

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

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

OSSE
STUDENT HEARING OFFICE
2012 MAY 21 AM 9:09

Parent,¹ on behalf of,
Student,

Petitioner,

Date Issued: May 20, 2012

Hearing Officer: Melanie Byrd Chisholm

v.

District of Columbia Public Schools,
Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a year old male, who is currently a grade student attending School A. The student is currently a general education student and has not been identified as a student with disabilities eligible for special education and related services.

On March 6, 2012, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to identify the student as a student with disabilities and eligible for special education and related services and by failing to develop an appropriate individualized education program (IEP) for the student. As relief for this alleged denial of FAPE, Petitioner requested, *inter alia*, that the student be determined as eligible for special education services as a student with a specific learning disability (SLD); that an IEP be developed for the student which provides specialized instruction in all academic areas, accommodations as recommended in the student's evaluations, occupational therapy (OT), pull-out instruction for reading, mathematics, written expression and extended school year (ESY); that DCPS hold a 30-day review after the development of the student's IEP to discuss the student's progress; and compensatory education.

On March 15, 2012, Respondent filed its Response to the Complaint. In its Response, Respondent asserted that none of the student's evaluations recommend direct services for the student; the IEP Team determined that the student was not eligible to receive special education

¹ Personal identification information is provided in Appendix A.

services; the IEP Team did not believe the data reviewed from the independent evaluation supported that the student be identified as a student with SLD and eligible for special education services; and the student has not been denied a FAPE.

On March 20, 2012, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement. Accordingly, the parties agreed that the 45-day timeline started to run on April 6, 2012, following the conclusion of the 30-day resolution period, and ends on May 20, 2012.

On April 4, 2012, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issue, relief sought and related matters. During the prehearing conference, the parties stipulated that the parent requested that the student receive an evaluation for special education; in June 2011 – August 2011, DCPS conducted psychological, speech-language, educational and occupational therapy evaluations; the IEP Team met in August 2011 and determined that the student was not eligible for special education and related services however the parent did not agree with the IEP Team's decision; the parent did not agree with the evaluations conducted by DCPS and requested an independent educational evaluation (IEE); and on February 6, 2012, the IEP Team met to review the results of the IEE and again determined that the student was not eligible for special education and related services. The parent did not agree with the IEP Team's decision.

The Hearing Officer issued the Prehearing Order on April 4, 2012. The Prehearing Order clearly outlined the issue to be decided in this matter and confirmed May 16-17, 2012 as the dates for the due process hearing. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. Neither party disputed the issue as outlined in the Order.

On May 8, 2012, Petitioner filed Disclosures including twenty-eight (28) exhibits and three (3) witnesses.² On May 9, 2012, Respondent filed Disclosures including twelve (12) exhibits and four (4) witnesses.

The Petitioner elected for the hearing to be closed. Petitioner's Exhibits 1-28 were admitted without objection. Respondent's exhibits 1-12 were admitted without objection.

The hearing concluded at approximately 10:42 a.m. on May 17, 2012, following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

² A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

ISSUE

The issue to be determined is as follows:

1. Whether DCPS failed to provide the student a FAPE by failing to identify the student as a student with special needs and eligible for special education and related services and failing to develop an IEP for the student?

