District of Columbia

Office of the State Superintendent of Education

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Confidential

STUDENT[1], by and through her Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Date: June 15, 2011 <u>Representatives:</u> Counsel for Petitioners: Alana Hecht, Esq. Brown and Associates 1220 L Street, NW #700 Washington, D.C. 20005 Counsel for DCPS: Assistant Attorney General Linda Smalls Esq. 1200 First Street, NW Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

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

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened June 15, 2011, at the OSSE Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2009.

BACKGROUND:

Student or "the student" is age in grade and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of Autism Spectrum Disorder ("Autism"). The student is enrolled at a DCPS school hereinafter referred to as "School A." She has been enrolled at School A since the start of the 2009-2010 school year. The student's disability classification was recently changed to Autism and had previously been Mental Retardation ("MR"). Prior to the student's enrollment at School A, for a number of years, the student attended a full time special education program in another DCPS school, hereinafter referred to as "School B."

Petitioner asserts DCPS denied the student a free and appropriate public education ("FAPE"). Specifically, Petitioner asserts DCPS was aware of the student's Autism during the 2009-2010 school year and the student's classification, programming and educational placement should have be reconsidered and modified but DCPS did not do so during the student's individualized educational program ("IEP") meetings in school year 2009-2010 and school year 2010-2011.

Petitioner seeks as relief for the alleged denials of FAPE the student's DCPS funded placement student at Ivymount School, a private full time special education program for the 2011-2012 school year and transportation services and that DCPS fund a compensatory education program.[2]

DCPS maintains the student's IEP was reasonably calculated to provide educational benefit at the time it was developed and the IEP, least restrictive environment ("LRE") and placement and location of services, School A, are all appropriate.

On April 18, 2011, Petitioner filed the due process complaint. A resolution meeting was held on May 4, 2011. The parties did not resolve the complaint. On May 11, 2011, this Hearing Officer conducted a pre-hearing conference. This Hearing Officer issued a pre-hearing order on May 16, 2011, stating the issues to be adjudicated, the relief Petitioner is seeking and Respondent's position with regard to the complaint and/or defenses.

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[2] As compensatory education Petitioner seeks the following services: 75 hours of independent tutoring, 100 hours of independent mentoring, and 2 weeks of summer camp at one of two proposed area locations of camp Aristotle at the Auburn School for a cost not to exceed

ISSUES: [3]

The issues adjudicated are:

(1): Did DCPS deny the student a FAPE by failing to provide an appropriate placement during the 2009-2010 and 2010-2011 school years.[4]

(2): Did DCPS deny the student a FAPE by failing, in May of 2010, to tailor her IEP to her Autism?[5]

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-27 and DCPS Exhibit 1-7)[6] that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: [7]

1. The student is age in grade and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of Autism. The student has been enrolled at DCPS School A since the start of the 2009-2010 school year. (Parent's testimony)

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

[4] Petitioner alleges by October of 2009, DCPS was already aware that her placement was inappropriate based on the severity of her disability. Several disciplinary records from October and November of 2009 allegedly showed the student was not willing to go into and out of the classroom, and that it took more than one teacher working with her to get her to comply with even basic instructions

[5] Petitioner's alleges the student's IEP is inappropriate and incomplete, and has been since the May 2010 IEP meeting because it was not altered to take into account the student's autism and the severe impact her autism has on her educational success. Petitioner alleges the student's IEP goals and objectives should have been re-written to take into account the autism diagnosis and this was not done.

[6] Any documents objected to by either counsel and not admitted into the record would be noted in Appendix A. In this case although there were objections by DCPS counsel to two of Petitioner's documents (P-12 & P-13), those documents were admitted by the Hearing Officer principally because they were documents provided to Petitioner by DCPS.

