

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

**STUDENT,
By and through PARENT¹**

Petitioner,

v.

**DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,**

Respondent.

Case No.

Bruce Ryan, Hearing Officer

Issued: April 18, 2011

095E
STUDENT HEARING OFFICE
APR 19 12 11 09

HEARING OFFICER DETERMINATION

I. INTRODUCTION/PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed February 2, 2011, on behalf of a nine-year old student (the "Student") who resides in the District of Columbia and has been determined by DCPS *not* to be eligible for special education and related services as a child with a disability under the IDEA. Petitioner is the Student's adult sister and legal guardian.

The Student presently attends his neighborhood DCPS elementary school (the "School"), where he is in the grade. During the 2008-09 school year, the Student resided in Maryland and attended school in the Montgomery County Public Schools ("MCPS") system. Prior to that, he had attended DCPS schools, and he returned to DCPS for the 2009-10 school year.

Petitioner claims that DCPS has denied him a free appropriate public education ("FAPE") by: (a) failing to implement the Student's June 12, 2009 individualized education program ("IEP") from MCPS; (b) failing to find the Student eligible for special education services in May and November 2010; (c) failing to develop an appropriate IEP and provide an appropriate

¹ Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

educational placement during the 2009-10 and 2010-11 SYs; and (d) failing to evaluate the Student in all areas related to his suspected disability, specifically speech and language.

DCPS filed its Response on February 9, 2011, which responds that DCPS has not denied the Student a FAPE. DCPS asserts that the Student does not have a disability that qualifies him for special education. DCPS also asserts that during the 2009-10 school year, DCPS provided “comparable services” to those on the Student’s out-of-state IEP, while it evaluated him and determined he was not eligible, pursuant to 34 C.F.R. 300.323(f).

A resolution session was held March 2, 2011, which did not resolve the Complaint. A DPC Disposition form was completed on that date, but the copy filed with the SHO was signed only by DCPS. Accordingly, it was agreed the 30-day resolution period ended on March 4, 2011.

Prehearing Conferences (“PHCs”) were held on March 4 and 7, 2011, at which the parties discussed and clarified the issues and requested relief. Five-day disclosures were filed as directed on March 23, 2011; and the Due Process Hearing (“DPH”) was held on March 30, 2011. Petitioner elected for the hearing to be closed.

At the conclusion of the 03/30/2011 DPH, the parties agreed to hold a second hearing session on April 14, 2011, to address compensatory education. However, the parties subsequently agreed to a stipulation (described in Part IV below) that eliminated the need for the additional hearing session. The parties also submitted post-hearing briefs on Section 300.323(f).

During the DPH, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner’s Exhibits: P-1 through P-31.

Respondent’s Exhibits: R-1 through R-15.

In addition, the following Witnesses testified on behalf of each party at hearing:

Petitioner’s Witnesses: (1) Petitioner; (2) Independent Psychologist; and (3) Student’s Tutor.

Respondent’s Witnesses: (1) former Special Education Coordinator (“SEC”) at School (2009-10 SY); (2) DCPS School Psychologist; (3) DCPS Gen. Ed. Teacher (2009-10); (4) DCPS Gen. Ed. Teacher (2010-11); and (5) DCPS Special Ed. Teacher.

II. JURISDICTION

The Due Process Hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*. The HOD deadline is April 18, 2011.

III. ISSUES AND REQUESTED RELIEF

As confirmed at the PHCs and in opening statements at the DPH, the following issues were presented for determination at hearing:

- (1) **DCPS' Obligation to Provide Services Upon Transfer from MCPS** — Did DCPS deny the Student a FAPE by failing to implement and/or provide "comparable services" to the Student's June 12, 2009 IEP from MCPS beginning in August 2009, when he returned to DCPS from MCPS?
- (2) **Eligibility Determination** — Did DCPS deny the Student a FAPE by failing to identify and determine him to be eligible for special education and related services under the IDEA at MDT meetings in May and/or November 2010? Petitioner alleges that the Student meets the criteria for eligibility as a child with a specific learning disability ("SLD") and/or other health impairment ("OHI").
- (3) **If Eligible, Failure to Develop Appropriate IEPs** — Did DCPS deny the Student a FAPE by failing to develop appropriate IEPs during the 2009-10 and 2010-11 School Years?
- (4) **If Eligible, Failure to Provide Appropriate Educational Placement** — Did DCPS deny the Student a FAPE by failing to provide an appropriate educational placement during the 2009-10 and 2010-11 School Years?
- (5) **Failure to Evaluate in All Areas of Suspected Disability (Speech/Language)** — Did DCPS deny the Student a FAPE by failing to conduct a speech/language evaluation, as recommended by the independent comprehensive psychological evaluation reviewed at the MDT's November 2010 meeting?

