sup> *Id.*

FAPE.<sup>206</sup> This is not the end of the inquiry, however. The dispositive issue is whether the student was harmed by the LEA's failure to comply with its obligations.<sup>207</sup> In other words, to succeed on a procedural claim, parents must demonstrate that the school district's procedural violations affected their child's ability to receive the educational benefit that the IDEA requires.<sup>208</sup> If a disabled child received a FAPE in spite of a technical violation of the IDEA, the LEA has fulfilled its statutory obligations.<sup>209</sup>

The threshold issue in this case is when the PCS suspected or should have suspected the Student was a child with a disability under IDEA. The IDEA defines a "child with a disability" as a child with a listed disorder or "specific learning disabilities" who, "by reason thereof, needs *special education and related services*."<sup>210</sup> An LEA may deny special education services to a child with a disability if it is determined, through an appropriate evaluation, that the child only needs related service(s) and not special education.<sup>211</sup>

**A. Petitioner Failed to Prove that the PCS Denied the Student a FAPE by Failing to Comply with Its Child-Find Obligations During the 2009-2010 School Year.**

In September 2009, Petitioner informed the PCS that the Student had been diagnosed with ADHD and ODD. Petitioner also informed the PCS that she had previously received specialized instruction and related services pursuant to an IEP, but had been exited from special education at the end of the 2007-2008 school year. Thus, the PCS was on notice that the Student had *previously* been identified as a Student with a disability under IDEA.

It is undisputed that the Student began exhibiting behavioral difficulties shortly after her enrollment at the PCS in August 2009. Because the Student's behavioral difficulties did not appear to impact her educational performance — she was performing at or above grade-level in all core subjects — the PCS decided to provide the Student a Section 504 plan to address her behavior. Petitioner agreed with this decision even though she had years of experience with the evaluation and IEP process and awareness of her procedural rights, which she gained during the years the Student attended DCPS schools as a special education student.

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<sup>206</sup> *Hawkins ex rel. D.C. v. District of Columbia*, 539 F. Supp. 2d 108, 113-14 (D.D.C. 2008); *District of Columbia v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007).

<sup>207</sup> *Kruvant 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").

<sup>208</sup> *Roark v. District of Columbia*, 460 F. Supp. 2d 32, 42 (D.D.C. 2006) (citing *Lesesne*, 447 F.3d at 834).

<sup>209</sup> See, e.g., *Hung Hanh Thi Nguyen v. District of Columbia*, 681 F. Supp. 2d 49, 51 (D.D.C. 2010) (upholding hearing officer who found that, although the student suffered from depression and a mood disorder, he did not suffer an emotional disturbance because "[t]he record is, at best, inconclusive that [the student's] emotional problems adversely affect his educational performance"); *M.M. ex rel. D.M. v. Sch. Dist.*, 303 F.3d 523, 533-34 (4th Cir. 2002).

<sup>210</sup> 34 C.F.R. § 300.8 (emphasis added).

<sup>211</sup> *Parker v. Friendship Edison Pub. Charter Sch.*, 577 F. Supp. 2d 68, 74 n.4 (D.D.C. 2008) (citing 34 C.F.R. § 300.7 (a)(2)(i)).

Moreover, during her testimony, the Educational Advocate could not identify a specific deficit or any lack of progress that was due to the failure of PCS to begin the evaluation process during the 2009-2010 school year. The Educational Advocate acknowledged that the Student performed well academically during the 2009-2010 school year. She also admitted that, where a student's behaviors do not impede her academic progress, it would be appropriate to provide behavioral services in the form of a Section 504 plan because the student does not require specialized instruction.

The definition of "individual with a disability" under Section 504 of the Rehabilitation Act in many respects is broader than the definition of "child with a disability" under IDEA.<sup>212</sup> For the purposes of Section 504, the term "individual with a disability" is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment."<sup>213</sup> Under IDEA, the term "child with a disability" is defined as "a child (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) *who, by reason thereof, needs special education and related services.*"<sup>214</sup> Under IDEA, ADHD that meets these criteria is considered an "other health impairment,"<sup>215</sup> while ODD is considered an emotional disturbance.<sup>216</sup>

It is undisputed that, at all times since her enrollment at the PCS, the Student has continued to meet these criteria for a disability under Section 504 of the Rehabilitation Act. However, her academic performance remained at or above grade-level, with the exception of her performance in reading upon enrollment in the PCS through the end of the 2009-2010 school

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<sup>212</sup> *George v. District of Columbia*, 2004 U.S. Dist. LEXIS 29042, 10-11 (D.D.C. Mar. 4, 2004) (citing *Muller v. Committee on Special Educ. of E. Islip Union Free Sch. Dist.*, 145 F.3d 95, 100 n.2 (2d Cir. 1998)).

<sup>213</sup> *George*, 2004 U.S. Dist. LEXIS 29042, 10-11 (citing 29 U.S.C. § 705(20)).

