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,[1]

Petitioner,

v.

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

Respondent.

Date Issued: May 13, 2011

Hearing Officer: Ramona M. Justice

Case No:

Hearing Room: Room 2006

OSSE STUDENT HEARING OFFICE 2011 MAY 13 AM 10:07

HEARING OFFICERS' DETERMINATION

I. JURISDICTION

The due process hearing was held, and the Hearing Officers' Determination is issued, 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 18, 2011, the parent, through her Attorney, filed with the District of Columbia, Office of the State Superintendent of Education ("OSSE"), Student Hearing Office, an "Administrative Due Process Complaint Notice", on behalf of the student.

On March 21, 2011, the Student Hearing Office assigned the due process complaint to this Hearing Officer. On March 23, 2011, the Hearing Officer issued to the parties a "Notice of Prehearing Conference", scheduling the prehearing conference for April 4, 2011 at 3:00 p.m.; and an Order requiring the parties to notify the Hearing Officer of the date, time, and outcome of the resolution meeting. On March 28, 2011 the Respondent filed "District of Columbia Public School's Response to Parent's Administrative Due Process Complaint".

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[1] *Personal identification information is provided in Appendix A.*

According to the IDEA, the Respondent must convene a resolution meeting within fifteen (15) calendar days from the date of the complaint, which expires in this matter on April 2, 2011. The thirty (30) day resolution period ended on April 17, 2011.

On April 4, 2011, the Respondent filed the "Resolution Period Disposition Form", notifying the Hearing Officer that the resolution meeting convened on March 31, 2011, without resolution. Therefore, the 45 day timeline for convening a hearing and issuing a decision began on April 1, 2011, the day after the resolution meeting; and expires on May 15, 2011.

The prehearing conference was held on April 4, 2011 at 3:00 p.m., and on April 5, 2011, 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 2, 2011, at 9:00 a.m...

The due process hearing convened on May 2, 2011, at 9:00 a.m., as scheduled, at 810 First Street, N.E., 2nd Floor, Washington, D.C... The hearing was closed to the public, pursuant to the parents' request. Each party was represented by an Attorney; and each Attorney provided opening statements.

There were no preliminary matters for discussion, or for the Hearing Officer to decide. During discussion of disclosures, the Petitioner offered into evidence Petitioner's Exhibits 1-40, and the Respondent offered into evidence Respondent's Exhibits 1-10. The Respondent objected to Petitioner's Exhibits 34-40, on the ground that the disclosures are untimely, because the disclosures were due on April 25, 2011, however submitted on April 26, 2011, 1 day beyond the 5 day disclosure period. The Petitioner represents that Petitioner's Exhibit 34 was submitted beyond the 5 day disclosure period because it was not received from Respondent until April 26, 2011. The Petitioner withdrew Petitioner's Exhibit 38.

After hearing arguments from the parties, the Hearing Officer overruled Respondent's objection, admitting into the record as evidence Petitioner's Exhibit 34, finding that the document is relevant, reliable and probative of the issues in the complaint, while noting, that the Confidential Psychological Evaluation identified in Respondent's disclosures as Exhibit 4 was revised on *March 31, 2011*, and the Petitioner's Exhibit 34, also identified as the Confidential Psychological Evaluation prepared by the Respondent, was revised on *April 18, 2011*, and certain information contained in each evaluation differs, and therefore, both evaluations are relevant, reliable, and probative of the issues in the complaint and should be admitted.

The Hearing Officer also determined that the April 18, 2011 revised Confidential Psychological Evaluation should have been included in Respondent's Disclosures submitted on April 25, 2011, however, was not included. For these reasons, the Respondent's objection to admitting Petitioner's Exhibit 34 is overruled and Petitioner's Exhibit 34 is admitted into the record as evidence. Respondent also objected to Petitioner's Exhibit 6, however, the objection was overruled and the exhibit admitted.

The Hearing Officer overruled Respondent's objection, and admitted into the record as evidence Petitioner's Exhibit 40, finding that the Respondent would not be unduly prejudiced if Exhibit 40, representing a witnesses curriculum vitae was admitted, particularly since the witness is not offered by Petitioner as an expert witness. The Hearing Officer sustained Respondent's objection to Petitioner's Exhibit 39, by excluding the exhibit, as untimely, however, allowed Petitioner's witness to testify regarding compensatory education services proposed for the student.

In summation, the Hearing Officer admitted into the record as evidence Petitioner's Exhibits 1-37 and 40, excluding Petitioner's Exhibit 39 as untimely, and Petitioner's Exhibit 38 as withdrawn by Petitioner. The Hearing Officer also admitted into the record as evidence Respondent's Exhibits 1-10. Each disclosure was accompanied by a witness list.

Petitioner's witnesses included: the student's mother, and Education Advocate. The Respondent's witnesses included the Compliance Case Manager.

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 all issues in the complaint.

III. BACKGROUND

The student is years of age; and in the grade at a District of Columbia public middle school, which the student began attending during the middle of the 2010/11 school year. During the 2009/10 school year, the student attended a District of Columbia Public Charter School.

On April 2, 2009, the Respondent convened an eligibility meeting to determine the student's eligibility for special education services. The Respondent determined the student ineligible for special education services. The parent was not present at the meeting.

On November 12, 2010, a due process complaint was filed in this matter regarding the student's discipline, and on December 16, 2010, the Hearing Officer issued a decision and Order requiring, among others, the Respondent to evaluate and convene an eligibility meeting to determine the student's eligibility for special education services, within certain timeframes.

On March 18, 2011, the parent, through her Attorney, filed this due process complaint challenging the Respondent's compliance with the December 16, 2010 Hearing Officer's Determination; the appropriateness of the IEP eligibility team that convened on April 2, 2009 and the April 2, 2009 ineligibility determination; and development of an appropriate IEP for the student on April 2, 2009.

IV. ISSUES

The following issues are before the Hearing Officer:

(1) Whether the District of Columbia Public Schools denied the student a free appropriate public education, by failing to identify and determine the student eligible for special education services on April 2, 2009, in violation of the "Child Find" provisions of the IDEA, at 34 C.F.R. §300.111 and §300.304(c)(4) and (6)?

(2) Whether the District of Columbia Public Schools denied the student a free appropriate public education, because on April 2, 2009, the Respondent failed to properly convene an IEP team, by ensuring that the IEP team included the student's parent, in violation of the IDEA, at 34 C.F.R. §300.321(a)(1); 300.322(a)?

