

**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  
March 27, 2013

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PETITIONER,<sup>1</sup>  
on behalf of STUDENT,

Date Issued: March 26, 2013

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 (“Petitioner” or “Mother”), 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 her Due Process Complaint, Petitioner alleges that DCPS has denied Student a free appropriate public education (“FAPE”) by failing to develop an appropriate Individualized Education Program (“IEP”) for Student, that includes full-time placement in an outside of general education, therapeutic setting.

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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 11, 2013, named DCPS as respondent. The case was assigned to the undersigned Hearing Officer on January 14, 2013. The parties met for a resolution session on February 8, 2013 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on February 11, 2013. On February 6, 2013, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on March 19 and 20, 2013 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. Respondent DCPS was represented by DCPS COUNSEL.<sup>2</sup>

The Petitioner testified and called as witnesses, INDEPENDENT PSYCHOLOGIST, SPECIAL EDUCATION TUTOR, STUDENT, NON-PUBLIC SCHOOL ADMISSIONS DIRECTOR and EDUCATIONAL ADVOCATE. DCPS called as witnesses, SCHOOL PSYCHOLOGIST, SCHOOL SOCIAL WORKER, SPECIAL EDUCATION TEACHER and SPECIAL EDUCATION COORDINATOR. Petitioner's Exhibits P-1 through P-27 were admitted into evidence without objection, with the exception of Exhibits P-14, P-15, P-22, P-23 and P-24 which were admitted over DCPS' objections. DCPS' Exhibits R-1 through R-32 were admitted without objection, with the exception of Exhibit R-4, which was admitted over Petitioner's objection. Counsel for both parties made opening and closing statements. There was no request for post-hearing briefing.

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<sup>2</sup> Petitioner appeared for part of the first day of the hearing. She was not present for the second day. LEA PSYCHOLOGIST also appeared briefly for DCPS on the first day of the hearing.

## **JURISDICTION**

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

## **ISSUES AND RELIEF SOUGHT**

- Whether DCPS’ September 28, 2012 IEP is inappropriate because it does not meet Student’s alleged requirement for full-time specialized instruction, in an outside of general education, therapeutic, setting;
- Whether the September 28, 2012 IEP is inappropriate because it does not specify that Student’s related behavioral support services will be provided in both group and individual counseling sessions;
- Whether the September 28, 2012 IEP is inappropriate because its post-secondary transition goals lack sufficient specificity;
- Whether DCPS has denied Student a FAPE by not conducting an updated functional behavioral assessment and not making revisions to Student’s behavior plan to address his non-attendance and oppositional behaviors; and
- Whether DCPS has denied Student a FAPE by not conducting a Level II vocational assessment.

For relief, Petitioner seeks an order for DCPS to fund Student’s private placement at Non-Public School for the remainder of the 2012-2013 school year and school transportation, an order for DCPS to convene Student’s IEP team to revise his IEP to address its alleged deficiencies; and an order for DCPS to fund Independent Educational Evaluation (“IEE”) functional behavioral and Level II vocational assessments of Student. Petitioner also seeks an award of compensatory education to compensate Student for educational harm he allegedly suffered at CITY HIGH SCHOOL under his September 28, 2012 IEP.

## **PARTY STIPULATION**

The parties stipulate that they entered into a settlement agreement in April 2012. (The settlement agreement, which was not offered into evidence, apparently provided for a DCPS-

funded IEE psychological evaluation of Student, which was conducted on May 24-25, 2012. *See* Exhibit R-13.)

### **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 is an AGE resident of the District of Columbia. Testimony of Mother.
2. Student is eligible for special education and related services under the primary disability classification, Other Health Impairment ("OHI"), due to Attention Deficit Hyperactivity Disorder ("ADHD"), Oppositional Defiant Disorder ("ODD"), and Learning Disorder - Not Otherwise Specified. Exhibits P-5, P-11<sup>3</sup>.
3. Student is a student of Low Average cognitive ability whose academic skill set falls just below his abilities. May 2012 skill testing, coupled with his academic performance showed that Student's academic skill set obtainment is in decline despite his higher end of Low Average range of cognitive aptitude. Exhibit P-12.
4. Student has been enrolled at City High School since the beginning of the 2011-2012 school year. In the current school year, he is repeating GRADE after failing that grade for the 2011-2012 school year. Testimony of Mother.
5. In the middle of the 2011-2012 school year, Student was referred for a Functional Behavioral Assessment ("FBA") due to his persistent pattern of inappropriate behaviors toward staff and students, which was having a negative impact on his academic performance. In the January 27, 2012 FBA, Student was reported to be often belligerent towards staff, to often use excessive profanity towards staff and students, as frequently out of his seat antagonizing other

