DISTRICT OF COLUMBIA OFFICE OF THE STATE SUPERINTENDENT
OFFICE OF COMPLIANCE AND REVIEW

STUDENT, a minor, by and through
her Parent[1]

Petitioner,

v

DISTRCIT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

SHO Case No:
Erin H. Leff, Hearing Officer

OSSE
STUDENT HEARING OFFICE
2011 MAR -4 PM 1:31

HEARING OFFICER DETERMINATION

DECISION

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STATEMENT OF THE CASE

On January 3, 2011 Parent, on behalf of her child ("Student"), filed an Administrative Due Process Complaint Notice ("Complaint"). HO 1.[2] requesting a hearing to review the identification, evaluation, or placement of or provision of a free, appropriate public education ("FAPE") to Student by District of Columbia Public Schools ("DCPS") under the Individuals with Disabilities Education Act, as amended ("IDEA"). 20 U.S.C.A. §1415(f)(1)(A) (Supp.

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[1] Personal identifying information is provided in Appendix A, attached hereto.
[2] Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioner's Exhibits will be referred to as "P" followed by the exhibit number; and Respondent's Exhibits will be referred to as "R" followed by the exhibit number.

2010). Respondent filed a Response to Parent's Administrative Due Process Complaint Notice (HO 5) on January 21, 2011. A resolution meeting was held on January 20, 2011. The parties were not able to reach an agreement. HO 4.

At all times relevant to these proceedings Petitioner was represented by Sarah Tomkins, Esq., of the Law Office of Donna Wulkan and Laura George, Assistant Attorney General, represented DCPS. I held a telephone prehearing conference on February 1, 2011. HO 7. By agreement of the parties, the hearing was scheduled for February 22, 2011. The hearing was held as scheduled.[3] Due to the serious illness of one of Petitioner's witnesses, the parties agreed at the close of the February 22, 2011 hearing date to continue the hearing to February 25, 2011. The hearing concluded on that date.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (Supp. 2010); 34 C.F.R. § 300.511(a) (2010); and the District of Columbia Municipal Regulations, Title 5e, Chapter 30, Education of Handicapped (2003).

ISSUE(S)

The issues are whether DCPS denied Student a FAPE by:

1. Failing to provide Student a comprehensive psychological and psycho-educational evaluation;
2. Failing to develop an appropriate IEP for Student in the 2009-2010 school year. The IEP did not include present levels of performance, and social-emotional goals were not individualized. The IEP was not reasonably calculated to provide Student educational benefit;
3. Failing to develop an appropriate IEP for the 2010 -2011 school year. The present levels of performance were based on test scores from the previous school year. The social-emotional goals do not address Student's needs. The IEP is not reasonably calculated to provide Student educational benefit. In addition, the Parent did not receive notice of the meeting, was not aware the meeting was occurring and did not participate in the meeting as a result. The actual date of the meeting is not clearly identified on the IEP;
4. Failure to implement the IEP as written for the 2009-2010 and 2010 – 2011 school years. Student has not received any pull-out instruction while the IEP

[3] Alfredo Vasquez, law student from the Law Office of Donna Wulkan, attended the hering.

calls for both 10 hours of pull-out special education instruction and five hours of inclusive special education instruction.

5. Failure to provide Student an appropriate placement in a full-time special education school;
6. Failing to appropriately discipline student and not developing a comprehensive, individualized method of addressing Student's behavioral problems. Student is suspended for reasons that are prohibited under DC code. Documentation is not consistent. There has been no response to Petitioner's request at the manifestation determination meeting on December 7, 2011 for a new FBA and BIP.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are found in Appendix B.

Exhibits admitted on behalf of Respondent are found in Appendix C.

Exhibits admitted on behalf of Hearing Officer are found in Appendix D.:

B. Testimony

Petitioner testified and presented the following witnesses:

- Family Counselor,
- Todd Christiansen, M.D., admitted as an expert in child and adolescent psychiatry and in mental health and psychiatry issues not including education or related services issues that are not mental health based
- C. David Missar, Ph.D., admitted as an expert in clinical psychology and educational programming regarding students' social, emotional and/or behavioral needs
- Assistant Director of Education,

DCPS presented the following witnesses:

- Special Education Coordinator, Charter School
- Special Education Coordinator,

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:

