

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Parent, on behalf of the Student,

Petitioner,

v.

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

Respondent.

Date Issued: May 25, 2011

Hearing Officer: Ramona M. Justice

Case Number:

OSSE
STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

I. JURISDICTION

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

II. PROCEDURAL POSTURE

On March 31, 2011, the parent, through her Attorney, filed an "Administrative Due Process Complaint Notice", with the District of Columbia, Office of the State Superintendent of Education ("OSSE"), Student Hearing Office. On April 7, 2011 the Respondent filed a response to the student's due process complaint notice.

On April 3, 2011, the Student Hearing Office assigned the due process complaint to this Hearing Officer. On April 13, 2011, the Hearing Officer issued to the parties a "Notice of Prehearing Conference", scheduling the prehearing conference for May 24, 2011 at 10:00 a.m.; and an Order requiring the parties to notify the Hearing Officer of the date, time, and outcome of the resolution meeting.

The Respondent must convene a resolution meeting within fifteen (15) calendar days from the date of the complaint, which expired in this matter on April 15, 2011. The thirty (30) day resolution period expired on April 18, 2011.

The resolution meeting convened on April 18, 2011, and the parties were unable to resolve the issues in the complaint. The 45 day timeline for convening a hearing and issuing a decision began on April 19, 2011, the day after the resolution meeting; and expires on June 2, 2011.

The prehearing conference was rescheduled and held on April 26, 2011 at 12:00 p.m., to accommodate the schedules of the parties. On this date, the Hearing Officer issued a prehearing order summarizing matters discussed during the prehearing conference, issues to be decided by the Hearing Officer, and confirming the due process hearing for May 24, 2011, at 9:00 a.m...

The due process hearing was rescheduled and held on May 18, 2011, at 10:15 a.m., at 810 First Street, N.E., 2nd Floor, Washington, D.C... The hearing was closed to the public, pursuant to the Petitioner's request. Each party was represented by an Attorney; and each Attorney provided opening statements. There were no preliminary matters for the Hearing Officer to address, prior to proceeding with a hearing on the merits of the issues in the complaint.

The Respondent offered into evidence Respondent's exhibits 1-3; and the Petitioner offered into evidence Petitioner's exhibits 1-25. Petitioner withdrew from the disclosures Petitioner's Exhibits 23 and 24. Receiving no objections to the disclosures submitted, the Hearing Officer admitted into the record as evidence Petitioner's exhibits 1-22 and 25, and Respondent's exhibits 1-3.

Petitioner's witnesses included: the student's grandmother, serving as the student's legal guardian and Petitioner; the student's Educational Advocate; a Psychologist; and the Admissions Director, from _____ The Respondent's witnesses included: the Respondent's Psychologist, and the Special Education Coordinator (SEC), from the student's school.

The due process hearing concluded with the Petitioner and Respondent providing closing statements; and requesting that the Hearing Officer find in each party's favor on the issues in the complaint.

III. STATEMENT OF THE CASE

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Statement of the Case is as follows:

1. The student is _____ years of age, and a _____ grade student at a District of Columbia public elementary school.¹ The student attended began attending the school during the 2009/10 school year.²
2. The student is disabled and eligible to receive special education services under the IDEA.³ The student's disability classification is Multiple Disabilities, including Emotional Disturbance (ED) and Other Health Impairment, specifically identified as Attention Deficit Hyperactivity Disorder (ADHD).⁴

¹ Testimony of Petitioner.

² Id.

³ Petitioner's Exhibit 14.

⁴ Petitioner's Exhibits 11-1 and 4-9.

3. During the 2009/10 and 2010/11 school years the student exhibited problematic behavior, impacting the student's learning and educational performance; and the learning of other students.⁵ The student received numerous disciplinary referrals and was suspended, due to conduct; and the student's behaviors at school have become increasingly worse.⁶

The student's problematic behavior includes: poor impulse control, inability to manage behaviors, difficulty remaining focused, inability to complete assignments, and distractibility, all of which impact the student's availability for learning.⁷

On **October 8, 2009**, a Student Support Team (SST) convened to determine whether the student should be identified as a student suspected of having a disability; and appropriate classroom and behavioral interventions.⁸ Academic concerns included: disorganized, slow rate of work, incomplete assignments, failure to follow directions, low rate of retention, poor writing, reading, math skills, gives up easily, does not work well independently, and does not work well with others.⁹ Behavioral concerns included: easily distracted, hostile when criticized, attention seeking behavior, cheats and lies.¹⁰

The SST also noted that the student had little recognition of letters or numbers; was not aware of many letter sounds; was unable to focus in large and small groups; was unable to retain skills taught; was very disruptive in class; and fought with classmates almost daily.¹¹

The student's teachers reported utilizing the following classroom interventions: modified curriculum/demands, small group instruction, daily guided reading, daily behavior charts, acknowledging positive behavior, assigned seating, time-outs, and parent conferences.¹² The SST noted that although the student's curriculum was modified, the student's teachers found it necessary to utilize prekindergarten and kindergarten work; in small group instruction, the student was unable to focus; during daily guided reading, the student was unable to focus and retain information; and the Petitioner was contacted a few times.¹³

The SST determined that the student was struggling academically and behaviorally, in the classroom, on school grounds, in the cafeteria, and in the hallway; and recommended continued use of the classroom and behavioral interventions, supports, and modifications, to address the student's academic deficits and behavior.¹⁴

4. On **October 23, 2010**, an independent "**Comprehensive Psychological Evaluation**" was completed to assess the student's cognitive, academic, and social emotional functioning; and assist in the student's educational planning.¹⁵

⁵ Testimony of Petitioner, and Petitioner's Exhibits 8, 9, 13, 14, 15, 17, 18, 20, and Respondent's Exhibits 2 and 3.