As relief, Petitioner requests that the Hearing Officer find that the Student is eligible for special education and related services under the IDEA (*i.e.*, overturn DCPS's determination of non-eligibility). Petitioner also requests that the Hearing Officer order DCPS to: (a) conduct a functional behavior assessment ("FBA") and develop a behavior intervention plan ("BIP"); (b) conduct a speech/language evaluation or authorize an independent speech/language evaluation;

(c) convene an MDT/IEP team meeting to review the evaluations and develop an appropriate IEP, and (d) award compensatory education services.²

IV. STIPULATION

Following the Due Process Hearing, the parties agreed to the following stipulation and agreement:

“If the Hearing Officer rules in Petitioner’s favor on the claims of denial of FAPE for which Petitioner is seeking retroactive relief in the form of compensatory education, the parties agree that to satisfy the parent’s request for compensatory education arising from those claims, DCPS agrees to fund up to 50 hours of individualized specialized instruction to be provided by a qualified independent (non-DCPS employee) instructor of the parent’s choice at a rate not to exceed \$65/hour. Services are to be completed by June 30, 2012. The parties agree that this fully satisfies and resolves Petitioner’s request for compensatory education relief for the claims asserted in Case No. 2011-0109.”³

V. FINDINGS OF FACT

1. The Student is a -year old student who resides in the District of Columbia. Petitioner is the Student’s adult sister and legal guardian (*i.e.*, parent for IDEA purposes). The Student has been determined by DCPS *not* to be eligible for special education and related services under the IDEA as a child with a disability.
2. The Student currently attends his neighborhood DCPS elementary school (the “School”), where he is in the grade. *See P-1; Petitioner Test.*
3. During the 2007-2008 school year, the Student attended two other DCPS elementary schools, where he received special education and related services pursuant to an IEP developed by DCPS. *See P1; P24; Petitioner Test.*
4. During the 2008-09 school year, the Student moved in with Petitioner and resided in Montgomery County, Maryland. On or about August 25, 2008, Montgomery County Public Schools (“MCPS”) convened an IEP team meeting and developed an IEP. The IEP classified the Student as having Multiple Disabilities (*i.e.*, learning disabled and Other Health

² During the pendency of this proceeding, DCPS agreed to continue to implement services that were in effect prior to May 2010, as the last agreed upon placement. *See Prehearing Order*, issued March 27, 2011, ¶ 10.

³ *See* email correspondence dated April 14, 2011, between Petitioner’s counsel and DCPS’ counsel (added to the record as Hearing Officer Exhibit 1).

Impairment due to ADHD). It provided 22.5 hours per week of specialized instruction Outside General Education, three (3) hours per week of specialized instruction within General Education, and 90 minutes per month of counseling services Outside General Education. *P23-19*.

5. On or about June 12, 2009, MCPS convened another, annual IEP Team meeting. MCPS continued to classify the Student as multiply disabled. MCPS developed a revised IEP that provided five (5) hours per week of specialized instruction in a setting Outside General Education and 15 hours per week of specialized instruction within an inclusion, general education setting. *P22-14*.
6. During the summer of 2009, the Student moved back into the District of Columbia.
7. On August 13, 2009, DCPS convened an initial MDT/IEP team meeting. The IEP team discussed the Student's needs and his proposed placement at the School for the 2009-10 school year. *See Exhibit R-1; SEC Test*. Petitioner's counsel requested an ED cluster program for the Student, despite the fact that his disabilities under his existing IEP from MCPS were SLD/OHI. *R1-2*. The team expressed concerns regarding the ability of the School to meet all of the Student's needs, but indicated that he "could be given 15 hours of specialized instruction by the pull-out primary teacher." *R1-2*.
8. On August 27, 2009, DCPS convened a second MDT/IEP team meeting for the purpose of discussing the Student's behavior and goal-setting for his success at the School. *R2-1*. The team agreed that the Student needed more time in the general education classroom to gain grade level skills, and that "he should remain in special education only 5 hours weekly according to the IEP" from MCPS. *R2-2*. The team also noted that the Student was on medication for his ADHD condition, which "appears to be working." *Id*. The meeting notes further state that the School did not feel that a BIP needed to be implemented at that time, and that his CFSA social worker "feels that he is doing much better than when he was in [Maryland]." *R2-2 – R2-3*.
9. During the 2009-10 school year, the evidence shows that DCPS provided special education and related services to the Student, but for significantly fewer hours than what was specified in his June 2009 IEP from MCPS. The Student told Petitioner he was occasionally pulled out for services by one of the special education teachers, but he did not know how often. *Petitioner Test*. The SEC testified that she thought the IEP required only 5 hours of pull-out

