ORIGINAL

District of Columbia

Office of the State Superintendent of Education

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STUDENT[1], by and through her Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Dates: April 5, 6, 2011 <u>Representatives:</u> Counsel for Petitioners: Renee Erline, Esq. Children's Law Center 616 H Street, NW #300Washington, D.C. 20001 Counsel for DCPS: Assistant Attorney General Linda Smalls, Esq. 1200 First Street, NW Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened April 5, 2011, and concluded on April 6, 2011, at the OSSE Student Hearing Office 810 First Street, NE, Washington, DC 20003, in Hearing Room 2009.

BACKGROUND:

Student or "the student" is age in and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of Other Health Impairment ("OHI"). The student is enrolled at a District of Columbia public charter school hereinafter referred to as "School A." He has been enrolled at School A since the start of the 2010-2011 school year.

Prior to attending School A the student was enrolled in a private day care center for the previous two school years, hereafter referred to as "School B". In March 2010, because of behavior difficulties the student displayed at the private day care center, the student's parent contacted District of Columbia Public Schools ("DCPS") Early Stages to have the student evaluated for eligibility for special education services. DCPS conducted evaluations in June and July 2010 and convened an eligibility meeting on July 29, 2010, at which the student was determined ineligible.

When the student began attending School A in August 2010, the parent provided School A staff the DCPS evaluations. The student allegedly continued displaying behavioral difficulties at School A and on December 15, 2010, a second eligibility meeting was convened and the student was determined eligible.

An individualized educational program ("IEP") meeting was held for the student at School A on December 21, 2010, at which an IEP was developed. The IEP provided for part-time special education services although the parent requested the student be provided a full-time IEP and placement. Subsequent IEP meetings were convened on January 10, 2011, February 11, 2011, and March 21, 2011, at which behavior plans were reviewed and the student's educational placement was discussed.

On March 23, 2011, Petitioner filed a due process complaint alleging, inter alia, DCPS had failed to provide the student an appropriate IEP and placement. Petitioner also filed a motion for expedited hearing and DCPS filed an opposition to the motion. On February 25, 2011, DCPS filed an opposition to the motion for expedited hearing. On March 4, 2011, this Hearing Officer issued an order denying the motion for expedited hearing.

A resolution meeting was held on March 7, 2011. The parties did not resolve the complaint and a pre-hearing conference was conducted on March 17, 2011.[2] This Hearing Officer issued a

[2] Attempts were made by this Hearing Officer to schedule the pre-hearing conference soon after the

pre-hearing order on March 22, 2011, stating the issues to be adjudicated, the relief Petitioner is seeking and Respondent's position with regard to the complaint and/or defenses.

At a subsequent IEP meeting convened on March 28, 2011, the team agreed the student was in need of a full time special education placement and DCPS proposed the student be placed in a special education program located at a DCPS elementary school, hereafter referred to as "School C". As a result of this meeting a brief second pre-hearing conference was held on March 24, 2011. On March 24, 2011, Petitioner filed a motion for summary decision. On April 1, 2011, DCPS filed an opposition to Petitioner's motion. On April 4, 2011, this Hearing Officer issued a order denying the motion for summary decision. A second pre-hearing order was issued on April 4, 2011, to record the occurances and rulings since the first pre-hearing conference and to present revision of the issues to be adjudicated.

The hearing was conducted on April 5 and 6, 2011. At the conclusion of the hearing each counsel requested to submit written closing arguments that were submitted on April 18, 2011.

ISSUES: [3]

The issues adjudicated are:

(1) Whether DCPS failed to provide the student a free appropriate public education ("FAPE') by failing to timely identify, locate, and/or evaluate the student as a child in need of special education?

> Petitioner acknowledges that the "child find" claim is limited by the statute limitations to February 22, 2009. Although, Petitioner alleges the student should have been identified by DCPS at the time of his third birthday while he was attending School B. He was allegedly demonstrating behaviors and/or conditions that should have put DCPS on notice that he should have been identified.

(2) Whether DCPS denied the student a FAPE by failing to complete appropriate evaluations and evaluate the student in all areas of suspected disability?

> Petitioner alleges the evaluations conducted by DCPS Early Stages were inappropriate because they did not assess behavioral and emotional skills/conditions.

(3) Whether DCPS denied the student a FAPE by failing to find the student eligible at the July 29, 2010, eligibility meeting?

> DCPS conducted a psychological evaluation and an educational evaluation of the student

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resolution session information was made available. This was the first date mutually available for both counsel.

[3] The alleged violation(s) and/or issue(s) listed in the complaint may not directly correspond to the issue(s) outlined here. However, the parties agreed at the hearing that the issue(s) listed here and as stated in the revised pre-hearing order dated April 4, 2011, are the issue(s) to be adjudicated.

in the summer of 2010 and convened an eligibility meeting on or about July 29, 2010, at which the student was found ineligible. Petitioner alleges that with the evaluations that were conducted, despite them allegedly being inappropriate and/or incomplete, the student should have been found eligible at the July 29, 2010, eligibility meeting.

(4) Whether DCPS denied the student a FAPE by failing to issue a prior written notice when the student was found ineligible on July 29, 2010?

(5) Whether DCPS failed to timely evaluate the student when he began attending School A?

Petitioner alleges the student should have been identified and evaluated after he began attending School A at the start of the 2010-2011 school year. Petitioner alleges when the student was enrolled at School A the parent provided School A staff the DCPS evaluations and documents that stated the student's eligibility should be reconsidered when he started the 2010-2011 school year if behavioral difficulties persisted. Petitioner alleges the student displayed behaviors early in the 2010-2011 school such that School A staff and DCPS as the local educational agency ("LEA") should have been put on notice the student should have been re-evaluated and/or reconsidered for special education eligibility.

(6) Whether DCPS denied the student a FAPE by failing to provide the student an appropriate IEP?

Petitioner alleges the IEP developed for the student on or about December 21, 2011, was inappropriate because it contained an insufficient number of hours of specialized instruction and incomplete and inappropriate goals. Petitioner also alleges the present levels of performance in the social/emotional areas were inadequately detailed.

(7) Whether DCPS denied the student a FAPE by failing to issue a prior written notice when DCPS refused to provide the student a full time individualized educational program ("IEP") and placement following the December 15, 2010, eligibility determination and in the IEP developed on December 21, 2010?

(8) Whether DCPS denied the student a FAPE by failing to ensure the presence of legally mandated IEP team members at meetings including the January 10, 2011, and February 11, 2011, IEP meetings.

Petitioner alleges there was no DCPS LEA representative present at these meetings.

(9) Whether DCPS denied the student a FAPE, in violation of 34 C.F.R. 300.324(a)(1), by failing to consider the concerns of the parent and needs of the student in developing the student's IEP at the December 21, 2010, meeting and at subsequent IEP meetings on January 10, 2011, and February 11, 2011?