FINDINGS OF FACT

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

1. In 2008, the student was evaluated for special education and related services. The student was found to be not eligible due to a lack of instruction (inconsistent teachers) during the school year and the team's inability to determine if the student's lack of progress was due to a lack of understanding or a lack of motivation. The student was found to have average to high average cognitive abilities and below average to average academic functioning. The student also tested below average in visual-motor integration and displayed a possible need for OT services. (Petitioner's Exhibits 3 and 6; School Psychologist's Testimony)
2. In May 2011, the student's parent requested that the student be evaluated to determine eligibility for special education and related services. The Multidisciplinary Team (MDT) agreed that evaluations were needed to determine if the student was eligible for special education and related services. The student's parent signed consent for the child to be evaluated in June 2011. (Petitioner's Exhibits 3, 11, 12, 13, 14, 21, 22 and 24; Respondent's Exhibits 8 and 9)
3. The MDT met on August 2, 2011 to discuss the results of the Psychological Evaluation, OT Evaluation, Speech and Language Evaluation. The MDT chose to use the student's IQ as measured from the student's January 15, 2009 Psychological Evaluation. (Petitioner's Exhibits 3, 9 and 10; Respondent's Exhibits 5, 6 and 7; Mother's Testimony; School Psychologist's Testimony)
4. Of the three criteria used within the discrepancy model to determine a SLD, the MDT determined that the student met all Criteria 1 & 2 but was not eligible for special education and related services because of a lack of appropriate instruction in reading (due to the student's frequent absences (18) and tardy arrivals (68) during the 2010-2011 school year). While the parent agreed with the determination at the August 2, 2011 meeting, on September 9, 2011, the parent requested an IEE. (Petitioner's Exhibits 9, 10, 19 and 20; Respondent's Exhibits 5, 6 and 7; School Psychologist's Testimony)
5. The student has an average intelligence quotient (IQ) although his IQ score ranges on various evaluations. Based on the student's cognitive ability, he should be able to perform on grade level. (Petitioner's Exhibits 1, 3, 4, 6, 7, 8, 9, 10 and 14; Respondent's Exhibits 3, 4, 6, 8, 10 and 11; Independent Evaluator Testimony; School Psychologist Testimony)

6. The student's evaluation scores are "scattered" both in that his scores on various subtests range greatly within one evaluation and that the student's scores on subtests range greatly between evaluations. The student is functioning in the average to low average range in mathematics, in the low average range in reading and in the low range in written language. The student was more than two years below the student's chronological age in Brief Achievement, Total Achievement, Broad Written Language, Brief Reading, Brief Writing, Written Expression, Academic Skills and Academic Fluency as well as the subtests of Passage Comprehension, Math Fluency, Writing Fluency and Spelling. (Petitioner's Exhibits 1, 2, 3, 6, 9, 10 and 14; Respondent's Exhibits 3, 6, 7, 8, 10 and 11; Independent Evaluator Testimony; School Psychologist Testimony)
7. The student does not use isolated wrist and finger movements but rather moves his whole forearm as one unit. The student is functioning at the fourth (4th) percentile rank in manual coordination, is very low in motor coordination, and is below average in overall handwriting skills. (Petitioner's Exhibit 4)
8. School B attempted the interventions of small group instruction, pre-teaching, re-teaching, after-school program, assistance with reading and writing fluency and mental health services. Despite these interventions, the student continued to perform below grade-level expectations. (Petitioner's Exhibits 3, 10 and 15)
9. The student may benefit from pre-teaching, frequent breaks, an environment with reduced distractions, preferential seating, increased time, verbal cues and repetition of directions. (Petitioner's Exhibits 3 and 5)
10. The student is performing at the "beginning" level on 42 of 49 4th Grade State academic standards. On the Pace Interim Assessment (PIA) the student has scored below basic in reading and math on the past three assessments. (Respondent's Exhibits 2 and 12; Teacher's Testimony)
11. The student writes letters and numbers backwards and has difficulty expressing himself in writing. (Petitioner's Exhibits 1, 4, 10, 12, 14 and 16; Respondent's Exhibits 3, 6 and 8; Mother's Testimony; Teacher's Testimony)
12. During the 2011-2012 school year, the student has shown some progress in reading fluency. (Respondent's Exhibit 2; Teacher's Testimony)
13. The student does not have Attention Deficient Hyperactivity Disorder (ADHD) and although the student is quiet, withdrawn and does not like to work in groups, he does not have clinically significant behaviors. (Petitioner's Exhibits 1, 3 and 7; Respondent's Exhibits 2 and 10; Independent Evaluator's Testimony; Mother's Testimony; Teacher's Testimony)
14. During the 2010-2011 school year at School B, the student was absent eighteen (18) days and tardy sixty-eight (68) times. During the 2011-2012 school year at School A, the student has been absent three (3) days and tardy nine (9) times. (Respondent's Exhibits 6, 10, 11 and 12)
15. The DCPS 4th Grade Writing Standards are: (1) Writes opinion pieces on topics or texts, supporting a point of view with reasons and information; (2) Writes informative/explanatory texts to examine a topic and convey ideas and information clearly; (3) Writes narratives to develop real or imagined experiences or events using effective technique, descriptive details, and clear event sequence; and (4) Conducts