(3) Whether the District of Columbia Public Schools denied the student a free appropriate public education (FAPE), because it failed to conduct initial evaluation of the student, convene an eligibility meeting to determine the student's eligibility for services, and develop an appropriate Individualized Education Program (IEP) for the student, as warranted, within 120 days of the date the parent requested evaluation of the student to determine the student's eligibility for special education services; in violation of the IDEA at 34 C.F.R. §300.301(a)(b)(c)?

(4) Whether the District of Columbia Public Schools denied the student a free appropriate public education (FAPE), because it failed to comply with the December 16, 2010 Hearing Officer's Decision requiring the Respondent to conduct a Functional Behavioral Assessment within thirty (30) school days of issuance of the Order; and complete a Comprehensive Psychological Evaluation and convene an eligibility meeting to review the evaluation and determine the student's eligibility for special education services, within sixty (60) school days of issuance of the Order?

V. RELIEF REQUESTED

The Petitioner requests that the Hearing Officer find in its favor on each issue in the complaint. The Petitioner requests that the Hearing Officer issue an Order requiring the Respondent to conduct a Comprehensive Psychological Evaluation and/or fund an independent Comprehensive Psychological Evaluation.

The Petitioner also requests that the Hearing Officer issue an Order requiring the Respondent to convene a meeting to identify and determine the student eligible for special education services, under the disability classification of emotional disturbance, develop an appropriate IEP, and Behavioral Intervention Plan (BIP) for the student; and provide the student compensatory education services for harm to the student, due to violations occurring during the 2009/10 and 2010/11 school years.

VI. CREDIBILITY DETERMINATIONS

The testimony of the witnesses presented by the parties was credible. The Respondent's disclosures included a Comprehensive Psychological Evaluation, indicating that the evaluation report was prepared on March 24, 2011 and revised on March 31, 2011; and the Petitioner's disclosures included a Comprehensive Psychological Evaluation provided by the Respondent, indicating that the report was prepared on March 24, 2011 and revised on April 18, 2011. However, the March 24, 2011 evaluation report is not included in the disclosures.

Additionally, there is disparity in the data included in the March 31, 2011 and April 18, 2011 evaluations, and the Respondent's Psychologist that prepared the two (2) evaluations was not available for testimony to explain the data and disparities in the data, which renders the data unreliable.

VII. STATEMENT OF FACTS

1. The student is years of age, and in the grade, at a District of Columbia public middle school, which the student began attending during the middle of the 2010/11 school year.[2] During the 2009/10 school year, the student attending the School, a District of Columbia Public Charter School.[3]

2. Throughout the student's education, the student struggled academically and behaviorally, dating back as early as the 1st grade.[4] Consistently, the student achieved basic and below basic scores in all academic areas; and was retained in the 3rd and 6th grades.[5]

3. The student's history is significant for inappropriate, disruptive and non-compliant behaviors at school, suspensions due to behavior dating back to the 1st grade, and difficulties with sustaining attention, conduct problems, social skills/peer interaction, school defiance, and skipping class, which has had an adverse impact on the student's overall academic performance and school progress, throughout the student's education.[6]

   Socially/emotionally the student evidences the following behavioral difficulties: argumentative, threats towards others, easily irritated and angered, and impulsive; hyperactive; impulsive; and problems with peer relations.[7]

   During a Teacher Assistance Team meeting held in October 2003, notes developed by the team indicate that since the beginning of that school year the student exhibited insubordinate and violent behavior, and acted out when he did not receive one-on one attention. Another TAT document stated that the student was defiant toward his teacher, did whatever he felt like doing, antagonized other students, and had tantrums. The record reflects that behavioral interventions and supports implemented over the years continue to prove unsuccessful.[8]

4. On ***March 2, 2004***, while in the 1st grade at the a ***Clinical Evaluation*** was completed, diagnosing the student with *Oppositional Defiant Disorder*.[9]

   The evaluator recommended special education services as a student with an emotional disability; that the school initiate measures within the student's classroom to ensure the safety of the student and others, because of the student's aggressive and pugnacious tendencies; that the student not be allowed to access to sharp objects without supervision; and a small, structured classroom with a behavior management plan should be considered, particularly to provide alternatives and consequences for the more aggressive actions of the student; and a continuation of counseling.[10]

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[2] Testimony of parent, and Respondent's Exhibit 5.
[3] Petitioner's Exhibit 23-1.
[4] Petitioner's Exhibit 2, page1, Petitioners Exhibits 29-34.
[5] Petitioner's Exhibit 34-3 and testimony of parent.
[6] Petitioner's Exhibit 2, page 8 of 11, Exhibit 26, Exhibit 20, Exhibit 27, and Exhibit 29.
[7] Id.
[8] Petitioner's Exhibits 3, 4, 29-3, 31, and 33.
[9] Petitioner's Exhibit 30-5 and 30-6.
[10] Id.

5. On ***June 13, 2005***, while a 2nd grade student at School, a ***Functional Behavioral Assessment*** was completed.[11] The assessment documents the student's past acting out behaviors such as defiance, tantrums, verbal and physical aggression with peers, verbal aggression with adults, task refusal, and noncompliance with rules and limits.[12]

   The aggressive and tantrum behaviors escalated rapidly and were often unresponsive to attempts at de-escalation; and the seriousness of the student's behavior generated concern regarding the safety of peers around the student.[13] In one incident the student used scissors to cut the skin and hair of another student; and in another, accidentally hit another student in the eye with a pencil, showing no remorse for the accident.[14]

   Recommendations include: an Intervention Behavior Plan to provide appropriate strategies and accommodations for addressing the student's behavior at school; individual and group counseling to address emotional issues an increase the student's receptivity to interventions and learning; and that the Multidisciplinary Development Team (MDT) review the Functional Behavioral Assessment (FBA), along with the clinical psychological evaluation and reports from other disciplines to determine if the current setting is the appropriate environment for the student.[15]

6. On ***November 2, 2005***, the parent signed "Consent for Evaluation-Initial or Reevaluation" authorizing the Respondent to reevaluate the student to determine the student's eligibility for special education services.[16]

7. On ***November 2, 2005***, the Respondent developed a Student Evaluation Plan for the student, including completion of an updated Educational Evaluation. [17]

8. On ***November 5, 2005***, while a 3rd grade student, the District of Columbia Public Schools developed an Intervention Behavior Plan (IBP) for the student.[18]

9. On ***March 13, 2009***, an ***Educational Evaluation*** was completed.[19] The student was referred for evaluation by the student's mother, due to concerns regarding the student's behavior.[20] At the time of the evaluation the student was 11 years, 6 months in age, however performed at the 4th and 5th grade equivalent in broad reading, broad math, broad written language, math calculation skills, written expression, academic skills, academic fluency, and academic applications.[21] The student performed at the 3.7 grade equivalency in writing samples, 3.9 in reading fluency, 4.9 in passage comprehension, 4.4 in applied problems, 4.2 in writing fluency, 4.8 in math fluency, 5.1 in letter word identification, 5.4 in spelling, and 4.7 in calculations.[22]

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[11] Petitioner's Exhibit 29.
[12] Id.
[13] Id.
[14] Id.
[15] Petitioner's Exhibit 29, page 4.
[16] Petitioner's Exhibit 32-1.
[17] Petitioner's Exhibit 33.
[18] Petitioner's Exhibit 31.
[19] Petitioner's Exhibit 9-1.
[20] Id.
[21] Petitioner's Exhibit10-3.
[22] Id.

