

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

Student Hearing Office  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
April 17, 2014

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PETITIONER,  
an adult student,<sup>1</sup>

Date Issued: April 16, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Student Hearing Office,  
Washington, D.C.

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or STUDENT), under the Individuals with Disabilities Education Act, as amended (the IDEA ), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In his Due Process Complaint, the adult Student alleges that Respondent District of Columbia Public Schools (DCPS) denied him a free appropriate public education (FAPE) in the 2013-2014 school year by not providing an appropriate Individualized Education Program (“IEP”) to address his behavioral and school attendance issues.

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<sup>1</sup> Personal identification information is provided in Appendix A.

Student, an AGE young man, is a resident of the District of Columbia. Petitioner's due process complaint, filed on January 31, 2014, named DCPS as respondent. The parties met for a resolution session on February 18, 2014 and were unable to reach an agreement. The 45-day period for issuance of this Hearing Officer Determination began on March 3, 2014. On February 28, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters and I issued my Prehearing Order on the same day. The due process hearing was convened before me on March 25, 2014 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by Petitioner's COUNSEL. DCPS was represented by DCPS' COUNSEL.

Petitioner testified and called as witnesses, MOTHER and PSYCHOLOGIST. DCPS called as witnesses SPECIAL EDUCATION COORDINATOR and MATH TEACHER. Petitioner's Exhibits P-1 through P-37 were admitted into evidence without objection, with the exceptions of P-1 and P-34 which were not offered. DCPS' Exhibits R-1 through R-15 were admitted without objection. Petitioner's Counsel made an opening statement. Counsel for both parties made closing statements. Neither party requested leave to file a post-hearing memorandum.

### **JURISDICTION**

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

### **ISSUES AND RELIEF SOUGHT**

The issues to be determined in this case and relief sought are:

Whether DCPS denied Student a FAPE in the 2013-2014 school year, by:

- failing to develop and implement an appropriate IEP for Student that meets his needs for full-time special education programming;
- failing to provide Student appropriate services to address his social-emotional and behavioral issues; and
- failing to reevaluate Student, conduct a Functional Behavioral Assessment (FBA) and develop a Behavior Intervention Plan (BIP) to address Student’s behavioral and attendance issues.

For relief, Student seeks an order for DCPS to ensure that he receives an IEP that provides full-time special education services, a BIP and an attendance plan; for DCPS to provide him an appropriate placement/location of services at a public or nonpublic school; and for DCPS to fund appropriate Independent Educational Evaluation (IEE) evaluations of Student including a comprehensive psychological, social history, an FBA and a vocational assessment. In addition, Petitioner seeks an award of compensatory education, to compensate him for educational harm resulting from DCPS’ alleged denial of FAPE in the 2013-2014 school year.

### **FINDINGS OF FACT**

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

1. Student resides with Mother in the District of Columbia. Testimony of Mother. He is eligible for special education and related services as a Student with Multiple Disabilities (MD). Exhibits P-20, R-11. According to DCPS’ April 11, 2012 Disability Worksheet, the underlying impairments supporting Student’s MD classification are Emotional Disturbance (ED) and Orthopedic Impairment. Exhibit P-23. (Presumably the “Orthopedic Impairment” label is an error. A January 21, 2012 Comprehensive Psychological Evaluation report diagnosed Student with Dysthymic Disorder and Attention Deficit Hyperactivity Disorder, NOS (ADHD). Exhibit P-32.

(No testimony was offered at the due process hearing that Student has an Orthopedic Impairment.)

2. Student was initially found eligible for special education when he was in the first grade, based upon an ADHD diagnosis. When student was in sixth grade at CITY ELEMENTARY SCHOOL, he was assigned a dedicated aide. He has not been provided a dedicated aide since he was promoted to middle school. In middle school, Student got into a lot of arguments and fights and he was suspended a lot. Testimony of Mother.

3. Student matriculated to CITY HIGH SCHOOL at the beginning for the 2009-2010 school year. At City High School, Student started skipping classes and hanging out in the hallways. He did not have so many fights as in middle school. In the 2010-2011 school year, Student's school attendance at City High School worsened. His grades at City High School have been mostly D's and F's. Testimony of Mother.

4. In the 2012-2013 school year, Mother was informed that Student was not actually going to school. In the middle of the school year, SPECIAL EDUCATION TEACHER, started picking up Student at his home in the morning and driving him to school. Student's attendance improved and his grades rose. Testimony of Mother. That period lasted no more than two months. At some point, Special Education Teacher stopped picking Student up for school. Testimony of Math Teacher.

