

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

Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

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STUDENT, <sup>1</sup>	)	
through the Parent,	)	
	)	Date Issued: July 14, 2015
Petitioner,	)	
	)	Hearing Officer: John Straus
v.	)	
	)	Case No: 2015-0156
████████████████████	)	
████████████████████ (“████ PCS”)	)	Hearing Date: June 16, 2015
	)	Room: 2003
Respondent.	)	

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**HEARING OFFICER DETERMINATION**

**Background**

The Petitioner, who is the Student’s mother, filed a due process complaint notice on February 10, 2015, alleging that the Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”). The Petitioner alleged that the █████ PCS failed to develop an appropriate Individualized Education Program (“IEP”) to address the Student’s absenteeism, academic malaise, and academic frustration; failed to conduct requested evaluations; and failed to complete an appropriate vocational assessment and transitional plan. The Petitioner requested the Hearing Officer order █████ PCS to convene an IEP meeting to discuss and determine placement; award compensatory education or conduct an assessment to determine compensatory education; fund an academic assessment, a socio-emotional assessment, a vocational assessment, a clinical assessment, and a Functional Behavioral Assessment (“FBA”); develop a Behavioral Intervention Plan (“BIP”), behavioral contract, or attendance contract; develop a transition plan; and develop and implement an appropriate IEP.

████ PCS asserted the school made reasonable efforts to have the Petitioner participate in the development of the IEP, but the Petitioner did not participate. There was an incident after the IEP was developed that resulted in the Student’s absences so █████ PCS states it was willing to convene an IEP meeting. █████ PCS further asserted that it was not aware of a request for assessments and is seeking a consent to evaluate the Student.

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

### **Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the IDEA, as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and 38 D.C. Code 2561.02.

### **Procedural History**

The due process complaint was filed on April 30, 2015. The Petitioner waived the resolution meeting, but the Respondent did not. The first resolution session was scheduled for May 12, 2015. However, the Petitioner did not attend and the resolution session was rescheduled. The resolution meeting took place on May 20, 2015 with the Petitioner via telephone, at which time, the parties agreed to keep the 30-day resolution period open. The 45-day timeline to issue a final decision began on May 31, 2015 and the final decision is due by July 14, 2015. *See* 34 C.F.R. §§ 300.510 and .515.

The due process hearing was held on June 16, 2015. The due process hearing was a closed hearing. The Petitioner was represented by Joy Freeman, Esq. and █████ PCS was represented by Donovan Anderson, Esq. Neither party objected to the testimony of witnesses by telephone. The Petitioner participated in the hearing. The Petitioner presented three witnesses: Special Education Consultant (“Consultant”), Education Advocate and the Petitioner. █████ PCS presented one witness: Special Education Coordinator (“SEC”).

The Petitioner’s Disclosure Statement, filed and served on June 9, 2015, consisted of a witness list of seven witnesses and documents P-01 through P-37. The Petitioner’s documents were admitted into evidence without objection. The Respondent’s Disclosure Statement, filed and served on June 9, 2015, consisted of a witness list of four witnesses and documents R-1 through R-11. The Respondent’s documents were also admitted into evidence without objection.

The issues to be determined in this Hearing Officer Determination are as follows:

1. Whether █████ PCS denied the Student a FAPE by failing to provide an IEP on February 24, 2015 that is reasonably calculated to provide the Student a FAPE; specifically, 1) the IEP lacks inadequate hours of specialized instruction, 2) the social emotional goals do not address the Student’s absenteeism, 3) there is no Behavior Intervention Plan or attendance contract, 4) there are no behavioral support and counseling services as part of her Extended School Year (“ESY”) services, and 5) the Present Level of Performance (“PLOP”) information is not sufficient, not current or inaccurate in the Math, Written Expression, and Socio-emotional/Behavioral domains.
2. Whether █████ PCS denied the Student a FAPE by failing to evaluate the Student pursuant to the Petitioner’s September 16, 2014 written request; specifically, █████ PCS failed to conduct a comprehensive psychological assessment, FBA and social history.

3. Whether █████ PCS denied the Student a FAPE by failing to conduct a vocational assessment to determine transition goals and services by February 24, 2015 or sooner.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact<sup>2</sup> are as follows:

