



## Hearing Officer Determination & Order

### **JURISDICTION**

The Due Process Hearing was convened and this Hearing Officer Determination ("HOD") and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq., the implementing regulations for IDEIA; 34 Code of Federal Regulation ("C.F.R.") Part 300; and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

### **INTRODUCTION**

On 05/05/09, a Due Process Complaint Notice ("Complaint") was filed by the parent ("Parent" or "Petitioner") on behalf of the 17 year old student ("Student"), alleging that District of Columbia Public Schools ("DCPS") denied Student a free appropriate public education ("FAPE") in violation of IDEIA, when DCPS failed to provide Student with an appropriate disability classification, when DCPS failed to timely evaluate Student, when DCPS failed to provide Student with an appropriate Individualized Education Program ("IEP"), when DCPS failed to provide Student with an appropriate placement, and when DCPS failed to annually update Student's IEP; with all of these failures resulting in the denial of a FAPE. Petitioner alleges that Student is entitled to compensatory education due to the denials of a FAPE.

The parties did not engage in mediation or the resolution process prior to the due process hearing.

### **THE DUE PROCESS HEARING**

The due process hearing convened on 06/26/09, but did not go forward due to the unavailability of Petitioner. The hearing was continued until 07/16/08 and proceeded on that date, but could not be concluded due to an insufficient amount of time allotted to complete witness testimony. The hearing resumed again on 07/28/09 and concluded on that date.

Petitioner was represented by Pierre Bergeron, Esq. ("Petitioner's Attorney") and DCPS was represented by Laura George, Esq. ("DCPS' Attorney"). Petitioner participated in the due process hearing in person.

DCPS declined to enter into settlement discussions with Petitioner.

### **Disclosures:**

Petitioner's Five-Day Disclosure letter dated 06/17/09 contained Petitioner's Exhibits #1-17; Petitioner's Exhibits #1-17 were admitted into evidence without objection. Petitioner's Amended Disclosure Letter dated 06/17/09 contained Petitioner's Exhibits #18-20; Petitioner's Exhibits #18-20 were admitted into evidence without objection. Petitioner's 3<sup>rd</sup> Amended Disclosure Letter dated 06/22/09 contained

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Petitioner's Exhibit #21, which was admitted into evidence without objection. DCPS did not object to Petitioner's Amended disclosure letter dated 06/17/09 or Petitioner's 4<sup>th</sup> Amended Disclosure letter with a date of 06/17/09 and an amended date of 06/24/09.

DCPS' Disclosure Statement dated 06/19/09 contained DCPS' Exhibit #1, which was admitted into evidence without objection.

#### Witnesses:

Witnesses for Petitioner included: (1) Student, (2) Petitioner, (3) Dr. Michael E. Barnes, who qualified as an expert in clinical psychology with a specialty in adolescent psychology, (4) Dr. Ava Hughes-Booker, who qualified as an expert witness in identifying emotional disturbance ("ED") and learning disabled ("LD") disabilities and developing programming and placements for ED and LD students, (5) Dr. Emma Jean Norfleet-Haley, who qualified as an expert witness in clinical psychology with a specialty in children and is Student's current psychotherapist, (5) Admissions Director at (6) Admissions Coordinator at and (7) case manager.

DCPS presented no witnesses.

#### Stipulations:

- (1) Petitioner's Exhibit #20 is Student's 2008-2009 school transcript; and
- (2) is on the list of school facilities approved by the District of Columbia Office of the State Superintendent of Education ("OSSE").

Issues Presented in the Complaint: See Introduction section of this HOD.

All issues identified in the Complaint remained active for litigation.

#### Relief Requested by Petitioner:

- (1) A finding of a denial of a FAPE on Issues #1-5;
- (2) DCPS to place and fund Student at a full-time private therapeutic day program such as
- (3) DCPS to provide Student with related services consisting of wrap around services that include individual and family counseling, medication management, and therapeutic recreation;
- (4) Compensatory education in the form of wrap around/transition services; and

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(5) Extended School Year ("ESY") services for the next three years.