⁶ Petitioner's Exhibit 8.

⁷ Petitioner's Exhibit 17-4.

⁸ Petitioner's Exhibit 20-1.

⁹ Petitioner's Exhibit 20-2.

¹⁰ Id.

¹¹ Petitioner's Exhibit 20-1.

¹² Petitioner's Exhibit 20-3.

¹³ Petitioner's Exhibit 20-3.

¹⁴ Id.

¹⁵ Petitioner's Exhibit 18-1.

At the time of the evaluation the student was 6 years, 11 months, and in the 2nd grade, performing at the grade equivalency of 1.09 in broad reading, 2.0 in broad mathematics, 1.3 in broad written language, 1.1 in brief reading, 2.0 in brief mathematics, 2.2 in math calculation skills, 1.4 in brief writing, and 1.3 in written expression.¹⁶ The student performed at the grade equivalency of 1.5 in academic skills, K.3 in academic fluency, 1.3 in academic applications; 1.3 in letter-word identification, <K.0 in reading fluency, 2.3 in calculation, 2.0 in math fluency, 1.3 in spelling, <K.2 in writing fluency, K.9 in passage comprehension, and 1.7 in applied problems.¹⁷

The evaluator determined that the student satisfies the eligibility criteria as a student with an Emotional Disturbance and Other Health Impairment, specifically identified as ADHD.¹⁸

Recommendations include: a Psychiatric Evaluation; Speech/Language Evaluation; Occupational Therapy Evaluation; a highly structured, more restrictive educational environment; full-time self contained setting that can provide the student with the emotional, behavioral, and academic supports the student requires; and a therapeutic placement is strongly recommended given the magnitude of the student's current difficulties and failure to respond to the school's behavioral management system.¹⁹

Recommendations also include: academic instruction appropriate for the student's current skill level (i.e. reading instruction with late kindergarten to early 1st graders); academic work aimed at increasing the student's basic decoding skills; specialized instruction aimed at improving the student's reading comprehension skills, instruction strategies to assist the student in organization of information and recognition of the main idea of the material; modified assignments, extended time to complete assignments and tests; school-based counseling (60 minutes/week); FBA and BIP; modified listening environment, preferential seating, a quiet, structured study area, and more time to respond; a quiet place free of distractions in which to complete homework, and study in small increments with support.²⁰

5. On **October 26, 2010**, an independent "**Psycho-Social History Evaluation Report**" was completed, due to concerns regarding the student's social/emotional and behavioral functioning.²¹ The student was diagnosed with Disruptive Behavior Disorder, Attention Deficit Hyperactivity Disorder (ADHD); and a rule out of a Reading Disorder, Disorder of Written Expression, and Mixed Receptive-Expressive Language Disorder.²²

The evaluator reports that the student's behaviors at school had become increasingly worse and the student was unable to manage her behaviors; there was some concern regarding the student's poor impulse control, inability to manage behaviors, difficulty remaining focused, inability to complete assignments, and distractibility; and the impact of the student's behaviors on the student's academic success.²³

¹⁶ Petitioner's Exhibit 18-16.

¹⁷ Id.

¹⁸ Petitioner's Exhibit 18-11.

¹⁹ Petitioner's Exhibit 18-12.

²⁰ Id.

²¹ Petitioner's Exhibit 17-1.

²² Petitioner's Exhibit 18-11.

²³ Petitioner's Exhibit 17-4.

The evaluator concluded that the student would benefit from behavioral supports and wrap around services that would provide in-home/community counseling, mentoring, and tutoring to address the student's academic and behavioral issues.²⁴

6. On **December 6, 2010**, the Respondent's Psychologist completed a "Review of Independent Educational Evaluation".²⁵ The Respondent's Psychologist determined that the student presents with significant symptoms of inattention, impulsivity, and hyperactivity; is diagnosed with Attention Deficit Hyperactivity Disorder (ADHD); and meets the eligibility criteria under Other Health Impaired, and that the ADHD adversely affects the student's educational performance.²⁶

The Respondent's Psychologist also determined that the student should not be considered eligible for services under the disability category of Emotional Disturbance; because the student's disruptive behaviors may be attributed to the student's untreated ADHD.²⁷

The Respondent's Psychologist recommended referral of the student to appropriate medical personnel to determine the need for medical treatment of the ADHD; school based counseling; frequent redirection to task; having tasks broken into smaller increments; modeling and reminders of appropriate interactions; continue the Wilson Reading program; spend more time practicing reading at home; and individual and family psychological services.²⁸

7. On **December 7, 2010**, the Respondent's Psychologist reviewed the independent Comprehensive Psychological Evaluation completed on October 23, 2010.²⁹ The Respondent's Psychologist agreed with the data in the independent evaluation, however, disagreed with the evaluation conclusions opining that the conclusions in the evaluation were not supported by the data provided because the evaluation failed to include a classroom observation of the student, and updated teacher reports.³⁰
8. On **December 14, 2010**, pursuant to an October 27, 2010 Settlement Agreement, the Respondent convened an eligibility meeting to review independent evaluations, and determine the student's eligibility for special education services.³¹ The Respondent reported that the student is making progress behaviorally at the student's current school, and that the school would like to offer the student the least restrictive environment; and provide supports to address the student's needs.³²

The Respondent determined the student eligible for special education services.³³ The parties disagreed regarding the student's eligibility for special education services under the disability classification of emotionally disturbed.³⁴ The team agreed to convene an IEP team meeting on January 12, 2011, to develop an IEP for the student.³⁵

²⁴ Petitioner's Exhibit 17-4.