5. Student's April 19, 2013 IEP was initially drafted by Special Education Teacher. The IEP identified mathematics, reading, written expression and emotional, social and behavioral development as areas of concern. For each area of concern Student's present level of performance is described. The IEP team reported that Student needed help attending school on a daily basis and being more assertive in the

classroom, as well improving his overall self confidence to prevent removal from the general education setting. The team reported that Student had not demonstrated any disciplinary issues over the school year, but that his high truancy rate and withdrawn behaviors were preventing him from successfully accessing the general education curriculum. The IEP provided Student would receive five hours per week of Specialized Instruction in the General Education setting and five hours per week Outside General Education. The IEP also provided 120 minutes per month of Behavioral Support Services. Exhibit P-2.

6. Prior to the beginning of the current, 2013-2014, school year, Student reached the age of majority and the parent's rights under the IDEA transferred to him. Exhibit P-27. In the current school year, Student has rarely gone to school. Student learned in December 2013 that he had been dropped from City High School rolls for nonattendance. He was allowed to re-enroll, but was dropped again in January 2014, after which he again re-enrolled. Student testified that he usually goes to a public library or to Union Station when he is not in school. He does not like his City High School classrooms because he believes there are too many students in his classes, the teachers are unable to maintain control and the classes are too loud and distracting. Student is failing his courses. Testimony of Student.

7. After Student re-enrolled, he was assigned, in January 2014, to a small class of Learning Disabled and ED students taught by a special education teacher. Student's IEP was not revised to reflect this change in his programming. Testimony of Special Education Coordinator.

8. Student was administered an Independent Educational Evaluation (IEE) comprehensive psychological evaluation in January 2012. The evaluator administered a

battery of cognitive, achievement and behavioral assessments. According to the January 21, 2012 comprehensive psychological evaluation report, Student's cognitive functioning tested in the Average range. On the Wechsler Individual Achievement Test – Third Edition (WIAT-III), Student obtained Below Average to Average scores. His mathematics composite scores were an area of weakness. The evaluator observed that behaviorally, Student appeared to disconnect himself from his peers to avoid bullying, teasing and rejection. At school, he displayed deficiencies in peer relations and poor social skills. On tests of attention, results indicated that Student had poor concentration/attention and difficulty keeping his mind on his work. In addition, he demonstrated some slight impairment in areas of executive functioning. The evaluator diagnosed Student with Dysthymic Disorder and Attention Deficit Hyperactivity Disorder, Not Otherwise Specified. Exhibit P-32.

9. Student was referred for an IEE functional behavioral assessment (FBA) in January 2012 to address behavioral concerns, including poor attendance, lack of motivation, non-participation in class, avoidance of social interaction, and non-completion of work. The evaluator recommended, *inter alia*, that Student receive social skills and assertiveness training, encouragement from teachers to participate in class, and a structured behavior modification plan - earning points daily towards a weekly goal/reward. Exhibit R-14. The FBA was reviewed at an IEP team meeting on May 8, 2012. The IEP team decided there was no need for a Behavior Intervention Plan (BIP) because all of Student's teachers were aware of his concerns, getting him to school and participating in class. Mother and Student's former educational advocate agreed with the IEP team decision. Exhibit-11. No BIP has been developed for Student this school year. Testimony of Special Education Coordinator.

## CONCLUSIONS OF LAW

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

### Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

### Analysis

1. Was DCPS' April 19, 2013 IEP inappropriate for Student because it did not meet Student's alleged need for full-time special education programming?

In his due process complaint, Petitioner alleges that the City High School April 29, 2013 IEP is inappropriate because it does not meet his alleged need for full-time special education programming. The IDEA requires that to provide a FAPE, "[t]he IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch.*

*Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). At the due process hearing, Petitioner did not allege that City High School had not complied with the IDEA's procedural requirements for developing the April 29, 2013 IEP. Nor did Student offer any testimony from an educator or other expert supporting his alleged need for full-time special education services.

Petitioner also alleged in the due process complaint that the IEP's annual goals for mathematics, reading, written expression and social-emotional areas of concern were inadequate because there were no grade level equivalencies or present levels of performances articulated. The IDEA requires that each child's IEP must include annual goals to enable the child to be involved in and make progress in the general education curriculum and meet each of the child's other educational needs that result from the child's disability. *See* 34 CFR § 300.320(a)(2). Each of the areas of concern in Student's IEP does describe his present levels of performance. Petitioner has not cited any authority for requiring grade level equivalencies to be included in IEP annual goals.