**FINDINGS OF FACT**

#1. On 10/15/05, DCPS conducted a psychological evaluation and ruled out a diagnosis of emotional disturbance; however, the evaluator lacked more credible clinical information due to parental non-participation. The evaluator did indicate that although emotional disturbance was ruled out, there was something afoot; however, there were no indications of depression. Student was diagnosed with Cognitive Disorder NOS, Reading Disorder, Oppositional Defiant Disorder, Adjustment Disorder with Disturbance of Conduct, and R/O Mixed Receptive Expressive Language Disorder. Student achieved a Full Scale IQ of 86, and the evaluator opined that individuals in the IQ range from 81 to 91, absent any medical disabilities, learning disabilities, or major psychopathologies, should, theoretically, be able to transcend public education in a regular education environment. The evaluator also opined that Student's various "mischief" and other untoward behaviors directly related to Student's perception of being inadequate due to poor reading abilities. Special education was recommended due to Student's reading disorder. (*Petitioner's Exhibit #12, Report of Psychological Evaluation dated 10/15/05*).

#2. On 06/09/06, DCPS conducted a psychological evaluation at the request of the 02/08/06 IEP team because of serious behavioral problems emanating from Student. The 06/09/06 psychological evaluation (clinical only) was based primarily on an interview with parent and parent's completion of the Conner's Rating Form and the Behavior Rating Inventory of Executive Functioning; however, the findings and conclusions of the evaluation were based on a review of anecdotal records, verbal communications with the principal, teacher, and the dean of men in conjunction with information provided by Petitioner. The evaluator concluded that Student met the high standard required for Student to be classified as an emotional disturbed individual. The evaluator stated that a diagnosis of emotional disturbance would be suggested at the next IEP team meeting and that the psychologist would most likely diagnose attention deficit-hyperactivity disorder ("ADHD"). (*Petitioner's Exhibit # 11, Report of Psychological Evaluation dated 06/09/06*). The 06/09/06 clinical psychological evaluation was based primarily on an interview with Petitioner, and only is considered a tool to be used to gather other information about Student. On the basis of this clinical evaluation, a traditional comprehensive clinical psychological evaluation should have been conducted. (*Testimony of Dr. Ava Hughes-Booker*).

#3. On 02/08/06, Student was receiving special education services as a LD student. The next IEP team meeting following the completion of the 06/09/06 psychological evaluation occurred on 03/15/07. On 03/14/07, the 10/05/05 psychological evaluation was reviewed by the Multidisciplinary Team ("MDT"), but the 06/09/06 psychological evaluation was not reviewed. Student was classified as LD and prescribed 15 hours/week of specialized instruction outside of general education and .5 hours/week of social worker services. The 03/15/07 IEP increased the amount of specialized instruction from 5 to 15 hours/week to assist Student in the areas of math and writing. (*Petitioner's Exhibit #8; IEP dated 03/15/07*).

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#4. The next time the IEP team convened to develop an IEP after the 03/15/07 IEP was developed, was on 01/28/09. Petitioner was not present at the 01/28/09 IEP team meeting, and did not sign the 01/28/09 IEP. At the 01/28/09 IEP team meeting, the IEP team reviewed a 12/10/08 psychological evaluation and a 02/27/09 psychiatric evaluation, both prepared by the Superior Court of the District of Columbia and provided to the MDT for review. On the 01/28/09 IEP, Student received a primary disability classification of Specific Learning Disability and was prescribed 400 minutes/week of specialized instruction outside general education and 30 minutes/week of behavioral support services in the general education setting. The behavioral support services were prescribed to address poor class attendance, defiant behaviors and coping skills. (*Petitioner's Exhibit #1, IEP dated 01/28/09*).

