

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

STUDENT,  
By and through PARENT<sup>1</sup>

*Petitioner,*

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

*Respondent.*

Case No.

Bruce Ryan, Hearing Officer

Issued: May 2, 2011

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STUDENT HEARING OFFICE

**HEARING OFFICER DETERMINATION**

**I. INTRODUCTION/ PROCEDURAL BACKGROUND**

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed March 1, 2011, on behalf of a year old student (the "Student") who resides in the District of Columbia and has been determined by DCPS to be eligible for special education and related services as a child with a disability under the IDEA. The Student currently attends her neighborhood DCPS high school (the "School"), where she is in the      grade. Petitioner is the Student's parent.

Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") by: (1) failing to conduct a triennial reevaluation of the Student; (2) failing to implement the Student's individualized education program ("IEP") as written during the 2009-10 school year; (3) failing to evaluate the Student prior to removing behavioral support services from her IEP; (4) failing to convene a proper MDT/IEP team meeting on November 18, 2010; and (5) failing to include any behavioral support services in the 11/18/2010 IEP.

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<sup>1</sup> Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

DCPS filed its Response on March 10, 2011, which responds that DCPS has not denied the Student a FAPE. DCPS asserts (*inter alia*) that the MDT/IEP team discussed and determined that the Student is not in need of behavioral support services at school, and that Petitioner has not alleged educational harm from any procedural violations.

A resolution session was held on March 18, 2011, which did not resolve the Complaint. Pursuant to the parties' written agreement in the form of a Resolution Period Disposition Form, the resolution period ended as of 03/18/2011.

A Prehearing Conference ("PHC") was held on April 6, 2011, at which the parties discussed and clarified the issues and requested relief. *See Prehearing Order*, ¶¶ 5-6. Five-day disclosures were filed as agreed on April 18, 2011; and the Due Process Hearing ("DPH") was held on April 25, 2011. Petitioner elected for the hearing to be closed.

During the DPH, the following Documentary Exhibits were admitted into evidence without objection:

**Petitioner's Exhibits:** -1 through 13.

**Respondent's Exhibits:** R-1 through R-6.

In addition, there was one Hearing Officer Exhibit (HO-1), which was an IEE letter dated 04/19/2011. And the following Witnesses testified on behalf of each party at hearing:

**Petitioner's Witnesses:** (1) Petitioner; (2) Student; and (3) Educational Advocate.

**Respondent's Witnesses:** No witnesses.

## II. **JURISDICTION**

The Due Process Hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures* ("SOP"). The HOD deadline is May 2, 2011.

### III. ISSUES AND REQUESTED RELIEF

As confirmed at the PHC and in opening statements at the DPH, the following issues were presented for determination at hearing:

- (1) **Triennial Reevaluation** — Did DCPS deny the Student a FAPE by failing to conduct a timely reevaluation, including but not limited to a psycho-educational evaluation?
- (2) **Failure to Implement IEP (2009-10 SY)** — Did DCPS deny the Student a FAPE by failing to implement the Student's IEP during the 2009-10 school year with respect to behavioral support services? Specifically, Petitioner alleges that the Student did not receive all her required pull-out counseling between September 2009 and April 2010.
- (3) **Failure to Evaluate (Psychological)** — Did DCPS deny the Student a FAPE by failing to conduct a comprehensive psychological evaluation prior to eliminating behavioral support services from the IEP, which took place in April 2010?
- (4) **Procedural – 11/18/2010 MDT Meeting** — Did DCPS fail to convene a proper MDT/IEP team meeting by not including a general education teacher? And did such procedural inadequacy result in a denial of FAPE pursuant to 34 CFR 300.513?
- (5) **Inappropriate 11/18/2010 IEP** — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP in November 2010? Specifically, Petitioner appears to allege that the 11/18/2010 IEP should have included one hour of behavioral support services.

As relief, Petitioner requests that DCPS be ordered to: (a) fund an independent comprehensive psychological evaluation and any other necessary evaluations or reevaluations; (b) convene an MDT/IEP team meeting to review the results of such evaluation; and (c) provide the Student with compensatory education relief.