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

2. The student's disability classification was recently changed to autism and had previously been MR. Prior to the student's enrollment at School A, for a number of years, the student attended a full time special education program in another DCPS school, School B. (Parent's testimony)

3. The student began attending School B after she was found eligible for special education services. After the student's second year at School B the parent began to notice the student grasped basic information that was being presented but overtime the parent believed the student was being taught the same fundamental curriculum over and over again. The parent began to believe by the student's third year at School B the student was not being challenged. The student eventually asked the parent could she move on to another more challenging school environment. (Parent's testimony)

4. On March 12, 2009, DCPS presented the parent with a list of schools from which she could choose where the student's IEP could be implemented. (Petitioner's Exhibit 17-3)

5. On June 17, 2009, DCPS convened a placement meeting at School B. The parent attended. School B was proposed and the team agreed School A could implement the student's IEP and meet the student's needs and the student would attend School A in the following school year. The parent agreed in the change of placement to School A. The student began attending School A at the start of the 2009-2010 school year. (Parent's testimony, Petitioner's Exhibit 25)

6. Soon after the student began attending School A the student began to display behavioral difficulties and the student often refused to enter the school and classroom. The transitions were difficult and the school staff repeatedly called the parent to assist in getting the student to enter school and transition to class. She was not getting along with her peers and the staff did not understand why. (Parent's testimony)

7. During the student's first year at School A, on October 4, 2009, a Behavior Incident/Observation Report was completed by School A staff regarding the student's behaviors of being out her seat walking around the classroom and taking an inordinate time to enter and leave the classroom. On the on November 17, 2009, the student displayed behavior difficulties that were documented by the school staff. The student would not enter the classroom for over an hour despite the staff's efforts to get her to come into the room and once in the room she began to mumbling and laughing and refused to take a seat. (Petitioner's Exhibits 18-1, 18-5, 18-7)

8. An educational evaluation completed on November 12, 2009, showed that the student, who was in 6th grade at the time, had the following scores on the Woodcock Johnson III. (Petitioner's Exhibit 24)

    a. Math Calculation: 3.1
    b. Academic Skills: 2.9
    c. Academic Fluency: 2.9
    d. Letter-Word Identification: 2.6
    e. Reading Fluency: 3.2

f. Calculation: 2.9
g. Math Fluency: 3.5
h. Spelling: 3.6
i. Writing Fluency: 2.3

9. A functional assessment interview completed for the student on November 23, 2009 illustrating the types of behaviors the student showed during the she arrived at School A from School B. According to the teacher who filled out the assessment, the student was not successfully transitioned into the less restrictive environment. Her behavior issues including taking 15 to 20 minutes to enter a room and 10 to 15 minutes to exit a room with 1 on 1 assistance, talking to herself and laughing out loud, refusing to sit in her group, becoming distraught during transition periods, wandering away from the group even with 1 on 1 direction, having tantrum related behaviors. The teacher indicated that the behaviors most manifested themselves during instruction, both in groups and 1 on 1. (Petitioner's Exhibits 18-8, 18-9, 22)

10. The student met regularly with a psychologist outside of school. The student talked with the psychologist about her difficulties in school. Because of the student's behavioral difficulties at school the parent took the student to Children's National Medical Center ("Children's). On March 29, 2010, she was diagnosed with autism by Children's. (Parent's testimony, Petitioner's Exhibit 17)

11. On April 26, 2010, the parent provided DCPS a hand written letter informing of the student's recent re-assessment by Children's and requesting a new IEP based on recommendations by Children's about the student's class size and class environment. (Petitioner's Exhibit 17)

12. On April 27, 2010, the student was suspended for four days for throwing objects toward the teacher and other students. (Petitioner's Exhibit 11-4)

13. The student's IEP meeting was held on May 21, 2010. The parent requested the student's placement be changed. At the conclusion of the meeting the parent was dissatisfied because there were no changes in the student's program or placement. (Parent's testimony)

14. A report from the student's doctor May 20, 2010, stated that "transitioning from a small environment such as School B to School A, where the population is at least doubled, it is understandable that [the student] may experience difficulties encountering large groups. Given that middle school environments tend to be noisy [the student] may have difficulty tolerating the noise level and confusion." The doctor suggested the school consider these concerns in addressing the student's behavior. (Petitioner's Exhibit 16-1)

15. At the IEP meeting of May 21, 2010, the school Psychologist, Linda Bernett, participated by telephone and stated that in light of the recent report from Children's diagnosing the student with autism, "the disability change needs may need further investigation by DCPS." (Petitioner's Exhibit 14-1)