#5. Student's grade transcript from reflected a grade of "F" in Algebra 1a, Health & Physical Education, and Health Education; a "D" in Extended Literacy 9; and a B+ in Learning Lab 1. (*Petitioner's Exhibit #4, Transcript dated 04/17/09*). Student had excessive absences in Citizenship, Environmental Science, and Learning Lab 2. (*Petitioner's Exhibit #4, Report to Parents on Student Progress dated 05/07/09*). From 08/18/08 through 04/17/09, Student had 251 unexcused absences, 4 excused absences, and was tardy 24 times. (*Petitioner's Exhibit #5, Attendance Summary 18 Aug 2008 to 17 Apr 2009*). As of 04/17/09, Student had earned only 2 Carnegie units and needed 21.5 more units in order to graduate with a high school diploma. (*Petitioner's Exhibit #7, DCPS Letter of Understanding dated 04/17/09: Testimony of Adriel Lyons*).

#6. On 03/14/07, the MDT at \_\_\_\_\_ noted that attendance and behavior contributed to Student's failing grades, that frequent absences due to suspensions might contribute to Student falling behind in math, and that Student's absences adversely impacted Student's progress in counseling. (*Petitioner's Exhibit #8, MDT Meeting Notes dated 03/14/07*).

#7. Student has a substance abuse problem for which Student has received in-patient drug treatment, and Student was arrested on criminal charges in 2005, 2007 and 2009. On 12/10/08, Student was clinically diagnosed with Cannabis Dependence, Adolescent Antisocial Behavior, and Borderline Intellectual Functioning. The 12/10/08 psychological test data showed feelings of hopelessness and abandonment related to Student's dependency needs of looking for and needing constant guidance; however, there was no diagnosis of depression. (*Petitioner's Exhibit #9, Psychological Evaluation dated 12/10/08*). There were depressive elements of the diagnoses, due to a long history of family and school events. These depressive elements affect Student's ability to function in school. The diagnoses rise to a level of emotional disability because the depressive elements interfere with learning and rise to a level that disables Student at school. Student's excessive cannabis use, i.e., smoking 7-8 joints per day, interferes with school. The evaluator's conclusions were based on a review of records and interview with Student, but the evaluator did not talk with parents or teachers. The 12/10/08 psychological evaluation recommended special education services to address Student's

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Borderline range of intelligence scores, and in particular to address reading difficulties (Student attained a Broad Reading score of a 5.7 grade equivalent). With learning disabilities, there is more focus on academics. With emotional disabilities, there is more focus on behavior disorders that interfere with learning. (*Testimony of Michael E. Barnes; Petitioner's Exhibit #9, Psychological Evaluation dated 12/10/08*).

#8. A psychiatric evaluation dated 02/27/09 indicated that Student did not exhibit any symptoms of hyperactivity, depression, anxiety, or psychosis. The evaluator indicated that Student's primary caretakers do not appear to be cognitively or emotionally able to provide the supervision necessary to maintain Student's safety in the community, due to their own psychosocial deficits. Student was diagnosed with Anti-Social Behaviors of Adolescent; Remote history of ADHD: Conduct Disorder; R/O Substance abuse vs. dependence; Borderline Intelligence; Asthma, and Lack of Primary Support, Legal Educational. It was determined that Student was in need of structure and supervision that Student is apparently not able to receive at home. (*Petitioner's Exhibit #10, Psychiatric Evaluation dated 02/27/09*).

#9. Prior to attending Student attended  
which is an open space school. At  
 Student was retained in the grade, and promoted to grade despite failing grades.  
 (*Testimony of Student*). During the 2008-2009 school year, Student attended grade at  
is a school without walls and has open classrooms with  
 approximately 21-26 students in each class, with one teacher and no teacher assistant  
 assigned to each class. has a traditional lecture style program with no  
 multisensory approach. There is no structure in place to make sure that students  
 transition from one class to another. is a large school with large classes, and  
 too much space for Student to socially navigate. (*Testimony of Dr. Ava-Booker*). Student  
 stopped going to class from September 2008 through the Spring of 2009 because Student  
 didn't understand the work. (*Testimony of Student*). During that time, Student also  
(*Petitioner's Exhibit # 10, Psychiatric*  
*Evaluation dated 02/27/09*). Student began living in a group home on 05/21/09, and even  
 though Student went to school from the group home, Student nonetheless skipped going  
 to class. Prior to living in the group home, Student lived with Petitioner and went to  
 school, but did not attend classes. (*Testimony of Student*). Student can't keep up with the  
 class at and is too embarrassed to ask for help. (*Testimony of Dr. Emma Jean*  
*Norfleet-Haley*). Student needs specialized instruction to address learning. (*Testimony of*  
*Dr. Ava Hughes-Booker*).