specialized instruction, with the rest of his schedule in the general curriculum (without specialized instruction), and that this program was to be followed. *SEC Test*. She was not aware of the additional IEP requirement of 15 hours per week of specialized instruction in a general education (inclusion) setting. *Id.* And one of the DCPS teacher witnesses testified that specialized instruction took place only in a pull-out setting, for approximately 1 ½ hours per day, with occasional teacher consultation in the general education classroom. *DCPS Gen. Ed. Teacher (2009-10) Test*.⁴ DCPS also provided approximately 30 minutes of counseling services per week. *Id.*

10. On April 30, 2010, the DCPS School Psychologist completed a psychological evaluation of the Student. *R-3*. The evaluation was considered a re-evaluation because the Student had already been evaluated and was receiving services under the IEP from MCPS. *School Psych. Test*. “He was referred for reevaluation by both his regular and special education teachers who believe[d] that [Student] is no longer in need of specialized instruction. His behavior had improved significantly, and his academics appear to be on grade level.” *R3-1*.
11. The 04/30/2010 evaluation report found (*inter alia*) that the Student had made a lot of progress; that he no longer qualified for special education as a student with SLD; and that, while he continued to have ADHD, the condition was not adversely affecting his learning. *Id.* The DCPS School Psychologist based her conclusions on her classroom observation, teacher comments, parent interview, and previous test scores. *Id.* See also *R3-7* (“Due to his medication, his ADHD appears to be under control and it is not impacting his educational performance.”); *DCPS Gen. Ed. Teacher (2009-10) Test*. (grades and test scores improved as year went on; no problems were reported concerning homework being completed).
12. On May 4, 2010, DCPS convened another MDT/IEP team meeting, at which DCPS reviewed the 04/30/2010 psychological evaluation and an educational evaluation dated April 22, 2010. Based on the evaluations and other information, the team appeared to determine that the Student no longer met the IDEA criteria for either a learning disability or OHI/ADHD. See *School Psych. Test.*; *R-3*. Petitioner disagreed with the findings and requested an

⁴ While the DCPS School Psychologist testified that she “understood” that the School was providing the rough “equivalent” of the MCPS IEP (both pull-out and inclusion), she also testified that a special education teacher was not in the Student’s general education classroom when she observed it. *School Psych. Test*. However, during the current (2010-11) school year, the DCPS general education teacher testified that a special education teacher has provided some specialized (inclusion setting) instruction. *DCPS Gen. Ed. Teacher (2010-11) Test*.

independent comprehensive psychological evaluation. She did not agree that special education services should be terminated and requested that DCPS continue providing the Student with such services. *See Petitioner Test.*; P-12.

13. Following the 05/04/2010 meeting, DCPS issued a Prior Written Notice indicating that DCPS was refusing to identify the Student as a child with a disability under the IDEA. *See Exhibit R-8*. In explanation of the proposed action, DCPS stated: "Student does not meet criteria to be identified as a student with a disability under IDEA and does not need special education and related services. [Student] is currently functioning at age and grade level based upon his scores on the Kaufman Test [for] Educational Achievement." R-8. Although the Notice is dated May 4, 2010, the evidence is not clear as to exactly when the Notice was actually issued and received by Petitioner.
14. On or about June 16, 2010, in response to an earlier due process complaint, DCPS sent Petitioner a letter authorizing an independent comprehensive psychological evaluation at DCPS expense (the "IEE Letter"). *See P-8*. As a result of receiving the IEE Letter, Petitioner withdrew the earlier complaint.
15. During the 2010-11 school year, the evidence shows that DCPS provided special education and related services to the Student on an even more sporadic basis. The special education teacher testified that he only worked with the Student "whenever there was a need," which was "not very often." *Spec. Ed Teacher Test*. His testimony was very vague.
16. On or about October 5, 2010, Petitioner submitted the report of independent comprehensive psychological evaluation dated September 24, 2010, completed by Keisha Mack, Ph.D. *See Exhibits P-1; P-16*. The report found (*inter alia*) evidence that the Student was "experiencing moderate to severe weaknesses in attention, hyperactivity, and executive functioning," and that "his cognitive flexibility, attention, planning, organizing and self-monitoring are variable at best and likely makes learning difficult in school and especially less structured contexts." P16-12. On the other hand, standardized tests of academic achievement indicated that the Student's academic achievement levels were generally age appropriate, except for a notable weakness in reading. *Id.*⁵ The evaluator concluded that the Student "continues to meet the