16. The student's doctor had the following impression after diagnosing the student with autism "regarding the student's behavioral problems, we feel that the environment that she has been placed in is a change and contributes to her acting out. If she was in a smaller setting or in a smaller group such as before, this problem would probably not be evident." (Petitioner's Exhibit 16-6)

17. At the May 21, 2010, meeting, the parent voiced concerns over the placement at School A explaining that the student needed a more one-on-one environment based on her disability and that the current placement at Emery was a "detriment to her social and emotional development." The parent explained that she wanted her daughter to have the academic challenges of a school like School A with the smaller environment that she had at her previous school. The parent explained that at School B, the environment was small enough but her daughter did not have any academic challenges and that was a detriment to her growth. (Petitioner's Exhibit 14-2)

18. The student's May 21, 2010, IEP prescribed 26 hours of specialized instruction outside the general education setting, 30 minutes per week of adaptive physical education in the general education setting, 30 minutes a week of physical therapy outside the general education setting, and 1 hour per week of Speech & Language Pathology outside the general education setting. The student academic goals remained the same and were carried over from the previous IEP. The physical and health goals were reduced to a single goal "[the student] will demonstrate one year's proficiency in safe navigation of her educational setting with objectives that were previously goals regarding increasing muscle strength. Her motor skills/physical goals were reduced. The student's hours of specialized instruction, physical therapy and speech & language services remained the same. The one-hour per week occupational therapy services was replaced with 30 minutes per week of applied physical education. Extended School Year ("ESY") services were continued in the updated IEP but the new IEP contained no ESY goals. (Petitioner's Exhibits 14 & 23)

19. After the School was informed about the student's autism diagnosis the School A nurse prepared a "care plan" stated the student's behavioral problems "prevent her from achieving academic success." The nurse noted the following issues that interfered with the student's ability to access the learning environment: inability to interact with others, isolation, inability to cope with changes in her environment, throwing tantrums, having a low frustration tolerance, potential for self-injury and injuring others through acts such as hitting. The care plan included goals and inventions to address the student's behaviors. (Petitioner's Exhibit 15)

20. The student's classroom teacher, counselor and principal have all called the parent about the student's behavioral difficulties including wandering in and outside the classroom and difficulties with peers. The student occasionally wanders in the school to another floor and interacts with another teacher she knows. Prior to March 2011 when the parent filed a due process complaint the principal and counselor called the parent frequently about the student's behaviors. The parent expressed that she was tired of the repeated calls and that there had been no change in the student's program to address the behaviors. (Parent's testimony, Petitioner's Exhibit 25-1)

21. On March 4, 2011, the student was suspended for three days for causing a disruption in the school. (Petitioner's Exhibit 11-2)

22. The student's echolalia and wandering at school and the changes in mood and behavior from day to day, frustration she exhibits with other people and they can bring her down are manifestation of her autism. The student tends to be bossy with her peers and gets along better with adults than peers. The student appears mature and although she is thirteen is often mistaken as an adult. The student does not seem enthusiastic about school any longer and she is being constantly told at school that her behaviors are inappropriate. The parent believes the student needs a smaller classroom with academic challenge and a program and staff that are familiar with working with children with autism. The parent believes the student is under stress for being continually reprimanded for behaviors she can't control. (Parent's testimony)

23. The parent has seen an improvement in the student's speech and communication skills since she been attending School A. However, the parent cannot speak to any improvement in the student's social interactions because she primarily observes the student's behavior at home, which has never been problematic. (Parent's testimony)

24. The student has had the same classroom teacher for both the 2009-2010 and 2010-2011 school year. In the 2009-2010 school year the student had 12 students in her classroom with a teacher and aide. The student's teacher noted that during the student's first year at School A the student was non-compliant in making social relationships with students and staff, she would not comply with sitting at a desk or in seat and several calls needed to be made to the parent to assist in getting the student to comply. testimony)