#10. Student is currently on medication for depression. (*Testimony of Student*). Student presents with a classic depressed mood; and with a depressed mood, Student cannot handle the stress of day to day academic regime. Symptoms of Dysthymic Disorder, which is what Student has, are irritability and poor decision making. Student is currently experiencing major depression and this affects Student's ability to perform in school. Student uses drugs to get a release from day to day depression. Once there is a reduction from mood related symptoms through the use of drugs, Student does it again. Externalized behaviors due to depression make it seem like Student is intentionally

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overlooking the rules. Poor decision making is driven by mood and need for release. *(Testimony of Dr. Emma Jean Norfleet-Haley).*

#11. is too large to meet Student's needs. Student needs a small, therapeutic environment with someone to provide personalized instruction, and does not have small classes. Student needs to be able to engage in a therapeutic relationship if Student feels frustration in school. Student's best opportunity for growth is at home and school where counseling is available. *(Testimony of Dr. Emma Jean Norfleet-Haley).* Student has anti-social behavior that is a manifestation of Student's inability to learn; there is acting out behavior when a student can't understand the schoolwork. The depression has not been treated and Student's school performance suffers. *(Testimony of Dr. Ava Hughes-Booker).*

#12. Wrap around services encompass in-home meetings, monitoring, in-school support, conflict resolution, crisis intervention, economic empowerment and training, medication management, and therapeutic recreation. *(Testimony of Dr. Ava Hughes-Booker).*

#13. Student is committed to DYRS until age 19. Since 05/21/09, Student has been residing in a therapeutic group home, and is adjusting well there. At the group home, Student receives group therapy and individual therapy with a staff psychologist. While committed to DYRS, Student has the assistance of a DYRS case manager who ensures that Student has all the community services necessary to be successful in the community. The DYRS case manager had contracted with First Home Care to provide wrap around services for Student while Student is in the community, but she is not sure whether the services have actually begun because she has not been Student's DYRS case manager since 06/22/09. *(Testimony of Michelle Hannibal).*

#14. is a highly structured, full time special education school that provides educational services to prior DCPS students who have a disability classification of LD and/or ED. The school is approved by OSSE *(Stipulation #2)*, provides transportation to students when needed, provides wrap around services to students by providing recreational outings on weekends for 6-7 hours, works closely with independent wrap around service providers, provides vocational testing and offers vocational programs where Students are paid to train, has an extended school year program, and has an aggressive policy in making sure students get to school.

also has an incentives program that provides monetary rewards for good behavior and attendance, offers a hot breakfast program at no cost, prevents students from leaving school without a formal check out process, has teachers who are certified in special education, has classrooms of no more than 10 students, has therapists available at the school, and distributes behavior management point sheets to all students. Student has been accepted for admission into based on a review of all of Student's educational records, including the 03/15/07 IEP and the 01/28/09 IEP, and based on an interview with Student. *(Testimony of Student)* Student expressed a genuine desire to attend and appeared invested in succeeding at *(Testimony of Student).*

### **DISCUSSION AND CONCLUSIONS OF LAW**

“The burden of proof in an administrative hearing...is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 44 IDELR 150 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. 3030.3.

In this case, where Petitioner alleges statutory violations under IDEIA dating back to 06/09/06, the statute of limitations must be applied. 34 C.F.R. 300.511(e) states that a parent must request an impartial hearing on the due process complaint within 2 years of the date that parent knew or should have known about the alleged action that forms the basis of the due process complaint. The origin of Petitioner’s claims is a 06/09/06 clinical psychological evaluation that suggested a disability classification of ED (*Finding of Fact #2*), and absent anything in the record to the contrary, the effective date that Petitioner knew or should have known about the results of this evaluation is 03/15/07, the date the evaluation should have been reviewed at the MDT meeting. The Complaint was filed on 05/05/09, and therefore the 2 years statute of limitations begins on or about 05/05/07.