1. Student is years old. She is repeating the grade at a charter school for which DCPS serves as the Local Education Agency. This is her second year at the current charter school. Student began attending the current school in the spring of 2009 after being expelled from a different charter school for starting a fire. P 3; Testimony of Petitioner.
2. Student began receiving special education services as a student with an emotional disability in January 2009. P 11, p.2. She has a well documented history of behavior problems in school. P 3; P 11; P 12; P 15; P 16; P 17; P 18; P 19; P 20; Testimony of Testimony of Christiansen; Testimony of Missar; Testimony of Petitioner; Testimony of Testimony of
3. Student has an array of emotional disabilities and symptoms. She is depressed and anxious and has difficulties with impulse control. Her diagnoses include Bipolar II Disorder, Oppositional Defiant Disorder, and Dysthymic Disorder. P 15.
4. Student's cognitive abilities are in the high to high average range. Her working memory and processing speed, however, are below average reflecting a long standing history of Attention Deficit Hyperactive Disorder ("ADHD"). She is easily distractible. P 15; Testimony of Missar.
5. Student's October 27, 2009 IEP does not include statements of her Present Levels of Performance ("PLOP") in any academic area. P 18. The PLOP for the social emotional

area is very broad and does not adequately capture her disabilities. Testimony of Christiansen. This IEP has one reading goal. There are no other goals on the IEP despite the IEP identifying three areas requiring specialized instruction and related services: reading, mathematics and social emotional. The LRE statement specifically references the need for psychological counseling, but there is no counseling goal. The IEP is to be provided in a neighborhood school in a combined general education and special education classroom, with 10 hours of special education instruction provided in the general education classroom and 5 hours provided outside the general education classroom per week.

P 18.

6. Student has a Behavioral Intervention Plan dated 6/2/10. P 19.
7. Student has been suspended for 11 days in the 2010-2011 school year. R 2.
8. Student's September 16, 2010 IEP includes statements of her present levels of performance in reading, mathematics and social, emotional and behavioral development. There are goals in each of these areas. P 20. However, the PLOP statements are not appropriate in that they do not reflect her general functioning, are too broad, use scores from her 2009 educational testing and do not accurately reflect her emotional lability, impulsivity and inability to manage her behavior in the moment. Testimony of Missar.
9. The September 16, 2010 IEP continues to require that Student's program be provided in a neighborhood school in a combined general education and special education classroom. This IEP, however, flipped the percentages of time to be spent inside the general education classroom and outside the general education classrooms, requiring that Student receive 10 hours of special education instruction outside general education and 5 hours of

special education instruction inside general education per week. She also is to receive one hour of behavior support outside general education weekly. P 20.

10. Parent did not participate in the development of the September 16, 2010 IEP. She did not receive a Letter of Invitation. Testimony of Petitioner.

11. Student is receiving 5 hours of math special education instruction outside general education and 5 hours of history special education instruction inside general education per week. Student also has had counseling available to her but has not accessed counseling consistently because she has not been in school consistently. Testimony of

12. Student has some attendance problems. She also has missed school due to suspensions and to being sent home for behavioral reasons. R 2; Testimony of Petitioner; Testimony of Testimony of

13. Student received a psycho-educational evaluation in March 2009 and a clinical psychological evaluation in February 2009. She was not evaluated again until January 2011 despite numerous documented behavioral and academic issues. P11; P 12; P 15.

14. Student is not achieving academically commensurate with her ability. Her academic achievement scores reflect academic stagnation in that she has not shown progress in the last two years. Between 2009 and 2011Student lost 8 scaled score points on the Woodcock Johnson III in Broad Reading and Calculations. She also lost 10 scaled score points in Broad Mathematics. These are significant losses in a short period of time. During the same time period Student lost 3 points in Broad Written Language. P11; P15; P 29; Testimony of Missar.

15. Student's academic stagnation is attributable to the school's failure to provide adequate interventions to address her ADHD and emotional disabilities. Testimony of Missar; Testimony of Christainsen.
16. The effect of Student's disabilities on her education is progressive in that she is increasingly showing school evasive behaviors. The more she is successful at evading school the more these behaviors will occur. Her underlying mood disorder and related anxiety result in efforts to avoid anxiety provoking situations such as school. This reinforces her avoiding school by not attending, becoming disruptive or getting suspended. The more she is out of school, the further behind she becomes academically, creating more anxiety and increased efforts to avoid the anxiety by not attending school. Testimony of Christiansen.
17. Student is a danger to herself and others. She has made multiple suicide attempts, one on school grounds, and set at least two fires, one on school grounds. HO 1; Testimony of Christainsen; Testimony of Missar; Testimony of Petitioner.
18. Student requires a full time, small, separate special education program placement. Such a placement would decrease the multiple distracting factors in the environment, allow greater focus on her emotional lability and the identification of developing lability in her moods prior to the actual occurrence thereby limiting her time out of school and decreasing her anxiety. A non-public setting would allow needed direct family intervention to create better parent child interactions and consistency in behavior interventions. She also requires on-going immediate access to crisis intervention, staff trained in de-escalation techniques and psychiatric care. Testimony of Christiansen.