25. The teacher noted during the student's second year (2010-2011) the student's behavior has improved. The student transitions into the classroom more easily. She sits and completes her work. The student makes 90% or better on all of her tests. She has done well with multiplication in single and double digits. She is able to communicate and clarify her desires and problems. The student has become more social with other student's in her classroom. The student can be redirected. The student able to see the school counselor anytime she needs. She gets up and lets the teacher know she needs to talk and is allowed to leave to see the counselor. The student now knows the building and school staff and moves through the building lining up and leaving with the group. She comes into the room by herself. The student is in a self-contained classroom for all of her academics. She interacts with non-disabled peers during events in the school. Her interaction with those students is generally without problem. testimony)

26. The student can be verbally confrontational with other students in expressing her opinion. There are currently thirteen students in her classroom with one teacher and two aides. Cognitively, the student is older than she appear to be in her evaluations. She makes good analysis and acts quite mature. The student cognitive abilities are the highest of those students in her classroom. The class is between the second and third grade level. The student is operating at about the fourth grade level. Sometimes the student's wandering

and disruptive behavior still manifest but not to the degree of her first year at School A. testimony)

27. In March 2011 an independent neuropsychological evaluation was conducted of the student. The evaluation confirmed the student's previous diagnosis of autism. The evaluation determined the student's cognitive abilities to be in the borderline range with a full scale IQ of 71; however, the student's processing speed was below the other areas assessed. The student academic achievement scores were below average, commensurate with the cognitive abilities; however, the student's achievement in written expression was extremely low. Based upon the student's autism as it affects her daily interactions with her peers and her teachers. She is a concrete thinker, whose social presentation tends to be awkward and may be off-putting to peers her age. Thus, every attempt should be made to help to increase [the student's] social relatedness, and this can be done through a social skills group, and she should be in a full time special education setting with a low student to teacher ratio of no more than five students to one teacher to affectively address her academic deficits. The evaluator recommended a program that can provide social skills training and is skills at addressing behaviors and concerns of students with autism. The evaluator interviewed the student and the parent but did not interview any of the student's teachers. (Dr. Nelson's testimony, Petitioner's Exhibit 7-11, 7-12, 7-13)

28. A DCPS school psychologist reviewed the independent neuropsychological evaluation. As a result of her review of the evaluation and her knowledge of the student the DCPS psychologist recommended that the student would benefit from "a small student to teacher ratio with academics taught full-time with specialized instruction for students that are high functioning. Also the low student to teacher ratio can incorporate the teaching of strategies to improve problem solving skills develop strategies to improve attention and methods to increase retention and organization skills and improve social cues." Participation in a literate, motivating, risk-free classroom environment may assist [the student] in developing a positive attitude toward writing as well as improving her writing skills. A literate classroom features student's written work prominently, is filled with reading and writing materials and has word list on the wall. A motivating and risk free environment is created by the teacher setting an exciting mood that alls for student input and flexibility on topics and also reinforces and supports the student's accomplishments." Petitioner's Exhibit 8-7, 8-8)

29. The parent's educational advocate conducted an observation of the student's classroom on March 16, 2011. She also had a chance to discuss the student's behavior and success at School A with her classroom teacher, who confirmed that the student is struggling in her current environment due to the large classroom setting and transitions throughout the school day, which are very difficult for the student to handle. The advocate observed the student refusing to follow classroom instructions, refusing to transition between classes, humming loudly throughout the observation period, and exhibiting typical characteristics of a student with autism. The student was constantly attempting to correct the teacher and asking for an explanation for every instruction she is given. The advocate spoke with the teacher who said the student is rude and constantly calling out in the classroom and caused problems that required her to correct and redirect the student daily. On June 1, 2011, the parent's educational advocate conducted another observation and again

observed that the student often blurted out her thoughts and required redirection by the teacher to alter the behavior. testimony)

30. DCPS convened the student's annual IEP meeting on May 18, 2011. At this meeting the parent expressed that she believed the student was in need of more one to one classroom environment with a more challenging academic program that the student had at School B. In essence, the parent stated the student's needs environment the student had at School B with the academic challenge the student was being provided at School A. (Petitioner's Exhibit 14-2)