Petitioner alleges that DCPS did not consider the parent's concerns regarding the severity of the student's condition(s) and/or behaviors and her opinion that the student was in

need a full time IEP and placement as shared at the IEP meeting(s).

The following issues are to be decided by the hearing officer regarding the remedies sought by Petitioner: The appropriate placement/location of services for the student:
and/or DCPS proposed placement School C and the appropriate compensatory education, if any, for the student if denial(s) of FAPE are proved.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-57 and DCPS Exhibit 1-24) that were admitted into the record and are listed in Appendix A.[4] Witnesses are listed in Appendix B. This Hearing Officer also considered the parties' written closing arguments submitted April 18, 2011.

FINDINGS OF FACT: [5]

1. The student is age in and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of OHI. The student is enrolled at a District of Columbia public charter school, School A. The student has attended School A since the start of the 2010-2011 school year. (Parent's testimony, DCPS Exhibit 10)

2. Prior to attending School A the student was enrolled in a private day care center for the previous two school years, hereafter referred to as "School B". The student began attending School B when he was age two during the summer of 2008. The student turned age three while he was attending School B. School B staff reported to the parent soon after he began attending that the student engaged in disruptive behaviors and was overly active during instruction and class activities. (Parent's testimony)

3. The parent discussed her concerns about the student's behaviors with the student's physician. The physician referred the parent to a neurologist at Howard University Hospital, Dr. Jayam Throuth. On April 23, 2010, the parent took the student to Dr. Trouth who evaluated the student for, among other things, Attention Deficit and Hyperactivity Disorder ("ADHD"). The doctor suggested the student have a reward system to assist in improving his behaviors and a small structured class with greater one

[4] The exhibits that were not admitted into the record either because they were challenged by the opposing counsel and withdrawn by the presenting counsel or not admitted by this Hearing Officer are noted in Appendix A.

[5] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

on one attention from his teacher. The doctor stated that medication would be considered at a later time. (Parent's testimony, Petitioner's Exhibit 21)

4. In January 2010 the staff at School B suggested the parent contact DCPS Early Stages to assist with the behavior and attention concerns displayed by the student at school and at home. On March 23, 2010, the parent completed a child find referral form at DCPS Early Stages to have the student evaluated for eligibility for special education services. (Parent's testimony, Petitioner's Exhibit 1)

5. DCPS Early Stages has existed since October 2009, and is a reconstituted department charged with ensuring students who are in need of special education are identified and evaluation timely. Early Stages conducts outreach efforts for children to be identified and assessed. testimony)

6. On June 28, 2010, DCPS Early Stages coordinator, Sophia Homonoff, conducted a parent interview screening. The parent shared with the DCPS Early Stages staff the student's behavioral difficulties. The staff attempted to conduct evaluations of the student but the student was not cooperative. As a result the evaluations had to be completed on a later date at School B. The evaluator did not observe the student in his classroom at School B. testimony, DCPS Exhibit 16)

7. DCPS clinical psychologist Margaret Mallory, Ph.D conducted a psychological evaluation of the student on June 28, 2010, and July 23, 2010. The evaluation was conducted on two days because the student did not cooperate with the assessments the first day and needed redirection and focusing to complete the assessments. The evaluation consisted of a record review, a clinical observation, a phone interview with the student's teacher at School B and a cognitive assessment: Wechsler Preschool and Primary Scale of Intelligence, Third Edition (WPPSI-III). Dr. Mallory noted the student had been identified as having ADHD thus she did not conduct further assessments for that condition. Dr. Mallory determined the student's cognitive abilities were generally in the above average range with a full-scale IQ score of 112. (Dr. Mallory's testimony, DCPS Exhibit 14)

8. Based on the teacher interview Dr. Mallory reported that the student was "very disruptive in her classroom, … frequently calls his peers names (e.g. ugly, stupid), is sometimes aggressive toward his classmates (e.g., he once slapped a female classmate in the face), and sometimes threatens them with physical violence. Dr. Mallory noted that the teacher reported there was no formal behavioral system in place in the classroom by which the student received consistent rewards and consequences for his behaviors. According to the student's teacher at School B, although the student had displayed behavior difficulties the student possessed the academic foundation necessary to successfully transition to kindergarten. Dr. Mallory believed that because the student was in a day care setting rather than a structured school setting, there was no behavior system being used and because his academic abilities did not seem to be adversely impacted by his ADHD and behaviors he did not meet the criteria for special education eligibility. (Dr. Mallory's testimony, DCPS Exhibit 14)

9. Dr. Mallory recommended the student would likely work best for short, concentrated time periods, with frequent breaks and opportunities for movement and preferential seating and a behavior system. The evaluator also recommended therapeutic support services for the parent to assist in developing strategies to improve the student's behavior at home and she recommended that "since [the student] is about to transition to a traditional academic setting, if his behavioral difficulties at school persist, a formal behavior plan should be developed. If [the student] fails to respond to intervention and or his behavior begins to have an adverse impact on his academic performance, his eligibility for special education services should be revisited." (Dr. Mallory's testimony, DCPS Exhibit 14)

10. On June 28, 2010, and July 13, 2010, DCPS Early Stages evaluation coordinator Gianna Biscontini conducted an educational evaluation of the student. Ms. Bisontini observed and evaluated the student at School B. The evaluation included a Battelle Developmental Inventory 2nd Edition (BDI-2). The assessment measured the student's developmental performance across five domains: Adaptive, Personal- Social (Adult Interaction, Peer Interaction, Self-Concept and Social Role), Communication, Motor and Cognition. The assessment measured the student as having developmental delay in Adaptive, mild developmental delay in Personal Social and average in Cognition. The evaluator stated "[The student] may benefit from an "air seat," lap buddy, fidget or other sensory strategy that will allow him to move around while still remaining seated. [The student's] foundational academic skills may have appeared lower than they actually are due to his difficulty with attention and focus. A behavior plan may be used to include… strategies to help him remain in his seat with a calm body…" (Ms. Biscontini's testimony, DCPS Exhibit 15)

11. On July 29, 2010, DCPS convened an eligibility meeting at which the evaluations DCPS conducted were reviewed. The parent participated in the meeting. The DCPS staff included the evaluators who conducted the psychological and educational evaluations, Dr. Mallory, and Ms. Bisontini and the Early Stages coordinator who conducted the parent interview. There was no teacher from School B who participated. The DCPS members of the team reviewed the disability criteria and concluded the student did not meet the criteria. Thus, they did not find the student eligible. The parent was clearly aware of the DCPS team members' decision and disagreed with the decision. The notes from the meeting indicate that Dr. Mallory believed the student demonstrated more oppositional defiant behavior than characteristics of ADHD. The parent expressed that the student would be attending a charter school at the start of the 2010-2011 school year. Dr. Mallory recommended there be a behavior plan in place at the student charter school to address the student's behaviors. DCPS prepared an eligibility determination report that included the meeting notes and the eligibility criteria used to determine the student as ineligible. However, no prior written notice was issued by DCPS as to the decision of ineligibility. (Parent's testimony, Ms. Bisontini's testimony, DCPS Exhibit 13)