²⁵ Respondent's Exhibit 3-2.

²⁶ Petitioner's Exhibit 3-7.

²⁷ Id.

²⁸ Petitioner's Exhibit 3-8.

²⁹ Respondent's Exhibit 3.

³⁰ Id.

³¹ Petitioner's Exhibit 14.

³² Petitioner's Exhibit 14-2.

³³ Petitioner's Exhibit 14-2.

³⁴ Id.

³⁵ Id.

9. On **December 21, 2010**, an independent **“Psychiatric Evaluation”** was completed to assist in clarifying the student’s psychiatric difficulties and determine the appropriateness of psychopharmacological intervention.³⁶ The student was diagnosed with Disruptive Behavior Disorder and Attention Deficit Hyperactivity Disorder (ADHD).³⁷ Recommendations include: case management services, family therapy, community support, and psychotropic medication.³⁸
10. On **January 13, 2011**, the student was accepted as a student at the
11. On **February 11, 2011**, the Respondent convened an IEP team meeting without the parent, and developed an IEP for the student, prescribing 2 hours of specialized instruction daily, outside the general education setting; and 30 minutes of behavioral support services, weekly, in the general education setting.⁴⁰
12. On **February 15, 2011**, the Respondent issued to the Petitioner a “Prior Written Notice-Identification” informing the Petitioner that the Respondent proposed to identify the student as a student with a disability under the IDEA, under the disability classification of Multiple Disabilities, including, Other Health Impairment, specifically identified as Attention Deficit Hyperactivity Disorder (ADHD) and Emotional Disturbance (ED).⁴¹
13. On **February 22, 2011**, the Respondent’s Psychologist completed a “Review of Independent Educational Evaluation Psychiatric”.⁴² The Respondent’s Psychologist determined that the student presents with significant symptoms of inattention, impulsivity, and hyperactivity; satisfies the eligibility criteria under Other Health Impairment, specifically identified as ADHD; and has limited alertness/heightened alertness to the education process due to the ADHD, which adversely affects the student’s educational performance.

The Respondent’s Psychologist acknowledged the independent diagnosis of Disruptive Behavior Disorder, and recommended a determination of whether the student satisfies the eligibility criteria as a student with an emotional disturbance.

14. On **March 4, 2011**, the Respondent convened an IEP team meeting to develop an IEP for the student.⁴³ The Respondent developed an IEP for the student prescribing ten (10) hours of specialized instruction weekly, in reading, written expression, and mathematics; and 30 minutes of behavioral support services weekly.⁴⁴ The Petitioner, through the Education Advocate, disagreed with the level of specialized instruction services; general educational setting; and placement.⁴⁵

³⁶ Petitioner’s Exhibit 13-1.

³⁷ Petitioner’s Exhibit 13-4.

³⁸ Id.

³⁹ Petitioner’s Exhibit 2.

⁴⁰ Petitioner’s Exhibit 12-1 and 12-7.

⁴¹ Petitioner’s Exhibit 11-1.

⁴² Petitioner’s Exhibit 10.

⁴³ Petitioner’s Exhibits 5-7.

⁴⁴ Id.

⁴⁵ Petitioner’s exhibit 5-3

The Education Advocate requested a full-time special education program, outside the general education setting, in a therapeutic environment due to the student's numerous disciplinary referrals and reports from the student's general and special education teachers that the student is removed from class more than two (2) hours each day due to the student's inability to remain focused and on task.⁴⁶

15. On **March 4, 2011**, the Respondent's Psychologist completed an "**Evaluation Summary Report**", based on a review of the December 7, 2010 Comprehensive Psychologist Evaluation.⁴⁷

In *mathematics*, problem solving and telling time are areas of concern; the student is rated as below basic with expected skills at the beginning level; and the student's teacher reports that the student is making small gains however must work on managing behavior to make academic gains.⁴⁸ The student's mathematics skill level is comparable to that of an average 2nd grade student.⁴⁹

In *reading*, fluency, comprehension, blending and decoding are areas of concern; and the cognitive evaluation reveals that the student's non-verbal reasoning skills, fall into the low average range and are relative weaknesses for the student.⁵⁰

In *written expression*, sentence structure, punctuation, writing fluency, and overall written language are areas of concern.⁵¹ The Comprehensive Psychological Evaluation reveals that the student was unable to complete any items on the writing fluency and the student's overall written language scores fell in the low range.⁵²

Socially/emotionally, hyperactivity, attention, and conduct, difficulty during less structured activities, impulsivity, bullying, aggression, and difficulty following direction and accepting redirection are areas of concern for the student.⁵³ The student also requires proximity to adults and lessons tailored to her needs.⁵⁴

16. On **March 11, 2011**, a Hearing Officers' Decision was issued dismissing Petitioner's claim that the Respondent denied the student a FAPE, by failing to evaluate the student to determine the student's eligibility subsequent to the student's referral to the SST in October, 2009; and the Respondent stipulated on the record to fund an independent Speech/Language Evaluation and classify the student as a student with Other Health Impairment and Emotional Disturbance.⁵⁵

⁴⁶ Petitioner's exhibit 5-3.

⁴⁷ Petitioner's Exhibit 7-1.

⁴⁸ Id.

⁴⁹ Petitioner's Exhibit 7-3.

⁵⁰ Petitioner's Exhibit 7-3.

⁵¹ Petitioner's Exhibit 7-5.