31. On June 1, 2011, DCPS convened another IEP meeting for the student. The parent and her advocate participated in the meeting. The student's goals in Math, Reading, Written Expression and Communication/Speech & Language were updated. The IEP team at the June 1, 2011, meeting reviewed and completed the disability worksheet for autism and determined the student met the criteria for this disability and the student's IEP was amended to reflect the change in disability classification. (DCPS Exhibit 5)

32. On June 11, 2011, DCPS issued a Prior Written Notice that stated the student would remain in an out of general education setting and would remain at School A. (DCPS Exhibit 2)

33. School A houses the citywide programs for MR, kindergarten through 8th grade at School A. There are other student's with autism in the school. For autistic students their social and communications skills are of greatest concern and functional and daily living skills are incorporated in all the IEP academic goals and in the student's case her communication goals now reflect attention to her autism concerns. testimony)

34. The student's communication goals in the student's IEP state the following:

> Weaknesses: [the student's] behavior in language therapy and her special ed. Classroom is socially inappropriate. She talks out at will, taunts her classmates when she feels like it and inappropriately dominates most group discussions with spontaneous inappropriate comedic comments. She can but does not follow directions multi-level directions with numerous variables immediately and frequently leaves the classroom to pace the hall in front of her classroom when she becomes agitated or oppositional. [the student] makes frequent articulation errors that she corrects easily when the errors are brought to her attention. He use of cognitive academic language needs to be strengthened along with her use and understanding of the "the verb to be.'"
>
> Strengths: [the student is engaging personable student who articulates her thoughts and ideas clearly and distinctly. She shows strong skill development in the area of analytic thinking and auditory comprehension. She interprets nonverbal communication adequately, uses social scripts as expected and understands posted and implied rules that are required in curricular and non-curricular activities. He understanding of irregular nouns (which was a primary

goal of her for this school year is much improve and evidenced in her basic interpersonal communication. Sometimes he needs to be reminded to use the correct forms of irregular nouns [the student enjoys learning and knows how to ask questions for clarification to seek information. She is a positive influence in group language therapy most of the time. (DCPS Exhibit 6)

35. The communication goals in the student's IEP developed June 1, 2011, are:

    (1) "...perform a variety of tongue, lip and jaw exercises, upon request, in 4/5 trials, independently."

    (2) "...observe turn taking rules in the classroom or social interactions 80% of the time."

    (3) "...make relevant contributions to a topic during classroom discussion 80% of the time."

    (4) "...join and leave an on-going communicative interaction appropriately 80% of the time."

    (5) "use appropriate strategies for getting attention 80% of the time."

    (6) "...respond appropriately when asked to change her actions 80% of the time."

    "increase her understanding of the copular by 80% accuracy."

36. The student's current IEP has academic goals in the areas of Math, Reading, Written Expression, Communications/Speech and Language, Health/Physical and Motor Skills/Physical Development. The IEP did not contain any social emotional goals and there was no BIP to address the behaviors. The student does not have counseling in her IEP, although she has access to the school social worker when she choices. (DCPS Exhibit 6)

37. The student has been interviewed and is being considered for admission to located in Rockville, Maryland. is a full time special education school with a school population of 250 students. has a multiple learning needs program for students with various disability classifications including students with Autism, ages six through twenty-one. The students at are grouped by functional level and some earn a certificate; some earn a diploma. In each classroom the age range of students may be two to three years. The class being proposed for the student has ten students, with a head teacher and an associate teacher each with a degree in special education and an assistant teacher. The classroom is further supported by a speech therapist, occupational therapist and behavioral therapist. A social worker is assigned to the students in two classrooms with 50 % of their time with each class providing individual and group services. Because the student has higher level of language and academic skills has proposed a classroom where the work is more

challenging and the student's work more independently. All the academics are delivered in the self-contained classroom. The students go to other places in the school for Music, Art, PE and Library. The base tuition is for an 11-month program. has not completed the admission process for the student would like to continue and complete the student's admission process including reviewing additional documentation and the student's most recent IEP and a visit to the student's current school and/or speak with the student's current teacher and school staff. The school believes that it can meet the student's needs. testimony)

CONCLUSIONS OF LAW:

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

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [8] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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

Issue (1): Did DCPS deny the student a FAPE by failing to provide an appropriate placement during the 2009-2010 and 2010-2011 school years.