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<sup>3</sup> [Sic] The Hearing Officer takes notice that under the IDEA, Specific Learning Disorder is a separate disability and not an Other Hearing Impairment underlying "chronic or acute health problem." *See* 34 CFR § 300.8(c)(9), (10).

students and rarely completing homework assignments. Student was also reported to have poor attendance, accruing 16 school absences, 53 unexcused class absences and 51 “tardies” as of mid-year. The FBA reported that Student’s behavior was “most certainly affected by his identified diagnosis of ADHD (combined Type), and ODD. [Student’s] inattention, impulsivity, and frequent boredom are all related to ADHD. [His] argumentative behavior, confrontational behavior, [the] fact that he is easily annoyed are all symptoms related to either ODD [*sic*].”

Exhibit P-11.

6. On February 8, 2012, Student’s City High School Multidisciplinary Team (“MDT”) developed a Behavior Intervention Plan (“BIP”) for Student, intended to address his aggression, school and class attendance, and completion of school work, and intended for Student to recognize and proactively deal with barriers to his academic success. The BIP included provisions to reinforce desired behaviors, including verbal praise and reinforcement, a periodic reward system, and breaks from class, along with consequences for negative behaviors. Mother and Educational Advocate participated in the development of the BIP. Exhibit P-13.

7. Student’s IEP team met at City High School on February 29, 2012 to revise and update Student’s IEP. A representative from the law firm then representing Petitioner attended the meeting. The team adopted annual goals for Written Expression and Emotional, Social and Behavioral Development. The IEP provided Student 5 hours per week of Specialized Instruction in the General Education setting and 60 minutes per week of Behavioral Support Services.

Exhibit P-5.

8. Student accrued a lot of absences and suspensions during the 2011-2012 school year. His problem behaviors included clowning-around in class, fighting and other infractions.

Testimony of Mother.

9. Student did not make educational progress in the 2011-2012 school year. He failed his classes and has accrued only 1 credit toward high school graduation. Testimony of Educational Advocate.

10. Following a May 24-25, 2012 IEE psychological evaluation, Independent Psychologist reported that Student's poor school attendance needed remediation. She opined that her record review, consults and social-emotional assessments "illuminate" Student as having negative perception regarding school that could be affecting his attendance, which results in negative and/or inconsistent performance. Exhibit P-12.

11. Student could have attended DCPS summer school in summer 2012, but did not attend. Exhibit P-7.

12. Student's IEP/MDT team met at City High School on September 7, 2012. The purpose of the meeting was to review Student's May 25, 2012 IEE psychological evaluation and review his IEP. Mother and Petitioner's Counsel attended the meeting. At the meeting, Petitioner's Counsel requested that the school conduct another FBA of Student. Student was placed in a 9-week Algebra I recovery class. The school counselor suggested placing Student in a resource class for mathematics. The team decided to provide school transportation to Student to address his tardiness and truancy. The team decided Student's February 2012 BIP remained appropriate, except to add additional cool-down breaks. The team agreed to meet again on September 28, 2012 to update Student's math and reading goals and revise his IEP. Exhibit P-6.