1. The Student is seventeen-year-old tenth grader who is classified as a student with a disability under the IDEA and attended █████ PCS during the 2014-2015 school year. (Stipulated)
2. On April 4, 2013, the Student received a psychological assessment. Academically, the Student tested about five years behind her current grade level. The assessment notes the Student's "social, emotional, and behavioral functioning appears to be negatively impacted by her academic difficulties and frustrations at school, as well as the recent loss of her older brother...She has a history of truancy from school....[the student] appears to lack good judgment and adequate impulse control, which is often a function of executive functioning impairments consistent with ADHD." The evaluator stated the Student is a student with Attention Deficit with Hyperactivity Disorder, adjustment disorder, and a learning disorder and recommended the Student receive one hour per week of behavior support services in school to target problem behaviors, such as skipping classes and being truant from school and continue with her involvement in basketball. (Exhibit P-12)
3. On July 1, 2013, the IEP team developed a BIP. The BIP did not address the Student's truancy. (Exhibit P-13) The Student enrolled in █████ PCS at the beginning of the 2013-2014 school year. (Stipulated)
4. On October 7, 2013, the IEP team convened and determined the Student is a student with an Other Health Impairment ("OHI") under the IDEA. The team determined the areas of concern were Mathematics; Reading; Written Expression; and Emotional, Social and Behavioral development and developed goals in those areas. The team developed annual goals for the Student in each area, including Social, Emotional and Behavioral goals that included self-advocacy and anger management, maintaining focus, and problem solving strategies. The team stated the Student required ten hours per week of specialized instruction in the general education setting and one hour of behavior support services per week outside the general education setting. Finally, the team indicated the Student does not require ESY services or a BIP. (Exhibits P-7 and R-1)
5. The Student was given the Brigance transition skills inventory on October 1, 2013. The October 7, 2013 IEP team noted the Student loves to play basketball and wants to go to college and play in the Women's National Basketball Association ("WNBA") or overseas

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<sup>2</sup> Parenthetical references in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. The Hearing Officer made Findings of Fact based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

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- basketball. The IEP team developed transition goals including researching criteria for being drafted or signing as a free agent for a WNBA/overseas basketball team. (Exhibits P-7 and R-1)
6. On November 7, 2014, the SEC contacted the Petitioner's attorney stating she was not able to reach the Petitioner to schedule an IEP team meeting and requested assistance. (Exhibit R-8 and SEC's testimony) On November 12, 2014, the Educational Advocate requested an IEP team meeting on behalf of the Petitioner. (Exhibits P-26, P-27, P-29, P-30 and R-10 and Educational Advocate's and SEC's testimony) On January 27, 2015, the SEC notified the Petitioner's attorney that she made several attempts to contact the Petitioner to convene an IEP team meeting and that the Petitioner was not responsive. (Exhibit R-7 and SEC's testimony) Three attempts were made by the SEC to invite the Petitioner and her attorney to IEP team meeting but neither the Petitioner nor her attorney responded. (Exhibits P-16 and R-3 and SEC's testimony)
  7. On February 2, 2015, the Petitioner was notified that the Student has been truant and was advised that truancy charges may be filed against the Student or parent. (Exhibit P-25 and Educational Advocate's testimony) On February 23, 2015, the Student's Spanish teacher stated that she tried to contact the Petitioner because the Student had not attended her Spanish class the entire quarter. (Exhibit R-9) The Student was absent a total of thirty-five days before the IEP team meeting on February 24, 2015. (Exhibits P-21 and R-5 and Educational Advocate's testimony)
  8. The special education teacher administered the Brigance assessment over a two or three day period to measure the Student progress in Reading and Written Language. (Exhibits P-6 and R-2)
  9. On February 24, 2015, the IEP team convened without the Petitioner present. The team developed goals in Mathematics; Reading; Written Expression; and Emotional, Social, and Behavioral Development. The Emotional, Social and Behavior Development goals focused on growth in communication, self-esteem, managing anger, managing attention deficit, and self-advocacy. The team determined the Student's PLOP to develop the IEP goals. The PLOP in Mathematics was determined by observations of the special education teacher and general education teacher. In Reading and Written Language the PLOP was based on test results from the Brigance. Regarding social emotional functioning, the team noted the Student made leaps and bounds. The IEP team did not develop a BIP. The team further determined the Student is to receive specialized instruction within the general education setting for 10 hours per week and, for one hour per week, she is to receive behavioral support services outside the general education setting. The team determined the Student requires ESY services with critical skill areas in math fluency and reading comprehension. Behavior/socio-emotional development was not identified as a skill area for the purposes of ESY. The Student is to receive five hours per week of specialized instruction during ESY from July 6, 2015 to July 31, 2015. (Exhibits P-6 and R-2 and SEC's testimony)