### IV. FINDINGS OF FACT

1. The Student is a -year old student who resides in the District of Columbia. Petitioner is the Student's mother. See -3; *Petitioner Test.*; *Student Test.*
2. The Student has been determined by DCPS to be eligible for special education and related services under the IDEA as a child with a disability. -5; -7; R-1; R-6. Her disability classification is Specific Learning Disability ("SLD"). *Id.*

3. The Student currently attends her neighborhood DCPS high school (the "School"), where she is in the \_\_\_\_\_ grade. See \_\_\_\_\_-3; *Petitioner Test*. The Student attended the School during both the 2009-10 and 2010-11 school years.
4. The Student's current IEP is dated November 18, 2010. It provides for five (5) hours per week of specialized instruction in a General Education setting. *R-1, p. DCPS00009*. Her IEP immediately prior to that, dated April 15, 2010, provided the same services in the same setting. *R-6, p. DCPS000039; see also CF-7, p. 7*.
5. On or about September 24, 2010, Petitioner and DCPS entered into a written settlement agreement ("SA"), which authorized Petitioner to obtain an independent Vocational II Assessment and required DCPS to convene an MDT/IEP team meeting to review the assessment, review and revise the IEP (if necessary), and discuss compensatory education and site location. \_\_\_\_\_-4. The SA further provided, *inter alia*, that it was "in full satisfaction and settlement of all claims contained in the pending Complaint [filed 08/30/2010], including those claims under IDEA and §504 the Parent now asserts or could have asserted within the statute of limitations as of the date of the signed [SA]." \_\_\_\_\_-4, p. 3.
6. Following the SA, an independent Vocational II Assessment of the Student was obtained, and DCPS convened an MDT/IEP team meeting pursuant to the SA on November 18, 2010. See *R-5, p. DCPS000030*. The listed participants at the meeting included the DCPS Compliance Case Manager ("CCM"), Special Education Coordinators ("SEC"s), Educational Advocate, Parents, Special Education Teacher, and General Education Teacher. *Id.* According to the meeting notes, the meeting was scheduled to start at 10:00 AM, but did not start until 11:00 AM "due to the parent being late to the meeting." *Id.* "[T]he DCPS team was available and the general education teacher was at the table but due to the meeting starting late had to leave, but was available if needed." *Id.*
7. At the 11/18/2010 IEP meeting, Petitioner noted that the Student's grandmother had recently passed away, and that the Student had missed school around that time (mid-October 2010) when she was in bereavement. *R-5, p. DCPS000030*. The Student's educational advocate then asked about the Student's not receiving behavioral support services at school this year. *Id., p. DCPS000031*. The SEC responded that the Student "is doing fine in school and she may have emotional hurt but it doesn't affect her academics, she is doing well." *Id.* The

CCM added that the Student “may indeed need emotional support, but it is not to the point that it prevents her from doing her schoolwork and focusing.” *Id.*<sup>2</sup> The team therefore concluded: “There is no need for behavioral support if the student is not being impacted academically.” *Id.* The team further noted that “if we see the next advisory that her grades have slipped, this can be revisited, if needed.” *Id.*

8. The 11/18/2010 IEP itself made similar observations. Under the Emotional, Social, and Behavioral Development Area of Concern, the IEP stated that the Student “is currently performing well academically and she has no need for behavioral supports at this time.” *R-2, p. DCPS000008. See also id., Annual Goal 1* (“Student has made improvement with her academics. She stated in an MDT/IEP meeting held on 11/18/10 with parent and advocate that she did not want to participate in therapy, despite the recent loss of her grandmother. Parent was provided information regarding the William Wendt Center who specializes in Grief and Loss.”).
9. On or about March 25, 2011, following the Complaint and resolution session in this case, the School issued its report cards for the third Advisory. The Student’s grades appeared to slip somewhat. She received D’s in U.S. History and French II and an F in Chemistry (with a notation that she had “excessive absences”) for that period. *R-2, p. DCPS000017.* She received an A in Bus. Communications. *Id.* Her final grades for first-semester courses included an A in Bus. Communication, a B in French I, a B- in English, and a D in Algebra II & Trigonometry. *Id.; R-3, p. DCPS000019.*
10. Attendance records show that the Student had a total of 152 missed classes (including 95 unexcused absences) from August 2010 to April 2011. *See R-4.*
11. On or about April 19, 2011, following the five-day disclosure date, DCPS issued a letter to Petitioner authorizing the following independent educational evaluation (“IEE”) of the Student, at the expense of the District of Columbia: “Psychological Assessment.” *HO-1.* The IEE letter does not specify the precise scope of the authorized psychological assessment. *Id.*