⁵ However, the Student's 3d grade report card showed significant progress in reading, as Petitioner agreed on cross examination. The Student progressed from a 1 to 2- to 2 to 2+ over the course of the school year (R5-1), and teacher comments showed that he was improving (R5-3). *See Petitioner Test. See also DCPS Gen. Ed. Teacher (2010-11) Test.* (testifying to "great progress" made by the Student this school year).

- criteria for attention deficit hyperactivity disorder, as he continues to demonstrate significant difficulties with attention, hyperactivity, and impulsivity when he is not medicated.” *Id.*
17. The 09/24/2010 independent evaluation report also recommended a speech-language evaluation “to assist with ruling out any [speech-language] deficits that may be negatively impacting [Student’s] academic and behavioral progress.” *P16-13*. The report noted that the Student’s “weaker verbal reasoning ability is consistent with a child who might be experiencing speech language delays.” *P16-11*.
 18. On or about October 28, 2010, DCPS’ School Psychologist issued a written report reviewing the independent psychological evaluation. *Exhibits R-9; P-15*. The review concluded that the Student did not meet DCPS criteria for a student with either a Specific Learning Disability (“SLD”) or Other Health Impairment (“OHI”). He did not meet SLD criteria mainly because his cognitive and academic test results both fell within the Low Average to High Average ranges with no significant discrepancies. *See R9-6* (also noting absence of SLD report by independent evaluator). And he did not meet OHI criteria mainly because a “review of current results, observations, and interviews indicate that [Student] is achieving adequately for his age or grade placement despite his ADHD.” *Id.*
 19. On or about November 2, 2010, DCPS issued an Analysis of Existing Data summarizing the information reviewed in the evaluation process (*R-11*); and on or about November 3, 2010, DCPS issued a new Prior Written Notice again indicating that DCPS was refusing to identify the Student as a child with a disability under the IDEA (*R-12*). Petitioner disputed this determination. *P-6*.
 20. In explanation of the 11/02/2010 proposed action, DCPS stated: “Student does not meet criteria to be identified as a student with a disability under IDEA and does not need special education and related services. Based on the Independent Assessment, observations, DCCAS, DIBELS, and work samples, [Student] doesn’t meet the criteria for a student with Special Needs. When [Student] takes his medication, he is able to focus and complete tasks appropriately in the classroom and one-to-one.” *R-12*. *See also R10-5* (disability work sheets; Dr. Mack reported that when not on is medication, [Student] was fidgety, hyperactive and impulsive,” but when he “takes his medication, he is able to focus and complete tasks appropriately in the classroom and one-to-one.”); *R14-1* (DC BAS results); *Petitioner Test.* (testifying that Student does “much better” on medication, which enables him to focus at

- school until afternoon; but that it “wears off” by the time he gets home, and then he is hyperactive); *Id.* (Petitioner usually helps him with homework when tutor is not there).
21. On or about November 8, 2010, Petitioner’s counsel requested that DCPS conduct a speech/language evaluation for the purpose of determining whether the Student has a language disorder. *P-5.*
22. On or about November 17, 2010, DCPS completed a report of speech/language evaluation of the Student, as requested by Petitioner and recommended in the 09/24/2010 independent psychological evaluation. *R-15.* The report found that both the Student’s receptive standard language and expressive standard language scores show that he is within the normal range of functioning. *R-15, p. 7.* He also tested in the normal range of functioning on expressive vocabulary, but in the moderately low range for receptive vocabulary. *Id.* Overall, the report concluded that his difficulties and weaknesses did not have a negative impact on his ability to access the curriculum. *Id.*

VI. DISCUSSION AND CONCLUSIONS OF LAW

A. Summary

The Hearing Officer concludes that Petitioner met her burden of proving that DCPS failed to provide the Student with a FAPE (including services comparable to those described in the June 2009 IEP from MCPS), between August 2009 and November 2010, while DCPS was evaluating the Student. However, the Hearing Officer upholds DCPS’ determination of non-eligibility, and concludes that Petitioner failed to prove any of her other claims. Petitioner is awarded relief in the form of compensatory education services as specified in the parties’ stipulation and agreement.

B. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to develop an appropriate IEP or to provide an appropriate educational placement for a student. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-E3030.3. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11

(D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

C. Issues/Alleged Denials of FAPE

The IDEA requires that all students be provided with a Free Appropriate Public Education (“FAPE”). FAPE means:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...” 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; DCMR 5-E3001.1.

In this case, Petitioner has proved by a preponderance of the evidence that DCPS violated the IDEA and denied the Student a FAPE under Issue 1, but she has failed to meet her burden of proof under the remaining issues.

1. DCPS’ Obligation to Provide Services Upon Transfer from MCPS

Petitioner claims that DCPS denied the Student a FAPE by failing to implement and/or provide “comparable services” to the Student’s June 12, 2009 IEP from MCPS beginning in August 2009, when he returned to DCPS from MCPS. The IDEA provides, in relevant part:

“If a child with a disability (*who had an IEP that was in effect in a previous public agency in another State*) transfers to a public agency in a new State, and enrolls in a new school *within the same school year*, the new public agency (in consultation with the parents) *must provide the child with FAPE (including services comparable to those described in the child’s IEP from the previous public agency)*, until the new public agency – (1) conducts an evaluation(if determined to be necessary by the new public agency); and (2) develops, adopts, and implements a new IEP, if appropriate....”

34 C.F.R. §300.323(f) (emphasis added); 71 Fed. Reg. 46,681-82 (Aug. 14, 2006). Under this provision, any evaluation of such child conducted by the new public agency “would be to determine if the child is a child with a disability and to determine the educational needs of the child.” 71 Fed. Reg. at 46,682. In other words, “the evaluation would not be a reevaluation, but would be an initial evaluation by the new public agency.” *Id.*

Here, Petitioner enrolled the Student during the summer, and the Student did not actually begin attending the DCPS School until the start of the 2009-10 school year. In her written closing, Petitioner argues that Section 300.323(f)'s "comparable services" provision does not apply in such circumstances because the student did not transfer and enroll "within the same school year." Thus, she argues that DCPS was required to convene an IEP meeting and develop its own IEP prior to the new school year.⁶ DCPS seems to agree as to the inapplicability of Section 300.323(f), without discussing the consequences for this case.⁷

The Hearing Officer is not aware of any judicial holdings on this precise issue of statutory construction, and the parties have cited none.⁸ However, the U.S. Department of Education provided the following guidance in addressing comments to proposed rule 300.323:

"Some commenters requested clarification regarding what a new public agency should do when a child's IEP is *developed (or revised) by the child's previous public agency at the end of a school year (or during the summer)*, for implementation during the next school year, *and the child moves before the next school year begins (e.g., during the summer)*.... This is a matter to be decided by each individual new public agency.... the new public agency could decide to adopt and implement that IEP, unless the new public agency determines that an evaluation is needed...."

U.S. Dep't of Education, *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Analysis of Comments and Changes*, 71 Fed. Reg. at 46,682 (August 14, 2006); *see also* 34 C.F.R. §300.323(a).

This is basically the situation involved here. MCPS developed an IEP for the Student on June 12, 2009, near the end of the 2008-09 school year; the Student then moved back into D.C. during the 2009 summer; and he enrolled in his new DCPS School in August 2009, prior to the start of the 2009-10 school year. On these facts, the Hearing Officer concludes that DCPS (as

⁶ Petitioner's Memorandum Addressing 34 C.F.R. Sec. 300.323 (f), filed April 4, 2011,

⁷ Email correspondence from Laura George, Esq., dated April 4, 2011.