The student's fluency with academic tasks was within the low average range compared to others at his age level; his academic skills and ability to apply those skills were both within the average range; and when compared to others at his age level, the student's performance was average in broad reading, mathematics, math calculation skills, and written language; and low average in written expression.[23]

10. According to a ***March 13, 2009*** Evaluation Summary completed by the Respondent, when compared to others his age, the student's academic achievement was in the average range in Math Calculation Skills and Broad Math; the student's overall reading ability is limited, reading tasks above the age 10-10 level will be quite difficulty for the student; the student's overall ability to express himself in writing is limited to average, writing fluency tasks above the age 11-5 will be quite difficult for the student; and behavioral support services are recommended to address the student's bullying.[24]

11. On ***March 17, 2009***, the Respondent completed a ***"Comprehensive Psychological Evaluation"*** to assess the student's intellectual functioning.[25] The student was referred for evaluation due to a history of non-compliance particularly during periods of transition and while attending certain classes.[26] Emotionally the student achieved scores in the clinically significant range for aggression, depression, and bullying.[27]

    The evaluator determined that although the student appeared to require emotional support in the school setting, the student failed to satisfy the eligibility criteria of a student with an emotional disability, and should receive services through the school counselor or school mental health worker providing individual counseling to address the student's anger, time on task and appropriate behavior in the school setting particularly during times of transition.[28] Among others, the evaluator recommended that the family seek outside counseling services to follow-up on the student's elevated levels of depression.[29]

12. On ***April 2, 2009***, the Respondent convened an eligibility determination meeting to discuss and determine the student's eligibility for special education services.[30] The team determined the student ineligible for special education services.[31] The parent was not present at the meeting.[32]

13. On ***October 4, 2010***, the parent requested reevaluation of the student to determine the student's eligibility for special education services; and on this date, the Respondent issued to the parent an "Acknowledgement of Referral to Special Education Letter", acknowledging receipt of parent's referral of the student for initial evaluation and informing the parent that the next step was for the school staff to review various educational and behavioral data and determine whether to proceed with an evaluation.[33]

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[23] Petitioner's Exhibit 10.
[24] Petitioner's Exhibit 8-2 through 8-10, and Respondent's Exhibit 1.
[25] Petitioner's Exhibit 9-1, and Respondent's Exhibit 2.
[26] Id.
[27] Petitioner's Exhibit 5-17.
[28] Petitioner's Exhibit 2, page 4 of 11.
[29] Petitioner's Exhibit 5-17.
[30] Petitioner's Exhibit 5-8.
[31] Petitioner's Exhibit 5-8 and Testimony of parent.
[32] Testimony of parent.
[33] Petitioner's Exhibit 5-6, Petitioner's Exhibit 15-1, and Petitioner's Exhibit 17-1.

14. On ***October 4, 2010***, the Respondent issued to the parent a "Letter of Invitation to a Meeting", to discuss the student's eligibility for special education services, behavior, and parent concerns.[34] The letter of invitation proposed October 13, 2010 at 10:30 a.m. for the meeting, and indicates that an initial contact was made with the student's mother on October 4, 2010, in person.[35]

15. On ***October 6, 2010***, the parent, through her Attorney, forwarded a second request to the Respondent, for comprehensive reevaluation of the student, to include however not limited to a Comprehensive Psychological Evaluation.[36]

16. On ***October 19, 2010***, First Home Care Corporation conducted a diagnostic assessment of the student.[37] The parent referred the student to First Home Care due to the student's ongoing social and emotional difficulty and irregularity, behaviors, and inability to focus and playing in class.[38]

    First Home Care noted that most of the following symptoms were reported for at least two years: anger and irritability as symptoms of depression in adolescents, anxiety symptoms including excessive worry, often losing his temper, *Attention Deficit Hyperactivity Disorder (ADHD)*, including easily distracted, short attention span, and difficulty focusing in class, and conduct issues including bullying and intimating others, and multiple suspensions.[39]

    The clinical evaluation summary reports that the student presents with Axis I: *Depressive Disorder* NOS; that the student would become angry easily "when people do things"; and his frequency of anger was not for about "5 times" a day; and the student was most angry, then happy.[40]

    First Home Care also reported that the student has a history of and is currently experiencing distractibility and behavioral problems that may be indicative of other conditions, such as ADHD or other learning disabilities; and recommended that the student participate in an additional assessment in six months, following a psychological assessment and with the involvement of his mother, in order to determine a more accurate diagnostic picture.[41]

    Thereafter, the District of Columbia Department of Mental Health developed an Individualized Plan of Care for the student, documenting his diagnosis of Depressive Disorder NOS, and recommended placement of services to reduce the student's symptomatic behaviors.[42]

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[34] Petitioner's Exhibit 18-1.
[35] Id.
[36] Petitioner's Exhibit 13-4.
[37] Petitioner's Exhibit 11-1.
[38] Petitioner's Exhibit 2, page 4 of 11, and testimony of parent.
[39] Petitioner's Exhibit 11-4.
[40] Id.
[41] Petitioner's Exhibit 11-10.
[42] Petitioner's Exhibit 12-1.

17. On ***November 12, 2010***, a due process complaint was filed in this matter, and on December 16, 2010, a Hearing Officer's Determination was issued, requiring the Respondent to provide the student 10 hours of independent tutoring to compensate the student for the three (3) days the student was without an alternative educational placement and/or educational services.[43]

    The Order also required the Respondent to conduct a Functional Behavioral Assessment (FBA), within thirty (30) school days of the issuance of the Order; and within sixty (60) school days of issuance of the Order, complete evaluations requested by the parent in October, 2010, to determine the student's eligibility for special education services, and convene an eligibility determination meeting.