⁵² Petitioner's Exhibit 7-5 and 7-6.

⁵³ Petitioner's Exhibit 7-7.

⁵⁴ Id.

⁵⁵ Petitioner's Exhibit 1-9 and 1-10.

17. On **March 23, 2011**, an independent "**Speech-Language Evaluation**" was completed.⁵⁶ Formal testing reveals that the student presents with overall average language skills with slightly below average to low vocabulary skills; and had difficulty with word class subtests, with scores falling in the below average range.⁵⁷

The evaluator opined that the student's vocabulary skills would continue to grow in the student's academic setting; and the student's knowledge and use of words for expressing meaning will increase, therefore, speech language services were not recommended at that time.⁵⁸

18. On **March 31, 2011**, the Petitioner, through her Attorney, filed this due process complaint challenging the appropriateness of the student's March 4, 2011 IEP; and placement during the 2010/11 school year.

IV. ISSUES

The issues before the Hearing Officer are as follows:

- (1) Whether the District of Columbia Public Schools failed to develop an appropriate Individualized Education Program (IEP) for the student on March 4, 2011, because the student requires a full-time special education program, outside the general education setting; and the **level of specialized instruction services** prescribed in the student's IEP, is insufficient to enable the student to access the general education curriculum and receive educational benefit; in violation of the IDEA, at 34 C.F.R. §§300.320, 300.324 (a)(1)(iv), and 300.513?
- (2) Whether the District of Columbia Public Schools failed to provide the student an appropriate placement during the 2010/11 school year, because the **location of services** identified in the student's March 4, 2011 IEP, is unable to provide the student the full-time special education program, outside the general education setting, which the student requires to access the general education curriculum and receive educational benefit; in violation of the IDEA, at 34 C.F.R. §§300.114(a)(2)(ii), 300.116 (a)(2) (b)(2); and 300.513?

V. RELIEF REQUESTED⁵⁹

The Petitioner requests that the Hearing Officer issue an Order finding that the Respondent denied the student a free appropriate public education (FAPE), because it failed to provide the student an appropriate IEP and placement during the 2010/11 school year.

The Petitioner requests that the Hearing Officer issue a decision finding that the nature and severity of the student's emotional disability is such that the student requires a full-time special education program, outside the general education setting.

⁵⁶ Petitioner's Exhibit 3-1.

⁵⁷ Petitioner's Exhibit 3-6.

⁵⁸ Petitioner's Exhibit 3-6 and 3-7.

⁵⁹ During discussion of preliminary matters, the Petitioner waived its right to request compensatory education services, representing that placement of the student in a full-time special education program, outside the general education setting, compensates the student for the denial of a FAPE, occurring during the 2010/11 school year.

The Petitioner requests that the Hearing Officer issue an order requiring the Respondent to fund the student's placement in a full-time special education program, outside the general education setting, in a therapeutic environment specifically designed for students with an emotional disability; and transportation.

VI. CREDIBILITY DETERMINATIONS

Credibility of testimony refers to the reliability of testimony, based on competence of the witness and likelihood that it is true. Credibility of testimony is usually supported by other substantiating evidence, but credibility is a determination to be made by the trier of fact. In this instance the trier of fact is the Hearing Officer. The Hearing Officer finds that the testimony of all witnesses at the hearing was credible.

VII. FINDINGS OF FACT

After considering all the evidence, as well as the pleadings, witness testimony, and the administrative record, this Hearing Officer's Findings of Fact are as follows:

1. Appropriateness of Student's IEP (Level of Services)

As early as October, 2009, prior to the eligibility determination, the Respondent's Student Support Team (SST) identified the student as requiring additional academic and behavioral support; and instituted various classroom and behavioral interventions, supports, and modifications, including however not limited to: student/teacher check-in and check-out sheets, student discipline, referring the student to the 8th grade special education class for time outs, contacting the Petitioner to address the student's behavior, reading intervention, and 30 minutes a week of behavioral support services, weekly.⁶⁰

Second, the student's 2nd grade teacher reports that the 2nd grade has been a difficult transition for the student; the student struggled to follow the classroom rules and expectations; the student was frequently in conflict with other students.⁶¹

During the *first* advisory, the student tested below basic; struggled to decode words; and although the student had shown some growth since being introduced to the Wilson Reading System, the student required frequent prompting to use this strategy; the student was easily frustrated with her academic deficits; and showed small gains during this advisory.⁶² The student enjoys math and had shown small gains on both units this advisory, however; it was necessary that the student continue to work on managing her behavior to make academic gains this year.⁶³

During, the *second* advisory, the student's teacher reports that the student struggled due to behavior concerns and inattentiveness, the student had difficulty remaining focused during guided reading, despite working in a small group; the student is part of a guided writing group and small math group to address arts and math, however the student made little academic progress and is below basic in language arts and math.⁶⁴

⁶⁰ Petitioner's Exhibit 20.

⁶¹ Petitioner's Exhibit 9-3.

⁶² Id.

⁶³ Petitioner's Exhibit 9-3.

⁶⁴ Id.

During the *third* advisory, the student's teacher reported that the student continued to struggle in the 2nd grade despite numerous interventions, has difficulty paying attention and requires frequent redirection, has difficulty completing assignments independently and craves teacher attention and support.⁶⁵

The student has difficulty identifying complete sentences; failed to master any of that advisory's math units; and continued to struggle with place value and number sense concepts.⁶⁶ Reports of the student's performance during the 4th Advisory of this school year are not in the record.