13. Student's IEP team met at City High School on September 28, 2012 to revise and update his IEP. Exhibit P-7. Student, Mother and Petitioner's Counsel attended the meeting. The IEP was revised to add math and reading goals and to place Student in a resource classroom for math. In the September 28, 2012 IEP, Student's Specialized Instruction Services were

increased to 15 hours per week, including 10 hours per week in the general education setting and 5 hours per week, outside general education, in the mathematics resource classroom. The post-secondary transition plan in Student's September 28, 2012 IEP was based upon the February 27, 2012 Educational Assessment and Functional Skills Assessment conducted by FORMER SPECIAL EDUCATION TEACHER. The transition plan included a Long Range Goal, "Upon graduation from high school student will attend 4 year university", and short-term goals, "[Student] will research and compare 3 different colleges/universities and their course offerings. [Student] will compare each college in regards to course offerings, tuition and location." Supplementing the IEP, to address his tardiness, Student was placed on a daily progress report regime. Exhibit P-7, Testimony of Special Education Teacher. The IEP team agreed that the revised IEP would be appropriate to serve Student's needs. Testimony of Special Education Coordinator. Mother went along with the September 28, 2012 IEP to see how it would work. Testimony of Mother.

14. Following the September 7, 2012 MDT meeting, DCPS issued a Prior Written Notice to add bus transportation services to Student's IEP. Exhibit R-29. However, Student refused to ride the school bus. Transportation services were not included in the September 28, 2012 IEP. Exhibit R-4, Testimony of Special Education Teacher.

15. Since the September 28, 2012 IEP meeting, Student is still failing in school. Exhibit P-23. His January 25, 2013 Report to Parents on Student Progress reported F's in all classes, except a D in Fluency Skills. All teachers, except Student's Sports teacher, reported excessive absences. Id. Since September 2012, Student missed 75% of his counseling sessions due to his being absent from school. Testimony of Social Worker. During the fall term, Student

appeared only two times for his first period English inclusion class. Testimony of Special Education Teacher.

16. Following a fighting incident on January 17, 2013, Student was suspended from City High School for 45 days. At a Manifestation Determination Review (“MDR”) meeting on January 29, 2013, the MDR team determined that Student’s conduct was not a manifestation of his disability. Educational Advocate attended the meeting by telephone and disagreed with the determination that the conduct was not a manifestation of Student’s disability. Exhibits P-8, P-9. Student has been offered an alternative interim placement at ALTERNATIVE ACADEMY. Testimony of Educational Advocate.<sup>4</sup>

17. On February 8, 2013, DCPS issued an IEE authorization for Student to obtain an updated FBA and a Vocational Assessment II. Exhibit R-30. These independent evaluations were conducted on February 20 and 21, 2013. Exhibit P-14, P-15.

18. Student has been accepted for the Learning Disabled (“LD”) program at Non-Public School. Prior to deciding to accept Student, Admissions Director interviewed him and reviewed Student’s DCPS IEP and his 2012 comprehensive psychological evaluation. Testimony of Admissions Director.

19. Non-Public School, located in the District of Columbia, is a full-time therapeutic day school for students, aged 14 to 22, with emotional/behavioral issues. There are 44 students in the program. Non-Public School is fully certified by the D.C. Office of the State Superintendent of Education (“OSSE”). Non-Public School has block scheduling, offering four daily classes through a changing daily cycle. In addition to academic courses, students may take

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<sup>4</sup> Whether the January 29, 2013 MDR determination was correct is not an issue in this case. Although the evidence establishes that Student has been offered an interim placement at Alternative Academy, Petitioner’s Counsel represented that Student has not attended school since his January 17, 2013 suspension.

trade courses such as carpentry or barbering. In Student's classroom, there would be a maximum of 8 students, taught by a teacher and teaching assistant. All teachers are certified. Non-Public School has an attendance policy. If a student is absent for 3 days, the school will usually do a home visit and may notify the DCPS truancy office. If attendance does not improve in 30 days, DCPS may order the student's return to public school. All students are on a point-system behavior plan. At Non-Public School, students have no interaction with non-disabled peers. The school's annual tuition is approximately \$40,000. Testimony of Admissions Director.

### **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:

#### **Legal Standard for Prospective Non-Public Placement**

Petitioner asserts that Student is entitled to public funding from DCPS for a private placement, because DCPS' September 28, 2012 IEP does meet Student's alleged requirement for full-time specialized instruction, in an outside of general education, therapeutic, setting. The IDEA ensures that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Under the Act, DCPS is obligated to devise IEPs for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991). If no suitable public school is available to fulfill the child's IEP needs, DCPS must pay the costs of sending the child to an appropriate private

school; however, if there is an “appropriate” public school program available, *i.e.*, one “reasonably calculated to enable the child to receive educational benefits,” DCPS need not consider private placement, even though a private school might be more appropriate or better able to serve the child. *Id.* (citing *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)).