19. DCPS has offered Student a placement in the ED program at

is a large, general education high school with approximately 900 students. The ED program has approximately 30 students. Class sizes range from 3 to 12. Each class has a certified teacher and 2 to 3 aides are assigned to classes. The students in the ED program are in self-contained classes for math, reading, social studies and science. Most of the students in the program are not in self contained settings for approximately 80 minutes per day. They attend electives with their non-disabled peers. They also attend lunch with and change classes at the same time as their non disabled peers. The staff who work with the ED program includes two school psychologists, three social workers and a therapist from a partnership school. They work with parents as well as the students. A crisis team is available. This team has not been used this academic year. Testimony of

20. is a non-public, special education school providing services for 220 days (rather than the 180 days provided by DCPS) per school year. There are 54 students in the high school program. All teaches are certified. Student staff ratios are generally 4 to 1. Each student has an assigned teacher who serves as a case manager. The case manager meets with the students on his/her caseload daily. Reports of student progress are provided to parents weekly. The school has a school wide behavior program and also develops individualized behavior programs for students as needed. only suspends students as a last resort. has an experienced crisis intervention team. staff includes two behavior specialists and a psychiatrist. Staff proactively address emotional lability issues in an effort to prevent crises from developing. Testimony of Holloway

21. has accepted Student. is able to address Student's needs. Testimony of

Testimony of Christiansen; Testimony of Missar.

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. I find all witness testimony presented in this matter to be credible.

Whether DCPS denied Student a FAPE by failing to provide Student a comprehensive psychological and psycho-educational evaluation

Under IDEA

> A public agency must ensure that a reevauation of each child with a disability [i]s conducted . . . [i]f the public agency determines that the educational or related service needs, . . . warrant a reevaluation:

34 C.F.R. § 300.303(a).

At a minimum, reevaluations are to occur at least once every three years unless the public agency and parent agree a reevaluation is not necessary. 34 C.F.R. § 300.303(b).

In the instant matter, Student entered her current charter school in the spring of 2009 following an expulsion, on or about February 17, 2009, from a different charter school for setting a fire on school grounds. She has struggled since her enrollment in her current school both emotionally and academically, including being required to repeat the ninth grade at her current school. She exhibits a range of behavior that interferes with her ability to benefit from her education including school evasive behavior such as not attending school, leaving the classroom, fighting, not following directions and not following rules. Student received a psycho-educational evaluation in March 2009 and a clinical psychological evaluation in February 2009. She received

no additional psychological evaluations since those dates until the psychological/psycho-educational evaluation performed in January 2011.

DCPS argues that the prior evaluations are not stale in that they are less than three years old. While it is true that under general practice reevaluations are only performed every three years, the IDEA regulations cited above, make clear that there are circumstances under which evaluations may occur more often. Reevaluations are to occur if a public agency determines a student's educational or related service needs warrant a reevaluation. It is clear that the student's current school did not make this determination, and it is also clear that the school should have made this determination.

Student entered her current placement following setting a fire in her prior placement. This is dangerous behavior, and at the time it was new behavior reflecting a change in Student's dysfunction. It would be appropriate under such circumstances to question what was happening with Student. It is not unlikely that an attempt to answer such a question would lead to a determination that circumstances warranted a reevaluation. Moreover, even if Student's increasingly dysfunctional behavior alone was not sufficient to warrant such a determination by the school, Student also was deteriorating academically to such a degree that she was required to repeat the ninth grade. Surely the evidence that Student was deteriorating both academically and emotionally should have led to a determination that a reevaluation was warranted.

DCPS' position is that the current evaluations are not stale, and in this they are correct. However, staleness of evaluations is inapposite to the issue here. Petitioner's allegation is not that the reevaluation was not performed within the statutory three year timeline. Petitioner's allegation is that the need to reassess Student should have been identified when she was expelled

from one school for setting a fire, continued to demonstrate serious behavioral problems in her new placement and also showed academic failure.