Third, a Comprehensive Psychological Evaluation was completed on October 23, 2010. The evaluator states that the student requires a highly structured, more restrictive educational environment. The evaluator recommends placement in a full-time, self contained setting that can provide the student the emotional, behavioral, and academic supports the student requires. During the hearing the evaluator testified that the student requires a full-time special education program, outside the general education setting, due to concerns regarding the student's safety and the safety of peers.⁶⁷

The October 26, 2010 independent Psycho-Social History Evaluation Report recommends wrap around services to address the student's academic needs; suggesting that the student requires services throughout each school day.⁶⁸

Fourth, according to the October 23, 2010 Woodcock Johnson III Academic Tests of Achievement scores, the student's overall level of academic achievement is low; the student's ability to apply academic skills is within the low range, and the student's fluency with academic tasks is within the very low range.⁶⁹ When compared to others at the student's grade level, the student's standard scores are average in broad math, math calculation skills, and brief mathematics; the student's standard scores are low (compared to grade peers) in broad reading, brief reading, broad written language, written expression, and brief writing.⁷⁰

The evaluator reported that the student's functioning in math is on grade level and the student's reading and writing skills are one year delayed, which the evaluator opines is due to the student's behavior and poor attention span, resulting in the student's unavailability for academic instruction, rather than any type of specific learning disability.⁷¹ Nonetheless, the evaluator recommends a rule out of a Reading Disorder, Disorder of Written Expression, and Mixed Receptive-Expressive Language Disorder.⁷²

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Petitioner's Exhibit 18-12, Testimony of independent Psychologist.

⁶⁸ Petitioner's Exhibit 17-4.

⁶⁹ Petitioner's Exhibit 18-12.

⁷⁰ Id.

⁷¹ Id.

⁷² Petitioner's Exhibit 18-12.

Fifth, during the 2009/10 and 2010/11 school years, as a behavioral intervention, the student is removed from the student's general education class and placed in an 8th grade special education class or a sibling's classroom for time out periods, due to problematic behavior. This occurs approximately 2-3 times a week, for 2-3 hours each.⁷³ Frequent absences from the classroom due to behavior, rendered the student unavailable for learning and impacted the student's educational performance.

The student received group behavioral support services, classroom interventions, modifications, supports, and reading intervention.⁷⁴ Interventions also included the school contacting the Petitioner 2-3 times a week to retrieve the student from school or to address the student's behavior.⁷⁵ The classroom and behavioral interventions proved unsuccessful.⁷⁶

Since development of the March 4, 2011 IEP, the student receives specialized instruction in reading, mathematics, and written expression; and behavioral support services. There are fewer discipline referrals since development of the IEP, however; the school continues to contact the Petitioner 2-3 times a week to address the student's behavior; and academically, the student continues to struggle in the 2nd grade, despite numerous interventions, has difficulty paying attention, limited attention span, and difficulty with fluency and comprehension; and requires frequent redirection.⁷⁷

Finally, a review of the student's 2009/10, and 2010/11 report cards, teacher reports, and evaluations reflect that during the last two (2) school years, despite numerous interventions, modifications, and supports, the student remains below basic; continues to struggle academically and behaviorally; and has shown minimum to no progress.⁷⁸

The Hearing Officer finds that the District of Columbia Public Schools failed to develop an appropriate Individualized Education Program for the student on March 4, 2011, because the nature and extent of the student's disabilities (i.e. ED, ADHD, and academic deficits) are such that ten (10) hours of specialized instruction services per week as prescribed in the student's March 4, 2011 IEP is insufficient, to provide the student access to the general education curriculum, and educational benefit.

The Hearing Officer also finds that the evidence is insufficient for a finding that the nature and severity of the student's emotional disability is such that the student requires a full-time special education program, outside the general education setting.

2. Appropriate Placement (Location of Services)

The October 23, 2010 independent Comprehensive Psychological Evaluation provides that the student's placement at Wheatley Educational Campus is inappropriate because the student requires a highly structured, more restrictive educational environment; and placement in a full-time, self-contained setting that can provide the student the emotional, behavioral, and academic support the student clearly requires.⁷⁹

⁷³ Testimony of parent and SEC.

⁷⁴ Testimony of SEC.

⁷⁵ Testimony of Petitioner.

⁷⁶ Testimony of Petitioner, and Exhibit 18-13.

⁷⁷ Petitioner's Exhibit 9-3, 9-10, 10-7,

⁷⁸ Petitioner's Exhibits 8, 9, 17-4, and Testimony of Petitioner.

⁷⁹ Petitioner's Exhibit 18-13.

The evaluator “strongly recommends” a therapeutic environment for the student, given the magnitude of the student’s current difficulties; and failure to respond to the school’s behavior interventions.⁸⁰

On December 14, 2010, the Respondent convened an eligibility determination meeting to review the student’s independent evaluations, determine the student’s eligibility, and discuss placement.⁸¹ According to the Respondent’s meeting notes, during the meeting the Petitioner informed Respondent that it “feels like things are turning around, her behavior and homework has improved recently. Recently noticed a change in her, she’s calmer. She would still like to continue with the process”.⁸²

Although the Petitioner informed the Respondent at the December 14, 2011 eligibility meeting that the student’s homework and behavior improved, and it was her desire to proceed with the eligibility process, on January 13, 2011, approximately one month later; and prior to the March 4, 2011 placement meeting and determination, the Petitioner sought and secured the student’s acceptance at a private school.⁸³

There is no evidence that prior to the March 4, 2011 placement meeting and determination, the Petitioner expressed concern regarding the student’s current placement, to the Respondent; provided the Respondent the opportunity to address any concerns regarding the student’s-

placement; considered other District of Columbia Public Schools, as alternative placements for the student; or requested that the Respondent provide the student additional supports, interventions, and modifications to support the student’s academic and behavioral needs, at the student’s current placement.