12. At the July 29, 2010, eligibility meeting the parent made the DCPS staff members aware of the school the student would be attending at the start of the 2010-2011 school year. DCPS Early Stages conducts a 30-day and three months and six month follow up with

any student that is found ineligible. followed within the parent at some point during the 2010-2011 school year regarding the parent's request for DCPS funding of an independent evaluation and also consulted with the school staff once the student began attending School A. testimony)

13. The parent first explored enrolling the student in his neighborhood school; however, she there was told there was no space in the school's The parent then enrolled the student at School A, as a result of finding the school on the internet. She chose School A because among other things the information on the website indicated the school had a low student to teacher ratio. When the student began attending School A on August 31, 2010, the parent provided School A staff the DCPS evaluations as well as the information from Dr. Trout and a note from Children's National Medical Center which stated the student had been diagnosed with ADHD. (Parent's testimony, Petitioner's Exhibits 22)

14. At School A the student was placed in a regular pre-kindergarten classroom with approximately fourteen students and one teacher and a teacher's aide. Soon after the student began attending School A the school the student displayed behavioral difficulties which continued and escalated. His social skills were extremely low. The school staff began to call the parent regarding the student's behavior. The student's classroom teacher began documenting the student's disruptive and inattentive behaviors. (Parent's testimony, testimony, Petitioner's Exhibit 24)

15. The parent would have to pick the student up early from school at least twice per week because of his behavior. The student was suspended approximately seven times during the first semester for physical aggression. The parent met several times with staff regarding the student's behavior. The staff stated they wanted to put the student on half-day attendance. The parent pointed out to the staff that the student should be treated as a student with special needs but the staff pointed out that the DCPS paperwork stated the student did not have a disability. The student has missed significant classroom instruction at School A because of his time out of the classroom due to disruptive behavior. The student is physically aggressive and does not like school because he has no friends there. (Parent's testimony, Petitioner's Exhibits 24 & 25)

16. On October 7, 2010, School A developed a behavior plan to address the student's disruptive behaviors. The targeted behaviors were the student's "high level of energy, a short attention span, and difficulty consistently following rules and instructions. He has a difficult time managing frustration and is pushing or hitting on a daily basis." (Petitioner's Exhibit 27)

17. The student began taking medication to address his ADHD in November 2010 and was seeing a psychiatrist. The student began to be calmer and stay in the classroom because he was given increased medication by the parent. However, the student was still not fully participating in the classroom activities. (Parent's testimony)

18. Because of the student's behaviors the School A social worker contacted the parent to begin a student support team process. However, that process was not begun because of

scheduling difficulties and the student was eventually referred for consideration for special education services. testimony)

19. On December 13, 2010, DCPS psychologist, Dr. Lorna Sanchez conducted a psychological observation of the student at School A. Discussions with the classroom teacher revealed that the student's disruptive behaviors and inattention began soon after he began attending School A. The teacher noted that although a behavior plan was developed for the student on October 7, 2010, the plan was somewhat effective initially but ineffective over time and the student's disruptive and inattentive behaviors persisted. The school staff noted that the student's behaviors warranted repeated school suspensions but accommodations were being made to limit the of number suspensions. Dr. Sanchez confirmed the student's inattention and oppositional behaviors during her own classroom observation of the student. Dr. Sanchez concluded the student exhibited severe ADHD that was significantly impacting his educational performance and learning and that he would need special education services. (Petitioner's Exhibit 14)

20. On December 13, 2010, Emmanuel Olarinde, Ph.D. conducted a neurodevelopmental assessment of the student. Dr. Olarinde conducted a battery of assessments and interviewed the student and conducted a clinical observation of the student. Dr. Olarinde concluded that as a result of the student's severe ADHD the student had also developed significant oppositional and defiant behaviors. Dr. Olarinde concluded the student met the criteria of emotional disturbance and posed a significant risk to himself and others because of his behaviors. Dr. Olarinde recommended the student be placed in a highly structured self contained classroom where his behavioral, emotional and cognitive needs could be effectively met. He recommended the program be highly structured enough to manage the student's maladaptive behaviors and emotions without constantly calling the parent to come to the school and intervene. (Petitioner's Exhibit 15-1, 15-6)

21. On December 15, 2010, DCPS convened an eligibility meeting at School A and the student was determined eligible. Dr. Sanchez shared the results of her observation and noted that the student's behaviors presented as more than ADHD and he also exhibited oppositional defiance. The team noted that the behavior plans implemented for the student had been unsuccessful. The student's classroom teacher acknowledged that since the second week of September up until the eligibility meeting the student had been physically aggressive and displayed disruptive and inattentive behaviors. The teacher noted that most recently the student behavior was a bit better. The parent noted at the meeting the behavior was probably better because he had begun medication for his ADHD. The teacher noted that despite his behaviors the student was doing well academically and was meeting pre-kindergarten standards. However, she noted that there was only one assessment the student completed because he refused to complete them even when working one on one with the teacher. The team agreed the student was eligible with a disability classification of OHI because of the student's ADHD. The team agreed to reconvene on December 21, 2010, to develop the student's IEP. testimony, DCPS Exhibit 12)

22. An individualized educational program ("IEP") meeting was held for the student at School A on December 21, 2010, at which an IEP was developed. The parent and her

representative participated in the meeting. The team included the student's teacher, the school's special education teacher and other School A staff. The DCPS representative Mr. Evan Murray, participated by telephone. The parent asked for the assistive technology tools that had been recommended in the student's evaluations. The school agreed to obtain the tools but they were never provided the student. The student's teacher believed that in light of all of strategies that had been attempted with the student the student might need to have all his services in a full time special education setting. (Parent's testimony, testimony, DCPS Exhibit 9, 10 & 12)

23. The IEP prescribed the student receive 10 hours per week of specialized instruction in the general education setting and 60 minutes per week of behavioral support services in the general education setting, 60 minutes of behavioral support services outside the general education setting and 60 minutes per month of behavioral support consultation services. The IEP included academic and social/emotional goals. The least restrictive environment ("LRE') section of the IEP only mentions that the student must be removed from the general education setting for behavioral support services. The student's location of services remained School A. The IEP provided for part-time special education services although the parent requested the student be provided a full-time IEP and more restrictive placement. Mr. Murray stated he was following DCPS guidelines with regard to the LRE and before he could offer a full-time program a part-time program would be tried. The team agreed to conduct a functional behavior assessment ("FBA") and develop a behavior intervention plan ("BIP"). A School A administrator suggested that in light of the parent's concerns about the part-time IEP the IEP could be reviewed in 45 days to determine if the level of services was appropriate. The parent consented for the IEP to be implemented. (Parent's testimony, testimony, DCPS Exhibits 9 & 10)