Therefore, I find by a preponderance of the evidence that Student was denied a FAPE when DCPS failed to provide Student a comprehensive psychological and psycho-educational evaluation after her enrollment in her current school.

Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student in the 2009-2010 school year. The IEP did not include present levels of performance, and social-emotional goals were not individualized. The IEP was not reasonably calculated to provide Student educational benefit.

Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for the 2010 - 2011 school year. The present levels of performance were based on test scores from the previous school year. The social-emotional goals do not address Student's needs. The IEP is not reasonably calculated to provide Student educational benefit. In addition, the Parent did not receive notice of the meeting, was not aware the meeting was occurring and did not participate in the meeting as a result. The actual date of the meeting is not clearly identified on the IEP;

The two issues identified above are combined for discussion as the IDEA requirements addressed in these issues are either identical or similar. Any distinctions in the resolution of these issues are identified below.

Under the IDEA each local education agency is required to provide a FAPE to each student found eligible for special education and related services. A FAPE is:

> Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . .[a]re provided in conformity with an . . .IEP that meets the requirements of [the IDEA regulations].

34 C.F.R. § 300.17. *See also*, D.C. Code § 30.3001.1.

An IEP is a written statement that includes, in pertinent part, the eligible student's: present levels of academic and functional performance; the affect of the student's disability on his/her

involvement and progress in the general curriculum; measurable annual academic and functional goals designed to meet the student's educational needs resulting from his/her disability; a statement of the special education and related services, supplementary aids and services, and program modifications and supports to be provided to the student to allow him/her to advance toward attaining the IEP goals and progress in the general curriculum and to participate in nonacademic activities. In addition the extent of the student's participation with nondisabled peers must be addressed. 34 C.F.R. § 300.320. *See also*, D.C. Code § 30.3009. In developing the IEP the team is to consider the strengths of the child, the concerns of the parent for enhancing the education of the student, the results of the most recent evaluation and the academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a). *See also*, D.C. Code § 30.3007. If a student's behavior impedes the student's learning or that of other students, the team is to consider interventions and strategies to address the behavior. *Id.* An IEP that memorializes the team's FAPE determination must be designed to provide the student with some educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982). All students found eligible for services under IDEA are determined to fit in one of 13 eligibility categories. 34 C.F.R. § 300.306. *See also*, D.C. Code § 30.3001.

In the instant matter Student has multiple disabilities including bipolar disorder II, oppositional defiant disorder, dysthymic disorder and ADHD. She is emotionally labile and unable to control her behavior when she is in an emotionally reactive state. She also is highly distractible. Student's history of hospitalizations, on-going discipline problems and progressively poor academic performance and school attendance reveal Student to be a person in great need of intervention focused on her identified individualized needs. She is classified as a student with emotional disabilities. The IEPs provided Student in the 2009-2010 and 2010-2011 school years

are broad and general providing little in the way of directed intervention to address Student's individualized needs and support her in achieving the academic success testing indicates she is capable of achieving.

Student's behavior is severely impacting her classroom performance. Her behavior has resulted in multiple suspensions and in student being sent home on several additional occasions without the school recording these "send-homes" as removals from school. In addition, Student is distractible and often has trouble maintaining focus on class work. Her inability to remain in class and focus results in her falling further and further behind academically. The further she falls behind the more anxious she becomes, and as her anxiety increases she becomes increasingly school evasive in an effort to minimize her anxiety. When not emotionally aroused Student is able to discuss her issues in a rational fashion, but once aroused she is impulsive and reactive. She lacks the ability to control her behavior when she is in the throes of an emotionally laden episode or event.

The 2009 – 2010 IEP

The 2009- 2010 IEP does not include statements of Student's present levels of academic performance as required by IDEA. Statements of present levels of performance are the basis for educators and parents to assess how much progress a student is expected to make under the IEP and assess whether progress is occurring. Student's IEP includes only one goal, a goal in reading. The IEP does not include goals addressing the other needs the IEP itself identifies. Student's identified needs in mathematics are not addressed, and her intense social emotional needs are not addressed. Respondent did not dispute that the IEP failed to include Student's present levels of academic achievement and performance nor that the IEP included only one goal. It is not

possible to construe this IEP as meeting the requirements for an individualized program designed to address Student's individualized educational needs.