“The question of whether a public school placement is appropriate rests on ‘(1) whether DCPS has complied with IDEA’s administrative procedures and (2) whether or not the IEP . . . was reasonably calculated to provide some educational benefit to [the student.]’” *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010) (quoting *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 80 (D.D.C.2004)). “While an IEP under the IDEA must be reasonably calculated to furnish educational benefits to the child and must be developed with parental involvement, it does not have to maximize the potential of a disabled child or include all the wishes of a child’s parents.” *See Rowley*, 458 U.S. at 189–90, 102 S.Ct. 3034; *Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C.Cir.1988) ( Proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.) A Hearing Officer may award appropriate equitable relief, including a prospective private placement, when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012), citing *Branham v. District of Columbia*, 427 F.3d 7, 11–12 (D.C.Cir.2005).

#### 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 STUDENT DENIED A FAPE BECAUSE DCPS' SEPTEMBER 28, 2012 DID NOT PROVIDE FULL-TIME SPECIALIZED INSTRUCTION, IN AN OUTSIDE OF GENERAL EDUCATION, THERAPEUTIC, SETTING?

The issue of whether DCPS' September 28, 2012 IEP was, or was not, appropriate for Student rests on (i) whether DCPS complied with IDEA's administrative procedures in developing the IEP and (ii) whether the September 28, 2012 IEP was reasonably calculated to enable Student to receive educational benefits. *See J.N., supra*, 677 F.Supp.2d at 322. Because Petitioner has not alleged that DCPS failed to comply with the IDEA's procedural requirements, I proceed directly to the second prong of the inquiry.

“Judicial review of IEPs under the IDEA is meant to be largely prospective and to focus on the child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was reasonably calculated to enable the child to receive educational benefits.” *S.H. v. Fairfax Cnty. Bd. of Educ.*, 875 F.Supp.2d 633, 652 (E.D.Va.2012) (Internal quotations and citations omitted, emphasis supplied.) *See, also, S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008) (Measure and adequacy of an IEP can only be determined as of the time it is offered to the student.) In assessing the September 28, 2012 IEP, it is necessary to look at Student's prior year experience at City High School because Student's experience under his 2011-2012 IEPs provided data that the IEP team drew upon to formulate, prospectively, his 2012-2013 IEP. *Cf. M.S. v. Fairfax County School Bd.*, 2007 WL 1378545, 12 (E.D.Va..2007), *rev'd on other grounds*, 553 F.3d 315 (4th Cir.2009), (Prior year IEPs important in placing student's educational needs and progress in context for the development of later IEPs); *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005) (Highly relevant

whether student was making progress and experiencing meaningful educational benefit from prior IEP.)

Student's February 29, 2012 IEP, which included annual goals for Written Expression and Emotional, Social and Behavioral Development, provided 5 hours per week of Specialized Instruction, all in the general education classroom, and 60 minutes per week of Behavioral Support Services. It is undisputed that Student did not make progress or experience educational benefit under the February 29, 2012 IEP. At the September 28, 2012 IEP meeting, the IEP team added additional educational goals and services to Student's IEP, including math and reading goals, 5 hours per week of Specialized Instruction in the mathematics resource classroom and an additional 5 hours per week of inclusion services in the regular education setting. The IEP team agreed that the IEP would be appropriate to serve Student's needs. Petitioner and Petitioner's Counsel, who attended the September 28, 2012 IEP meeting, agreed to the implementation of the plan.

No evidence was offered at the due process hearing that at the time the September 28, 2012 IEP was developed, Student required a full-time, outside of general education, school placement. Although the evidence establishes that Student has not progressed under the September 28, 2012 IEP, "the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so." *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C.2008) (citation and internal quotations omitted). I find Petitioner has not shown that when developed, the September 28, 2012 IEP did not provide personalized instruction with sufficient support services to permit Student to benefit. *See Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (FAPE requirement is satisfied when a school district provides the disabled child with "personalized instruction with

sufficient support services to permit the child to benefit educationally from the instruction.”  
quoting *Rowley, supra*, 458 U.S. at 203, 102 S.Ct. 3034.)