24. A Prior Written Notice was issued by DCPS on December 21, 2010, which stated that the student was being identified as a child with a disability. The notice stated that the team considered no other options. There was no mention in the notice as to the team's consideration or non-consideration of the parent's request that the student be provided full time special education services. The parent received a copy of the Prior Written Notice and the student's IEP. testimony, DCPS Exhibit 11)

25. The student's IEP was implemented at School A following the December 21, 2010, IEP meeting. The student was provided the specialized instruction and behavioral support services the IEP prescribed. testimony)

26. School A convened a subsequent IEP meeting for the student on January 10, 2011, to review the FBA and BIP that had been agreed to on the day the student's IEP was developed. The parent and her representative attended. There was no DCPS representative present. The team discussed and agreed to the BIP and agreed to review the BIP in thirty days to determine its effectiveness. testimony, DCPS Exhibit 8)

27. The staff at School A conducted a review of the BIP on February 11, 2011. The parent and her representative participated in the meeting. There was no representative from DCPS who attended the meeting. The School A staff determined the student BIP had

been minimally effective. "There has been slight improvement in [the student's] behavior in the classroom. However, this improvement is outweighed by the continued defiant and aggressive behaviors he displays." The team determined that because the behavior plan was ineffective the next step was to review the student's LRE with a DCPS representative present at meeting that was to occur within the next thirty days. (Parent's testimony, DCPS Exhibit 5-1, 6 & 7)

28. DCPS convened an IEP meeting on March 21, 2011, at which the student's IEP and educational placement were discussed. The parent and her attorney attended the meeting. The student's IEP was amended to include 25 hours of specialized instruction outside the general education setting and the behavior support services remained the same. The LRE section of the IEP was amended to state that the student required services in a general education setting because supplemental supports and interventions that had been attempted in the general education setting were unsuccessful. The team also included extended school year ("ESY") services in the student's IEP. DCPS proposed two possible school locations for the student's IEP to be implemented. The team members agreed to reconvene to make further modifications to the student's academic and social/emotional goals. (DCPS Exhibits 3 & 22)

29. On March 24, 2011, DCPS issued a Prior Written Notice for the student to attend a special education program located at School C. (DCPS Exhibit 2)

30. DCPS has proposed that the student be placed in a self-contained special education classroom for kindergarten students located at School C, a DCPS elementary school. There are eight special education students at the program at School C. Some of the students in the classroom have low cognitive abilities. There are not students in the classroom who have behavior intervention plans. The classroom has a certified special education teacher. This class has lunch, recess and special classes such as art and music with general education students. The special education social worker assigned to the school will have to attempt to provide the student the behavioral support services in his IEP on the days she is at School C. She is not at the school full time. If the student were in crises the school based counselor, the special education coordinator or the dean of students would have to provide support to the student. The school has no de-escalation room. testimony)

31. On March 25, 2011, DCPS issued Petitioner an independent education evaluation ("IEE') authorization for the parent to obtain independent speech and language and occupational therapy evaluations. (DCPS Exhibit 1)

32. On March 28, 2011, the parent, along with a representative from her attorney's office, visited the school proposed by DCPS, School C. The school's special education coordinator told the parent that there where eight special education students in the program one with one special education teacher and a dedicated aide for one of the eight students. Some of the students were non-verbal and some were in wheel chairs. They were also told the student would be in the cafeteria with other general education students and the student would be with general education students for special classes as music and art. There are approximately 500 students attending School C. The parent and her

representative were also told during their visit to School C that there is a psychologist at School C who conducts evaluations. The special education social worker is at the school two days per week and will service twenty special education students. There is a full time social worker available to service all 500 students in the school and is not exclusive to the special education students. The classroom proposed for the student services students with various disabilities. (Parent's testimony, Ms. Egger's testimony)

33. At a subsequent IEP meeting convened on March 28, 2011, the DCPS representatives and School A staff members agreed the student was in need of a full time special education placement. The parent and her representative did not attend the meeting, as it was the same day that the parent visited School C. DCPS proposed the student be placed in a special education program located at a DCPS elementary school, School C. (Parent's testimony, DCPS Exhibit 24

34. The student has been accepted at is a full-time special education school with certified special education teachers and certified related services providers. admissions team examined the student's evaluations, his IEP, FBA, and BIP as well as their own impressions of the student and decided to accept him. Their acceptance was based on the perceived benefit the student would gain from their highly structured environment, intense of social-emotional support and feedback the staff can provide the student about his comportment in the classroom. testimony)

35. can provide the student with the specialized instruction and behavioral support services that are currently in his IEP. A program with a certified special education teacher and a teacher's aide has been identified for the student. The classroom can accommodate up to eight students. Currently the class has three students. In addition to the student, two other students with learning and developmental challenges have been accepted for this classroom. The DC Office of the State Superintendent of Education ("OSSE") has placed at least one other student in this program. testimony, Petitioner's Exhibit 55)

36. classroom is set up for guided play and imaginative, multisensory learning as appropriate for The classroom schedule includes morning meeting, literacy time, math time, recess, lunch in the classroom, music and art in the classroom different days, and physical education some days. The classroom also has a sensory area that is designed for privacy and for de-escalation. The teacher can use fidget toys to help the student sustain and regulate attention and emotion. testimony)

37. integrates related services into the day-to-day of the classroom, including the social worker's services. A quiet de-escalation room for the preschoolers is set up next to the lower school director's office. The small space includes sensory tools such as a bean bag chair for the child to have a sense of containment and tactile input to help calm down. The room is a last resort as a place to be removed from overstimulation, since goal is to teach young children to regulate themselves, and use self-calming strategies. testimony)

38. The teacher who is assigned to the pre-kindergarten classroom has worked at since January 2010 and is special education certified, with a Master's degree in Early Childhood Special education. She has five to six years of prior teaching experience with a wealth of experience in behavioral management. The teacher receives training every other week regarding behavior management as part of a professional learning community focused on child behavior, and has attended a two-day training by OSSE and other conferences. The assistant teacher is full-time and has an undergraduate degree in psychology. Every other week alternating with the professional learning community, a child study team convenes about each child with the lower school director and related service providers and teachers to process the students' behaviors, progress, and make plans about next steps. A review of the progress is sent home to the parent bi-weekly. testimony)

39. has a full-time social worker for the lower school of 54 students. The full-time social worker provides a social skills group in the pre-kindergarten classroom as part of the regular curriculum, where children work on recognizing emotions, developing empathy, as well as a twice-weekly lunchtime social skills time for the children to recount social experiences and learn from them. A full-time Ph.D. level psychologist is assigned to the lower school at who provides individual counseling and social skills groups for students with behavioral support services included on their IEPs. has occupational therapists, speech therapists, and physical therapists on staff. will hold a 30-day review of the student's IEP to make changes necessary to meet the student's needs. testimony)