The 2010 – 2011 IEP

The 2010 – 2011 IEP improves upon the 2009-2010 IEP. It includes statements of present levels of performance and includes goals in the reading, mathematics and social emotional behavioral areas. Petitioner argues that this IEP too is inadequate to meet Student's identified needs. The goals are too broad and despite Student's ongoing behavior problems and school avoidance issues the level of service remains the same.

The academic goals on this IEP are, as Petitioner contends, rather broad. I find, however, that they meet the *Rowley* standard of providing some educational benefit. It is in the area of social emotional goals that I find the IEP does not address Student's educationally related needs. The social emotional goals are designed to have Student focus on identifying her emotional triggers and discuss coping strategies. Student is quite able to do these things when she is not emotionally charged. However, when she is in an emotional state, both the expert psychologist and the expert psychiatrist testified Student is unable to control her behavior. Both indicated it is important to provide proactive, practices on an on gong basis throughout the day to prevent the outbursts from occurring. Weekly one hour discussions, as designed in the 2010-2011 IEP, will have little impact on Student's behavior, and it is this behavior that is interfering with her ability to access her education and receive educational benefit. I, therefore, find by a preponderance of the evidence that the 2010- 2011 IEP is not reasonably calculated to provide Student educational benefit.

In addition, Petitioner did not participate in the development of the 2010-2011 IEP. Pursuant to 34 C.F.R. § 300.321(a)(1), the public agency must ensure the IEP team includes the

parent of the student with a disability. While both petitioner and Student are identified on the face of the IEP as attending the IEP meeting, neither signed the IEP. Petitioner did not receive notification of the meeting to develop the IEP and did not attend the meeting. The failure to invite Petitioner to participate in the IEP meeting is a substantive violation of IDEA.

In arguing that both the 2009-2010 and 2010-2011 IEPs are appropriate, DCPS indicates that Petitioner has not stated what these IEPs should contain. Yet this is not the case, Petitioner has specifically identified the weaknesses of each IEP as discussed above. DCPS also indicates, and Petitioner does not contest, that Petitioner declined to attend the last scheduled IEP meeting. While it is true that cooperation in developing a new IEP is to be expected, the development of a new IEP would not in any way change the content of the pre-existing IEPs.

For these reasons I find by a preponderance of the evidence, that neither the 2009-2010 IEP nor the 2010-2011 IEP were designed to provide Student educational benefit. I further find Student was denied a FAPE under both the 2009-2010 IEP and the 2010- 2011 IEP.

Whether DCPS denied Student a FAPE by failing to implement the IEP as written for the 2009-2010 and 2010 – 2011 school years. Student has not received any pull-out instruction while the IEP calls for both 10 hours of pull-out special education instruction and five hours of inclusive special education instruction.

IDEA requires that a free, appropriate public education ("FAPE") must be available to all eligible children. 34 C.F.R. § 300.301. A FAPE is defined as special education and related services provided in conformity with an IEP." 34 C.F.R. § 300.17. While it is clear that *de minimis* deviations from the content of the IEP are contemplated, substantive deviations from the IEP can be construed as denials of FAPE. *See, Van Duyn v, Baker School District 5J*, 481 F.3d 770 (9th Cir. 2007).

Both the 2009-2010 IEP and the 2010-2011 IEP require Student receive 15 hours of special education instruction per week. The first IEP requires Student receive 10 hours of special education instruction provided in the general education classroom and 5 hours provided outside the general education classroom. The 2010-2011 IEP requires Student receive 5 hours of special education instruction provided in the general education classroom and 10 hours provided outside the general education classroom. Each IEP also includes either one hour of behavior support or counseling per week.

At hearing testimony revealed Student is not receiving the services as required on her 2010-2011 IEP. According to the Special Education Coordinator at Student's current school, she is receiving 5 hours of special education instruction outside the general education environment rather than the 10 hours outside the general education environment required by her IEP. She also is not receiving her counseling services.[4] Petitioner also argues that a disciplinary process agreed upon by school staff and Petitioner at a meeting is not being implemented. This agreement, however, is not part of the IEP and, therefore, is not evidence of a failure to provide FAPE by failing to implement the IEP.[5]

Petitioner has argued, and I have found, that the IEPs in question do not provide Student a FAPE. Petitioner then asks that I find the failure to implement these two IEPs as written is a denial of FAPE. The illogic in this position is apparent. An IEP that does not provide a FAPE even if implemented as written could never provide a FAPE. However, I must assume that when the IEPs were drafted the Multidisciplinary Team ("MDT") intended to develop an IEP to provide Student a FAPE. I, therefore, find that the question of failure to implement the IEPs as

[4] Petitioner testified Student was not receiving her counseling services because one of her teachers would not allow Student to leave class to see her counselor. The Special Education Coordinator asserted Student was not receiving counseling due to her absences. Based on a review of Student's attendance records it is likely Student is not receiving counseling services due to a combination of factors.