short research projects that build knowledge through investigation of different aspects of a topic. (Respondent's Exhibit 12)

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:

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

Under the IDEA, a state must provide a "free appropriate public education" to children with disabilities. *See* 20 U.S.C. §1412(a)(1)(A). A state must, *inter alia*, identify and evaluate children with disabilities, and develop an "individual education program" for each child with a disability. *See* 20 U.S.C. §§1412(a)(3)(A),(a)(4). The IDEA and its implementing regulations define "child with a disability" to mean "a child evaluated in accordance with §§300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services." 34 CFR §300.8(a).

Specific learning disability means "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." 34 CFR §300.8(c)(10); *see also* 20 U.S.C. §1401; *Nguyen v. District of Columbia*, 681 F. Supp. 2d 49, 52 (D.D.C. 2010).

IDEA regulations further provide that an MDT Team "may determine" that a child has a SLD as defined in §300.8(c)(10) if three requirements are met. First, the child "does not achieve adequately for the child's age or to meet State-approved grade-level standards" in one or more basic academic skill areas (e.g. written expression, reading comprehension or mathematics calculation). 34 CFR §300.309(a)(1). Second, the child "does not make sufficient progress to meet age or State-approved" standards "when using a process based in the child's response to scientific, research-based intervention" or the child "exhibits a pattern of strengths and weaknesses in performance, achievement, or both" relative to relevant areas. 34 CFR

§300.309(a)(2). Third, the MDT Team determines its findings are not the result of factors such as a visual or hearing disability, cultural or environmental factors. 34 CFR §300.309(c)(3).

Each State must adopt criteria, consistent with 34 CFR §300.309, for determining whether a child has a SLD as defined in §300.8(c)(10). Local educational agencies (LEAs) must use the State criteria in determining whether a child has a SLD. *See* 34 CFR §300.307. The criteria adopted by the State must not require the use of a severe discrepancy between intellectual ability and achievement; must permit the use of a process based on the child's response to scientific, research-based intervention; and may permit the use of other alternative research-based procedures for determining if a child has a SLD. *See* 34 CFR §300.307(a). The District of Columbia Office of the State Superintendent (OSSE) has adopted criteria by implementing the rules in 5 DCMR §E-3006.

These rules provide that the "IEP team shall determine that a child has a SLD if: a disorder is manifested in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to learn, think, speak, read, write, or do mathematical calculations." 5 DCMR §E-3006.4(a). The rules also provide that LEAs "may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedure." 5 DCMR §E-3006.4(d). In addition, LEAs must prepare a written evaluation report that include the basis for making the determination regarding SLD, including a "statement whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services." 5 DCMR §§E-3006.5(g)(2), (6). Finally, OSSE states that the "IEP team may not determine that a child is a child with a disability if it determines that the determinant factor for the child's eligibility determination is: (a) lack of instruction in reading or mathematics; or limited English proficiency; and (b) the child does not otherwise meet the eligibility criteria." 5 DCMR §E-3006.6; *see also* 34 CFR §300.306(b).

The determination of a child's eligibility for special education under the SLD classification is a primarily fact-based inquiry. *See Michael P. v. Dept. of Educ. State of Hawaii*, 656 F.3d 1057 (9th Cir. 2011). In this case, the student has a history of poor academic performance and lack of proficiency in state grade-level standards. In 2008, the student was evaluated for special education and related services however was found to be not eligible due to a lack of instruction (inconsistent teachers) during the school year and the team's inability to determine if the student's lack of progress was due to a lack of understanding or a lack of motivation. During this evaluation, the student was found to have average to high average cognitive abilities and below average to average academic functioning. The student's January 15, 2009 Psychological Evaluation also noted concerns with the student's visual-motor integration and suggested that the student may need OT services.