40. also offers tutoring services, which can be provided during the afterschool program. Tutors are trained in pre-academic skill building and have worked with in the past. testimony)

41. Petitioner engaged the services of an educational consultant, to conduct a classroom observation of the student, review his educational and evaluation records, to observe the proposed placements for the student, to prepare a compensatory education plan and to provide testimony during the hearing regarding the student's location, identification and evaluation for special education services, the student's education placement and compensatory education. testimony [6])

42. observed the student at School A on February 15, 2010. observed the student needed several reminders from the classroom aide as he transitioned to the next class. The classroom aide and other staff members stayed next to student but the student was not able to participate and attend to instruction. The student was minimally engaged with his classmates. At the end of class, the student jumped onto a table and then insulted a peer. The student refused to go to the next class for about twenty minutes, during which the classroom aide remained in the hallway trying to work with him. The student's teacher reported that the student has deficits in his writing and

[6] In addition to being a factual witness, this witness was designated as an expert witness in evaluation, programming and placement of special education students.

math skills, but she has not been able to obtain testing scores. The student's teacher told that because of the student's behavior and low attention span he participates only 20% of the time in class. testimony)

43. Based on his review of the student's records and evaluations and his personal classroom observation of the student and his conversations with the student's teachers at School A, in opinion the general education setting is inappropriate for the student even during lunch, recess, and special classes. The student has apparently been unable to benefit from the modeling of nondisabled peers. testimony)

44.] was of the opinion that and in light of the information in the student's evaluations, DCPS should provide the student an IEP with full-time special education and psychological service supports in a self-contained classroom with a low student to teacher/staff ratio. In his opinion the student requires a placement with explicit social skills training embedded in the classroom and in group setting as a in related service provided by a someone qualified in psychological knowledge. testimony)

45. was of the opinion was that the student should have been found eligible at on July 29, 2010, and at latest by the end of the first grading period of the 2010-2011 school year. believes the eligibility team should have considered the student's ADHD, behavior and social emotional delay as impacting his education including his inability to regulate behavior during the Early Stages evaluations. testimony)

46. was of the opinion that the student should have been able to make average gains in his academic and social skills because of his average cognitive ability. estimated that the student missed 600 hours of services. The student's ability to benefit from services in addition to school, at his young age, was considered in the development of the compensatory education plan proposed. believes the student would likely be unable to handle more than a few additional hours per week of services. Thus, recommended two hours of tutoring, which could be provided at or through at home tutoring. He also recommended a ten-week social skills group for the student and his mother to assist the student to make up for the lost related services and explicit social skills instruction the student was not provided by DCPS over the school year. He also recommended twenty-five hours of behavioral consulting comprise frontloading about 10 hours of intensive data collection, then developing a plan with specific reinforcers and intervals for home and school, then fading as the plan is put in place. testimony)

47. also recommended as compensatory education a three week social skills camp that focuses on teaching social skills through physical movement. He believes the camp can provide a bridge for the student to continue practicing and improving his social skills during the time between ESY and the beginning of the next school year. testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a 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.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [7] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

34 C.F.R. § 300.17 provides that a free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.

ISSUE (1): Whether DCPS failed provide the student a free appropriate public education ("FAPE') by failing to timely identify, locate, and/or evaluate the student as a child in need of special education? Conclusion: DCPS identified and evaluated the student when its child find obligations were triggered with respect to this student. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

Congress passed the IDEA to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C.§1400(d)(1)(A). The IDEA provides funding to assist states in implementing a "comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families." 20 U.S.C.§1400(d)(2).

Under the IDEA, all states, including the District of Columbia, receiving federal education assistance must establish policies and procedures to ensure that "[a] free appropriate public education [FAPE] is available to all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1)(A).

Pursuant to 34 CFR §300.101 each state must ensure that FAPE is made available to each child

[7] The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

with a disability by his or her third birthday.

Child Find is DCPS' affirmative obligation under the IDEA: "As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process. Failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE." N.G. v. District of Columbia, 556 F. Supp. 2d 11, 16 (D.D.C. 2008). DCPS must conduct initial evaluations to determine a child's eligibility for special education services "within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment." D.C. Code § 38-2561.02(a).

School districts must ensure that "all children with disabilities residing in the State ... who are in need of special education and related services" are identified. Branham v. Gov't of the District of Columbia, 427 F.3d 7, 8 (D.C. Cir. 2005) (quoting 20 U.S.C. § 1412(a)(3)(A)).

The evaluation component of child find requires a district to conduct an initial evaluation of a child to determine whether he qualifies as a child with a disability within 60 days or within the time frame specified by the state (120 days in this case) and to determine his educational needs, including the content of his IEP. 20 USC 1414(a)(1)(C); 20 USC 1414(b)(2)(A).

Once such children are identified, a "'team' including the child's parents and select teachers, as well as a representative of the local educational agency with knowledge about the school's resources and curriculum, develops an 'individualized education program,' or 'IEP,' for the child." Branham, 427 F.3d at 8. "[T]he IEP must, at a minimum, 'provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" Id. (citing Bd. of Educ. Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)). 55 IDELR 6

In this instance although the parent testified the student was displaying behavioral difficulties while attending School B even as he turned age three and she sought assistance from physicians, there was no evidence that prior to March 2010, DCPS was put on notice of the student's behavioral difficulties such that its "Child Find" obligations relative to this student were triggered. Although DCPS has an affirmative duty to identify students who may have a disability under IDEA the fact that this student was not so located and identified by DCPS until the parent contacted DCPS does not prove that DCPS did not meet its obligations. There was credible testimony by Ms. Homonoff that DCPS has engaged at least in recent years in outreach efforts to make its "Child Find" services known. Although DCPS has been cited for ineffective "Child Find" efforts in the past these was noted for period long before this student turned age three. (See D.L., et al, v. District of Columbia 730 F. Supp. 2d 84 U.S. District Court, District of Columbia August 10, 2010)

It was precisely because the staff at School B made the parent aware of DCPS Early Stages that the parent was able to obtain assistance in the student being evaluated. After being contacted by the parent DCPS conducted evaluations within the required time frame. Thus, this Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence in this regard.

ISSUE (2): Whether DCPS denied the student a FAPE by failing to complete appropriate evaluations and evaluate the student in all areas of suspected disability? Conclusion: DCPS conducted all appropriate evaluations of the student. Petitioner did not sustain the burden of proof by a preponderance of the evidence in this regard.