18. On ***November 19, 2010***, the Respondent issued to the parent a "Notice of Proposed Disciplinary Action", representing a 45 day off-site long term suspension for an incident occurring on November 2, 2010, which the school described as use of an article that is not normally considered a weapon to intimidate or threaten another individual.[44]

19. On ***November 22, 2010***, the Respondent's Hearing Officer issued to the parent a "Notice of Final Disciplinary Decision", reducing the 45 day suspension to a 13 day suspension, from October 21, 2020 through November 22, 2010, based on the following fact which the Hearing Officer determined was substantiated: "On November 2, 2010 xxxx used an article that is normally considered a weapon to threaten another individual.[45]

20. On ***January 7, 2011***, the student's Science teacher completed the BASC-2 Teacher Rating Scale which reflects that the student's scores fell in the clinically significant range for hyperactivity, aggression, depression and conduct problems; the student fell in the at risk category for anxiety, attention problems and learning problems.[46]

    A Functional Assessment interview was conducted with two (2) of the student's teachers on January 20, 2011, documenting the student's verbal aggression, inappropriate expression of anger, difficulty attending consistently, refusal to product class work, avoidance of things that the student does not want to do or unwanted and inappropriate playfulness with peer; and-according to the Ohio Rating Scale completed on January 7, 2011, it is documented that the student argues with others, swears and screams at others, causes trouble for no reason and is physically aggressive.[47] It is also noted that educational deficits may be impacting the student's behavior.[48]

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[43] Respondent's Exhibit 3, and Petitioner's Exhibit 1
[44] Petitioner's Exhibit 5, page 3.
[45] Petitioner's Exhibit 5
[46] Respondent's Exhibit 9, page 0065.
[47] Id.
[48] Id.

21. On ***January 21, 2011***, the Respondent completed a "Draft" Functional Behavioral Assessment (FBA), and Behavioral Intervention Plan (BIP).[49] Behaviors of concern include: defiance, immature talking, social skills, noncompliance, picking on others, verbal aggression, bullying, off task, disorganization, hyperactivity, distracting others, minding other's business, seeking attention.[50]

22. On ***January 28, 2011***, the Petitioner forwarded a letter to the Special Education Coordinator at the student's school to inquire regarding the status of the Functional Behavioral Assessment, Speech and Language, and Comprehensive Psychological Evaluation.[51]

23. On ***February 7, 2010***, in response to an email from Petitioner's Attorney regarding the status of the evaluations ordered by the Hearing Officer, the Respondent forwarded an email to Petitioner's Attorney informing the Attorney of parent's failure to appear for a scheduled evaluation interview, difficulties of the Psychologist to interview the mother to complete the final portion of the Comprehensive Psychological Evaluation, the necessity of the parent's participation in completing the evaluation, and the delay in completing the evaluation due to parent's failure to cooperate with the evaluation interview process.[52]

24. On ***February 25, 2011***, the Respondent completed an ***Educational Evaluation*** reflecting that the student's academic skills are in the low average range for his age; the student's ability to apply academic skills is within the low average range; and the student's fluency with academic tasks is within the low range.[53]

    When compared to others at his age level, the student's standard score is average in brief reading; his broad reading, broad written language, written expression, and brief writing scores are in the low average range; and his standard scores are low (compared to age peers) in broad mathematics, math calculation skills, and brief mathematics.[54]

25. On or about ***March 4, 2011***, the parent contacted the Respondent's Compliance Case Manager to inquire regarding the status of the evaluations, and was advised that the evaluation report was forthcoming within the following week. At the time of the complaint, the evaluations were not completed.

26. The Respondent's disclosures include a ***Confidential Psychological Evaluation***, revised on March 31, 2011.[55] The evaluation reflects that the evaluation report was prepared on March 24, 2011; however, the March 24, 2011 report is not included in the record.[56]

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[49] Petitioner's Exhibits 3 and 4.
[50] Respondent's Exhibit 9.
[51] Petitioner's Exhibit 6-1.
[52] Respondent's Exhibit 5.
[53] Respondent's Exhibit 8.
[54] Id.
[55] Respondent's Exhibit 4.
[56] Petitioner's Exhibit 2.

The Comprehensive Psychological Evaluation the Respondent provided the Petitioner also indicates that the evaluation report was revised on April 18, 2011, although prepared on March 24, 2011. The data included in each report, specifically as it pertains to grades the student earned during the 2010/11 school year; the Wechsler Abbreviated Scale of Intelligence (WASI) Summary of Scores reflecting the student's verbal, performance, and FSIQ scores; and the Woodcock Johnson II Tests of Achievement scores, are significantly different; and there is no explanation for the differences.

The purpose of the evaluation was to assess the student's cognitive, academic, and social emotional behavioral functioning.[57] The student was referred for evaluation by his mother, due to concerns regarding the student's inconsistent academic performance, increasing behavioral concerns at school, and the impact on the student's academic progress.[58]

In each evaluation, the evaluator determined that the student satisfies the eligibility criteria as a student with Other Health Impairment, specifically identified as Attention Deficit Hyperactivity Disorder (ADHD) because the student's meets both criterion 1 and 2 and the student's disability has an adverse impact on the student's educational performance.[59]

The evaluator surmised that it appears that the student's behavioral difficulties are maladaptive and co-occur with his present diagnosis of Depressive Disorder.[60] The evaluator also acknowledged the student's history of behavioral concerns adversely affected the student's academic performance and overall school progress, and concluded that the student's previous diagnosis of Depressive Disorder is one of several behavioral disorders that as a result of ADHD may place the student at risk for forming secondary symptom of poor self-concept and depression.[61]

27. On ***March 30, 2011***, the Respondent issued to the parent a "Letter of Invitation" for an eligibility meeting to review the student's evaluations, discuss and determine the student's eligibility for special education services, including the following proposed dates and times to convene the meeting: April 11, 2011 at 9:00 a.m., April 12, 2011 at 1:00 p.m., April 26, 2011 at 11:00 a.m. and April 29, 2011 at 10:00 a.m..[62]

28. On ***April 5, 2011***, the Respondent issued to the parent a "Confirmation of Meeting Notice", confirming the eligibility meeting for April 26, 2011 at 1:00 p.m.; and emailed the same to Petitioner's Attorney.[63] The meeting convened as scheduled, however, the parent and parent's Attorney failed to appear.

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[57] Id.
[58] Id.
[59] Petitioner's Exhibit 34, page 10 of 12.
[60] Petitioner's Exhibit 34, page 10 of 12 and Respondent's Exhibit 4, page 11
[61] Id.
[62] Respondent's Exhibit 6.
[63] Respondent's Exhibit 7.