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<sup>2</sup> The Student also attended the 11/18/2010 IEP meeting and stated that “she feels she doesn’t need therapy and ... feels it is a waste of time,” according to the meeting notes. *R-5, p. DCPS000031.* She “further stated that if she ever feels the need to speak with someone, that she knows who to go to and does not want to have therapy.” *Id. See also* -6 (advocate meeting notes; Student “said she does not want therapy at all”) *Student Test.*

## V. DISCUSSION AND CONCLUSIONS OF LAW

### A. Summary

The Hearing Officer concludes that Petitioner's claims regarding any actions by DCPS prior to the date of the September 24, 2010 settlement agreement (Issues 2 and 3) should be dismissed with prejudice because Petitioner already settled and released such claims. With respect to the remaining claims (Issues 1, 4 and 5), Petitioner failed to prove by a preponderance of the evidence that DCPS denied the Student a FAPE and/or violated the IDEA as alleged.

### B. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to evaluate, develop an appropriate IEP, or implement an IEP as written. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-E3030.3. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

### C. Issues/Alleged Denials of FAPE

The Hearing Officer concludes that Petitioner's claims regarding any actions by DCPS prior to the date of the September 24, 2010 SA should be dismissed with prejudice because Petitioner chose to settle and release all such claims.<sup>3</sup> Allowing Petitioner to assert these claims "would work a significant deterrence contrary to the federal policy of encouraging settlement agreements," especially in the context of the IDEA. *D.R v. East Brunswick Board of Education*, 109 F.3d 896, at \*5 (3d Cir. 1997), *citing McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994).

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<sup>3</sup> As noted in the Findings, the 09/24/2010 SA expressly provides that it is "in full satisfaction and settlement of all claims contained in the [then] pending Complaint, including those claims under IDEA and §504 the Parent now asserts or could have asserted within the statute of limitations as of the date of the signed settlement agreement." *CF-4*, p. 3.

Accordingly, this disposes of the failure to evaluate and failure to implement IEP claims covered by Issues 2 and 3.<sup>4</sup>

With respect to Petitioner's claims regarding the November 18, 2010 meeting and the IEP developed there (Issues 4 and 5), the Hearing Officer concludes that Petitioner has not met her burden of proof. Petitioner has not shown that DCPS failed to include at least one regular education teacher of the Student on the IEP team. 34 C.F.R. 300.321 (a) (2); *Findings* ¶ 6. Nor has she shown that any such alleged procedural violation caused any harm to her or the Student. *See* 34 C.F.R. 300.513 (a) (2); *Lesesne v. District of Columbia*, 447 F. 3d 828 (D.C. Cir. 2006).

Petitioner also has not proved that the Student required the related service of counseling on her 11/18/2010 IEP. The evidence is undisputed that the Student's social/emotional issues were not adversely affecting her educational performance at the School and were not needed to assist the Student to benefit from special education at that time.<sup>5</sup> *See* 34 C.F.R. 300.17, 300.34; *Findings* ¶ 7. As the team discussed, the Student was mostly experiencing grief related to the death of her grandmother, and school-based counseling was properly determined not to be warranted to address such temporary, grief-related concerns. *See Parent Test. (cross examination); R-5, p. DCPS000030. Cf. Omidian v. Board of Educ. of the New Hartford Central School Dist.*, 52 IDELR 95 (N.D.N.Y. 2009) (where record shows student "suffers from emotional issues that overwhelmingly contribute to his academic difficulties," treatment of such issues through individual and group counseling are "services necessary to permit [student] to benefit from [specialized] instruction")

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<sup>4</sup> Even assuming *arguendo* that Petitioner could proceed with these claims, another fundamental problem with her case is that the April 2009 IEP that she alleges was not implemented was never put into evidence.