Conclusion: Petitioner presented sufficient evidence that the student placement and location of services at least as of the student's diagnosis of autism in the May 2010 IEP meeting is inappropriate. Petitioner sustained the burden of proof by a preponderance of the evidence.

The Individuals with Disabilities Education Improvement Act ("IDEIA") of 2004 requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

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

> [S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..."

20 U.S.C. § 1401(9), 34 C.F.R. § 300.17, 30 DCMR Sec. § 3001.1.

Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1. The FAPE requirement is satisfied when the State provides personalized instruction that is reasonable calculated to permit the child to benefit educationally. See Hendrick Hudson Board of Education v. Rowley, 458 U.S. 176, 203-204 (1982).

Additionally, pursuant to D.C. MUN. REGS. tit. 5, § 3010.2 (2003), DCPS "shall implement an IEP as soon as possible after the meeting where the IEP is developed..." Pursuant to 34 C.F.R. § 300.115(a), DCPS "must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

A school district is not required to implement a program that will maximize the handicapped child's potential. *Rowley, 458 U.S. at 198-99.* Rather, a handicapped child has a right to "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley, 458 U.S. at 203.* Rowley explained that implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.. . .We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. *Rowley, 458 U.S. at 200-02.*

testified the student displayed behavioral difficulties during her initial year at School A but confirmed the student's behaviors have improved in the current school year. Nonetheless, the student's behaviors of wandering outside the classroom, shouting out in class and sometimes being non-compliant have persisted, although to a lesser degree than during her first year. also testified that that student is in a classroom where she has significantly greater cognitive and academic abilities than the other students. The student is clearly more mature than the other students. The parent credibly testified that in the current school year prior to the due process complaint be filed the teacher, school counselor and even school principal were still calling her to assist in addressing the student's behaviors. In addition, the student has been suspended this school year for disruptive behaviors.

In March of 2010 was when the student was first diagnosed with autism, which explained her behaviors including her discomfort with the large school environment, being in close proximity to other children, and her disruptions in the classroom. The doctor from Children's stated, "regarding [the student's] behavioral problems, we feel that the environment that she has been

placed in is a change and contributes to her acting out. If she was in a smaller setting or in a smaller group such as before, this problem would probably not be evident."

DCPS was clearly aware of the student's diagnosis of autism and the concern of her doctor over her current school placement by the May 2010 IEP meeting. In that meeting the school psychologist specifically stated that based on the March diagnosis by Children's the student's needs needed to be re-examined. Instead, DCPS did nothing, allowing the student to stay in an environment that was clearly inappropriate.

Dr. Nelson in her neuropsychological evaluation indicated that the student requires a program tailored to her autism that has a small student to teacher ratio. This is what the parent has been requesting from the time that she realized the student needed a change in program.

Both the school nurse and the school psychologist indicated to the MDT team their concern that the student's programming take into account her autism. This is sufficient evidence to show that by a preponderance of the evidence, the student's current placement at School A in inappropriate. The student's continued placement at School A, in light of her continued disruptive behaviors and wandering out of the classroom, and which are not effectively being addressed, along with the student being in a classroom where she is apparently not with students of her own cognitive and academic levels demonstrate that the student is in an inappropriate placement and location of services and the student is being denied a FAPE.

Petitioner has proposed that the student be placed at Ivymount School. However, at the time of the hearing the student had not been accepted to the school and thus the Hearing Officer cannot place the student in a school to which the admission process is not complete and an offer of acceptance has not been made. Thus, the Hearing Officer directs that DCPS convene an IEP placement meeting to determine an appropriate placement and consider any proposed placements presented by the parent.

Issue (2): Did DCPS deny the student a FAPE by failing to in May of 2010 by failing to tailor her IEP to her autism?

Conclusion: The student's IEP for the 2010-2011 school year was inappropriate and did not effectively address the student's needs. Petitioner sustained the burden of proof by a preponderance of the evidence.

