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STUDENT HEARING OFFICE  
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**Confidential**

<p>STUDENT<sup>1</sup>, by and through her Parent Petitioners, v. District of Columbia Public Schools (“DCPS”) Respondent. Case</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: May 9, 2011</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Miguel Hull, Esq. Brown and Associates 1220 L Street, NW #700 Washington, D.C. 20005</p> <p>Counsel for DCPS: Assistant Attorney General Harsharen Bhuller, Esq. 1200 First Street, NW Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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<sup>1</sup> Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

## **JURISDICTION:**

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened May 9, 2011<sup>2</sup>, at the OSSE Student Hearing Office 810 First Street, NE, Washington, DC 20003, in Hearing Room 2009.

## **BACKGROUND:**

Student or "the student" is age \_\_\_\_\_ in \_\_\_\_\_ grade and has been determined eligible as a child with a disability under IDEA. The student is enrolled at a District of Columbia Public Schools ("DCPS") high school hereinafter referred to as "School A." During the 2009-2010 school year the student was enrolled a District of Columbia public charter school, hereinafter referred to as "School B," where he had attended for the past four school years from grade six through nine. The student had an individualized educational program ("IEP") during the time he attended School B. The student was not promoted to tenth grade at the end of the 2009-2010 school year. He attended summer school during summer 2010 in attempt to be promoted but was still not promoted as he was short one-half credit. At the start of the 2010-2011 school year the parent enrolled the student in a DCPS high school, hereinafter referred to as "School C." After a month at School C the parent transferred the student to School A.

On December 15, 2010, an IEP meeting was convened at School A. The student's IEP was amended so that five of his fifteen hours of specialized instruction were in a resource setting rather than inclusion. In March 2011 the student was suspended from school for what Petitioner alleges was (along with previous suspensions) more than ten school days and DCPS did not convene a manifestation determination review ("MDR"), conduct a functional behavior assessment ("FBA") or develop a behavior intervention plan ("BIP").

On March 31, 2011, Petitioner filed a due process complaint alleging, inter alia, DCPS had failed convene a MDR, conduct a FBA and develop a BIP. Petitioner also alleged the student's current IEP is inappropriate and his placement and current location of services, School A, is inappropriate.

On April 12, 2011, DCPS filed a response to the complaint. On April 21, 2011, a resolution meeting was convened. The parties did not resolve the complaint. This Hearing Officer convened a pre-hearing conference on April 26, 2011, and issued a pre-hearing order on April 29, 2011, stating the issues to be adjudicated, the relief Petitioner is seeking and Respondent's position with regard to the complaint and/or its defenses.

Petitioner seeks as relief: (1) an order directing DCPS to convene a MDR, (2) the student's placement with DCPS funding at a private special education placement, (3) independent assessments: vocational, educational and functional behavior assessment ("FBA"), (4) revision

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<sup>2</sup> This date was the 20<sup>th</sup> school day following the date the complaint was filed and the hearing was convened consistent with the expedited hearing requirements of 34 C.F.R. § 300.532(c).

of the student's IEP to include a full time placement, behavior intervention plan ("BIP") and a revised transition plan, and (5) reasonable compensatory education for the period the student has allegedly been denied a FAPE.<sup>3</sup>

DCPS maintains that the student has not been suspended for more than ten days and thus no MDR, FBA or BIP were required. DCPS also maintains the student's IEP and placement are appropriate and the student has not been denied a FAPE. DCPS asserts it conducted a vocational assessment on December 13, 2010, and developed an appropriate transition plan on December 15, 2010.

#### **ISSUES: <sup>4</sup>**

The issues adjudicated are:

- (1) Whether DCPS failed to provide the student a free appropriate public education ("FAPE") by failing to conduct a manifestation review determination ("MDR")?
- (2) Whether DCPS failed to provide the student a FAPE by failing to conduct a FBA and develop a BIP?
- (3) Whether DCPS failed to provide the student a FAPE by failing to provide an IEP and placement/location of services? Petitioner alleges the student needs a full-time out of general education IEP and placement.
- (4) Whether DCPS denied the student a FAPE by failing to provide complete an appropriate transitional/vocational assessment and failing to develop an appropriate postsecondary transitional plan/goals.