<sup>5</sup> Whether an IEP is appropriate "can only be determined as of the time it is offered for the student, and not at some later date." *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993); *see also Schaffer v. Weast*, 554 F.3d 470, 477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207). Thus, the fact that the IEP team expressed its intent to revisit the counseling issue based on future events (*i.e.*, "if we see the next advisory that her grades have slipped") does not undercut the validity of the 11/18/2010 IEP. If Petitioner wishes to argue that a *change* in IEP requirements is now needed based on recent academic performance (*see, e.g., R-2*) or other updated information, she should request another IEP meeting for that purpose and/or request such action at the upcoming IEP meeting to review the independent psychological assessment. If DCPS then refuses to change the Student's program, Petitioner is free to present additional claims of FAPE denial at that time. But any such additional claims cannot be part of this Complaint. *See* 34 C.F.R. 300.511 (d).

Finally, the Hearing Officer concludes that Petitioner has failed to prove that DCPS violated the triennial reevaluation requirements of the IDEA. The IDEA provides that DCPS “must ensure that a reevaluation of each child with a disability is conducted ... if [DCPS] determines that the educational or related services needs ... of the child warrant a reevaluation” or the child’s parent or teacher requests it. 34 C.F.R. §300.303 (a). Such a reevaluation “may occur” not more than once a year and “*must occur*” *at least once every three years*, unless the parent and DCPS agree otherwise. *Id.* §300.303 (b)(2) (emphasis added). *See, e.g., Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005) (giving effect to clear statutory language, without triggering conditions). The reevaluation must be conducted in accordance with §§300.304 through 300.311, which includes the requirement that the evaluation be “sufficiently comprehensive to identify all of the child’s special education and related services needs....” §300.304(c) (6); *see also Letter to Tinsley*, 16 IDELR 1076 (OSEP June 12, 1990) (triennial reevaluation “must be a complete evaluation of the child in all areas of the child’s suspected disability....”).

Petitioner has not shown by a preponderance of the evidence that DCPS should have conducted an updated psychological or psycho-educational evaluation as part of a triennial reevaluation of Petitioner by the date of the Complaint (*i.e.*, March 1, 2011). The evidence shows that the Student’s last eligibility date was 05/19/2008 (*R-1, p. DCPS000004*), meaning that DCPS should normally have until *05/19/2011* to conduct a complete triennial reevaluation. A week before the hearing, DCPS issued an IEE letter authorizing an independent psychological assessment, which appears to encompass the primary reevaluation that the Complaint alleged had not been updated (*i.e.*, psycho-educational). *See -3, pp. 5-7.* The 04/19/2011 IEE letter requests that Petitioner complete the authorized independent evaluation within 45 calendar days of its authorization, or by June 3, 2011 (*HO-1*); and DCPS should be permitted a reasonable period of time thereafter to complete its triennial re-evaluation process. Even assuming *arguendo* that DCPS failed to conduct any timely reevaluation, Petitioner has not shown that she would be entitled to any requested relief beyond the already authorized independent evaluation.

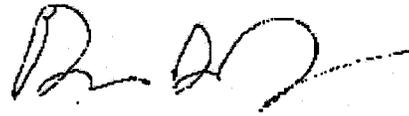
**VI. ORDER**

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

1. Petitioner's requests for relief in her Due Process Complaint filed March 1, 2011 are hereby **DENIED**;
2. The Complaint is **DISMISSED, With Prejudice**; and
3. This case shall be, and hereby is, **CLOSED**.

***IT IS SO ORDERED.***

Dated: May 2, 2011



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Impartial Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 U.S.C. §1415(i)(2).