In May 2011, the student's parent again requested that the student be evaluated to determine eligibility for special education and related services. The student's parent signed consent for the child to be evaluated in June 2011 and the MDT met on August 2, 2011 to discuss the results of the evaluation and to determine whether the student was eligible for special education and related services. Rather than conducting an updated IQ test, the MDT chose to review the results of the student's psychological evaluation conducted for the student's previous

eligibility determination, dated January 15, 2009. DCPS conducted an updated Woodcock Johnson III (WJ III) achievement test in July 2011, an OT evaluation and a speech-language evaluation.

The student's January 15, 2009 Psychological Evaluation states that the Reynold's Intellectual Assessment Scales (RIAS) was used to measure the student's Composite Intelligence Index (CIX) or IQ. On the RIAS, the student's CIX was 118. The report notes that there was a statistically significant discrepancy between the student's nonverbal intelligence index of 125 and his verbal intelligence index of 109. On the student's July 20, 2011 WJ III, the student scored in the average range in mathematics, in the low average range in reading, math calculation and written expression and in the low range in written language. The August 2, 2011 MDT discussed the results of these evaluations, additional emotional and behavioral evaluations conducted by the school psychologist, the student's speech-language and OT assessments and anecdotal information provided by the parent and teacher.

Of the three criteria used within the discrepancy model to determine a SLD, the MDT determined that the student met Criterion 1 (the student does not achieve adequately and/or does not make sufficient progress to meet age or state-approved grade-level standards in written expression) and Criterion 2 (student demonstrates a discrepancy between achievement and measured ability of two years below the student's chronological age and/or at least two standard deviations below the child's cognitive ability as measured). The MDT determined that the student did not meet Criterion 3 (impact on the student's achievement not a result of lack of instruction, other disability, environmental or cultural factors) because of a lack of appropriate instruction in reading (due to the student's frequent absences (18) and tardy arrivals (68) during the 2010-2011 school year). While the parent agreed with the determination at the August 2, 2011 meeting, on September 9, 2011, the parent requested an IEE.

The IEE report was completed on October 27, 2011. The Independent Evaluator used the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) to measure the student's IQ and used the WJ III to measure the student's academic achievement. In addition to other assessment and reviews, the Independent Evaluator also reviewed the student's August 2011 OT evaluation. The student's IQ, according to the WISC-IV, is 105, which is in the average range. On the WJ III, the student was more than two years below the student's chronological age in Brief Achievement, Total Achievement, Broad Written Language, Brief Reading, Brief Writing, Written Expression, Academic Skills and Academic Fluency as well as the subtests of Passage Comprehension, Math Fluency, Writing Fluency and Spelling. The Independent Evaluator recommended that the student be identified as a student with a SLD and receive special education supports in all academic areas (reading, math, written expression). The Independent Evaluator also noted that the student has a very low probability of having ADHD and while the Independent Evaluator noted that the student scored in the "at risk" range on the BASC-2, she did not recommend any counseling services. The Independent Evaluation noted the areas on concern on the student's August 2011 OT evaluation and the conclusion that the student was not found to meet the criteria for a student with a speech-language impairment based on his July 11, 2011 Speech and Language Initial Evaluation Report.

At the February 21, 2012 MDT meeting, the teacher stated that the student's Text Reading Comprehension (TRC) score had increased from a level "P" in September 2011, to a level "Q" in January 2012. She expected that the student would be at a level "S" by the end of the year. The teacher did not give information regarding the expected level for 4th grade students. The teacher also informed the team that the student's first PIA scores were 57% in reading and 56% in math; the student's 2nd PIA scores were 52% in reading and 38% in math; and the student's third PIA scores were 47% in reading and 53% in math. The teacher stated at the meeting that the student was performing at a basic level in reading and in math. However, at the hearing, the teacher testified that in order to be achieving on a basic level, the student must achieve at least a 60% on the PIA. During the February 21, 2012 meeting, the MDT again determined that the student was not eligible for special education and related services.