#### **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-37 and DCPS Exhibit 1-8) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

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<sup>3</sup> Although the due process complaint mentioned compensatory education as desired relief Petitioner presented no compensatory education plan although directed to do so by a date certain in the pre-hearing order.

<sup>4</sup> The alleged violation(s) and/or issue(s) listed in the complaint may not directly correspond to the issue(s) outlined here. However, the parties agreed at the hearing that the issue(s) listed here are the issue(s) to be adjudicated.

**FINDINGS OF FACT:<sup>5</sup>**

1. The student is age            in            grade and has been determined eligible as a child with a disability under IDEA with a disability classification of specific learning disability (“SLD”). The student is enrolled at a DCPS high school, School A. During the 2009-2010 school year the student was enrolled at a District of Columbia public charter school, School B, where he had attended four school years from grade six through nine. The student had reached the highest grade at School B and thus needed to change schools. At School B the student had an IEP that prescribed the following weekly services: 15 hours of specialized instruction per week in a general education setting and 1 hour of behavioral support services per week in an out of general education setting. (Parent’s testimony, DCPS Exhibit 1, Petitioner’s Exhibit 7)
2. At School B in the            grade the student earned a total of 5.5 credits and had GPA of 1.29. (Petitioner’s Exhibit 21)
3. A neuropsychological evaluation was conducted in July 2008 while the student was attending School A. The evaluation revealed the student had cognitive scores in the borderline range with a full scale IQ of 73. An educational evaluation was conducted while the student was attending School B in October 2009. At that time the student was operating on the 3.4 grade level in broad reading and 4.0 in broad math and 3.1 in broad written language. (Petitioner’s Exhibits 29 & 33)
4. The student was not promoted to the            grade at the end of the 2009-2010 school year. He attended summer school during summer 2010 in attempt to be promoted but was still not promoted as he was short one-half credit. At the start of the 2010-2011 school year the parent enrolled the student in a DCPS high school, School C. The student seem to enjoy being at School C and briefly was member of the school’s football team. After a month at School C the parent transferred the student to School A. The parent met with the special education coordinator at School A upon enrollment and provided the student’s IEP. The coordinator informed the parent that an IEP meeting would be convened which eventually was on December 15, 2010. Prior to the IEP meeting the student received special education services in an inclusion setting. (Parent’s testimony)
5. The parent on a few occasions attended the student’s classes and has communicated with the student’s teachers at School A. In November 2010 the parent visited the student’s classes and observed the student being provided little help to complete the classroom assignments. The student has had difficulty navigating a large high school environment with so many students. He has difficulty sitting still in class and walks around and seems to be very impulsive. There has, however, been no official diagnosis made regarding his apparent impulsivity. (Parent’s testimony)

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<sup>5</sup> The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party’s exhibit.