[5] Further issues regarding discipline are discussed *infra* at pp. 19 -21.

written should be addressed in an effort to establish whether DCPS attempted to provide Student a FAPE as they had conceived it, and, if not, whether that failure constituted a substantive deviation from the IEP.

I begin by noting Petitioner provided little, if any, evidence of Respondent's delivery of services under the 2009-2010 IEP. From opening argument through closing argument Petitioner's presentation focused on the alleged failure to provide services required by the 2010-2011 IEP. I, therefore, find by a preponderance of the evidence that Petitioner has failed to meet the burden of proof regarding the question of DCPS' failure to provide FAPE by not implementing the 2009-2010 IEP as written.

The evidence regarding the 2010-2011 IEP, on the other hand, clearly demonstrates Student has not received the services required. Petitioner has established Student did not receive one hour of counseling per week and five of the ten hours of special education instruction outside the general education environment as required by her IEP. The issue I must decide is whether the failure to provide these counseling and instructional services is a substantive deviation from the IEP.

Student did not receive the counseling services, at least in part, due to Student's own actions. The service could not be provided when Student was not in school. As Student was a contributing factor in the failure to deliver counseling services I find the failure to provide counseling does not constitute a substantive deviation from the IEP.

The question as to the failure to deliver 5 additional hours of service outside general education is a more difficult one. Five hours of special instruction is one third of the total number of the 15 hours of special instruction that Student is to receive under the 2010-2011 IEP. Further, it is one half of the 10 hours of instruction outside the general education environment the team

deemed necessary for her to receive a FAPE. Respondent's own witness testified they were going to adjust Student's schedule to include 5 hours of English instruction outside of general education, but they had not made the adjustment to her schedule. The IEP requiring this 10 hours of special instruction services outside of general education per week was developed in September of 2010. Yet, as of February 2011, after 5 months of school, the needed scheduling change had not been made. Moreover, Student has been struggling academically for at least this entire academic year and last academic year as evidenced by her being required to repeat the ninth grade. She is intellectually able to work at grade level, but requires intensive services in order to access her educational program. Among the services she requires are smaller classes and the MDT recognized this need by increasing her time outside of general education. Yet the school failed to make an adjustment to Student's schedule to implement the MDT's efforts to meet Student's educational needs. This lack of adjustment to Student's schedule resulted in Student having the same configuration of services (10 hours of special instruction inside general education and 5 hours outside general education) as had appeared on her previous IEP, an IEP I have all ready found did not meet Student's identified needs. I find the MDT's judgment in increasing her service hours outside general education reflects Student's needs for a smaller class environments and more individualized attention. I, therefore, find by a preponderance of the evidence that DCPS, failure to provide the configuration of services identified on Student's 2010-2011 IEP denied Student a FAPE.

Whether DCPS denied Student a FAPE by failing to appropriately discipline student and not developing a comprehensive, individualized method of addressing Student's behavioral problems. Student is suspended for reasons that are prohibited under DC code. Documentation is not consistent. There has been no response to Petitioner's request at the manifestation determination meeting on December 7, 2011 for a new FBA and BIP.

Under the IDEA, a special education student may be disciplined in the same manner and for the same duration as students without disabilities for up to 10 consecutive or cumulative school days in a school year. 34 C.F.R. § 300.530. However, a special education student may not be denied FAPE as a result of disciplinary removal, and if the behavior resulting in the suspension that would exceed 10 cumulative or consecutive days has a substantial relationship to the student's disability s/he may not be suspended unless the offense involves weapons, drugs or serious bodily injury. Id. IDEA also requires that schools assess students who have on-going behavior problems to determine the basis for the behaviors and then develop behavior intervention plans to attempt to eliminate or control the behaviors.

Petitioner alleges DCPS is not addressing Student's behavior appropriately. Student has had several documented out of school suspensions both in the 2009-2010 and 2010- 2011 school years. While Student does have a BIP dated June 2, 2010, Student's attendance record for the 2010-2011 school year still identifies 11 days of suspension. Petitioner contends there also have been numerous informal disciplinary removals when Student was sent home for behavioral reasons without documentation of a formal suspension. Petitioner indicates a similar pattern of suspensions and informal "send-homes" occurred in the 2009-2010 school year as well.