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10. The Student was given the Brigance transition skills inventory again on November 15, 2014. The February 2, 2015 IEP team noted the Student still likes to play basketball. She plays for the [REDACTED] team and volunteers at basketball camp. However, the summary of employment states upon graduation, the Student would like to seek full time employment and notes the Student is participating in an independent living program and the Student's goal is to attend a two or four year college. The team developed transition goals requiring the Student to identify and discuss academic skills or strategies, she will need to be successful in her college coursework, create a resume to help her obtain employment, and identify skills needed to continue to be successful in her independent living program. (Exhibits P-6 and R-2 and SEC's testimony)
11. On March 13, 2015, the Petitioner was notified regarding an expulsion hearing scheduled for March 16, 2015. The Petitioner was not able to attend the hearing. (Exhibit R-4 and Educational Advocate's and Petitioner's testimony)
12. By April 21, 2015, the Student made no progress on her math and written expression goals for the second and third reporting period of the 2014-2015 school year. (Exhibit P-9) As of the third quarter of the 2014-2015 SY, the Student is failing the following subjects: Spanish I, World History and Geography 2, Geometry, English, Biology, and Math due to excessive unexcused absences. (Exhibit P-22)
13. On April 28, 2015, the IEP team convened with the Petitioner via telephone. The team noted the Student has not attended school since February 9, 2015. The Petitioner was informed that the Student was expelled due to absenteeism. The SEC stated that she had attempted to contact the Petitioner prior to the February 24, 2015 IEP team meeting. The Educational Advocate requested independent assessments based on a request for assessment made at the beginning of the 2014-2015 school year. The Respondent's attorney requested documentation confirming the request. The Educational Advocate stated he would provide documentation. However, the SEC testified she did not receive such a request and there is no written documentation of this request in the record. (Exhibit P-8 and Educational Advocate's, Petitioner's, and SEC's testimony)
14. [REDACTED] PCS will conduct an academic assessment, a socio-emotional assessment, a vocational assessment, a clinical assessment, and an FBA; and convene an IEP team meeting to review the assessments pursuant to its triennial evaluation obligation. (Stipulated) [REDACTED] PCS attempted to get written consent from the Petitioner to evaluate the Student but has not been able to obtain written consent from the Petitioner. (SEC's testimony)

**Conclusions of Law**

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

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of

proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005).

**████ PCS did not deny the Student a FAPE by failing to provide an IEP on February 24, 2015 that is reasonably calculated to provide the Student a FAPE.**

As described by the U.S. Supreme Court, the IEP is a comprehensive statement of the educational needs of a child with a disability and the specially designed instruction and related services a district will employ to meet those needs. *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 556 IDELR 389 (U.S. 1985). A district's obligation to provide FAPE to a student with a disability is satisfied when the district provides the student with the personalized educational program necessary to allow the child to derive an educational benefit from that instruction. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982).

**1) The February 24, 2015 IEP has adequate hours of specialized instruction.**

The February 24, 2015 IEP team maintained the same number of hours of special education and related services from the October 7, 2013 IEP, at ten hours per week of specialized instruction in the general education setting and one hour of behavior support services outside the general education setting. The record supports that no assessments or any other information would have caused the IEP team to consider an adjustment the hours of services. Therefore, the hearing officer does not find the hours of specialized instruction to be insufficient.

**2) The social emotional goals in the February 24, 2015 IEP are appropriate**

The IEP has goals in emotional, social and behavioral development and provides for one hour per week of behavioral support services to implement the goals. The Student is removed from her general education classes to receive these services. The goals focus on self-advocacy, anger management, maintaining focus, and problem solving strategies. These services could be implemented by a school social worker or a school counselor to allow for a therapeutic milieu to develop.

The Petitioner argues that these goals should have focused on the Student's poor attendance. However, the Petitioner did not describe how the Student would work on her attendance during her counseling sessions. The goals developed by the team are based on the most recent assessment information and are appropriate for the Student. Therefore, the hearing officer finds goals are appropriate even though they do not address the Student's absenteeism.

**3) The February 24, 2015 IEP team was not required to develop a BIP or attendance contract**

There is nothing in the IDEA that requires IEP teams to develop attendance contracts. Likewise, neither Congress, the Department of Education, nor any statute or regulation "created any specific substantive requirements for the [BIP] contemplated by [the IDEA]." *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221*, 41 IDELR 146 (7th Cir. 2004), *cert. denied*, 110 LRP 39024, 543 U.S. 1009 (2004). The IDEA requires that the IEP team, in the case of a child

whose behavior impedes the child's learning or that of others, *consider* the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). A student's need for behavioral interventions and supports must be decided on an individual basis by the student's IEP team. 71 Fed. Reg. 46,683 (2006). The IDEA explicitly mandates the development of a BIP in one circumstance. If a student is subjected to a disciplinary change of placement, and the conduct is found to be a manifestation of a disability, the district must either: 1) conduct an FBA, unless the LEA had conducted an FBA before the behavior that resulted in the change of placement occurred, and implement a BIP for the child; or 2) if a BIP already has been developed, review the BIP, and modify it, as necessary, to address the behavior. 34 C.F.R. § 300.530(f).