The April 29, 2013 IEP team did identify the effect of Student's "high truancy and withdrawn behaviors" on his academic progress and the team provided Student 120 minutes per month of behavioral support counseling to deal with his self-esteem and motivation. Student's attendance record in the current school year shows that the behavioral support services in the April 29, 2013 IEP were not successful in overcoming Student's truant behavior. However, "[b]ecause the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student." *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008). Here there was no competent evidence that Student's April 29,

2013 IEP was inappropriate when it was developed or that Student then required full-time special education services. Therefore, I find that Petitioner has not met his burden of proof to show that when the April 29, 2013 IEP was developed, it was not reasonably calculated to enable Student to receive educational benefits.

2. Has DCPS denied Student a FAPE in the current 2013-2014 school year by (i) failing to provide appropriate services to address his social-emotional and behavioral issues; and (ii) failing to reevaluate Student, conduct an MDR and develop a BIP to address his behavioral and attendance issues?

Student contends that DCPS has denied him a FAPE by failing to adopt measures to address his behavioral and school attendance issues in the current, 2013-2014, school year. There was no evidence that Student has exhibited behavior issues, besides truancy, this year. However, he has attended school only sporadically and he is failing his courses. As Math Teacher testified, if Student does not attend class regularly, he will be left behind. Special Education Coordinator was aware of Student's nonattendance this year and she had a conference with Student and Mother, when Mother expressed concerns about Student's not being in school. The school's response to Student's truancy was to drop him from its rolls in fall 2013. After Student re-enrolled, he was assigned, in January 2014, to a small class of Learning Disabled and ED students taught by a special education teacher. However, Student's IEP was not revised to reflect this change in his programming and Student has not started attending school regularly.

This case illustrates the tension between the IDEA's mandate that a local education agency (LEA) address in some fashion persistent truancy affecting a student's educational progress and the responsibility of the adult student for his own educational decisions. Student is an adult and certainly neither DCPS nor City High School can

force an adult student to go to school. *Cf. Garcia v. Board of Educ. of Albuquerque*, 2007 WL 5023652, (D.N.M. 2007) (IDEA does not provide a remedy for this kind of case – chronic truancy – where the access to a free and appropriate public education is wide open, but the student refuses to attend school and refuses the numerous and extensive educational opportunities afforded to her.) However, Congress recognized in the IDEA that “social and emotional problems are not *ipso facto* separable from the learning process.” *Indept. School Dist. No. 284 v. A.C.*, 258 F.3d 769, 776–77 (8th Cir.2001). The IDEA requires, in the case of a child whose behavior impedes the child’s learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 34 CFR § 300.324(a)(2)(i); *Harris v. District of Columbia*, 561 F.Supp.2d 63 (D.D.C.2008). In *Lamoine School Committee v. Ms. Z. ex rel. N.S.*, 353 F.Supp.2d 18 (D.Me.2005), the Court considered a case of a student who had an “extensively documented” array of difficulties, particularly problems with attendance. The Court held that the Local Education Agency’s (“LEA”) IEP, which failed to address in some fashion student’s persistent absence and tardiness, could not be “adequate and appropriate.” *Id.* at 34. *See, also, Lauren P. ex rel. David P. v. Wissahickon School Dist.*, 2007 WL 1810671, 7 (E.D.Pa.2007), *rev’d in part on other grounds*, 310 Fed.Appx. 552, 2009 WL 382529 (3<sup>rd</sup> Cir. 2009) (LEA’s inconsistency of approach to Student’s behavioral problems, including lateness, absences, and failure to complete assignments, resulted in denial of FAPE.)

The IDEA regulations require that a student’s IEP team reviews the student’s IEP periodically and revises the IEP, as appropriate, to address any lack of expected progress toward the IEP annual goals and in the general education curriculum. *See* 34 CFR §

300.324(b). In the current school year, Student has made no progress toward his annual goals because he does not attend school. Instead of considering behavioral interventions or other revisions to Student's IEP to address his nonattendance, City High School simply dropped Student from its rolls. I conclude this was a denial of FAPE. *See, Lamoine, supra* at 34 (If student was not in school, he could not be said to be receiving "a free appropriate public education"); *Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011) (DCPS' failure to complete a Functional Behavioral Assessment and Behavior Intervention Plan, when warranted, will constitute a denial of a FAPE.)

Special Education Hearing Officers have broad discretion in ordering relief for a denial of FAPE. *See, e.g., G.G. ex rel. Gersten v. District of Columbia*, 2013 WL 620379, 8 (D.D.C. Feb. 20, 2013). Since an independent psychological evaluation and a functional behavioral assessment of Student were conducted in 2012, Student has not been administered any formal evaluations, which would assist his IEP team to understand the causes of his school avoidance behavior. Accordingly, I will order DCPS to convene Student's IEP team to identify what additional evaluations and data are needed to determine Student's educational needs and appropriate interventions for Student's school avoidance behavior. *See* 34 CFR § 300.305. In order to assist the IEP team in this task, I will order DCPS to engage an independent educational consultant, who has experience working with children with school avoidance behavior, to make recommendations to the IEP team on appropriate educational and psychological/behavioral assessments to determine Student's educational needs and to identify possible interventions to address his school avoidance behavior. Based upon those assessments and other data specified in 34 CFR §§ 300.305 and 300.324(b), Student's

IEP team must review and revise, as appropriate, his IEP.