Instead, on March 31, 2011, approximately 27 days after the March 4, 2011 placement meeting, the Petitioner filed the due process complaint alleging that the student’s current placement is inappropriate, and requesting the student’s placement at the private school secured by the Petitioner on January 13, 2011.

Second, the October 23, 2010 independent Comprehensive Psychological Evaluation recommends a Functional Behavioral Assessment and Behavioral Intervention Plan; an Occupational Therapy Evaluation; and additional evaluations to rule out a Reading Disorder, Disorder of Written Expression, and Mixed Receptive-Expressive Language Disorder.⁸⁴

The Hearing Officer finds that the evidence is insufficient to determine whether the nature and severity of the student’s emotional disability is such that the student requires a full-time special education program, outside the general education setting; the appropriateness of the student’s current placement; the appropriateness of the placement proposed by Petitioner; or the educational needs of the student, for the following reasons:

⁸⁰ Petitioner’s Exhibit 18-13.

⁸¹ Petitioner’s Exhibit 14 and 15.

⁸² Petitioner’s Exhibit 14-2.

⁸³ Petitioner’s Exhibits 1 and 2.

⁸⁴ Petitioner’s Exhibit 18-11 and 18-13.

- The Respondent has not fully explored available resources; or classroom and behavioral interventions, supports, and modifications, to address the student's academic and behavioral needs, at the student's current placement.
- The independent Comprehensive Psychological Evaluation recommends evaluations which have not been completed, however, must be completed to determine the educational needs of the student and whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

Once the evaluations are completed, an IEP team must review the evaluations; and review and revise the student's March 4, 2011 IEP to address any lack of expected progress toward the annual goals in the student's IEP; results of the evaluations; information regarding the child provided to or by the parents, the child's anticipated needs; and other matters.

- The student's placement is based on the student's IEP and the Hearing Officer has determined that the student's March 4, 2011 IEP is inappropriate, because the level of services in the IEP is insufficient to provide the student access to the general education curriculum and educational benefit; in addition to the need for additional evaluations.
- The Respondent must develop an IEP for the student that is reasonably calculated to enable the student to receive educational benefit; and appropriately designed and implemented, emphasizing the services necessary to provide the student 'meaningful' benefit; prior to any determination regarding the student's placement.

For these reasons, the Hearing Officer finds that absent comprehensive evaluations and development of an appropriate IEP for this student, any decision regarding the student's placement is premature.

IIX. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. The burden of proof is properly placed on the Petitioner, the party seeking relief in this matter.⁸⁵ Petitioner must prove the allegations in the due process complaint, by a preponderance of the evidence.⁸⁶

⁸⁵ *Shaffer v. Weast*, 546 U.S. 49, 56-057 (2005) and 5 D.C.M.R. §3030.3.

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

2. The Individuals with Disabilities Education Act (“IDEA”)⁸⁷ is the federal statute governing the education of students with disabilities.⁸⁸ The IDEA requires that all children with disabilities have available to them a free appropriate public education (“FAPE”), that emphasizes special education and related services, specifically designed to meet their unique needs; and prepare them for further education, employment, and independent living. See, 20 U.S.C. §1400(d) (1)(A).

Specially designed instruction means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child’s disability; and
 - (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.⁸⁹
3. An “appropriate’ public education does not mean the absolutely best or potentially maximizing education for the individual child. Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1314 (1987). Rather, the public agency only has to provide the student a “basic floor of opportunity”; and according to Rowley, in providing the student the basic floor of opportunity, the educational benefit received by the student must be ‘meaningful’ and cannot be trivial.⁹⁰

The IDEA defines a FAPE as special education and related services provided at public expense, under public supervision and direction, and without charge; meet the school standards of the State educational agency; includes an appropriate preschool, elementary school, or secondary school education in the State involved.

The IDEA also provides that the special education and related services must be provided in conformity with an Individualized Education Program (IEP) that meets the requirements of §§300.321 through 300.324.⁹¹

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

4. The U.S. Supreme Court has held that the FAPE required by the IDEA consists of an educational program specifically tailored to address the unique needs of the student by means of an ‘individualized education program’ (IEP).⁹²

According to Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley, 458 U.S. 176 (1982), in order for FAPE to be offered a student, the school district must show it complied with the statutory elements of an IEP, and the goals and objectives in the IEP are reasonable, realistic and attainable.

⁸⁷ The IDEA is reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) Public Law 108-446 and 20 U.S.C. §1400 et seq.

⁸⁸ The Federal regulations promulgated under the IDEA, are codified at 34 C.F.R. Part 300.

⁸⁹ IDEA, 34 C.F.R. §300.39 (b)(3)(i)(ii).

⁹⁰ Rowley v. Board of Education, 458 U.S. 176, at 177 206-207 (1982).

⁹¹ IDEA, 34 C.F.R. §300.17(d).

⁹² Id.

The FAPE requirement is satisfied when the State provided personalized instruction that is reasonably calculated to enable the child to benefit educationally; and is likely to produce progression, not regression.⁹³

5. When parents challenge the appropriateness of a program or placement offered to their disabled child by a school district under the IDEA, a Hearing Officers must undertake the following two-fold inquiry: 1) procedural compliance; and 2) substantive compliance.