The evidence supports that the Student's truancy has a negative impact on her grades. However, the IDEA does not require that the IEP team develop a BIP or attendance contract to address the Student's poor attendance. Furthermore, the Petitioner has not provided consent to evaluate the Student to conduct an FBA pursuant to 34 C.F.R. § 300.300(c). Therefore, the hearing officer determines that NCP PCS did not deny the Student a FAPE by failing to develop a BIP or attendance contract.

#### **4) Behavioral support and counseling services are not a necessary part of the Student's ESY services**

ESY means special education and related services that are provided to a child with a disability beyond the normal school year of the public agency; in accordance with the child's IEP; and at no cost to the parents of the child 34 C.F.R. § 300.106(b)(1). Under the IDEA, ESY must be provided only if a child's IEP team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child. 34 C.F.R. § 300.106(a). ESY services are necessary when a child will experience significant regression in the absence of an educational program and the time it will take to relearn the skills is excessive. *Jackson-Johnson v. District of Columbia*, 59 IDELR 101 (D.D.C. 2012).

The Petitioner argues that because the Student's IEP has behavior support services, the Student ESY services must include counseling services. Because the goal of ESY services is to prevent regression and recoupment of a student's IEP goals, a student's ESY services will likely differ from the services offered in the regular IEP. *Letter to Myers*, 16 IDELR 290 (OSEP 1989). (OSEP does not require States to ensure that a full continuum of placements is available solely for the purpose of providing ESY services.) The Student's ESY goals and services are reasonably calculated to prevent the Student from regressing over the summer. Therefore, the hearing officer determines that the ESY services are appropriate for the Student.

#### **5) The PLOP information is sufficient, current and accurate in the Math, Written Expression, and Socio-emotional/Behavioral domains.**

Each IEP must contain a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) 34 C.F.R. § 300.320(a)(1)(i). The Petitioner stipulated the present levels of performance

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in Reading was sufficient. The SEC credibly testified that the February 24, 2015 IEP team determined the Student's present levels of performance in Mathematics through observations of the special education teacher and general education teacher. The SEC further testified that the present levels of performance in the socio-emotional and behavioral domain was determined by the SEC. In Written Language the present levels of performance was based on test results from the Brigance. Based on the uncontroverted evidence, the hearing officer finds the present level of performance information is sufficient, current, and accurate.

**█████ PCS did not deny the Student a FAPE by failing to evaluate the Student pursuant to the Petitioner's September 16, 2014 written request; specifically, █████ PCS failed to conduct a comprehensive psychological assessment, FBA and social history.**

Pursuant to 34 C.F.R. § 300.303(a)(2), █████ PCS must ensure that a reevaluation is conducted if the Student's parents request an evaluation. The educational advocate's testimony that he made a request for an evaluation in September 2014 is contradicted by the SEC's credible testimony that no request for an evaluation was made at that time. The evidence supports that the SEC requested evidence from the educational advocate for this request and no evidence was provided. Likewise, no copy of a request was admitted into evidence by either of the parties. The best evidence rule is for the hearing officer to rely on the actual copy of the request. *See, Walker v. U.S.*, 402 A.2d 813 (1979). With no such request forthcoming, the hearing officer finds that no such request was made by the Petitioner.

**█████ PCS did not deny the Student a FAPE by failing to conduct a vocational assessment to determine transition goals and services by February 24, 2015 or sooner.**

The IDEA requires that IEPs for older students include a plan for a coordinated set of services designed to move special education students successfully from school to post-school settings. *See* 34 C.F.R. § 300.43. The transition plan must be tailored to reflect the particular skills and interests of the student. Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP team, and updated annually thereafter, the IEP must include appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills; and the transition services (including courses of study) needed to assist the child in reaching those goals. 34 C.F.R. § 300.320 (b).

Shortly after the Student enrolled at █████ PCS, the Student was given the Brigance transition skills inventory. The October 7, 2013 IEP team reviewed the assessment and developed transition goals and services. The Student was given the Brigance transition skills inventory again on November 15, 2014. The February 2, 2015 IEP team reviewed the assessment and developed transition goals and services again.

The Petitioner provided no evidence indicating the Brigance is not an age appropriate transition assessment. The record reflects that the Student was assessed each time the IEP team developed a transition services plan for the Student. Therefore, the Hearing Officer finds that the Student was not denied a FAPE by failing to evaluate the Student prior to developing transition goals and services.

**ORDER**

The Petitioner's due process complaint is dismissed with prejudice.

**IT IS SO ORDERED.**

**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: July 14, 2015

*/s/ John Straus*  
John Straus  
Independent Hearing Officer

Copies to:

Petitioner (U.S. mail)  
Petitioner's Attorney: Joy Freeman, Esq. (electronically)  
DCPS' Attorney: Donovan Anderson, Esq. (electronically)  
ODR (electronically)