6. At School A the student received an out of school suspension for five days for fighting in October 2010. He received another out of school suspension for three days in December 2010, resulting in a total of eight days of out of school suspension as of December 8, 2010. (DCPS Exhibit 4 & 5, Petitioner's Exhibit 16)
7. On December 13, 2011, the student was provided a Career Clusters Interest Survey as a guidance tool to generate discussion regarding careers in which the student might be interested. (DCPS Exhibit 8)
8. On December 15, 2010, the IEP meeting was convened at School A. The student's IEP and least restrictive environment ("LRE") was amended to so that five hours of specialized instruction per week would be provided outside the general education setting and 10 hours would be provided in the general education setting. The student's behavioral support services were reduced to 90 minutes per month. The IEP includes a post-secondary transition plan that states the student "hopes to attend college after high school graduation and with the hope of becoming a physical education teacher." The transition plan states the career clusters survey and an interview with the student were the assessments used to develop the transition goals. The goals were stated: "Given direct instructions, [the student] will use the internet to research 3 colleges that offer majors in Physical Education by December 15, 2011, Given direct instruction [the student] will use the internet to explore 3 occupations in the field of Physical Education 12/15/2011." (DCPS Exhibit 1-10, 1-11)
9. At the December 15, 2010, IEP meeting the parent asked if the student did not do well could he be placed in a self-contained classroom. She was told that this was a possibility. The student was finally put in a self-contained classroom one week before the third quarter ended in the latter part of March 2011. (Parent's testimony)
10. In February 2011 the parent visited School A and attempted to shadow the student in his classes to get a sense of the student's progress and performance since attending School A. The parent met with the school counselor. She was informed the student was repeatedly being found in the hallways and the school administration was considering sending the student to his neighborhood school because of this behavior. (Parent's testimony)
11. The student's teachers informed the parent the student wasn't doing well academically. He would participate in academic work he found easy but when he found the work difficult he left the classroom. The student complained to the parent that he was not receiving sufficient academic assistance to be able to complete the work. As a result he often wandered the halls. (Parent's testimony)
12. On March 1, 2011, the student received an out of school suspension for leaving the school campus. The suspension began March 2, 2011. The School A Dean of Students prepared a notice of proposed suspension informing the parent that a seven day suspension was being proposed for the student. The notice informed the parent the DCPS Instructional Superintendent would review the proposal and approve or modify the suspension. The notice informed the parent the student should not return to school until the review had been made and the Instructional Superintendent's office contacted the

parent directly regarding the decision. The Dean of Students later found out the proposed suspension was not approved. However, the parent had already received the suspension paperwork and the student had been sent home and told not to return after March 1, 2011. The Dean of Students made an attempt to call the parent and tell the parent the student could return to school but did not reach the parent. No correspondence was sent to the parent's home to inform the student to return. In the student's attendance record the student's absences during the period of the proposed suspension were originally recorded as out of school suspension but were later changed to excused absences.

testimony, Petitioner's Exhibit 15)

13. The student remained home for seven days and did not return to school until March 14, 2011. The student's 11<sup>th</sup> day of suspension for the school year was March 4, 2011. No one ever reached the parent to say the student could return to school sooner. DCPS did not convene a MDR and did not conduct a FBA or develop a BIP following the March 1, 2011, suspension. (Parent's testimony, Petitioner's Exhibits 15)

14. The student's 2010-2011 report card shows that he received the following grades: (Petitioner's Exhibit 9)

Advisory:	1	2	3	4
History/Geography	D	F	L	
Learning Lab	D	C	D	
Earth Science	F	F	F	
Reading Workshop	C	F	F	
English II	D	F	F	
Geometry	F	D	L	
Phys. Ed I	B	B		
Phys. Ed. I			C	

15. The student had a total of 17 absences from homeroom and 3.5 were excused and 13.5 unexcused. He was tardy 21 times. (Petitioner's Exhibit 9)

16. The student recently began receiving some of his specialized instruction in reading and math in a self-contained classroom. The student takes English in an inclusion general education setting with a special education teacher assisting in the classroom. There, the student is provided extra time to complete assignments. The student in a general education setting for all other subjects. The student has made some progress relative to his IEP goals; however he has made no progress with regard to a number of his IEP goals. The student's failure to attend class consistently and complete assignments has

affected his lack of progress and poor grades. (Petitioner's testimony, Exhibit 14)

testimony, Petitioner's

17. The parent has received a deficiency notice for the current year that stated the student was in danger of failing several of his classes for the school year. (Parent's testimony, Petitioner's Exhibit 23)

18. The student has difficulty understanding and completing classroom assignments since he began attending School A. He believes he is not provided sufficient assistance to complete the work and out of frustration often does not attend or leaves class. As compared to his experience when attending School B, where he felt he was provided sufficient accommodations and assistance, his time since attending School A has been frustrating and he would like to attend a different school where he will have more assistance and hopefully experience more academic success. (Student's testimony)

19. The student had been accepted to \_\_\_\_\_ is a private full time special education school with 73 students in grades 9 through 12. \_\_\_\_\_ is located in Beltsville, Maryland. The District of Columbia Office of the State Superintendent of Education ("OSSE") has certified \_\_\_\_\_ to operate a non-public school. The tuition for the school is \_\_\_\_\_ per year and the rate has been accepted by DCPS. Nine teachers are either certified in special education or in subject areas. The school can provide behavioral support services and other related services by certified personnel. There are fifteen students in 9<sup>th</sup> grade and fifteen students in 10<sup>th</sup> grade. The courses will enable the student to obtain a DC high school diploma. The school also has a credit recovery program and vocational transition services. \_\_\_\_\_ testimony)

### CONCLUSIONS OF LAW:

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. <sup>6</sup> *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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<sup>6</sup> The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the 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.