(1) Procedural FAPE (Procedural Compliance)

First, the Hearing Officer must determine whether the State complied with the *procedural requirements* of the IDEIA, in creating and implementing the student's IEP, or rendering the placement decision. However, the 2004 amendments to IDEA, at Section 615(f) (ii) specifically limit the jurisdiction of administrative hearing officers to make findings that a child failed to receive a FAPE due to procedural violations, unless it can be determined that the procedural violations:

- (I) impeded the child's right to a free and appropriate public education;
- (II) significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or
- (III) caused a deprivation of educational benefit to the student.

(2) Substantive FAPE (Conferral of Educational Benefit)

Second, once the Hearing Officer addresses the first criteria, it must determine whether the State complied with the *substantive requirements* of the IDEA, by developing an IEP for the student that is *reasonably calculated to enable the student to receive educational benefit*⁹⁴.

The IEP must also be *appropriately designed and implemented*, emphasizing special education and related services specifically designed to meet the student's unique needs, supported by such services, as are necessary to provide the student 'meaningful', benefit. If these two (2) requirements are satisfied, the State has complied with the obligation imposed by Congress, and the courts can require no more.

6. Appropriateness of Student's IEP (Level of Services)

It is the Hearing Officer's Decision that the Petitioner satisfied its burden by proving that the District of Columbia Public Schools failed to develop an appropriate Individualized Education Program (IEP) for the student on March 4, 2010, because it failed to comply with the *substantive* requirements of the IDEA, by ensuring that the level of specialized instruction services in the IEP is sufficient to provide the student access the general education curriculum; and educational benefit, in violation of the IDEA, at 34 C.F.R. §§300.320, 300.324 (a)(1)(iv), and 300.513.

⁹³ Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley, 458 U.S. 176 (1982).

⁹⁴ According to *Rowley v. Board of Education*, at 458 U.S. at 200-01 (1982), school districts are only required to provide students a "basic floor of opportunity"; and although an "appropriate" public education does not mean the absolutely best or potential maximizing education for the individual child; the educational benefit received by the student must be more than trivial.⁹⁴

First, the Respondent failed to comply with the *procedural* requirements of the IDEA, by ensuring that in developing the student's March 4, 2011 IEP, the Petitioner was not only a member of that team and participated in discussions regarding the needs of the student, however, the Respondent failed to ensure that the Petitioner has the opportunity to provide 'meaningful' input in all decisions regarding the student's educational program, and the provision of a FAPE to the student.

According to the Petitioner and Education Advocate, at the end of the meeting, the Respondent printed from its database and presented to the Petitioner, the student's IEP for signature. The parent was not at the February 15, 2011 IEP team meeting, and there is no indication that prior to the March 4, 2011 IEP team meeting, the Respondent provided the Petitioner the opportunity to provide 'meaningful' input in all decisions regarding the student's IEP. Thus, the Respondent denied the Petitioner the opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, in violation of the IDEA at 34 C.F.R. §300.322.

Second, the Respondent failed to comply with the *substantive* requirements of the IDEA, by ensuring that the student's IEP includes a statement of special education and related services and supplementary aids and services, based on peer reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications and supports for school personnel that will be provided to enable the child—

- (i) Advance appropriately toward attaining the annual goals;
- (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities;
- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section...

The record reflects that although the student's March 4, 2011 IEP includes a statement of special education and related services and supplementary aids and services, and a statement of the program modifications and supports that will be provided the child, history proves that the level of special education and related services and program modifications and supports are inadequate, because the student remains below grade level and has made minimum to no progress during the last two (2) school years.

Third, the Respondent failed to comply with the *substantive* requirements of the IDEA, because in developing the student's March 4, 2011 IEP, the IEP team failed to carefully consider:

- 1) the strengths of the child;
- 2) concerns of the student, parents, and student's Education Advocate, for enhancing the education of their child;
- 3) results of the recent independent evaluations;
- 4) the academic, developmental, and functional needs of the child; and
- 5) the potential harm on the student and on the quality of services the student requires, should the student fail to receive the level of specialized instruction necessary to access the general education curriculum, and receive educational benefit.⁹⁵

⁹⁵ IDEA, at 34 C.F.R. §300.324(a)(1)(iv).

Fourth, the Respondent failed to comply with the substantive requirements of the IDEA by ensuring that in developing the March 4, 2011 IEP, the IEP is *reasonably calculated* to enable the child to benefit educationally; and is likely to produce progression, not regression, because the level of special education services prescribed in the IEP is insufficient to provide the student access to the general education curriculum and educational benefit.

Finally, the Respondent also failed to ensure that the March 4, 2011 EP is *appropriately designed*, emphasizing special education services specifically designed to meet this student's unique needs, supported by such services, as are necessary to provide the student 'meaningful', educational benefit, access the general education curriculum, and a "basic floor of opportunity". The Respondent failed to satisfy these two (2) requirements in developing the student's March 4, 2011 IEP; thus, it failed to fulfill its obligation under the IDEA to provide the student an appropriate IEP and FAPE.

7. Appropriate Placement (Location of Services)

The IDEA provides that each public agency must ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities are educated with children who are nondisabled.⁹⁶

Special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only if the nature or severity of the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁹⁷ Consideration must also be given to any potential harmful effect on the child or on the quality of services the student requires.⁹⁸

The IDEA also provides that the placement decision must be made by an IEP team, including the parent; is made in conformity with the least restrictive environment (LRE) provisions; is determined at least annually; is based on the child's IEP; is as close as possible to the child's home; and unless the student's IEP requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.⁹⁹

In the District of Columbia, special education placements shall be made in the following order of priority, provided, that the placement is appropriate for the student and made in accordance with the IDEA:

- (1) DCPS schools, or District of Columbia public charter Schools pursuant to an agreement between the DCPS and the public charter school;
- (2) Private or residential District of Columbia facilities; and
- (3) Facilities outside of the District of Columbia.¹⁰⁰

⁹⁶IDEA, at 34 C.F.R. §30.114(a)(2)(ii).