**Issue #1 – Whether DCPS failed to provide Student with an appropriate disability classification, thereby denying Student a FAPE?** Specifically, Petitioner alleges that Student should have been classified with ED pursuant to the findings of a 06/09/06 clinical psychological evaluation that found Student emotionally disturbed, and Student’s IEP should have been revised accordingly. Petitioner also alleges that Student’s 12/10/08 psychological evaluation and 02/27/09 psychiatric evaluation (both conducted by the Superior Court of the District of Columbia) both suggest the appropriateness of a disability classification of ED. Petitioner alleges that even though the need for an ED disability classification became clear on 06/09/06, the allegation of failing to give Student an ED disability classification is ongoing, and as recently as 04/17/09, MDT members were at an impasse on the appropriateness of a disability classification of ED.

In this case, a 10/15/05 psychological evaluation prepared by a DCPS school psychologist ruled out a diagnosis of emotional disturbance. (*Finding of Fact #1*). However, a 06/09/06 clinical psychological evaluation, completed by the very same psychologist, indicated that Student would most likely be classified as ED at the next IEP team meeting. Unfortunately, despite the alarming results of the 06/09/06 clinical psychological evaluation, the evaluation was never reviewed at the next MDT/IEP team meeting that occurred on 03/15/07, or at any subsequent MDT/IEP team meeting. (*Finding of Fact #3*). The 06/09/06 clinical psychological evaluation, prepared by DCPS, was readily available to DCPS and should have been reviewed by the MDT soon after it was prepared. If it had been reviewed, it would most likely have resulted in a disability

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classification of ED for Student, and/or it would or should have been used as a tool to gather additional information about Student. (*Finding of Fact #2*).

The 06/09/06 clinical psychological evaluation was not a traditional clinical evaluation; it was an evaluation based on Petitioner's input per the Connor's Rating Scale, etc. However, the evaluation was not solely based on the report of Petitioner, it was also based on the reports of various school personnel (*Finding of Fact #2*), and the Hearing Officer concludes that it was a reliable evaluation tool. At a minimum, though, the 06/09/06 psychological evaluation should have triggered the development of a Student Education Plan (*Finding of Fact #2*) at the 03/15/07 MDT/IEP team meeting or the 01/28/09 MDT/IEP team meeting, which would have resulted in a subsequent reevaluation of Student. To date, a reevaluation of Student's educational needs still has not been done by DCPS. But for Petitioner's Attorney presenting the MDT with court ordered psychological and psychiatric evaluations (*Finding of Fact #4*), Student would still be floundering at

Student met its burden of proof by a preponderance of the evidence on Issue #1. Student was denied a FAPE when DCPS failed to review the 06/09/06 clinical psychological evaluation and give Student a disability classification of ED on or about 05/05/07 and at all times thereafter.

It should be noted that neither the 12/10/08 psychological evaluation or the 02/27/09 psychiatric evaluation prepared by the D.C. Superior Court suggested a diagnosis of ED. However, these assessments were prepared to provide treatment recommendations for Student's court involvement and not prepared for educational purposes. There was ample testimonial evidence in the record that Student suffered from and currently suffers from depression, and that Student's depression rises to the level of a disability because it affects Student's school performance. (*Finding of Fact #7*).

**Issue #2 - Whether DCPS failed to timely evaluate Student, thereby denying Student a FAPE?** Petitioner specifically alleges that since 06/09/06, Student's deteriorating behavior and poor school performance indicated a substantial change in circumstances, which suggested the need for DCPS to evaluate Student, and DCPS failed to take any action in that respect. Petitioner alleges that DCPS did not convene a MDT meeting until 01/28/09 to assess Student's needs and this was not until after Petitioner's Attorney submitted to DCPS copies of a 12/10/08 psychological evaluation and a 02/27/09 psychiatric evaluation prepared by the D.C. Superior Court.