34 C.F.R. § 300.17 provides that a free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.

**ISSUE 1:** Whether DCPS failed to provide the student a free appropriate public education ("FAPE") by failing to conduct a manifestation review determination ("MDR")?

**Conclusion:** DPCS was required to conduct and MDR and failed to do so. Petitioner sustained on the burden proof on this issue by a preponderance of the evidence.

Petitioner alleges the student has been suspended for more than ten days so far this school year and DCPS has not conducted the required MDR. An LEA is required to conduct a MDR, and reach a decision, within 10 days of the decision to remove the student for more than ten school days in a school year.

34 C.F.R. § 300.530 (e) provides:

Manifestation determination.

(1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine--

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

In determining whether the behavior is a manifestation of the disability, the team conducting the review may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP team determines that the child's IEP, and placement were appropriate and that the services in the IEP were being provided. D.C. Mun. Regs. Tit. 5 § 2510.9 (b) (1).

The student in this case has been suspended for more than ten days so far this school year. Although the suspension was proposed by the School A Dean of Students the student was sent home for a total of seven days and the parent was to be informed whether the proposed suspension was approved or modified. The parent received no such notice and the student remained out of school for a total of seven days, despite the fact that the full seven-day suspension was not ultimately approved. The student's original attendance record reflected that those seven days of absence were for out of school suspension. The records were later changed. Based on the fact the parent and student were never notified the student could return to school earlier than May 14, 2011, this Hearing Officer concludes the student was denied a FAPE by DPCS failing to conduct an appropriate MDR. Thus, the student missed five days of school from March 4, 2011, through May 11, 2011, he should not have missed, absent an appropriate MDR.

**ISSUE 2:** Whether DCPS failed to provide the student a FAPE by failing to conduct a FBA and develop a BIP?

**Conclusion:** DCPS failed to complete an appropriate FBA and convene an MDT meeting to develop an appropriate BIP to address the student's behavioral problems at school. Petitioner sustained the burden of proof on this issue by a preponderance of the evidence.

Petitioner alleges DCPS failed to complete an appropriate FBA and convene an MDT meeting to develop an appropriate BIP to address the student's behavioral problems at school.

An LEA has an affirmative obligation to ensure that a student is assessed in all areas of suspected disability, that the evaluation is sufficiently comprehensive to identify all of the student's special education needs, and that the evaluation includes all assessment tools that may assist in determining the content of the IEP. 20 U.S.C. § 1414 (b) (1)-(3); § 1414 (a) (6) (B); § 1414 (b) (3) (C) ("each local education agency shall ensure that assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided."); 34 C.F.R. Sec. 300.304 (b) and (c); 34 C.F.R. § 300.301 ("Each public shall ensure that a full and individual evaluation is conducted for each child being considered for special education"); 34 C.F.R. Sec. 300.111 (public agency must identify, locate and evaluate all students in the school district who may need special education services); D.C. Mun. Regs. tit. 5 § 3005.9 (g) ("The LEA shall ensure that: the child is assessed in all areas related to the suspected disability [ . . . ]"); D.C. Mun. Regs. tit. 5 § 3005.9 (h) (The LEA shall ensure that: in evaluating a child with a disability, the evaluation is sufficiently comprehensive to identify all of the child's special education and services needs, whether or not commonly linked to the disability category in which the child has been classified.").