DCPS is required to complete evaluations of children in 120 days under the IDEIA and DC law. 34 CFR § 300.301(c)(ii); D.C. Code § 38-26561.02 (2010) (DCPS shall evaluate within 120 days from the date the child was referred). Evaluation under the IDEIA includes assessment procedures as well as the eligibility determination. *See* 34 CFR §§ 300.15 (definition of evaluation includes § 300.306), 300.306 (procedures for eligibility meeting and decision).

The IDEA does not require LEAs to administer every test requested by a parent or educational advocate. Rather, to ensure that a child with a disability receives a FAPE, an LEA must use "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information." See 20 U.S.C. § 1414(b)(2)(A).

The parent first requested DCPS evaluated the student on March 23, 2010. DCPS attempted to evaluate the student on June 28, 2010 and completed the evaluations on July 23, 2010. DCPS conducted an eligibility determination on July 29, 2010. Although, the eligibility determination may have occurred just a few days beyond the 120 day requirement, the evidence demonstrated DCPS made efforts to conduct the evaluation timely. Dr. Mallory and Ms. Biscontini credibly testified they conducted evaluations that were appropriate and customary and there was no need to conduct any additional assessments because the student ADHD condition had already been identified. There was no evidence presented by Petitioner to rebut this testimony and no evidence that the student was harmed by the fact that eligibility determination was made just days beyond the 120 timeline. Thus, this Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of evidence on this issue.

ISSUE (3): Whether DCPS denied the student a FAPE by failing to find the student eligible at the July 29, 2010, eligibility meeting? Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student should have been found eligible at the July 29, 2010, meeting.

Pursuant to 34 C.F.R.§ 300.306 a student's eligibility is to be determined following evaluations by a group of qualified professionals and the parent. The team is to draw upon a variety of sources including assessment and input from the student's teacher. In the case at hand the DCPS staff who conducted the student's evaluations and considered input from the student's teacher at School B concluded the student was not eligible. Dr. Mallory credibly testified that the student teacher indicated the student was functioning sufficiently academically and had obtained the skills to attend kindergarten. Although there was indication the student had ADHD and behavioral difficulties it was reasonable to the DCPS team members to conclude that given the student academic functioning and the lack of a formal classroom structure and a behavior plan that a determination that the student was eligible was premature.

The parent stated at the meeting that she had identified a school for the student for the next school year which would begin just a month after the eligibility meeting. Dr. Mallory in her recommendations stated clearly that if the student's behavior difficulties persisted after he began his new school and interventions were tried the eligibility determination should be revised. Although testified that in his opinion this was sufficient data to find the student eligible on July 29, 2010, he also stated that in the alternative the student should have a least been found eligible by the ending of the first grading period in the 2010-2011 school year. The Hearing Officer concludes that the decision by the DCPS staff to not find the student eligible at the time, even over the parent's disagreement was reasonable. testified that DCPS Early Stages was to conduct a thirty, ninety and six month review of the student as a follow-up. The Hearing Officer concludes the based on the evidence presented Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

ISSUE (4): Whether DCPS denied the student a FAPE by failing to issue a prior written notice when the student was found ineligible on July 29, 2010? Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

Pursuant to 34 CFR § 300.503 DCPS is required to provide the parent a written notice of the action taken with regard to student and any action that it refuses to take. This provision also mandates the form of said notice. Although there was no evidence that DPCS provide the parent a formal Prior Written Notice when the student was found ineligible on July 29, 2010, the parent was provided the eligibility report that contained the criteria used to determine the student ineligible and provided her the notes of the eligibility meeting. There was insufficient evidence presented by the Petitioner that the failure to provide the parent a formal prior written notice 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. Lessene v. District of Columbia, IDELR 208 (D.C. Cir. 2006): A plaintiff must demonstrate "substantial harm" resulting from a procedural violation to establish a denial of FAPE.

ISSUE (5): Whether DCPS failed to timely evaluate the student when he began attending School A? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

Petitioner alleges the student should have been identified and evaluated after he began attending School A at the start of the 2010-2011 school year. Petitioner alleges when the student was enrolled at School A the parent provided School A staff the DCPS evaluations and documents that stated the student's eligibility should be reconsidered when he started the 2010-2011 school year if behavioral difficulties persisted. Petitioner alleges the student displayed behaviors early in the 2010-2011 school such that School A staff and DCPS as the local educational agency ("LEA") should have been put on notice the student should have been re-evaluated and/or reconsidered for special education eligibility.

The evidence demonstrates that after the student was found ineligible in July 2010, the DCPS clearly recommended that the student's eligibility be revisited if he continued to have difficulty with behaviors in school. testified that she was responsible for monitoring the student for the next six months. There was credible testimony from the parent and the student's

teacher at School A that soon after he began attending the school the student began to display behavioral difficulties. Although a behavior plan was attempted this plan was ineffective. The student began to display oppositional and aggressive behavior toward adults and his peers. Mr. Leighty credibly testified that by the end of the first grading period the student eligibility should have been revisited and the student should have been found eligible. This Hearing Officer is not convinced by DPCS' argument that it had another 120 days to determine the student's eligibility. DPCS has already conducted evaluations and although a behavior plan was developed it was soon determined the plan did not work. Consequently, this Hearing Officer concludes that DCPS should have convened another eligibility meeting and found the student eligible shortly after the first advisory grading period by the end of October 2010.

(6) Whether DCPS denied the student a FAPE by failing provide the student an appropriate IEP? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

Petitioner alleges the IEP developed for the student on or about December 21, 2011, was inappropriate because it contained an insufficient number of hours of specialized instruction and incomplete and inappropriate goals. Petitioner also alleges the present levels of performance in the social/emotional areas were inadequately detailed.

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also Scott v. District of Columbia, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

There was sufficient evidence based on the parent's and Mr. Leighty credible testimony that when the student was found eligible he should have been provided a full time special education program.

As the Supreme Court articulated in *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, (2009), "a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP." *Forest Grove* at 2491. expert opinion was that DCPS should have developed an IEP for The student in summer 2010. *See* 34 CFR § 300.323 (requiring an IEP to be developed within 30 days of initial eligibility). testified that in the spirit of least restrictive environment while also taking into account the seriousness of The student's social-emotional and behavioral concerns, for the first day of school the individualized education plan for The student should have had three hours of special education in a small, self-contained classroom as recommended by Dr. Trouth, and three hours in general education to try to have The student included with

nondisabled peers.

has further testified that by October 2010, DCPS should have provided an IEP for The student with full-time special education and psychological service supports. The student was not making progress on behaviors and was unavailable for learning because of ongoing and extreme social-emotional problems and behaviors. The information in the existing evaluations supported full-time special education. Instead, DCPS did not develop any program of special education to meet The student's unique needs, denying him FAPE. When there is no IEP, DCPS cannot have developed an IEP reasonably calculated to provide educational benefit. When DCPS finally developed an IEP for The student on December 21, 2010, it was inappropriate for the student's unique needs. For an IEP to provide FAPE, it must provide sufficient personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Bd. of Ed. v. Rowley*, 458 U.S. 176, 203 (1982). The IEP team knew in December 2010 that the student's disabilities were significant and severe. The team had four months of information about how extreme the student's ADHD and emotional/behavioral dysfunctions were and continued to be. Throughout those months, the student was hitting, kicking, shouting, yelling at peers, running out of the room and around the hallways.