VIII. 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. Failure to Comply with November 12, 2010 Hearing Officer's Decision

Functional Behavioral Assessment

The December 16, 2010 Hearing Officer's Determination (HOD), required the Respondent to conduct a Functional Behavioral Assessment (FBA) within thirty (30) school days of the issuance of the Order.[64] The thirty (30) day timeline to complete the FBA expired on February 16, 2011. The Respondent completed the FBA on or about January 21, 2011, prior to February 16, 2011 and expiration of the thirty (30) day deadline.[65]

The Hearing Officer finds that the Respondent complied with the December 16, 2010 Hearing Officer's Determination (HOD), by completing a Functional Behavioral Assessment (FBA) within thirty (30) school days of issuance of the HOD.

Comprehensive Psychological Evaluation and Eligibility Meeting

Psychological Evaluation

The December 16, 2010 Hearing Officer's Determination (HOD) also required the Respondent to complete evaluations requested by the parent in October, 2010 (i.e. a Comprehensive Psychological Evaluation), to determine the student's eligibility for special education services, and convene an eligibility determination meeting within sixty (60) school days of issuance of the Order.[66] The sixty (60) day timeline to complete the Comprehensive Psychological Evaluation, and convene an eligibility determination meeting expired on or about April 1, 2011.

The record purports that on March 24, 2011, the Respondent completed a Confidential Psychological Evaluation, and the record reflects that on March 31, 2011, the Respondent completed a revised Comprehensive Psychological Evaluation, prior to April 1, 2011 and expiration of the 60day deadline.[67]

The Hearing Officer finds that the Respondent complied with the December 16, 2010 Hearing Officer's Determination (HOD), by completing a Comprehensive Psychological Evaluation within sixty (60) school days of issuance of the December 16, 2010 HOD.

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[64] Petitioner's Exhibit 1, page 8.
[65] Petitioner's Exhibit 3.
[66] Petitioner's Exhibit 1, page 8.
[67] Respondent's Exhibit 4.

Eligibility Meeting

A review of email correspondence between the Respondent and Petitioner's Attorney reflects that on January 31, 2011 the Respondent's Compliance Case Manager forwarded an email to Petitioners' Attorney indicating that according to the Respondent's Psychologist completing the Comprehensive Psychological Evaluation, she was having difficulty interviewing the student's mother in order to complete the evaluation; and that the parent was under the impression that she should consult with her Attorney prior to answering any questions related to the student's evaluation.[68]

The Compliance Case Manager requested that Petitioner's Attorney communicate with parent and inform parent of the importance of cooperating in the evaluation process; and that the parent's input is the final portion of evaluation required by the Psychologist to complete the evaluation. On February 7, 2011, the Petitioner's Attorney responded indicating that she was out of the office the prior week, and inquiring regarding the status of the Comprehensive Psychological Evaluation.[69]

The Compliance Case Manager responded that the Psychologist was able to contact the parent and scheduled an interview to complete the parent portion of the evaluation; however, the parent failed to appear for the scheduled interview, as a result, the Comprehensive Psychological Evaluation was incomplete.[70]

The Compliance Case Manager informed Petitioner's Attorney that the Psychologist would not be able to have the Comprehensive Psychological Evaluation available at the eligibility meeting scheduled for February 8, 2011 because it was incomplete, and proposed February 14, 2011 as an alternate date and time for the meeting. The Compliance Case Manager also requested that the Petitioner's Attorney inform the parent of the importance of her cooperation in the evaluation process.[71]

The Petitioner's Attorney responded on February 7, 2011, indicating the she left a message for the parent on that date, requested to review the evaluation prior to the meeting; and subsequently responded to inform the Compliance Case Manager that the parent contacted the Psychologist in advance of the scheduled evaluation interview informing the Psychologist of her unavailability for the interview because her daughter was ill and taken to the hospital, and requested to reschedule the interview.[72]

On March 4, 2010, the Petitioner's Attorney emailed the Compliance Case Manager regarding non-receipt of the Psychological Evaluation and inquiring regarding the status of the evaluation.[73] On March 8, 2011, the Petitioner's Attorney contacted the Compliance Case Manager notifying the Respondent of noncompliance with the HOD; and that a new complaint was forthcoming.[74]

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[68] Respondent's Exhibit 5-0047.
[69] Respondent's Exhibit 5-0047.
[70] Respondent's Exhibit 5-0046.
[71] Id.
[72] Petitioner's Exhibit 35.
[73] Petitioner's Exhibit 37.
[74] Petitioner's Exhibit 38.

On March 30, 2011, after filing of the complaint, the Respondent issued to the parent a "Letter of Invitation" for a meeting to review the student's evaluations, and discuss and determine the student's eligibility for special education services, proposing four (4) dates and times to convene the meeting, beginning April 11, 2011.[75]

On April 5, 2011, the Respondent issued to the parent a "Confirmation of Meeting Notice", confirming the eligibility meeting for April 26, 2011 at 1:00 p.m.; and emailed the same to Petitioner's Attorney.[76] According to the Respondent, the meeting convened on April 26, 2011, as scheduled, the Respondent waited for an hour for the parent and/or parent's representative to appear for the meeting, however, the parent and/or parent's representative failed to appear for the meeting, as a result, the meeting failed to proceed as scheduled.

The Hearing Officer finds that the Respondent exercised reasonable efforts to secure the parent's participation and cooperation in completing the Comprehensive Psychological Evaluation, and convening the eligibility meeting, in a timely manner.

The parent's delay in responding to Respondent's requests and in completing parent portion of the Comprehensive Psychological Evaluation significantly contributed to the Respondent's delay in completing the evaluation and convening the eligibility meeting, in a timely manner.[77] Therefore, the Respondent should not be penalized for any delay in completing the Comprehensive Psychological Evaluation and convening the eligibility meeting, by the April 1, 2011 due date.

For these reasons, the Hearing Officer finds that the Respondent complied with the December 16, 2010 HOD to the extent possible; and that any delay in convening the eligibility meeting was significantly due to the parent's unavailability and lack of cooperation.

2. Failure to Properly Convene an IEP Team Meeting to Include Parent

On ***April 2, 2009***, the Respondent convened an eligibility determination meeting to discuss and determine the student's eligibility for special education services.[78] Meeting participants included the student's regular education teacher, special education coordinator, school psychologist, and a special education teacher.[79] The Eligibility Meeting Report cover page reflects that the parent attended the meeting; however, the parent was not present.[80]

The Respondent proceeded with the eligibility determination meeting, without the parent, and determined the student ineligible for special education services.[81] There is no evidence that the Respondent exercised reasonable efforts to ensure parent's availability and participation in the eligibility meeting; provided the parent prior written notice of the meeting; or that the parent was afforded the opportunity to participate in the meeting.