### Compensatory Education Request

Petitioner seeks an award of compensatory education to compensate for DCPS' alleged denial of FAPE in the current school year. Compensatory education is educational service that is intended to compensate a disabled student, who has been denied the individualized education guaranteed by the IDEA. Compensatory education is designed to place disabled children in the same position they would have occupied but for the school district's violations of IDEA. The proper amount of compensatory education, if any, depends upon how much more progress a student might have shown if he had received the required special education services, and the type and amount of services that would place the student in the same position he would have occupied but for the LEA's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011), citing *Reid, supra*, 401 F.3d at 516.

I have reviewed Psychologist's compensatory education proposal (Exhibit P-36). She recommends that Student receive 70 hours of tutoring and 16 hours of counseling to compensate him for being "exited from enrollment" at City High School in the fall of 2013. Psychologist misapprehends what happened in this case. Although Student was dropped from the school rolls after he failed to go to school, he was always allowed to re-enroll at-will. Student was not "exited" from City High School. I find that Psychologist's recommended relief does not correlate the actual denial of FAPE in this case, *i.e.*, DCPS's failure to adopt behavioral interventions and other strategies reasonably calculated to address Student's school avoidance behavior. Furthermore, Psychologist is not an education expert and she has not evaluated Student. In fact, she has never spoken to Student or to any of his teachers. I conclude that Psychologist's compensatory

education recommendation is not entitled to any weight.

The evidence from the hearing in this case does not establish what additional educational benefits likely would have accrued if DCPS had been proactive in addressing Student's school avoidance behavior over the 2013-2014 school year, or what services would be reasonably calculated to compensate Student for DCPS' not providing him additional supports.<sup>2</sup> I find, therefore, that Petitioner has failed to support her claim for compensatory education for this denial of FAPE. *See, Gill v. District of Columbia*, 770 F.Supp.2d 112, 118 (D.D.C.2011), *aff'd.*, 2011 WL 3903367, 1 (D.C.Cir. Aug. 16, 2011) (Due to the lack of evidentiary support, the Court is compelled to find that Plaintiffs have failed to support their claim for compensatory education.) While a court has discretion to take additional evidence concerning the appropriate compensatory education due a student, *see Gill v. District of Columbia*, 751 F.Supp.2d 104, 114 (D.D.C.2010), *aff'd.*, 2011 WL 3903367, 1 (D.C.Cir. Aug. 16, 2011), I am constrained under the DCMR to issue my final Hearing Officer Determination in this case no later than April 16, 2014. *See* DCMR tit. 5-E, § 3030.11. Therefore, based on the record before me, I will deny, without prejudice, Petitioner's request for a compensatory education award.

#### ORDER

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

ORDERED:

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<sup>2</sup> In my February 28, 2014 Prehearing Order, I advised the parties that under the case law in this jurisdiction, when a Petitioner seeks compensatory education, to establish a basis for such an award, the Petitioner must be prepared at the hearing to document with exhibits and/or testimony "the correct amount or form of compensatory education necessary to create educational benefit" to enable the hearing officer to project the progress Student might have made, but for the alleged denial of FAPE, and further quantitatively defining an appropriate compensatory education award.

1. Within ten business days of entry of this order, DCPS shall engage, at public expense, a qualified independent educational consultant, who has experience working with students with school avoidance behavior, to review Student's educational history, his 2012 evaluations and assessments, and other available data in order to develop recommendations for Student's IEP team on appropriate additional assessments and other data needed to determine Student's ongoing educational needs and to address his school avoidance behavior. Within twenty school days of entry of this order, or as soon as practicable after the educational consultant has readied these recommendations, DCPS shall convene Student's IEP team, including Student and the educational consultant, to determine, informed by the educational consultant's recommendations, what assessments and other data are needed to determine Student's ongoing educational needs and to explore the causes of his school avoidance behavior. Subject to obtaining Student's consent, DCPS shall promptly obtain such assessments of Student and other data as determined needed by the IEP team. When those assessments are completed, DCPS shall ensure that Student's IEP team meets promptly to review the data and revise Student's IEP.
2. Petitioner's request for an award of compensatory education is denied without prejudice.
3. All other relief requested by the Petitioner herein is denied.

Date: April 16, 2014

s/ Peter B. Vaden  
Peter B. Vaden, Hearing Officer

### **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).