<sup>214</sup> *Id.* (emphasis added) (citing 20 U.S.C. § 1401).

<sup>215</sup> Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or *attention deficit hyperactivity disorder*, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) *Adversely affects a child's educational performance.* 34 C.F.R. § 300.8 (c)(9) (emphasis added).

<sup>216</sup> Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and *to a marked degree that adversely affects a child's educational performance*: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors; (B) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; and (E) a tendency to develop physical symptoms or fears associated with personal or school problems. 34 CFR § 300.8 (c)(4)(i) (emphasis added).

year.

Petitioner presented no evidence to show that the Student's behavioral difficulties impaired her academic performance during the 2009-2010 school year.<sup>217</sup> Petitioner also presented no evidence to show that the PCS should have suspected that she had a disability under IDEA. As stated above, Petitioner has the burden of proof on these issues.

Even if the PCS should have suspected the Student had a disability when her behavioral difficulties escalated and her grades slipped at the end of the 2009-2010 school year, Petitioner failed to show that the Student suffered substantive harm as a result of this procedural violation. Instead, by the end of the 2009-2010 school year, the Student had progressed to grade level in reading and continued to perform at grade level in all other core academic subjects.

For these reasons, this Hearing Officer finds that Petitioner failed to prove that the PCS denied the Student a FAPE during the 2009-2010 school year.

**B. Petitioner Proved that the PCS Denied the Student a FAPE by Failing to Timely Comply with Its Child-Find Obligations During the 2010-2011 School Year.**

At the outset of the 2010-2011 school year, the Student's behavioral difficulties escalated significantly. For the reasons explained below, this Hearing Officer finds that by October 20, 2010, the PCS should have suspected that the Student had a disability.

During the first month of the 2010-2011 school year, the Student was disruptive in class, failed to return to her seat when requested, and made inappropriate comments to the dean of student support. She yelled at a classmate, stormed away after earning a reprimand, and was constantly off-task and talking in class even after receiving several warnings.

The PCS responded to the Student's escalating behavioral difficulties by revising her Section 504 plan. Petitioner was present at this meeting and expressed concern about the number of detentions she had received. Yet, once again, she did not request that the PCS evaluate the Student.

On September 21, 2010, the Student earned an in-class suspension. As she walked out of class, she called her teacher stupid and a dummy. She subsequently told a school dean that she was "deaf," refused to get a book from the library when instructed to do so, and was off-task throughout her class, playing with a toy, constantly laughing, and behaving badly when redirected. The Student was suspended twice during the first quarter of the 2010-2011 school year.

On October 20, 2010, the Student was rude and disruptive and yelled that the PCS was "stupid" after earning yet another detention, the PCS should have been on notice that her Section 504 plan was insufficient to fully address her behavioral difficulties. Moreover, considering that the PCS was aware that the Student previously had been diagnosed with ADHD and ODD, and found eligible for specialized instruction and related services, it should have suspected that the

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<sup>217</sup> See *C.B.*, 322 Fed. Appx. 20; 52 IDELR 121.

Student may again have a disability.

In November 2010, the Student threatened to slap the dean of students. By mid-January 2011, the Student's grades had declined dramatically. For the first time since her initial enrollment at the PCS, she earned failing grades. On January 25, 2011, the PCS threatened to expel the Student. Yet, it still failed to initiate the evaluation process to determine whether the Student had a disability under IDEA.

Only after Petitioner requested that the PCS evaluate the Student on January 25, 2011, did the PCS decide to act. Although the PCS evaluated the Student in all areas of suspected disability and then developed an IEP, it did so more than five months after it should have suspected that the Student had a disability.

This Hearing Officer finds that October 20, 2010, is the latest date on which the PCS should have suspected that the Student had a disability. Yet, the PCS did not conclude the evaluation process for another five months. During this time, the Student failed her reading, writing, and science courses. These were the first failing grades the Student had earned at the PCS. Thus, the Student suffered an educational detriment as a result of the failure of the PCS to timely identify her as student with a suspected disability.

Thus, Petitioner proved that the PCS denied the Student a FAPE by failing to timely identify her as a student with a suspected disability.

**C. Petitioner Failed to Present Sufficient Evidence for This Hearing Officer to Award Compensatory Education to the Student.**

When a school system fails to provide special education or related services to a disabled student, the student is entitled to compensatory education, "i.e., replacement of educational services the child should have received in the first place."<sup>218</sup> An award of compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA."<sup>219</sup>

Because compensatory education is a remedy for past deficiencies in a student's educational program," a finding as to whether a student was denied a FAPE in the relevant time period is a "necessary prerequisite to a compensatory education award."<sup>220</sup> 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."<sup>221</sup> This standard carries a qualitative rather than quantitative focus, and must be applied with flexibility rather than rigidity.<sup>222</sup>

Some students may require only short, intensive compensatory programs targeted at

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<sup>218</sup> *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

<sup>219</sup> *Reid*, 401 F.3d at 518.