On his third quarter report card, the student was "beginning" to develop the skills to be proficient in 16 of 18 4th Grade English Language Arts Standards; and "developing" toward proficiency in two of 18 4th Grade English Language Arts Standards. The student was not "secure" in any of the 4th Grade English Language Arts Standards. The student was "beginning" to develop the skills to be proficient in eight of 10 4th Grade Mathematics Standards; and "developing" toward proficiency in two of 10 4th Grade Mathematics Standards. The student was not "secure" in any of the 4th Grade Mathematics Standards. The student was "beginning" to develop the skills to be proficient in all eight 4th Grade Science Standards. The student was "beginning" to develop the skills to be proficient in ten of 13 4th Grade English Social Studies Standards; and "developing" toward proficiency in three of 13 4th Grade Social Studies Standards. The student was not "secure" in any of the 4th Grade Science or Social Studies Standards. The report card recorded that the student had been absent three (3) days and tardy nine (9) times during the 2011-2012 school year. The parent and the teacher testified that the student continues to write letters and numbers backwards.

The Respondent argued that the student is not eligible because the student is "making progress" in the regular education classroom. The evidence does not support this contention. On the student's 3rd Quarter report card, the student was performing at the "beginning" level on 42 of 49 State academic standards. While the student may have been making some progress, he was not making enough progress to move from a "beginning" level of performance to a "developing" level of performance after three quarters. Furthermore, the teacher was unable to describe or quantify the progress she claimed the student was making. Additionally, while the teacher represented to the MDT that the student was performing at a basic level in reading and in math, neither the student's grades nor the student's PIA scores reached the basic level. The teacher also conceded that 4th grade student should not be reversing letters and numbers.

The student's evaluation scores are "scattered" both in that his scores on various subtests range greatly within one evaluation and that the student's scores on subtests range greatly between evaluations. For example, on his July 2011 WJ III (Form A), the student scored a 72 (1.4 grade-level equivalent) on the Math Fluency subtest, a 96 (3.5 grade-level equivalent) on the Calculation subtest, and a 94 (3.3 grade-level equivalent) in Broad Math. Three months later, on his October 2011 WJ III (Form B), the student scored a 70 (1.9 grade-level equivalent) on the Math Fluency subtest, an 81 (3.0 grade-level equivalent) on the Calculation subtest, and 75 (2.6 grade-level equivalent) in Broad Math. Likewise, on his July 2011 WJ III, the student scored a

91 (3.0 grade-level equivalent) on the Letter-word Identification subtest and an 83 (2.1 grade-level equivalent) on the Reading Fluency subtest. On his October 2011 WJ III, the student scored an 80 (2.6 grade-level equivalent) on the Letter-word Identification subtest and a 94 (3.6 grade-level equivalent) on the Reading Fluency subtest. In both Writing Fluency and Applied Problems, the student had a 19-point discrepancy between the two administrations of the WJ III. The difference in the student's IQ score on the RIAS (118) and the student's IQ score on the WISC-IV (105) also contributes to the discussion regarding scatter.

The School Psychologist and the Independent Evaluator discussed the scatter in the student's evaluation scores. The Independent Evaluator concluded that because of the scatter between index scores, the student's IQ may not be the best measure of his cognitive functioning and that individual composite scores should be used to identify the student's strengths and weaknesses. The School Psychologist testified that the scatter shows that the student has strengths and weaknesses. The School Psychologist also testified that there are many possibilities as to why the student had lower scores on one test than the other including regression, the confidence interval, a difference in attention during tests, or that the student does not test well.