In a related claim, Petitioner contends that Student has been denied a FAPE because DCPS has not revised Student’s behavior plan to address his non-attendance and oppositional behaviors. The evidence supports the view that Student’s truancy and school suspensions were a major factor in his lack of educational progress in school year 2011-2012. In such circumstances, the IDEA requires the education agency to consider behavior interventions to address the attendance issues. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i) (Requirement, in the case of a child whose behavior impedes the child’s learning, to consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.) *See, also, e.g., Lexington County School Dist. One v. Frazier ex rel. D.T.* 2011 WL 4435690, 9 (D.S.C.2011) (Whether an IEP should address a student’s resistance to attending school where it is related to his disability and prevented the student from benefitting from special education.)

In this case, DCPS cannot be faulted for not adopting positive behavioral interventions and supports, and other strategies, calculated to address Student’s attendance issues. DCPS conducted a comprehensive FBA in January 2012 to assess Student’s pattern of inappropriate school behaviors and poor attendance. His IEP team developed a Behavior Intervention Plan, based on the FBA, on February 8, 2012. Student’s behavior and attendance did not improve. At the September 7, 2012 MDT meeting at City High School, the team reviewed Student’s BIP, added “cool-down” breaks and instituted school bus transportation to encourage Student to attend school. Student was also placed on a daily progress report regime to address his tardiness. Despite the MDT team’s interventions, Student’s poor school attendance and behavior issues

continued. In *Garcia v. Board of Educ. of Albuquerque*, 2007 WL 5023652 (D.N.M. 2007), the Court addressed the problem of a high school student who had a pattern of extreme truancy. The Court found that the “IDEA does not provide a remedy for this kind of case - 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.” *Id.* As Independent Psychologist observed in her May 2012 psychological evaluation, “[Student] cannot receive help if he does not show up to school in a timely manner.”<sup>5</sup>

Like an IEP, the appropriateness of a BIP is not whether it “will guarantee some educational benefit, but whether it is reasonably calculated to do so.” *Thompson R2-J School Dist. v. Luke P., ex rel. Jeff P.*, 540 F.3d 1143, 1149 (10<sup>th</sup> Cir.2008). I find that Student’s BIP, with the additional services offered at the beginning of the 2012-2013 school year, was reasonably calculated to provide educational benefits to Student.

Lastly, Petitioner also faults the September 28, 2012 IEP for not specifying that Student’s related behavioral support services will be provided in both group and individual counseling sessions and for lacking sufficient specificity in its secondary transition goals. Petitioner cites no authority for requiring an IEP team to specify that behavioral support services will be provided in both group and individual counseling sessions. However, the September 28, 2012 IEP Present Level of Educational Performance recites that “[Student] does a good job in individual counseling,” and “[i]n group counseling session he struggles a bit to remain focused, but still does a good job.” It is clear from the IEP that Student is offered counseling in both group and individual sessions. I find that the IEP’s not specifying the counseling format does not make the plan deficient.

With regard to transition services, Student’s IEP must include—

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<sup>5</sup> Exhibit P-12.

(1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(2) The transition services (including courses of study) needed to assist the child in reaching those goals.

*See* 34 CFR § 300.329(b). Consistent with these requirements, Student's September 28, 2012 IEP contains long ranges goals (Upon graduation from high school student will attend a 4 year university) and short-term goals (Student will research and compare 3 different colleges/ university and their course offerings. Student will compare each college in regards to course offerings, tuition and location.) Certainly, these goals will not be reached if Student does not attend school. However, I find that the IEP transition goals do not want for specificity.

In summary I conclude that Petitioner has not met her burden of proof to show that the September 28, 2012 IEP, at the time it was created, was not reasonably calculated to provide Student educational benefits. DCPS prevails on this issue.