⁸ Petitioner cites dictum in *Maynard v. District of Columbia*, 701 F. Supp. 2d 116 (D.D.C. 2010), where the court appeared to express the view that Section 300.323(f) was "inapposite" where a student transferred schools during the summer, because that was not "within the same school year." 701 F. Supp. 2d at 123. The court suggested that, rather than provide comparable services in that situation, DCPS would be required to develop its own IEP prior to the start of the next school year. However, the court upheld the hearing officer's decision on an alternative basis; and, even on the non-controlling 300.323(f) question, the facts did not actually involve an inter-state transfer. The case involved a claim for tuition reimbursement relating to the withdrawal of a D.C. student from a *private school* to a DCPS public school. *See* 701 F. Supp. 2d at 119, 123 & note 4.

the new public agency) could decide either to “adopt and implement” the MCPS IEP or to provide services “comparable” to such IEP, pending completion of its own initial evaluations and eligibility process. Given the short time window, it was not feasible for DCPS to complete this entire process (which by statute can take up to 120 days) before the Student began the new school year. DCPS properly initiated a reevaluation process to review the Student’s needs.

Until the evaluation (or reevaluation) was conducted, however, Section 300.323 (f) required DCPS to provide the Student with a FAPE. *See 71 Fed.Reg.* 46540, 46681 (Aug. 14, 2006). A new public agency may not deny special education and related services to the transferred student pending the determination of eligibility and development of a new IEP in that State. *See Questions & Answers on IEPs, Evaluations, and Reevaluations*, 54 IDELR 297 (OSEP June 1, 2010). While DCPS contends that “it implemented the Montgomery County IEP as written,”⁹ the evidence shows that it fell well short of that standard during the 2009-10 school year. *See, e.g., Findings*, ¶¶ 9, 15. Nor does the Hearing Officer find that the services provided were reasonably equivalent or comparable to those described in the June 2009 IEP from MCPS.¹⁰

Accordingly, Petitioner has shown by a preponderance of the evidence that DCPS denied the Student a FAPE from August 2009 to May 2010, as alleged under Issue 1.

2. Eligibility Determination

Petitioner next claims that DCPS denied the Student a FAPE by failing to identify and determine him to be eligible for special education and related services under the IDEA at MDT meetings in May and/or November 2010. As noted above, Petitioner alleges that the Student meets the criteria for eligibility as a child with a specific learning disability (“SLD”) and/or other health impairment (“OHI”). However, Petitioner did not prove this claim by a preponderance of

⁹ Email correspondence from Laura George, Esq., dated April 4, 2011.

¹⁰ According to OSEP, when a child transfers to a new public agency from another state, “comparable services means services that are ‘similar’ or ‘equivalent’ to those that were described in the child’s IEP from the previous public agency, as determined by the child’s newly-designated IEP Team in the new public agency.” 71 *Fed.Reg.* 46540, 46681 (Aug. 14, 2006); *see, e.g., Sterling A. v. Washoe County School District*, 51 IDELR 152 (D. Nev. 2008) (adopting OSEP interpretation; new agency in Nevada needed to provide services that were “similar” or “equivalent” to those provided for in California IEP).

the evidence. The Hearing Officer concludes that DCPS has properly exited the Student from special education services, as the MDT/IEP team determined that he no longer met the eligibility criteria under the IDEA.

The IDEA defines “child with a disability” to mean (in relevant part) “a child evaluated in accordance with 300.304 through 300.311 as having...an other health impairment, a specific learning disability, ... or multiple disabilities, and who, by reason thereof, needs special education and related services.” 34 C.F.R. 300.8 (a). “Other health impairment,” in turn, 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 ... *attention deficit hyperactivity disorder*...; and (ii) *adversely affects a child’s educational performance.*” *Id.*, 300.8 (c) (9) (emphasis added).

In this case, the clear weight of the evidence shows that the Student has an ADHD condition, but that his ADHD does *not* adversely affect his educational performance. *See Findings*, ¶¶ 11-13, 16, 18, 20. Due in substantial part to his medication, his ADHD appears to be under control and is not impacting his educational performance at this time. The DCPS School Psychologist elaborated on this conclusion in her 10/28/2010 Review of Independent Educational Evaluation, as follows:

“His teachers report little need for accommodations, modifications, and intervention strategies. His consistent performance in class – and home-work assignments in the areas of reading, math and language arts is also suggestive of a student who is making good academic progress. Furthermore, no difficulties with behavior, transition or focusing have been reported. Based on all data points, there appears to be sufficient evidence that [Student] is not in need of specialized services.” (R9-6).