Moreover, a student's IEP team must "consider the use of positive behavioral interventions and supports and adoption of strategies" to address a student's behavior that impedes the student's learning or that of others. 20 U.S.C. § 1414 (d) (3) (B); 34 C.F.R. § 300.324 (a) (2); and D.C. Mun. Regs. Tit. 5 § 3007.3.

In interpreting what constitutes "positive behavioral interventions, strategies, and supports," the U.S. Department of Education has found:

If [as part of the IEP process] IEP teams are proactively addressing a child's behavior that impedes the child's learning or the learning of others in the development of the IEPs, those strategies, including positive behavioral interventions, strategies and supports in the child's IEP will constitute the behavioral intervention plan that the IEP team reviews. 64 Fed. Reg. 12620 (1999).

The FBA is essentially the process that searches for an explanation of the purpose behind a student's problem behavior and is an integral part of the BIP. See Independent School District No. 2310, 29 IDELR 330 (SEA MN 1998) ("The general purpose of the functional assessment of behavior is to provide the IEP team with additional information, analysis, and strategies for dealing with undesirable behavior, especially when it is interfering with a child's education. The

process involves some variant of identifying the core or “target” behavior; observing the Pupil (perhaps in different environments) and collecting data on target behavior, antecedents, and consequences; formulating an hypothesis about the cause(s) of the behavior; developing an intervention(s) to test the hypothesis; and collecting data on the effectiveness of the intervention(s) in changing the behavior. Presentation of the information should be done in a manner useful for future work on the child’s behavioral issues.”).

With regards to a student’s failure to attend school, it is well established that a student’s refusal to cooperate with educational plan does not relieve school system of its obligation to provide FAPE. If a student is not cooperating by skipping classes, then the school system should consider revising IEP, changing placement, or doing additional testing. Letter to Boruki, 16 IDELR 884 (OSEP 1990) and Ranocas Valley Regional Board of Education, 41 IDELR 46 (NJ SEA 2004).

Here, the student has severe behavioral problems at school and has been suspended for more than ten school days this year. His behaviors include fighting and wandering the halls and leaving the school campus. This behavior has apparently negatively impacted his academic progress. To date DCPS has failed to complete the FBA/BIP for the student to address this problem behavior.

This failure to complete the FBA and BIP has resulted in a substantive and procedural denial of FAPE to the student. 20 U.S.C. § 1415 (f) (3) (E) (ii) (A procedural violation amounts to a denial of FAPE if it: 1) Impeded the child’s right to a FAPE; 2) Significantly impeded the parent’s opportunity to participate in the decision-making process of a FAPE to the parent’s child; or 3) Caused a deprivation of educational benefit.); and 34 C.F.R. § 300.513(a)(2). See also Denita Harris v. District of Columbia, Memorandum Opinion June 23, 2008, CA No.07-1422 (RCL) (“failure to act on a request for an independent evaluation is certainly not a mere procedural inadequacy; indeed, such inaction jeopardizes the whole of Congress’ objectives in enacting the IDEA.”).

**ISSUE 3:** Whether DCPS failed to provide the student a FAPE by failing to provide an IEP and placement/Location of Services?

**Conclusion:** The student’s current IEP and placement is inappropriate. Petitioner sustained the burden of proof by a preponderance of the evidence.

Petitioner alleges the least restrictive environment (“LRE”) for the student in his IEP is inappropriate and he needs a more restrictive setting. Petitioner asserts that the student needs a full-time out of general education IEP and placement. Although this Hearing Officer agrees the student’s IEP and placement are inappropriate the Hearing Officer was not convinced based on the evidence presented the student is in need of a full time out of general education IEP and placement.

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education (“FAPE”). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student’s IEP, which in turn is to be developed according to a student’s

unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also Scott v. District of Columbia, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 276, 182 (1982) (“The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program (“IEP”)).