2. HAS DCPS DENIED STUDENT A FAPE BY NOT CONDUCTING AN UPDATED FUNCTIONAL BEHAVIORAL ASSESSMENT AND NOT MAKING REVISIONS TO STUDENT'S BEHAVIOR PLAN TO ADDRESS HIS NON-ATTENDANCE AND OPPOSITIONAL BEHAVIORS?

In the preceding section, I found that Student's MDT/IEP team had revised his BIP and IEP in September 2012 to attempt to address his non-attendance and oppositional behaviors. I concluded that Petitioner had not shown that the BIP and IEP as revised, were not reasonably calculated to provide Student educational benefits. In her complaint, Petitioner also contends that DCPS denied Student a FAPE by not conducting an updated FBA. The IDEA does not specify what constitutes a valid or current FBA. *See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes*, 71 Fed. Reg. 46721 (August 14, 2006) (Declining request

that an FBA older than one year be considered invalid and/or requirement that education agency conduct a new FBA for Manifestation Determination Review.)

Prior to the Petitioner's filing her complaint in this case, DCPS last conducted an FBA of Student in January 2012. At the September 28, 2012 IEP meeting, Petitioner's counsel requested that an updated FBA be conducted, to which DCPS did not immediately agree. The January 27, 2012 FBA was a detailed and comprehensive assessment of the causes and functions of Student's school problem behaviors. Petitioner has not shown that the January 2012 FBA is now invalid or that a reevaluation was warranted when requested by her attorney at the September 28, 2012 IEP meeting. *See* 34 CFR § 300.303.

3. HAS DCPS HAS DENIED STUDENT A FAPE BY NOT CONDUCTING A LEVEL II VOCATIONAL ASSESSMENT?

For her final issue, Petitioner alleges that DCPS has denied Student a FAPE by not conducting a Level II vocational assessment<sup>6</sup> after Student reached his 16<sup>th</sup> birthday. The IDEA requires that, beginning not later than the first IEP to be in effect when a student turns 16, the student's IEP must include post-secondary goals and transition services (including courses of study) needed to assist the student in reaching those goals. Transition services include, "if appropriate," the provision of a functional vocational evaluation. 34 CFR §§ 300.320(b), 300.43. Student turned 16 before the September 28, 2012 IEP meeting. The post-secondary transition plan in Student's September 28, 2012 IEP was based upon the February 27, 2012 Educational Assessment and Functional Skills Assessment conducted by Former Special

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<sup>6</sup> Level I vocational assessments include all of the information included in a traditional psychological evaluation, with the addition of a vocationally oriented interview and vocational interest assessment. Level II is designed for students with more severe disabilities for whom vocational decisions cannot be made without more comprehensive vocational assessment. Level II assessments include all of the procedures included in Level I and additionally include expanded medical evaluations and require work sampling procedures. Fagan and Warden, Historical Encyclopedia of School Psychology, p. 417 (1996).

Education Teacher. Subsequent to the filing of the due process complaint in this case, Student obtained a DCPS-funded IEE Level II vocational assessment. However, there was no showing at the due process hearing that when Student's IEP team met on September 28, 2012, a Level II vocational assessment was needed or appropriate as part of Student's transition services. Petitioner has not met her burden of proof on this issue.<sup>7</sup>

#### SUMMARY

In summary, in this decision, I find that Petitioner has not met her burden of proof to show that at the time DCPS' September 28, 2012 IEP was created, it was not reasonably calculated to enable Student to receive educational benefits. Neither has Petitioner shown that Student was denied a FAPE by DCPS' not revising Student's BIP to address non-attendance and oppositional behaviors or by not conducting a Level II vocational assessment of Student. Having not shown a denial of FAPE, Petitioner's requested relief in this case must be denied.

#### ORDER

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

All relief requested by the Petitioner in this matter is denied.

Date: March 26, 2013

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

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<sup>7</sup> The failure to conduct a required evaluation would be a procedural violation of IDEA. An IDEA claim is viable only if the alleged procedural violation affected the student's substantive rights. *See Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006). Petitioner offered no evidence that Student suffered an "educational harm" resulting in denial of FAPE from DCPS' not conducting a Level II vocational assessment. *See, e.g., Taylor v. District of Columbia* 770 F.Supp.2d 105, 109-110 (D.D.C.2011).

**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).