It is, of course, impossible to determine how many days Student has been suspended without formal documentation. Petitioner's testimony in this area was non-specific. Petitioner also did not provide evidence as to the number of actual suspensions Student received in the 2009-2010 school year. That said, it is clear that Student's behavior has been extremely difficult to manage, and the school has not developed an effective process for doing so. Petitioner was clear that she had had discussions with school staff regarding the implementation of a school based intervention plan to attempt to decrease the amount of time Student spends out of school,

and Petitioner was equally clear that this plan was not implemented. Student was still receiving suspensions in January.

Respondent argues that there is no evidence of Student displaying dangerous school based behavior. This argument, however, is not supported by the evidence. Student was expelled from one school for dangerous behavior, and the testimony of numerous witnesses regarding her dangerous behavior was not contested. Even the placement proposed by DCPS includes components, such as a crisis intervention team, intended to address dangerous behavior.

While I have no doubt Student has had both documented and undocumented suspensions, the evidence in this area is sparse. Petitioner's testimony regarding the undocumented send home suspensions was limited in both scope and detail. The disciplinary records provided cover only the months of September, October and November. They reveal both positive and negative behaviors, and the negative behaviors range from minor to significant in nature. The consequences for these behaviors tend to reflect the seriousness of the incidents, ranging from minor to suspensions. Moreover these data also show a declining number of referrals for behavioral reasons over time,[6] and, as noted above, there is a behavior intervention plan in place. Finally, while attendance records indicate suspensions continued into January, attendance data alone cannot substantiate this claim. I find, by a preponderance of the evidence, that Petitioner has not met her burden of showing inappropriate discipline or failure to develop a plan to address Student's behavior as alleged herein.

Whether DCPS denied Student a FAPE by failing to provide Student an appropriate placement in a full-time special education school.

[6] I note this decline in actionable behavior may be as much a function of Student's increasing absences from school and school avoidant behavior rather than evidence of improving behavior.

After a school district develops an IEP that meets all of a student's educational needs, it must identify a placement in which to implement the IEP. The placement is to be in the least restrictive environment in which the IEP can be implemented. 34 C.F.R. §§ 300.114 – 300.118. *See also*, D.C. Code §§ 30.3011 – 30.3013.

Student, in the instant matter, has both learning disabilities and serious emotional disturbance. Her behavior has been deteriorating and her educational performance has stagnated. Student has been attending a charter school that includes both general education students and special education students. She has shown, despite her underlying strong academic abilities, she is unable to access educational opportunities in that environment. A psychiatrist who has worked with her, a psychologist who provided both a comprehensive psychological evaluation and a psycho-educational evaluation provided convincing, credible testimony that Student requires a separate, full-time special education program in a non-public school. There also is ample evidence demonstrating Student's need for the close supervision and limited opportunity for school evasive behaviors that such a program would provide.

DCPS response to Student's strong and complex needs that were thoroughly explained in the experts' evaluations was to offer the student a part time program for students with emotional disabilities located in a large, city high school with a population of approximately 900 students. It is difficult to understand how this proposed placement is intended to address the long lis of specific and complex needs presented by Student. It does not provide Student the full time services she requires. It does not limit the distractions that often lead to her nonresponsive school behavior. It does not provide Student or her school mates an environment that can support both her safety and theirs as she will spend a good part of each day in the larger school population. While DCPS' proposed placement includes staff who are willing to work with Student's family,

as recommended by the experts, the staff in the DCPS placement have no experience in crisis intervention. Yet Student is an individual who frequently, quickly and unpredictably cycles in and out of crisis due to her emotional lability. She, therefore, requires on-going immediate access to experienced crisis intervention, staff trained in de-escalation techniques and to psychiatric care. As a result I find the placement proposed by DCPS is not appropriate.

"Where a public school system has defaulted on its obligations under the IDEA, a private school placement is `proper under the Act' if the education by said school is `reasonably calculated to enable the child to receive educational benefits.'" *Blackman v. D.C.*, 278 F.Supp.2d 1, 4 (D.D.C.2003) (quoting *Rowley*, 458 U.S. at 207, 102 S.Ct. 3034). Petitioner has proposed placement at the in Baltimore, Maryland. The school's director of Admissions provided convincing testimony regarding ability to address Student's needs. The program would not only allow Student to receive remediation in the academic areas where she has fallen behind, it would allow her to obtain a high school diploma.

also provides services to address Student's school avoidant behavior, a process to identify and proactively prevent Student's extremely disruptive behaviors and an experienced crisis intervention team should the behaviors occur. also has a psychiatrist on staff.