On December 13, 2010, DCPS's own psychologist, Dr. Lorna Sanchez observed the student. Dr. Sanchez sat with the same team a few days before the IEP was developed and reviewed her report of the student, noting his *very* poor attention and concentration as well as *significant* emotional dysregulation. The student was and remains unavailable for learning or participating. Dr. Sanchez also reviewed and agreed with Dr. Olarinde's report, which told the team about *severe* deficits in the student's executive functioning and behavior, and that the student does not have the social skills to interact with peers. Dr. Olarinde recommended a highly structured small, self-contained classroom with a special education teacher skilled in behavioral techniques.

Issue (7): Whether DCPS denied the student a FAPE by failing to issue a prior written notice when DCPS refused to provide the student a full time individualized educational program ("IEP") and placement following the December 15, 2010, eligibility determination and in the IEP developed on December 21, 2010? Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

Pursuant to 34 CFR § 300.503 DCPS is required to provide the parent a written notice of the action taken with regard to student and any action that it refuses to take. This provision also mandates the form of said notice. The evidence demonstrates the parent was provided prior written notices following each of these meetings. There was insufficient evidence presented by the Petitioner that the failure to provide the parent all information that a formal prior written may contain 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. Lessene v. District of Columbia, IDELR 208 (D.C. Cir. 2006): A plaintiff must demonstrate "substantial harm" resulting from a procedural violation to establish a denial of FAPE.

ISSUE (8): Whether DCPS denied the student a FAPE by failing to ensure the presence of

legally mandated IEP team members at the MDT meetings including but not limited to the January 10, 2011, and February 11, 2011, IEP meetings. Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

The IEP team for a child must include a representative of the public agency. *See* 34 CFR § 300.321. Although no DCPS representative one at the table on January 10, 2011 or February 11, 2011 was a representative of DCPS, the LEA and public agency in this matter. There was insufficient evidence presented that the absence of DCPS representative 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. The purpose of the meetings were to review the student's behavioral plan and it was done by the School A staff. Lessene v. District of Columbia, IDELR 208 (D.C. Cir. 2006): A plaintiff must demonstrate "substantial harm" resulting from a procedural violation to establish a denial of FAPE. s

ISSUE (9): Whether DCPS denied the student a FAPE, in violation of 34 C.F.R. 300.324(a)(1), by failing to consider the concerns of the parent and needs of the student in developing the student's IEP at the December 21, 2010, meeting and at subsequent IEP meetings on January 10, 2011, and February 11, 2011? Petitioner alleges the parent's concerns regarding the severity of the student's condition(s) and/or behaviors and her opinion that the student was in need a full time IEP and placement as shared at the IEP meeting(s) were not considered by DCPS. Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

The IDEIA does not ensure that a FAPE will consist of the precise plan that the parent desires. Shaw v. District of Columbia, 238 F. Supp. 2d 127 (D.D.C. 2002)

(13) Whether DCPS denied the student a FAPE by failing to provide an appropriate educational placement.

A student's placement is to be in the least restrictive environment and ***in a school that is capable of meeting the student's special education needs***. See Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C.§ 1402 (9) (D) ("FREE APPROPRIATE PUBLIC EDUCATION- The term 'free appropriate public education' means special education and related services that include an appropriate preschool, elementary school, or secondary school education in the state involved" [and] "are provided in conformity with the individualized education program"); § 1401 (29) (D) ("The term 'special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability [. . .]."); 34 C.F.R. § 300.17 & 39; 34 C.F.R. § 300.116 (placement is to be based on student's IEP as determined by team including the parents); 34 C.F.R. § 300.327 & 300.501 (c); D.C. Mun. Regs. Tit. 5 § 3013.1-7 (LEA to ensure that child's placement is based on the IEP); and D.C. Mun. Regs. Tit. 5 § 3000.

The testimony presented on about the placement option proposed by DCPS clearly demonstrates the program at School C does not meet the student's needs. The evidence demonstrates that the students in the program and not at this students cognitive abilities and the school cannot ensure that the behavioral support services in the student's IEP are appropriate.

The hearing officer has the authority to fashion the equitable relief it deems appropriate. In the case at bar, it is the student's best interest to try every intervention and/or supplemental service possible for placing a student of average intelligence in the most restrictive educational setting. The IDEA promotes the education of students with disabilities with their non-disabled peers.

Branham ex rel Branham v. District of Columbia, 427 F. 3d 7; 44 IDELR 149 (D.C. Cir. October 25, 2005): D.C. Circuit identified a number of factors which should be considered in determining whether a prospective private placement is appropriate including: the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the private school; the placements cost the extent to which the placement represents the least restrictive educational environment as well as the conduct of the parties.

In order to implement the IEP, a team including the child's parents determines where the child should be placed. 20 U.S.C §1414(e). If no public school can meet the child's needs, DCPS is required to find an appropriate private school and cover the tuition for the child. Id. § 1412(a)(10)(B)(i); see Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 369 (1985). If a parent disagrees with the IEP or the subsequent placement, he or she is entitled to an "impartial due process hearing" conducted by the state or local educational agency. 20 U.S.C. § 1415(f)(1)(A). Any party aggrieved by the hearing decision may bring a civil action challenging the decision in federal district court. Id. § 1415(i)(2)(A).

A child's placement, as part of the special education that must be available to a child with a disability, must be able to meet the child's unique needs and be based on an appropriate IEP. *See* 20 USC § 1400(d)(1)(A); 34 CFR §§ 300.39, 300.116. The student's placement at School A was and is inappropriate to meet his needs. As testified by the student should have at least been in special education by the first day of school, in a self-contained classroom half the day. By the end of the first marking period, the student should have been in full-time special education in a self-contained classroom with staff to student ratio of 8-2. testified that full-time special education necessary for The student is 32.5 hours, because The student has demonstrated that he cannot benefit from general education peers at lunch, recess, and specials, because of his extreme behaviors and very low attention to instruction. The student needed a placement that could provide explicit social skills instruction in a group where The student could rehearse and practice social skills, provided by a skilled professional. The student also needed a placement where social skills instruction is embedded in the curriculum. Instead, The student was in general education with no special education until December.

From December until now the student has received only inclusion with pull-out behavioral support services, even after the team admitted and agreed that he needed a new placement as of February 11, 2011. Every single member of the MDT team on February 11, 2011 agreed that the student needed a full-time special education IEP and placement with a smaller classroom, more individual attention, and counseling available throughout the school day as needed and that WEDJ could not provide anything other than inclusion.