Again, the 2 years statute of limitations applies here. The Complaint was filed on 05/05/09; therefore, the 2 years statute of limitations begins on 05/05/07.

Missing classes, poor attendance, poor grades and being retained in the grade (*Findings of Fact #5, #6, #9*) were all indicators that Student needed specialized instruction. The last evaluation of Student conducted by DCPS was on 06/09/06, and the results of that assessment indicated that Student would most likely be classified as ED, in addition to Student's already existing classification of LD. (*Finding of Fact #2, #3*).

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However, that assessment was never reviewed by the MDT/IEP team at any subsequent IEP team meeting, in contravention of 34 C.F.R. 300.305(a) that requires the IEP team to review existing evaluation data on the child. Since the 06/09/06 psychological assessment was completed by the same DCPS psychologist who completed the 10/15/05 psychological evaluation, the Hearing Officer concludes that the 06/09/06 psychological evaluation was readily available to DCPS and should have been reviewed by the MDT. If it had been reviewed, it would most likely have resulted in a disability classification of ED for Student, or it would have triggered additional evaluations that would have shed light on a strongly suspected diagnosis of ADHD. (*Finding of Fact #2*). The record revealed that DCPS has not conducted any educational assessments of Student since 06/09/06. The psychiatric and psychological evaluations reviewed on 03/14/09 by the MDT were conducted by the D.C. Superior Court, and although thorough, these evaluations were geared towards treatment recommendations due to Student's societal misconduct, and not specifically geared towards providing educational treatment recommendations.

Pursuant to 34 C.F.R. 300.111, the local education agency must identify, locate and evaluate students who are in need of special education and related services, and this duty includes finding children who are suspected of having a disability and needing special education services even though they are advancing from grade to grade.

Petitioner met its burden of proof by a preponderance of the evidence that DCPS failed to timely evaluate Student.

**Issue #3 - Whether DCPS failed to provide an appropriate IEP, thereby denying Student a FAPE?** Petitioner specifically alleges that: (a) Since the clinical evaluation of 06/09/06, DCPS failed to provide Student with an appropriate IEP that includes services for emotionally disturbed students (for school years 2006, 2007 and 2008); (b) DCPS failed to provide Student with full-time LD and ED special education services since 06/09/06; and (c) DCPS failed to provide Student with appropriate wrap around services since 06/09/06.

As discussed previously under Issue #1, the 2 years statute of limitations begins on or about 05/05/07.

Since Petitioner met its burden of proof on Issue #1, i.e., that Student should have been classified as ED on or about 05/05/07, Petitioner has necessarily met its burden of proof on the question of whether or not DCPS should have provided Student with ED special education services since 05/05/07. The Hearing Officer previously concluded that Student should have received a disability classification of ED as early as 05/05/07, and the Hearing Officer concludes here that DCPS failed to provide Student with an appropriate IEP that included services for ED students, as far back as 05/05/07.

The question remains whether Student should have received an IEP that contained full time LD services since 05/05/07? The fact that Student was retained in the grade at \_\_\_\_\_ and promoted to \_\_\_\_\_ grade despite failing grades (*Finding of*

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*Fact #9*) was evidence enough that the 15 hours of specialized instruction prescribed by Student's 03/15/07 IEP was inadequate to address Student's educational needs. And certainly, there was no justification whatsoever for the reduction in specialized instruction to 6.6 hours/week by the MDT on 01/28/09, because Student was either not attending class or performing well. (*Finding of Fact #5*). Student suffered educational harm in the form of truancy and failing grades as a result of DCPS' irrational reduction in the number of hours of specialized services on 01/28/09, and as a result of DCPS' failure to adjust Student's IEP prior to that date.

The additional question remains as to whether DCPS should have provided Student with wrap around services to assist with Student's learning and emotional disabilities from 05/05/07 until 05/05/09?

Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home...and in other settings. 34 C.F.R. 300.39. Related services means transportation and such developments, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education and includes...recreation, including therapeutic recreation...and counseling services. 34 C.F.R. 300.34. The purpose of IDEIA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

Petitioner, stating that Student needed assistance in the community to combat truancy and tardiness, alleges that wrap around services should have been provided to Student since 05/05/07. To find that Petitioner met its burden of proof on this issue is speculative at best. Student's avoidance to learning and attending class stemmed from Student's inability to understand the classwork (*Finding of Fact #9*), and depression (*Findings of Fact #7, #10*). Wrap around services would have assisted with Student coming to school, but the evidence in the record was that Student came to the school building from Petitioner's home and from the group home, but failed to attend class. (*Finding of Fact #9*). The facts of this case do not support a conclusion by the Hearing Officer that DCPS denied Student a FAPE by failing to provide Student with wrap around services from 05/05/07 to 05/05/09. Petitioner failed to meet its burden of proof with respect to this issue.

**Issue #4 - Whether DCPS failed to provide an appropriate placement, thereby denying Student a FAPE?** Specifically, Petitioner alleges that DCPS failed to provide an appropriate placement for Student who has been deteriorating as evidenced by absences, failing grades, suspensions and fights in school, and that DCPS should have provided Student with full-time LD and ED special education services since 06/09/06.

Again, the 2 years statute of limitations places the beginning date of this allegation at 05/05/07.

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It is clear that Student's IEP dated 03/15/07 that prescribed 15 hours/week of specialized instruction and 1 hour/week of social worker services was inadequate to meet the special education needs of Student. In 2007, Student attended School, an open class environment, and the evidence in the record is that Student repeated grade during the 2007-2008 school years and was promoted to 9<sup>th</sup> grade at the end of the 2007-2008 school year despite failing grades. (*Finding of Fact #9*). During the 2008-2009 school year, while Student attended Student's grades and attendance were deplorable (*Finding of Fact #5*), and during this time, Student did not attend class because Student did not understand the classwork. (*Finding of Fact #9*). The evidence in the record was that was too large a school for Student and contained inadequate structure for Student. The evidence in the record also was that Student required a small, structured classroom setting. (*Finding of Fact #11*). Therefore, the Hearing Officer concludes that DCPS failed to provide Student with an appropriate school program/placement while Student attended and while Student attended and thus Student was denied a FAPE.

Petitioner met its burden of proof on Issue #4.

DCPS did not offer evidence regarding any possible public placement that would be appropriate for Student. Petitioner offered two possible appropriate private placements, i.e., The Hearing Officer concludes that (*Finding of Fact #14*) can meet all of Student's educational needs and is an appropriate placement for Student.

**Issue #5 - Whether DCPS failed to annually update Student's IEP in 2008, thereby denying Student a FAPE?** Specifically, Petitioner alleges that Student's 03/15/07 IEP that prescribed 15 hours/week of specialized instruction and .5 hours/week of social work services, was not annually updated in 2008. Petitioner alleges that Student's next IEP update occurred on 04/17/09, and this IEP prescribed 6.6 hours/week of specialized instruction and .5 hours/week of counseling. Petitioner alleges that DCPS' failure to update the IEP annually and properly assess Student's academic needs resulted in Student failing courses and exhibiting behavior problems and truancy.

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

DCPS was required to review Student's IEP periodically, but not less than annually, to determine whether the annual goals for Student were being achieved, and to revise the IEP as appropriate, to address any lack of expected progress toward the annual goals, and in the general education curriculum, if appropriate. 34 C.F.R. 300.324(b)(1). DCPS did not annually update Student's IEP on or about 03/14/08, as is required by IDEIA. Approximately 22 months elapsed from the time the 03/15/07 IEP was

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developed and the time a new IEP was developed on 01/28/09. Petitioner did not attend the 01/28/09 IEP team meeting and did not sign the IEP (*Finding of Fact #4*), and thus the 01/28/09 IEP was invalid as a vehicle for providing special education services because it did not include the input of Petitioner as an IEP team member, which is required by 34 C.F.R. 300.321(a). And, from 03/15/07 to 01/28/09, Student experienced truancy, academic failure, depression and social maladjustment. (*Findings of Fact #5, #7, #8, #9, #10*). The Hearing Officer concludes that DCPS' failure to update Student's IEP annually and properly assess Student's academic needs resulted in Student failing courses and exhibiting behavior problems and truancy. As a result of DCPS' failure, Student was denied a FAPE.