The IDEA requires the LEA use a variety of assessment tools and strategies to gather relevant functional and developmental information for initial evaluations, including information provided by the parents, that may assist in determining whether the child is a child with a disability; not use any single procedure as the sole criterion for determining whether a child is a child with a disability; and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 20 U.S.C. § 1414(b)(2); *see also* 34 CFR §§300.531-532.

In the present matter, because of the student's wide variation in assessment scores, it is particularly imperative to consider a variety of assessment tools and strategies to determine whether the child is a child with a disability. The School Psychologist testified that although the student's performance scores are low and there is a severe discrepancy between the student's IQ and performance, one evaluation cannot be used to identify the student as SLD and that anecdotal information must be used to make the determination. The MDT used this logic and found the student not eligible. However, the analysis was flawed in that the MDT ignored the evaluation results and the student's grades and only used anecdotal information thereby failing to use a variety of assessment tools and strategies to make their determination. Additionally, the MDT failed to acknowledge that the student continued to perform far below grade-level expectations even though the attendance and tardiness issues that were present during the 2010-2011 school year were no longer present in the 2011-2012 school year.

Taking the student's evaluation results, report card and anecdotal information provided by the parent and teacher into account, the Hearing Officer finds that the student does not achieve adequately and/or does not make sufficient progress to meet age or state-approved grade-level standards for all academic areas; the student demonstrates a discrepancy between achievement and measured ability of two years below the student's chronological age and/or at least two standard deviations below the child's cognitive ability as measured in written expression; and impact on the student's achievement not a result of lack of instruction, other

disability, environmental or cultural factors. Therefore, the Hearing Officer finds that the student is a child with a disability, specifically a child with a SLD in written expression, entitled to special education and related services. Despite the overall scatter in the student's evaluation scores, the student consistently scored two years below his chronological age in Broad Written Language, Spelling and Math Fluency. The student's Math Fluency scores are offset by his relative strengths in Math Calculation thereby suggesting the need for accommodations and modifications in the general education setting for mathematics.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The Hearing Officer concludes that DCPS denied the student a FAPE by failing to identify the student as a child with a disability on February 21, 2012, and failing to develop an IEP for the student. By failing to identify the student as a child with a disability, the student did not have access to specialized instruction and related services designed to provide educational benefit to the student. DCPS did not develop an IEP for the student therefore the student did not have an IEP that was reasonably calculated to enable the child to receive some educational benefit.

The Court in *Rowley* stated that the Act does not require that the special education services 'be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" Instead, the Act requires no more than a "basic floor of opportunity" which is met with the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley* at 200-203. Additionally, the IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 Supp. 2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. §1412(a)(5)); 5 DCMR §E-3011 (2006). The IDEA creates a strong preference in favor of "mainstreaming" or insuring that handicapped children are educated with non-handicapped children to the extent possible. *Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Ill. State Bd. of Educ.*, 184 F.3d 912, 915 (7th Cir. 1999). Furthermore, children with disabilities are only to be removed from regular education classes "if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR §300.550(b)(2).

The Petitioner presented evidence that the student needs to receive specialized instruction outside of the general education setting for his written expression instruction. The Independent Evaluator testified that instruction within the general education environment is inappropriate for the student because it is "not the model to use based on the child's test scores." The Petitioner also presented evidence that the student's specialized instruction in written expression should be

outside of the general education environment because prior attempts with small group instruction within the general education environment have been unsuccessful. The Petitioner did not present evidence on the amount of time during the school day that School A has scheduled for written expression. The Petitioner presented no evidence with regard to the amount of OT services needed for the student.³

The record contains evidence that, as an intervention, School A provided instruction for the student in a small group setting with special education students. The student's teacher stated that this intervention was not successful because the student was functioning at a higher level than the special education students in the small group and performed better in the general education environment. This intervention was not solely for written expression. The teacher also testified that supplementary aids in writing have helped improve the student's performance in writing. However the student has not progressed from a "beginning" level on any of the 4th Grade Writing Standards.