Additionally, student’s placement is to be in the least restrictive environment and in a school that is capable of meeting the student’s special education needs. See Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1402 (9) (D) (“FREE APPROPRIATE PUBLIC EDUCATION- The term ‘free appropriate public education’ means special education and related services that include an appropriate preschool, elementary school, or secondary school education in the state involved” [and] “are provided in conformity with the individualized education program”); § 1401 (29) (D) (“The term ‘special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability [. . . ].”); 34 C.F.R. § 300.17 & 39; 34 C.F.R. § 300.116 (placement is to be based on student’s IEP as determined by team including the parents); 34 C.F.R. § 300.327 & 300.501 (c); D.C. Mun. Regs. Tit. 5 § 3013.1-7 (LEA to ensure that child’s placement is based on the IEP); and D.C. Mun. Regs. Tit. 5 § 3000.

Additionally, the public agency must also ensure that an appropriate IEP is in place for the beginning of each school year. 20 U.S.C. § 1414 (d) (4) (A) (i); 34 C.F.R. § 300.323 (a); and D.C. Mun. Regs. Tit. 5 § 3010.1.

20 U.S.C. § 1414(d)(2004) delineates the requirements of an appropriate IEP. For an IEP to be appropriate, it should contain statements or descriptions of a student’s present levels of academic achievement, measurable annual goals, how to measure progress of annual goals, any necessary related services and supplementary aids, the extent to which a child will not participate with nondisabled children, accommodations necessary for district wide assessments, and the projected date for related services and their frequency, location, and duration. 20 U.S.C. § 1414(d)(A)(I-VII).

The student’s current IEP was developed on December 15, 2010, and was developed with the most current data available at that time. The IEP team may have attempted to develop appropriate programming and services to address the student’s unique needs and to confer educational benefit; however, the IEP has proved to be inappropriate.

Given the student’s low level of functioning, his behavioral difficulties and suspensions and his academic failure, it is clear that the student requires a more restrictive IEP and placement than is currently being made available to him. The student’s apparent limited academic progress and failing grades are to some extent the result of the student’s failure to consistently attend class and complete assignments. However, the student has acknowledged and his testimony demonstrated that a major reason he has not attended class consistently and completed assignments is because of the difficulty he is experiencing with work he is presented along with a lack of sufficient academic and behavioral supports for him to be successful.

It is well established that “[t]he failure of a student to cooperate with school staff in attaining goals and objectives in the student’s IEP does not relieve school officials of the responsibility to provide FAPE to that child. . . [T]he student’s failure to cooperate with school staff may be an indication of the need for reevaluation, a revision to the child’s IEP, or change in the child’s educational placement.” Ranocas Valley Regional Board of Education, 41 IDELR 46 (NJ SEA 2004) quoting Letter to Borucki, 16 EHLR 884 (U.S. Dept of Educ. Off. of Sp. Ed. Programs 1990)).

When the student arrived at School A with his IEP from School B he was provided specialized instruction in an inclusion setting. Based on the student’s testimony, he felt comfortable and supported in his middle school and was provided accommodations and assistance that helped him progress and earn some credits toward high school. Since attending, School A, however, the student has experienced a lack of sufficient support and has wound up displaying coping behaviors that cause him to apparently avoid class and assignments rather than seeking out help. The student’s transition from middle school to a larger, more populated school has resulted in the student performing worse academically. The student is already functioning more than five grades below level in reading and math.

In December 2010, the student IEP was amended to include more out of general education services. However, his behavioral support services were reduced, despite the suspensions he had received. It appears the student in attempting to navigate the rigors of high school needs more behavioral supports in his IEP, not less.

testified that the student’s specialized instruction was further increased with him being placed in a “self contained” class for reading and math. It does not appear that this recent change has been incorporated in the student’s IEP. The student’s other subjects, however, other than English, are in a general education setting with no supports. His grades reveal he is currently failing most his classes except Physical Education for which he has an apparent affinity.

34 C.F.R. §300.114 (a)(2)(i),(ii) (2007) states: Each public agency must ensure that—  
(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Although there was evidence that \_\_\_\_\_ can provide the specialized instructional therapeutic supports and vocational services to the student, \_\_\_\_\_ is full time special education school with no general education students. There, the student would be totally removed from any general education peers. The student was apparently somewhat successful in his previous middle school where he was with general education students and based on his testimony he attended classes and enjoyed school. The student has just begun high school and his difficulties navigating this environment in his first year is not sufficient evidence to immediately warrant a total removal from the general education setting.