⁹⁷ IDEA, 34 C.F.R. §300.114 (a)(1)(2)(ii).

⁹⁸ IDEA, 34 C.F.R. §300.116 (d).

⁹⁹ IDEA, at 34 C.R. §300.116(a)(2) (b)(2).

¹⁰⁰ D.C. Code §38-2561.02.

It is the Hearing Officer's decision that the Petitioner failed to prove that the District of Columbia Public Schools denied the student a free appropriate public education by failing to provide the student an appropriate placement during the 2010/11 school year, because the *location of services* identified in the student's March 4, 2011 IEP, is unable to provide the student the full-time special education program, outside general education, which the student requires to access the general education curriculum and receive educational benefit; in violation of the IDEA at 34 C.F.R. §§300.114(a)(2)(ii), 300.116 (a)(2) and (b)(2) and 300.513.

IX. COMPENSATORY EDUCATION SERVICES

The Petitioner satisfied its burden by proving that the District of Columbia Public Schools denied the student a free appropriate public education, by failing to develop an appropriate IEP for the student on March 4, 2011, entitling the student to compensatory education services from March 4, 2011 through the date of this decision.

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

According to *Mary McLeod Bethune Day Academy PCS v. Terri Bland*, Civil Action No. 07-1223 (2008), a compensatory education award is an equitable remedy that "should aim to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA.

Compensatory education is also part of the court's resources in crafting appropriate relief." *See Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005). Its purpose is to help the child make the progress that he/she would have made if an appropriate program had been available. The specific services provided the student must be tailored to the student's needs.

Under the theory of compensatory education, courts and hearing officers may award "educational services...to be provided prospectively to compensate for a past deficient program." *See G. ex rel. RG v. Fort Bragg Dependent Schs.* 343 F.3d 295, 308 (4th Cir. 2003).

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

According to *Reid* a compensatory education "award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F. 3d at 524. (D.C. Cir. 2005). This standard "carries a qualitative rather than quantitative focus," and must be applied with "[f]lexibility rather than rigidity."

Under the IDEA, the crafting of an award of compensatory education simply cannot be nebulous; and an arbitrary compensatory education award will never pass muster under the *Reid* standard. The Hearing Officer must engage in a fact intensive analysis that is qualitative rather than quantitative. *Branham v. D.C.*, 427 F.3d 7, 11 (D.C. Cir 2005); *Reid*, 401 F.4d at 524.

The amount of compensatory education is calculated by finding the period of deprivation of special education services; excluding the time reasonably required for the school district to rectify the problem. M.C. v. Cent. Reg'l. Sch. Dist., 81 F.3d at 397 (3rd Cir. 1996).

The Hearing Officer finds that the following compensatory education award is appropriately tailored to the student's unique needs; reasonably calculated to provide the student educational benefits that likely would have accrued had the violation not occurred; and is intended to mitigate any harm the student may have suffered as a result of the violation:

Compensatory Education Services Plan

(1) Evaluations

Within ten (10) school days of this decision and order, the Respondent shall issue to the Petitioner an independent educational evaluation letter authorizing funding of an independent Functional Behavioral Assessment, evaluations to rule out a Reading Disorder, Disorder of Written Expression, and Mixed Receptive-Expressive Language Disorder, and an Occupational Therapy Evaluation to determine whether the student would benefit from OT intervention such as a sensory diet, which may assist the student in better regulation of her alertness and increase her attention span.

Within ten (10) school days of receiving the final independent evaluation, the Respondent shall convene an IEP team meeting with the parent and/or parent's representative, to review the evaluations, revise the student's IEP, consistent with the findings and recommendations in the evaluations, and develop and implement a school wide Behavioral Intervention Plan for the student.

(2) IEP

- (a) The student's February 28, 2011 IEP is revised to reflect that the student will receive 18 hours of specialized instruction weekly, outside the general education setting, in reading, written expression, and mathematics; extended school year services for the 2010/11 school year; a full-time dedicated aide to accompany and assist the student throughout each school day; continued participation in the Wilson Reading Program; and 2 hours of behavioral support services, weekly.
- (b) Within fifteen (15) school days from the date of this decision and order, the Respondent shall convene an IEP team placement meeting with the parent and/or the parent's representative, to revise the March 4, 2011 IEP as prescribed in paragraph 2(a) above.

(3) Dedicated Aide

Within two (2) weeks of the date of this decision, the Respondent shall fund a full-time dedicated aide for the student beginning the 2011/12 school year.

(4) Independent Tutoring Services

- (a) The Respondent shall fund tutorial services for the student at a Lindamood-Bell Diagnostic Learning Evaluation, at a cost not to exceed _____, to remediate the student's deficits in reading, mathematics, and written expression.

- (b) The tutorial services may be provided at the student's school, at the end of each school day; at a _____ and/or at a Summer Clinic; and the student has until the end of the 2011/12 school year, to utilize the tutorial services. The Respondent shall provide the student transportation for the student to attend the _____ after school tutoring, and/or Summer clinic, if the tutoring services are not provided at the student's school.

X. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby **ORDERED**, that the Respondent shall fund and implement the student's Compensatory Education Plan, as provided on pages 19-20 of this decision.

XI. NOTICE OF RIGHT TO APPEAL

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

Date: May 25, 2011

Ramona M. Justice

Attorney Ramona M. Justice, Hearing Officer