Both the Petitioner and the Respondent presented evidence that the student is quiet, withdrawn and does not like to work in groups. The student's teacher testified that the student's "thoughts are better than his writing" and that the student does not take the appropriate time to think about sounds when writing. Additionally, while the 4th Grade Writing Standards indicate that that student should be able to write opinion pieces, write informative/explanatory texts, and write narratives, the student's evaluations show that he struggles with writing sentences with three target words and struggles with writing multisyllabic words. Additionally, the student's tendency to reverse letters when writing is below grade-level expectations. The Hearing Officer finds that because of the severity of the student's disability in spelling and writing fluency, the education of the student in the general education setting with the use of supplementary aids and services in written expression cannot be achieved satisfactorily.

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . 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 v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003).

In the instant matter, Petitioner has established that the student was denied a FAPE when DCPS failed to identify the student as a child with a disability on February 21, 2012, and failed

³ During the Prehearing Conference, the Hearing Officer made clear the expectation for the Petitioner to present evidence regarding the amount of specialized instruction and related services needed for the student. The Petitioner's attorney argued that the requested relief of an IEP Team meeting within 30 days of the hearing would be to appropriately address the student's progress. The Hearing Officer notes the concern that the Petitioner's failure to present evidence with respect to the amount of specialized instruction and related services needed for the student presents the Hearing Officer with the circumstance of having to allow the IEP Team to determine the appropriate amount of services thereby presenting an opportunity for the Petitioner to file a subsequent Complaint should the parent disagree with the IEP Team's decision. This circumstance places an unfair burden on the Respondent should a subsequent disagreement arise.

to develop an IEP for the student. The Petitioner did not prove by a preponderance of the evidence that the student should have been identified as a child with a disability at the August 2, 2011 MDT meeting. As a result of the failure to provide a FAPE beginning February 21, 2012, the student was harmed in that the student did not receive specialized instruction and related services needed for the student to receive educational benefit. During this delay, the student continued to make minimal or no progress toward grade-level State standards. The student is entitled to compensatory education for this denial of FAPE.

While the Petitioner requested, as compensatory education, four (4) hours per day of services from the Lindamood-Bell program for the 2012 summer, ten (10) hours per week in a summer camp program, one (1) hours per week of counseling for the 2012 summer, and five (5) hours per week of tutoring for the entirety of the 2012-2013 school year, the Hearing Officer finds this request excessive based on the denial of FAPE. An award of compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued. *Reid*, 401 F.3d at 524. The educational benefits that likely would have accrued are no more than twenty-seven and one half (27.5) hours of specialized instruction in written expression and no more than five and one half (5.5) hours of OT⁴.

ORDER

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

1. Within 10 business days, or on a date mutually agreed upon by both parties, that DCPS hold an IEP Team meeting to draft an IEP for the student, specifically, appropriate goals for written expression (related to spelling and fluency), appropriate goals for OT (related to manual coordination, appropriate formation of letters and numbers and handwriting), and the appropriate amount services for OT;
2. That DCPS prescribe, on the student's IEP, specialized instruction in written expression, outside of the general education setting, equal to the amount of written expression instruction per day in the student's classroom;
3. That DCPS include the classroom and assessment accommodations of repetition of directions, simplification of oral directions, location with minimal distractions, preferential seating, small group testing, breaks between subtests and extended time on subtests on the student's IEP, the parties may agree on additional accommodations and modifications;
4. That DCPS fund thirty (30) hours of instruction for the student at the Lindamood-Bell program, hours to be completed by August 27, 2012;
5. All other relief sought herein by Petitioner herein is **denied**.

⁴ The Petitioner did not present evidence as to the amount of time School A provides for written expression or the amount of OT services needed for the student. Hours are calculated using the rationale that a standard DCPS elementary school Language Arts block (inclusive of reading and written expression) is approximately one (1) hour per day and students with OT needs similar to this student typically receive thirty (30) minutes per week of OT services, and that eleven (11) school weeks elapsed between the February 21, 2012 MDT meeting and the due process hearing.

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 20, 2012

Melanie Byrd Chisholm
Hearing Officer