While Petitioner testified that she saw a “different situation” at home, when the Student’s medication wears off (*Pet. Test.*), there was no evidence that the home situation is adversely affecting his educational performance. For example, there are no teacher reports of missed or unacceptable homework assignments. *See DCPS Gen. Ed. Teacher (2009-10) Test. See also R-5 (2009-10 report card); R-6 (2009-10 DC BAS results); R-13 (current report card); R-14 (2010-11 DC BAS results).* Moreover, Petitioner’s independent evaluator did not conduct any classroom observations of the Student, did not speak to any of his teachers, and was not aware of what

services he was receiving at the time she performed her evaluation. *See Mack Test.* (cross examination).

In short, Petitioner did not present sufficient evidence to overturn the IEP team's decision. *See, e.g., N.C. v. Bedford Central School District*, 51 IDELR 149 (2d Cir. 2008); *Mowery v. Board of Education of the School District of Springfield*, 56 IDELR 126 (W.D. Mo. March 18, 2011) (finding no evidence that student needed special education and related services to receive an educational benefit).

3. Failure to Provide Appropriate IEP and Placement

Petitioner next claims that DCPS denied the Student a FAPE by failing to develop appropriate IEPs and failing to provide an appropriate educational placement during the 2009-10 and 2010-11 School Years. However, because Petitioner has not shown that DCPS improperly determined non-eligibility, DCPS cannot be found to have denied a FAPE by failing to develop an appropriate IEP and provide an appropriate educational placement for the Student, beyond the findings made under Issue 1 with respect to its Section 300.323 (f) obligations.

4. Failure to Evaluate

Finally, Petitioner claims that DCPS denied him a FAPE by failing to conduct a speech/language evaluation, as recommended by the independent comprehensive psychological evaluation reviewed at the MDT's November 2010 meeting.

As part of both an initial evaluation and any re-evaluation, DCPS must (*inter alia*) ensure that the child "is assessed in all areas related to the suspected disability," and that the evaluation is "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." 34 C.F.R. §300.304 (c) (4), (6); *see also Harris v. DC*, 561 F. Supp. 2d 63, 67-68 (D.D.C. 2008). Parents also have a right to request particular assessments to determine whether their child has a disability and the child's educational needs. *See, e.g., 34 C.F.R. 300.305 (d); see also Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005). The failure to act on a request for independent evaluation may constitute a denial of FAPE. *Harris v. DC, supra*, 561 F. Supp. 2d at 68-69.

Here, Petitioner requested that DCPS conduct a speech/language evaluation at the November 2, 2011 IEP tem meeting (*P-19*), and then followed up by letter on November 8, 2010. *P-5*. DCPS promptly responded the next day by agreeing to conduct the evaluation, *P-4*; and completed it about a week later. *R-15*. The evidence shows no unreasonable delay in acting on Petitioner's request for independent evaluation and no denial of FAPE in this regard. Accordingly, Petitioner failed to meet her burden of proof on Issue 4.

D. Requested Relief

Having found a denial of FAPE as described herein, the IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005). Compensatory education is an equitable remedy available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA. 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.'" *Reid v. District of Columbia*, 401 F. 3d at 521 (quotations omitted).

With respect to compensatory education for the denials of FAPE in this case, the parties have stipulated and agreed that to satisfy Petitioner's request for compensatory education arising from those claims, "DCPS agrees to fund up to 50 hours of individualized specialized instruction to be provided by a qualified independent (non-DCPS employee) instructor of the parent's choice at a rate not to exceed \$65/hour. Services are to be completed by June 30, 2012."¹¹ The parties agree that this fully satisfies and resolves Petitioner's request for compensatory education relief for the claims asserted in Case No. 2011-0109."¹² No other relief is found warranted.

¹¹ *Stipulation*, Part IV *supra*. See email correspondence dated April 14, 2011, between Petitioner's counsel and DCPS' counsel (added to the record as Hearing Officer Exhibit 1).

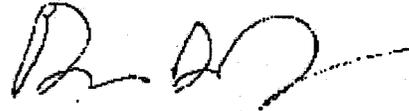
¹² *Id.*

VII. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby ORDERED:

1. As compensatory education relief for the denials of FAPE found herein, DCPS shall immediately fund 50 hours of individualized specialized instruction to be provided by a qualified independent (non-DCPS employee) instructor of Petitioner's choice at a rate not to exceed \$65 per hour. Services shall be completed by June 30, 2012.
2. This award fully satisfies and resolves Petitioner's request for compensatory education relief for the claims asserted in this case.
3. Petitioner's other requests for relief in her Due Process Complaint filed February 2, 2011, are hereby **DENIED**.
4. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.



Impartial Hearing Officer

Dated: April 18, 2011

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).