As recognized by the Court in *Blackman v. Dist. of Columbia,* irreparable harm results each day a child with disabilities does have an appropriate education tailored to his needs, and DCPS must

revise and provide appropriate IEPs and placements. 277 F. Supp. 2d 71, 80 (D.D.C. 2003) (citing *Cox v. Brown,* 498 F. Supp. 823, 828-29 (D.D.C. 1980).) DCPS had no reason for not attending the meeting on February 11, 2011 in violation of the law and thus obstructing the necessary immediate changes in The student's IEP and placement. Furthermore, now, as a remedy, DCPS proposed a new placement, which is wholly inappropriate for The student. (See section 14 below). The student's aggressive behavior, severe inattention and distractibility and inability to participate and make progress in his education have persisted and entrenched throughout the 2010-2011 school year as a result of DCPS's failures to provide services and placement that meet The student's needs.

Hearing officers have broad discretion in fashioning appropriate relief. *Sch. Comm. of Burlington v. Dep't. of Ed.*, 471 U.S. 359, 369 (U.S. 1985). Petitioner requests that in consideration of DCPS's numerous and severe violations of The student's and rights, DCPS be ordered to place, fund, and provide transportation for The student to a full time therapeutic day school that can meet his special needs. The student deserves this level of compensation and prospective assurance that he will receive a FAPE. In *Blackman v. DC*, 277 F. Supp. 2d 71(D.D.C. 2003), the DC District Court recognized that a denial of FAPE for even a "few months can make a world of difference in the life of a child." *See Blackman* at 79-80. The IDEIA's emphasis on intervening early highlights this point. *See* 34 CFR 300.34(3)(c). When an LEA fails to provide an appropriate placement for the child, placement in a private school that can meet the child's needs is an appropriate remedy. *See Diatta v. Dist. of Columbia*, 319 F. Supp.2d 57 (D.D.C. 2004). The remedy of private placement can be obtained through reimbursement when parents are financially able to place their children at the private school themselves, and it can also be obtained through prospective private placement. *See School Comm. of Burlington v. Dep't of Ed.,* 471 U.S. 359, 369 (1985), *Draper v. Atlanta Indep. Sch. Sys*, 518 F.3d 1275, 1286 (11th Cir. 2008). Though very much wants The student to be at already, she is unable to afford it. Through this Due Process Hearing, has satisfied her burden to prove denial of FAPE and she and The student are entitled to prospective placement relief.

Once a denial of FAPE has been established, a parent's only burden is to prove that the selected private placement is appropriate for the child. *See Burlington,* 471 U.S. at 369. The DC District Court further clarified in *Branham v. Dist. of Columbia*, 427 F. 3d 7 (D.D.C., 2005) that a parent seeking placement at a private school holds the burden of proving that the private placement is tailored to the child's specific needs. *See Branham* at *12*. Petitioner has proved beyond the preponderance of the evidence that The student has been harmed by DCPS's failures to properly locate, identify, and evaluate him and find him eligible, create appropriate IEPs, and place him appropriately and timely. The student has made little to no progress this year on his behavior, social skills, and his academic progress has slowed. The student's average IQ means that he should be making average progress.

There was sufficient evidence presented that is tailored to provide The student with what he needs to make educational progress. The student needs a self-contained classroom with teacher to student ratio of 7-2, full-time special education of 32.5 hours per week, a setting with staff trained and aware of psychological underpinnings of behavior to intervene whenever necessary, explicit social skills training embedded in the classroom and in pull-out

sessions, a quiet room, the instruction and implementation of sensory strategies to teach The student to self-regulate, and a small school to limit overstimulation. In dicta, the court in *Branham* explained that to determine the appropriateness of a private placement for a child, other courts found relevant factors such as nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. 427 F. 3d at 12. Petitioner has proved that The student's social-emotional and behavioral disabilities are severe, that he needs 32.5 hours of special education because he is not ready or able to benefit from a less restrictive environment, that offers the specialized services that will help The student make educational progress, and the cost is has the very low student to teacher ratio, psychological services, social skills curriculum embedded in the class and as additional related service, ability to reward/consequence The student's behavior at very short intervals, and the small school scope The student needs to reduce distractions and begin to learn to self-regulate. has the arrangements for lunch, specials, and recess in small, heavily staffed settings that are necessary to keep The student and other students safe from his impulsive and aggressive behavior. has experienced staff in working with young children with behavioral needs. The classroom at will provide The student with the active learning methods, consistent training in self-regulation and self-awareness necessary for him to make progress. When necessary, is equipped to remove The student to a small, sensorily-informed de-escalation room where The student can re-establish himself and learn to use self-calming and self-regulatory strategies. has the staff development, in bi-weekly behavior management training and bi-weekly student teaming meetings, to ensure that The student's program is continually tailored to meet his needs.

Compensatory education is an equitable remedy for the denial of a FAPE to a child with a learning disability. Reid, 401 F.3d at 523. 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." Id. at 522. (internal quotations omitted). Designing a compensatory education remedy requires "a fact-specific exercise of discretion by either the district court or a hearing officer." Reid, 401 F.3d at 524; see also Henry v. District of Columbia, _____ F. Supp. 2d _____, 2010 WL 4568841 (D.D.C. Nov. 12, 2010).

In either case, "the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Reid, 401 F.3d at 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526. DCPS may be required to "offer proof that the placement compensated for prior FAPE denials in addition to providing some benefit going forward." Id. at 525.

The Hearing Officer concludes that the as compensatory education for the denials of FAPE there was credible testimony by that the student would benefit from the tutoring service of two hours per week for one year. This Hearing Officer was not convinced that the other services

recommended were appropriate because the estimate time of denial of services does not meet that actual missed services determined herein. In addition there was no testimony has to the cost of any of the recommended services. Consequently this Hearing Officer concludes the student should be provided torturing services and a DCPS should conduct evaluations to determine the student's progress and the effectiveness of the services and the student's education program at the end of the ESY period of the 2010-2011 school year.

ORDER:

1. DCPS shall within fifteen (15) calendar days of date of this Order place and fund the student's attendance at for the remainder of the 2010-2011 school year and provide transportation services.

2. Within thirty calendar days of the student's attendance at DCPS shall convene an IEP meeting to review and revise the student's IEP to provide for fulltime special education services and to review the student's progress at

3. DCPS shall fund the following services as compensatory education for the denials of FAPE that have been found: two hours per week of academic tutoring at by tutoring for one calendar year.

4. DCPS shall conduct an educational and behavioral evaluation at the end of the 2010-2011 school year including ESY to determine the student academic and behavior progress and to determine the effectiveness of the compensatory education services provided.

APPEAL PROCESS:

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. §1415(i)(2).

Coles B. Ruff, Esq.
Hearing Officer
Date: April 21, 2011