A more appropriate tact is to first increase the student's hours of specialized instruction in out of general education setting, coupled with an increase in behavioral support services for a reasonable period to see if the student is successful prior to removing the student to the most restrictive setting.

Although School A may be an environment the student finds difficult to navigate, the evidence presented did not prove that School A was an inappropriate school setting for the student. Nonetheless, the Hearing Officer will direct that the IEP team review the student's location of services and consider other proposed locations that might assist this student in making a more gradual transition from middle school to high school. Consequently, this Hearing Officer is ordering that the student's IEP be amended to increase the student's hours of specialized instruction to a level that will more appropriately address the student's academic deficits and behavior difficulties and provide him individualized attention that is likely to afford him academic success.

**Issue (4):** Whether DCPS denied the student a FAPE by failing to provide complete an appropriate transitional/vocational assessment and failing to develop an appropriate postsecondary transitional plan/goals.

**Conclusion:** Conclusion: DCPS developed an appropriate transition plan based on an appropriate assessment. Petitioner did sustain the burden of proof on this issue by a preponderance of the evidence.

An IEP that will be in effect when a student turns 16 is to include "appropriate measurable postsecondary goals based upon age appropriate transition assessments related training, education, employment, and where appropriate, independent living skills." 20 U.S.C. § 1414 (d) (1) (A) (i) (VIII); 34 C.F.R. § 300.320 (b); 34 C.F.R. § 300.43 (transition services are part of special education).

Petitioner alleges that DCPS has not conducted an appropriate vocational assessment or transition plan for the student. DCPS conducted a vocational assessment for the student on December 13, 2010. A transition plan was subsequently developed at December 15, 2010, IEP meeting. In this case, DCPS met its obligation to conduct an appropriate transition/vocational assessment for this student. The law requires that an assessment be done in developing a transition plan for the first IEP to be in effect when the student turns 16.

The student's current IEP contains a post-secondary transition plan and goals. The recent vocational assessment - a survey and interview provided to the student generated his expressed career interests and based on the survey and the interview the goals were developed. Although a more detailed vocational assessment could have been conducted, IDEA does not specifically detail the form and content of an "appropriate transition assessment." The transition goal might be an appropriate first step in the student gaining information that would direct him toward his expressed career interests in Physical Education. There was insufficient evidence presented by

Petitioner from which this Hearing Officer can conclude that the assessment and the goals in the current transition plan are inappropriate. Petitioner has failed to present sufficient evidence, either documentary or testimonial, that would support a finding that that student was denied a FAPE in this regard.

However, based on upon the denials of FAPE that have been found above the Hearing Officer will also, as part of the relief granted, direct that DCPS fund an independent vocational assessment that can be reviewed by an IEP and team and additional transition goals can be considered and perhaps included in the student's IEP.

**ORDER:**

1. DCPS shall within fifteen (15) business days of date of this Order convene a MDR to determine if the student's March 1, 2011, behavior that resulted in his suspension from March 2, 2011, through March 11, 2011, was a manifestation of his disability. Based upon that determination the IEP team shall take appropriate action consistent with the requirements of IDEA.
2. DCPS shall within fifteen (15) business days of issuance of this order convene an IEP meeting to review and revise the student's IEP to (1) increase the number of hours of specialized instruction outside the general education setting, (2) increase the number of hours of behavior support to amount in his IEP when he arrived at School A, (3) determine an appropriate placement and location of services for the remainder of the 2010-2011 school year and for the 2011-2012 school year and (4) make a determination regarding extended school year services. The IEP team should also consider placement locations proposed by the parent.
3. DCPS shall fund and the parent shall obtain an independent comprehensive psychological evaluation, including an educational assessment, an independent FBA, an independent vocational assessment at the DCPS approved rates. DCPS shall convene an IEP meeting to review the independent evaluations within fifteen (15) business days of its receipt of those evaluations and develop a BIP for the student, if based on the FBA the team concludes development a BIP is appropriate.

**APPEAL PROCESS:**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).



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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: May 23, 2011**