Yet is located in Baltimore, Maryland -- at least an hour bus ride each way for Student. If Student is placed at not only would she be expected to spend six and one half hours in school every day, year round. She also would be expected to spend at least two hours on the bus each day commuting back and forth to Baltimore. For a student who is school avoidant and resistant, this is an extraordinarily long time. I note Student has not visited so it is impossible to assess her reaction to this proposed time commitment. As a result of the time

commitment required of Student to attend it is with great hesitation I find this proposed placement to be appropriate.

Whether Student should receive compensatory education.

Under *Reid*, a hearing officer may award compensatory education services that compensate for a past deficient program. *Reid v. District of Columbia,* 401 F. 3d 516, 365 U.S. App. D.C. 234 (D.C. Cir 2005) *citing G.ex. RG v Fort Bragg Dependent Schools,* 343 F.3d 295, 309 (4th Cir. 2003). IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid* at 524.

In the instant matter, Petitioner has established that 1) Student was denied FAPE when DCPS failed to provide Student a comprehensive psychological and psycho-educational evaluation after her enrollment in her current school; 2) Student's 2009- 2010 IEP and 2010-2011 IEP were not reasonably calculated to provide educational benefit; 3) Student was denied a FAPE by the failure to implement the IEP as written for the 2010 – 2011 school year; and 4) Student was denied a FAPE by the failure to provide Student an appropriate placement in a full-time non-public special education school. As a result of these failures to provide FAPE Student was harmed in that her significant academic and behavioral issues were not addressed appropriately. The extent of the harm includes the hours of special instruction not received during the 2010-2011 school year, the impact of the inappropriate placement on Student's academic stagnation and increasingly dysfunctional behavior and the months of ineffective,

inadequate and inappropriate responses to Student's social- emotional and behavioral issues thereby contributing to her loss in academic achievement.

Yet, despite these losses, I find it is not appropriate to award Student compensatory education. As noted above, the placement at requires a substantial time commitment on Student's part. Not only will she be attending school approximately six and one half hours per day, she also will be commuting at least two hours per day. The program is a year round program so the daily time commitment covers the summer as well as the standard school months of September through June. For a student who has significant emotional disabilities and ADHD, additional hours of instruction would be overly burdensome and run the risk of creating additional stress. As stress is one of the precipitating factors in student's dysfunctional behavior, including both acting out and school avoidance, it is, I find, ill-advised to include compensatory education in an all ready full academic schedule. I, therefore, decline Ordering that Student receive compensatory education.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law as follows:

1. Student was denied a FAPE when DCPS failed to provide Student a comprehensive psychological and psycho-educational evaluation after her enrollment in her current school.
2. The 2009- 2010 IEP was not reasonably calculated to provide educational benefit thereby denting Student a FAPE.

3. The 2010- 2011 IEP was not reasonably calculated to provide educational benefit thereby denting Student a FAPE.
4. DCPS did not deny Student a FAPE by failing to implement the IEP written for the 2009-2010 school year.
5. DCPS denied Student a FAPE by failing to implement the IEP as written for the 2010 – 2011 school years.
6. DCPS has not denied Student a FAPE by failing to appropriately discipline student and not developing a comprehensive, individualized method of addressing Student's behavioral problems.
7. DCPS denied Student a FAPE by failing to provide Student an appropriate placement in a full-time special education school.

ORDER

Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that:

1. Within 10 business days of the issuance of this Order, DCPS shall provide Student a prior notice of placement to the Student shall attend the school at DCPS expense for the remainder of the 2010-2011 school year and for the 2011-2012 school year, at a minimum;
2. DCPS shall provide Student transportation to and from the school, as required, for educational and IEP program purposes;
3. DCPS is to convene an MDT meeting, to include relevant staff from the school and Petitioner and Petitioner's counsel, if Petitioner so chooses, in cooperation with the

(2)(B).

school within 30 days of Student's enrollment to review and revise Student's IEP, as appropriate to her new school placement.

4. DCPS shall reimburse Petitioner for the costs of the independent comprehensive psychological and psycho-educational evaluation of January 6, 2011 (Report dated January 18, 2011).

IT IS SO ORDERED:

March 4, 2011
Date

Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).