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

Additionally, the public agency must also ensure that an appropriate IEP is in place for the beginning of each school year. 20 U.S.C. § 1414 (d) (4) (A) (i); 34 C.F.R. § 300.323 (a); and D.C. Mun. Regs. Tit. 5 § 3010.1.

Under these guidelines, the student's IEP is inappropriate and incomplete, and has been since the May 2010 meeting because it was not altered to take into account the student's autism and the severe impact it has on her educational success. Even DCPS's own psychologist indicated during the meeting that she believed that the student's educational programming should be revisited based on the diagnosis by Children's that the student was autistic. She was aware, as the rest of the team, how poorly the student was currently doing at under the IEP she had at the time and that the student needed more than what was able to offer. The student's IEP goals and objectives should have been re-written to take into account the autism diagnosis. However, that was not done.

During the May 2010 IEP meeting, the parent made it clear that she disagreed with the IEP because she did not feel it was adequately addressing the student's recent diagnosis or the manifestations of that disability. The parent has requested time and time again that something more or different be done to address her daughter's needs. The IEP goals remained unchanged from the previous IEP. DCPS failed to develop an appropriate IEP for the student. This has resulted in harm to the student, and a deprivation of educational benefit.

The recent IEP developed by DCPS on June 11, 2011, does include specific communication goals that appear to address the student behaviors that are a function of her autism disability. Prior to this recent IEP these needs of the student were not being effectively addressed. In addition, the student's IEP contains no social emotional goals. Although the student appears, based on testimony, to regularly seek out the school counselor to address her frustrations in classroom, there are no defined goals or specific services to address what seems to be ongoing social/emotional concerns.

The IEP is the centerpiece or foundation of special education. It is the guidebook that tells what services will be rendered, by whom in what manner and for what time period. If the IEP is not complete or is inappropriate then the services will not be effective and will result in a loss of educational benefit and a denial of FAPE.

20 U.S.C. 1414(a)(i) defines Individualized Education Program as a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes a statement of the child's present levels of academic achievement and functional performance." It includes measurable goals, statements of related services, assistive technology and other appropriate accommodations. It is developed by the IEP team which consists of the child's parent, general education teachers, LEA special education teachers and anyone deemed as a necessary participant by reason of the services provided to the student. The IEP is the centerpiece or main ingredient of special education services.

Under these guidelines, the student's IEP is inappropriate and incomplete, and has been since the May 2010 meeting because it was not altered to take into account the student's autism and the impact it has on her educational success. Even the school's own psychologist indicated during

the meeting that she believed that the student's educational programming should be revisited based on the diagnosis by Children's that the student was autistic. The student's IEP goals and objectives should have been re-written to take into account the autism diagnosis. However, that was not done.

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." "the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid, 401 F.3d 522 & 524.* To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

Compensatory Education is an equitable remedy crafted to remedy educational deficit created by "an educational agency's failure over a given period of time to provide FAPE to a student" Id. "Appropriate compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place." Id. The student's right to receive compensatory education is reasonable in light of DCPS' continued failure to provide FAPE to this student.

In this case, Petitioner included a compensatory education plan with her disclosures but failed to present evidence how the harm to the student would be ameliorated by the plan proposed. This leaves the Hearing Officer guessing as to what is the appropriate remedy as to compensatory education. Rather than grant an award that is not fact specific the Hearing Officer directs that DCPS conduct an comprehensive psychological evaluation of the student within ninety days of the student being in her new placement and Petitioner is allowed to file a complaint to seek compensatory education for the denials of FAPE noted herein within once that evaluation is completed.

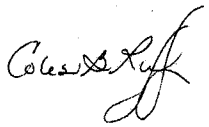
ORDER:

1. Within thirty (30) calendar days of the issuance of this Order DCPS shall convene an IEP/placement meeting and determine an appropriate placement/location of services for the student for the remainder of ESY and for the 2011-2012 school year.

2. Within ninety (90) calendar days of the student being placed in her new placement/ location of services DCPS shall conduct a comprehensive psychological evaluation of the student for purposes of determining the student's currently academic, social/emotional and behavioral functioning and her progress in the new placement and review and revise the student's IEP as appropriate.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: July 2, 2011