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[75] Respondent's Exhibit 6.
[76] Respondent's Exhibit 7.
[77] *J.J., et al. v. The District of Columbia, 2011 U.S. Dist. Lexis 23076 (March 8, 2011).*
[78] Petitioner's Exhibit 5-8 and Respondent's Exhibit 1-004.
[79] Id.
[80] Petitioner's Exhibit 8-1, Respondent's Exhibit 1,and testimony of parent.
[81] Respondent's Exhibit 1.

Furthermore, the Respondent presented no evidence that subsequent to the meeting, the Respondent provided the parent written notice of the ineligibility determination. According to the parent, she first learned of the April 2, 2009 eligibility meeting and ineligibility determination, at a recent resolution team meeting.[82]

The Hearing Officer finds that on April 2, 2009, the Respondent failed to properly convene an IEP team, by ensuring that the IEP team included the student's parents.

3. Failure to Identify, Locate, Evaluate, and Determine Student's Eligibility for Special Education Services on April 2, 2009

The record reflects that as early as *October, 2003*, while the student was 5 years of age and in the 1st grade, the Respondent's Teacher Assistance Team indicated during a meeting that since the beginning of the 2003/04 school year, the student exhibited insubordinate and violent behavior, was defiant toward his teacher, did whatever he felt like doing, antagonized other students, and had tantrums.

On *March 2, 2004*, while in the 1st grade, a Clinical Evaluation diagnosed the student with *Oppositional Defiant Disorder*.

In *November 2, 2005*, the parent authorized the Respondent to reevaluate the student to determine the student's eligibility for special education services; however, it was not until *March 17, 2009*, nearly four (4) years later, that the Respondent completed a *Comprehensive Psychological Evaluation.*

The Comprehensive Psychological Evaluation revealed that emotionally, the student achieved scores in the clinically *significant range for aggression, depression, and bullying*; however, the evaluator determined that the student failed to satisfy the eligibility criteria as a student with an emotional disability, and should receive behavioral support services from the school counselor or a mental health worker; and that the parent seek outside counseling to address the student's depression.[83]

On *March 13, 2009*, an *Education Evaluation* revealed that although 11 years, 6 months of age at the time of the evaluation, the student performed at the 4th and 5th grade levels in all academic areas, significantly below grade level.[84] The *March 13, 2009* Evaluation Summary completed by the Respondent also reflects that the student was average in math calculation skills and broad math, the *student's overall reading ability was limited*, and *written language was limited to average*.

On *March 17, 2009*, the Respondent completed a *"Comprehensive Psychological Evaluation"*.[85] Emotionally the student achieved scores in the *clinically significant range for aggression, depression, and bullyi*ng.[86]

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[82] Testimony of parent.
[83] Petitioner's Exhibit 9, page 8.
[84] Petitioner's Exhibit 10.
[85] Petitioner's Exhibit 9-1, and Respondent's Exhibit 2.
[86] Petitioner's Exhibit 5-17.

On *April 2, 2009*, the Respondent convened an eligibility determination meeting to discuss and determine the student's eligibility for special education services.[87] The team determined the student ineligible for special education services.[88]

The record reflects that the student attended District of Columbia Public Schools throughout his education, and during this period the Respondent was aware of the student's history of academic difficulties, two grade retentions, parent and teacher concerns regarding the student's behavior and the adverse impact on the student's learning and educational performance, the student's inability to thrive in his educational setting, the student's need for 1:1 academic support, threats the student posed to others in his academic environment because of his behavior, and that the behavioral interventions and supports instituted by the Respondent, consistently proved unsuccessful.

The record reflects that since the 1st grade, the Respondent knew or should have known that the student was suspected as a student with a disability, and in need of special education services, however, the Respondent failed to evaluate the student and determine the student eligible for special education services.

A review of the student's educational records, academic test results, parent and teacher reports, report cards and grades, and the student's lack of academic progress throughout the student's education, and two (2) grade retentions, support a finding that the student has a learning 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.[89] On April 2, 2009, the student satisfied the eligibility criteria as a student with a specific learning disability in reading, written expression, and mathematics.[90]

The record reflects that since the 1st grade the student exhibited an inability to build or maintain satisfactory relationships with peers and teachers; inappropriate types of behavior or feelings under normal circumstances; a general pervasive mood of unhappiness and depression; which clearly supports a finding that on April 2, 2009, the student satisfied the eligibility criteria as a student with an emotional disturbance.[91] However, on April 2, 2000, the Respondent failed to carefully consider this information and information obtained from the various sources, and determined the student ineligible for special education services.[92]

The Hearing Officer finds that on April 2, 2009 the District of Columbia Public Schools failed in its obligation under the Child Find provisions of the IDEA, to identify, locate, evaluate, and determine this student eligible for special education services.

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[87] Petitioner's Exhibit 5-8.
[88] Petitioner's Exhibit 5-8 and Testimony of parent.
[89] Petitioner's Exhibits 34, 30, 25, 19, 10, 9, and 2.
[90] Id. and Petitioner's Exhibit 34, pages 6-12, Respondent's Exhibit 4, pages 7-13, and Petitioner's Exhibit 19.
[91] IDEA, 34 C.F.R. §300.8 (4)(i)(B)(C) and (D).
[92] Petitioner's Exhibit 8.

4. **Failure to Conduct Initial Evaluations, Convene an Eligibility Meeting, and Determine the Student's Eligibility for Special Education Services, in a Timely Manner, Pursuant to Parent's Request**

The record reflects that on *October 4, 2010* the parent forwarded a written request for evaluation of the student to determine the student's eligibility for special education services, to the Special Education Department of the student's school.[93]

On *October 6, 2010*, the Petitioner, through her Attorney, forwarded a written request to the student's school requesting comprehensive evaluation of the student, including, however, not limited to a Comprehensive Psychological Evaluation.[94]

The DCPS was obligated to obtain parent's informed written consent, complete initial evaluations, and determine the student's eligibility for special education services, within a reasonable period of time, and no later than 120 days from October 4, 2010 and October 6, 2010, the dates the parent referred the student for evaluation.[95]

The Comprehensive Psychological Evaluation was completed in March, 2011, after the February 6, 2011 due date. Although the Hearing Officer determined that the parent contributed to the Respondent's delay in completing the evaluation and convening an eligibility meeting within 60 school days of the December 16, 2010 HOD, and the Respondent's should not be penalized for not complying with the HOD in a timely manner; the Respondent is not removed from its obligation under the Child Find provisions of the IDEA to conduct initial evaluations, convene an eligibility meeting, and determine the student's eligibility for special education services, within a reasonable period of time, and no later than 120 days from the date the student was referred for evaluation.