<sup>220</sup> *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36 (D.D.C. 2007).

<sup>221</sup> *Reid*, 401 F.3d at 524.

<sup>222</sup> *Id.* at 524.

specific problems or deficiencies.<sup>223</sup> Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.<sup>224</sup>

Petitioner presented a compensatory education plan developed by the Educational Advocate.<sup>225</sup> The Educational Advocate recommended that the Student be awarded compensatory education in the form of 150 hours of independent tutoring and ninety hours of mentoring. The Educational Advocate calculated the proposed compensatory education plan upon the assumption that the Student was denied a FAPE from September 2010 through March 28, 2011.<sup>226</sup>

Respondent presented no testimony or evidence to rebut the compensatory education recommendations of the Educational Advocate.

### **1. Petitioner's Tutoring Recommendation**

The Educational Advocate could not identify a specific academic deficit or any lack of educational progress that was due to the failure of PCS to begin the evaluation process prior to January 2011. The Educational Advocate acknowledged that the Student performed well academically during the 2009-2010 school year. She also admitted that, where a student's behaviors do not impede her academic progress, it would be appropriate to provide behavioral services in the form of a Section 504 plan because the student does not require specialized instruction.

The Educational Advocate's tutoring recommendation was premised on the assumption that the Student's grades during the 2009-2010 school year would have been higher if her behaviors had been addressed. Yet, an LEA is not required to maximize a student's academic potential.<sup>227</sup> IDEA requires only that the LEA provide a basic floor of opportunity that allows the student with a disability to access the curriculum.<sup>228</sup>

Although the Student failed three classes during the second quarter of the 2010-2011 school year, Petitioner presented no evidence of her actual deficits or educational detriment that resulted from these failing grades. Without this information, this Hearing Officer cannot craft a compensatory education award that reasonably calculated to provide the educational benefits that likely would have accrued had the PCS timely identified her as a student with a suspected disability.

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<sup>223</sup> *Reid*, 401 F.3d at 524.

<sup>224</sup> *Id.* See also *Thomas v. District of Columbia*, 407 F.Supp.2d 102, 115 (D.D.C. 2005) (noting that it is conceivable that no compensatory education may be required for a denial of FAPE if, for example, the student would not benefit from the additional services).

<sup>225</sup> Petitioner Exhibit 16.

<sup>226</sup> *Id.*

<sup>227</sup> *Rowley*, 458 U.S. at 198.

<sup>228</sup> *Id.*

## 2. Petitioner's Mentoring Recommendation

The Educational Advocate recommended that the Student receive ninety hours of compensatory education in the form of mentoring to address her social deficits and inability to regulate her behavior, which led to numerous infractions, suspensions, and, finally, a recommendation for expulsion. The Educational Advocate testified that, if the PCS had evaluated the Student during the 2009-2010 school year, she would be more successful at controlling her behavior.

The Educational Advocate stated that she calculated the hours of mentoring by reviewing the Student's records to determine how many services she had missed. She further testified that, unlike tutoring, compensatory related services have a 1:1 relationship to the services missed. In other words, for every hour of services missed, the Student should receive an hour of compensatory services.

The Educational Advocate stated that the Student would need only sixty hours of compensatory education in the form of mentoring if it this Hearing Officer finds that she received thirty minutes per week of counseling during her enrollment at the PCS. She also stated that the Student would require fewer hours of compensatory education if her behavior is improving now that she has an IEP.

Petitioner presented no evidence, however, of nature of the detriment the Student suffered, i.e., which skills she lacks, inappropriate behavioral tendencies, or other detriments that resulted of the denial of FAPE during the 2010-2011 school year. She also failed to present any testimony on the exact nature of the services required to address these deficits.

Moreover, the Educational Advocate's recommendation of ninety or sixty hours of mentoring is designed to compensate the Student for a denial of FAPE between September 2010 and March 28, 2011.<sup>229</sup> This is not the period of time during which this Hearing Officer found that the Student was denied a FAPE. Petitioner also presented no testimony or other evidence on which portion of the recommended services would compensate the Student for the services missed during the relevant period of time.

Without this information, this Hearing Officer cannot determine which areas of deficit or weaknesses the mentoring would address. Thus, Petitioner failed to provide the information that this Hearing Officer requires to award compensatory education that is reasonably calculated to assist the student in developing the skills she would have developed but for the denial of FAPE.

### ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 23rd day of April 2011, it is hereby:

ORDERED that the COMPLAINT IS DISMISSED WITH PREJUDICE.

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<sup>229</sup> See *Phillips v. District of Columbia*, at 20 (citing *Reid*, 401 F.3d at 524).

By: /s/ 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:

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Lauren Baum, Attorney at Law  
Student Hearing Office