In this matter, more than four (4) months lapsed from the dates of parent's initial request for evaluations made on October 4, 2010; and March, 2010, the date the evaluation was completed, which is more than a reasonable period of time for the Respondent to obtain parent's consent to proceed, conduct initial evaluations, convene an eligibility meeting, and determine the student's eligibility for special education services.

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[93] Petitioner's Exhibit 15.

[94] Petitioner's Exhibits 13 and 15.

[95] The D.C. Municipal Regulation, Title 5, Chapter 30, §3005.2 provides that the IEP team shall conduct an initial evaluation of a child *within a reasonable period of time of receiving a written referral and parental consent* to proceed and within the timelines consistent with Federal law and D.C. Code §38-2501. (2006). The District of Columbia Code, Chapter 25, §38-2501 (a), entitled "Special Education and Assessment", established a 120 day timeframe within which initial evaluations and assessments must be completed for students who may have a disability and may require special education services; applicable to all students, without distinguishing between students in *public or non-public schools.* The District of Columbia repealed D.C. Code, §38-2501(a), and failed to replace the section with another section establishing a timeframe for completing initial evaluations/assessments for students in public schools. D.C. Code, Chapter 25B, which is entitled "Placement of Students with Disabilities in Nonpublic Schools" is ambiguous. The *title* of the Chapter 25B leaves readers unclear whether the Chapter and its underlying provisions, only apply to students in nonpublic schools; or whether Chapter 25B, §38-2561.02 (a) establishes the timeline for DCPS to complete initial evaluations for all students, regardless of whether a student attends a public or non-public school. However, a review of recent Federal District Court decisions provides this Hearing Officer the necessary clarification. It is clear that the Federal District Court interprets Chapter 25B, §38-2561.02 (a), as establishing the timeline for DCPS to complete initial evaluations for all students, regardless of whether the students attend public or non-public schools. It is equally clear that the Federal District Court interprets Chapter 25B, §38-2561.02 (a); as requiring DCPS to assess or evaluate a student who may have a disability, and who may require special education services, within ***120 days*** from the date that the student is referred for an evaluation or assessment. *See, Dorros v. District of Columbia, 510 F.Supp.2d 97 (2007); Integrated Design and Electronics Academy Public Charter School v. McKinley, 570 F.Supp.2d 28 (2008); Jones ex rel. A.J. v. District of Columbia, 109 LRP 52722 (2009).*

The evidence clearly supports a finding that the student satisfies the eligibility criteria as a student with multiple disabilities (MD), including Emotional Disturbance (ED), Other Health Impaired, specifically identified as Attention Deficit Hyperactivity Disorder (ADHD), and Learning Disabled (LD).[96] However, as of the date of the complaint, the Respondent has not determined the student eligible for special education services.

The Hearing Officer finds that the District of Columbia Public Schools failed to conduct initial evaluation of the student, and convene an eligibility meeting to determine the student's eligibility for special education services, within a reasonable period of time or 120 days of receiving parent's request for evaluation.

IX. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as the Hearing Officer's review of governing legal authority and case law, 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.[97] Under the IDEA, the Petitioner must prove the allegations in the due process complaint, by a preponderance of the evidence.[98]

2. The Individuals with Disabilities Education Act ("IDEA")[99] is the federal statute governing the education of students with disabilities.[100] The IDEA ensures 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)(I)(A)*.

3. The IDEA defines a free appropriate public education (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; and 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.[101]

   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.

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[96] Petitioner's Exhibit 2, 3, 9, 10, 11, 12, 19, 20, 25, 26, 27, 29, 30, 31, 33, 34, and Respondent's Exhibits 2, 4, 8, and 9.
[97] *Shaffer v. 1 Weast*, 546 U.S. 49, 56-057 (2005) and 5 D.C.M.R. §3030.3.
[98] 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).
[99] 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..
[100] The Federal regulations promulgated under the IDEA, are codified at 34 C.F.R. Part 300.
[101] IDEA, 34 C.F.R. §300.17(d).

5. **Failure to Comply with December 16, 2010 Hearing Officer's Determination**

It is the Hearing Officer's decision that the Petitioner failed to satisfy its burden, by proving that the Respondent failed to comply with the December 16, 2010 Hearing Officer's Determination.

6. **Failure to Properly Convene an IEP Team**

The public agency must ensure that the IEP Team for each child with a disability includes, among others, the parents of the child.[102] The public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or are afforded the opportunity to participate, including notice to the parents early enough to ensure that they will have the opportunity to attend; and scheduling the meeting at a mutually agreed upon time and place; which failed to occur in this matter.[103]

It is the Hearing Officer's decision that the Petitioner satisfied its burden by proving that on April 2, 2009, the District of Columbia Public Schools failed to properly convene an IEP team, by ensuring that the student's parents were members of the eligibility team or were afforded the opportunity to participate in the meeting; in violation of the IDEA, at 34 C.F.R. §§300.321(a) (1) and (3); 300.322(a).

7. **Failure to Identify, Locate, Evaluate, and Determine Student's Eligibility for Special Education Services on April 2, 2009**

The "Child Find" provisions of the IDEA requires that the LEA have in effect policies and procedures to ensure that all children with disabilities residing in the State, and who are in need of special education and related services, are identified, located, and evaluated. In addition, subparagraph (c) of the "Child Find" provisions provide that "Child find" must also include children who are suspected of being a child with a disability under Section 300.8, and in need of special education, even though they are advancing from grade to grade.[104]

It is the Hearing Officer's decision that the Petitioner satisfied its burden by proving that on April 2, 2009, the District of Columbia Public Schools failed to identify, locate, evaluate, and determine this student's eligibility for special education services, in violation of the Child Find provisions of the IDEA, as set forth at the IDEA, at 34 C.F.R. §300.111 and 300.304 (c) (4) and (6).

8. **Failure to Conduct Initial Evaluations, Convene an Eligibility Meeting, and Determine the Student's Eligibility for Special Education Services, in a Timely Manner, Pursuant to Parent's Request**

The IDEA provides that consistent with the consent requirements in Section 300.300, either the parent of a child or the public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.[105]

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[102] IDEA, 34 C.F.R. §300.321(a)(1).
[103] IDEA, 34 C.F.R. §300.322(a).
[104] IDEA, 34 C.F.R. § 300.111.
[105] IDEA, at 34 C.F.R. §300.301(b).

On October 4, 2010 and October 6, 2010, the parent initiated requests for an initial evaluation of the student, to determine the student's eligibility for special education services. The District of Columbia provides that initial evaluations must be completed within a reasonable period of time, however, no later than 120 days of receiving a written referral and parental consent to proceed.

It is the Hearing Officer's decision that the Petitioner satisfied its burden by proving that the District of Columbia Public Schools failed to obtain parent's informed consent to evaluate, complete initial evaluation of the student, convene an eligibility meeting, and determine the student's eligibility for special education services, within a reasonable period of time, however, no later than 120 days of receiving a written referral and parental consent to proceed; in violation of the IDEA at 34 C.F.R. §§300.301(a)(b)(c)(1)(i)(ii) and (2)(i)(ii), and 300.304 (c)(4) and (6) and DCMR, Title 5, Chapter 30, §3005.2 and D.C. Code, Chapter 25B, §38-2561.02(a).

X. Free Appropriate Public Education

It is the Hearing Officer's decision that the violations in this matter, occurred over such an extended period of time, and are to such an extent that the violations impeded the child's right to a free and appropriate public education; significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; and caused a deprivation of educational benefit to the student.

It is also the Hearing Officer's decision that the violations in this matter seriously infringed upon the parent's opportunity to provide "meaningful" input in all decisions regarding the student's education, and the provision of a FAPE to the student.[106] For these reasons, it is the decision of the Hearing Officer that the student was denied a FAPE; and is entitled to compensatory education services for violations occurring during the 2009/10 and 2010/11 school years.

XI. COMPENSATORY EDUCATION SERVICES

It is the Hearing Officer's decision that Petitioner satisfied its burden of proof by presenting evidence that the Respondent failed to comply with the procedural requirements of the IDEA, and that the procedural violations impacted the substantive rights of the parent and student, resulting in denial of a FAPE to the student, and an entitlement to compensatory education services for violations occurring during the 2009/10 and 2010/11 school years.

According to *Stanton v. District of Columbia, 680 F. Supp. 2d 201 (D.C. Cir. 2010),* once a Hearing Officer finds that there was a denial of a FAPE, the Hearing Officer is obligated to craft an appropriate compensatory education award.

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[106] *See, Babb v. Knox County Sch. Sys., 965 F.2d 104, 109 (6th Cir. 1992); W.G., 960 F.2d at 1484.*

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.") However, a Hearing Officer cannot determine the amount of compensatory education that a student requires unless the record provides him with "insight about the precise types of education services [the student] needs to progress." *Branham, 427 F.3d at 12 (2005)*.

Relevant evidence includes "the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive environment." Id. In *Nesbitt*, the Court found that an "award was not adequately individualized or supported by the record", when the Hearing Officer was not provided with any information regarding the student's current grade level of functioning.

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."

The amount of compensatory education is calculated by finding the period of deprivation of special education services; and 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 crafting of an award of compensatory education under IDEA 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 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 violations not occurred; and is intended to mitigate any harm the student may have suffered as a result of the violations:

(1) IEP

Within fifteen (15) school days of the date of this decision the Respondent shall convene a MDT/IEP eligibility team meeting with the parent and/or parent's representative to develop an appropriate IEP for the student to include 27.5 hours of specialized instruction, *outside* general education; and two (2) hours of behavioral support services, weekly. The student's IEP shall reflect the disability classification of Multiple Disabilities to include: Emotional Disturbance, Other Health Impaired, specifically identified as ADHD, and Learning Disabled.

The student's IEP shall include goals addressing the student's deficits in math, math calculation skills, brief mathematics, math fluency, broad reading, reading fluency, written expression, writing fluency, applied problems, passage comprehension, broad written language, and brief writing.

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 parent's representative, for the purpose of identifying a full-time special education program, outside general education, in a small structured classroom with a small student to teacher ratio and minimum distractions, where the student can receive 1:1 academic support, a structured behavioral management program, providing alternatives and consequences for the student's behavior, and a reading program.

The Respondent shall issue a Prior Notice of Placement to the parent, within five (5) school days, if the placement is a public school, and thirty (30) calendar days, if the placement is a non-public or private school; authorizing funding of the student's tuition and transportation to the new school, for the remainder of the 2010/11 school year and through the 2012/13 school year.

(2) Independent Tutoring Services

The Respondent shall fund a Lindamood-Bell Diagnostic Learning Evaluation, at the cost of to determine the student's specific strengths and weaknesses in language and literacy skills (reading, mathematics, reading comprehension, and written language skills); and 120 hours of tutorial services, at a rate not to exceed per hour, in areas of need as identified in the Lindamood-Bell Diagnostic Evaluation; and to remediate the student's deficits in reading, mathematics, reading comprehension, written expression, and assist the student in learning specific comprehension strategies such as reading for the main idea and using context clues to determine word meaning.

The tutorial services may be provided at the student's school, at the end of each school day; at a Lindamood-Bell Learning Center; and/or at a Summer Clinic; and the student has until the end of the 2012/13 school year, to utilize the tutorial services. The Respondent shall provide the student transportation for the student to attend the Lindamood-Bell learning center, after school tutoring, if the tutoring is not at the student's school, and/or Summer clinic.

(3) Behavioral Support Services

The student's IEP shall include two (2) hours of individual counseling, per week, to assist the student in processing his discordant feelings regarding his academic difficulties; learn effective measures to express himself when needed, manage anger and frustration, understand how his disabilities interfere with his ability to function in the classroom; and assist the student in addressing his behavior and depressive disorder.

(4) Reading Tutorial

If a reading program is not included in the educational program at the student's placement, the Respondent shall fund an independent reading program and tutorial for the student at the rate of per hour, and an amount not to exceed available to the student through the end of the 2012/13 school year.

(5) Evaluations

The Respondent shall fund an independent Comprehensive Psychological Evaluation to reassess the student's cognitive, academic, and social emotional functioning; and within ten (10) school days of receipt of the independent evaluation, the Respondent shall convene an IEP team meeting with parent and parent's representative to review the evaluation and update the student's IEP, as appropriate, consistent with the findings and recommendations in the evaluation.

XII. ORDER

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

1. **ORDERED** that the District of Columbia Public Schools shall implement and fund the student's compensatory education award identified on page s 22-23 of this decision; and it is further

2. **ORDERED**, that in the event of DCPS' failure to comply with the terms of this decision and order, Petitioner's Counsel will contact the Respondent's Compliance Case Manager, and the DCPS Office of Mediation & Compliance to attempt to obtain compliance prior to filing a complaint, alleging the District of Columbia Public Schools failed to comply with this decision and order; and it is further

3. **ORDERED**, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. The District of Columbia Public Schools shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives.

XIII. 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 U.S.C. §1415(i).

Date: May 13, 2011

Ramona M. Justice

Attorney Ramona M. Justice, Hearing Officer