Petitioner met its burden of proof on Issue #5.

**Issue #6 - Whether Student is entitled to compensatory education for DCPS' failure to provide a FAPE?** Specifically, Petitioner alleges that Student is entitled to compensatory education for (a) DCPS' failure to appropriately classify Student's disability since 2006, (b) for DCPS' failure to provide Student with an appropriate IEP since 2006, and (c) for DCPS' failure to provide Student with an appropriate placement for the 2006, 2007 and 2008 school years; and Petitioner alleges that the amount of compensatory education should be equal to the number of days/hours that Student should have received appropriate special education services since 2006.

"Where a school system fails to provide special education or related services to a disabled student, the student is entitled to compensatory education." *Walker v. D.C.*, 157 F. Supp. 2d 11, 30 (D.D.C. 2001). "When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning "appropriate" relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place... The qualitative standard for determining compensatory education is that "compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Reid v. District of Columbia*, 43 IDELR 32 (2005).

Petitioner met its burden of proof on the issue of DCPS' failure to appropriately classify Student's disability since 05/05/07, on DCPS' failure to provide Student with an appropriate IEP since 05/05/07, and on DCPS' failure to provide Student with an appropriate program/placement since 05/05/07; with all of these failures resulting in the denial of a FAPE. However, an hour for hour, cookie cutter approach to the award of compensatory education is prohibited by *Reid*. "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, 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 v. District of Columbia*, 43 IDELR 32 (2005). There is insufficient evidence in the record to allow the Hearing Officer to conclude that the amount of compensatory education should be equal to the number of days/hours that Student should have received appropriate special education services since 05/05/07. However, what is clear from the

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evidence is that placement of Student at \_\_\_\_\_ will go a long way towards rectifying the educational atrocities Student experienced, and providing Student with the remedial services necessary to put Student back on track and near to the position Student would have been in if Student would have had a full time or near full time LD/ED program since 05/05/07. The testimony of the \_\_\_\_\_ Admissions Coordinator at \_\_\_\_\_ was impressive and persuasive in that \_\_\_\_\_ had a keen personal working knowledge of Student, and had already formulated an appropriate plan of action to address Student's academic strengths, deficiencies and desires. Additionally, Student appeared invested in attending \_\_\_\_\_

Student, age \_\_\_\_\_ is reaching the end of Student's academic career, and at this juncture has acquired only 2 Carnegie units towards graduation with a high school diploma. (*Finding of Fact #5*). \_\_\_\_\_ can provide a small, highly structured, nurturing educational environment for Student. \_\_\_\_\_, a full time, full service special education school, provides all of the services that Student will need to be successful in school, in the community, and in the workplace (*Finding of Fact #14*), if Student attends school and meaningfully participates in the program. Since wrap around services already have been contracted for by DYRS (*Finding of Fact #13*) on behalf of Student, and \_\_\_\_\_ also provides some wrap around services (*Finding of Fact #14*), there is no need for a duplication of these services through the educational system. Moreover, although there was testimonial evidence that wrap around services are critical to Student's success in the community, there was no showing by Petitioner that wrap around services would actually help Student access learning. Student generally came to school, but didn't go to class. (*Finding of Fact #9*).

Extended school year ("ESY") services are not being awarded. Student will be attending a new school and Student's progress or lack of progress and need for ESY services can be more effectively determined near the end of the upcoming school year. \_\_\_\_\_ has an ESY program that will be accessible to Student if ESY services are deemed appropriate by the IEP team.

### **ORDER**

**WHEREFORE**, it is

**ORDERED** that

- (1) DCPS shall fund and issue a Notice of Placement for Student to attend \_\_\_\_\_ with transportation as necessary, with Student's enrollment and attendance to commence at the start of the 2009-2010 school year; and
- (2) Within 45 calendar days of Student's enrollment at \_\_\_\_\_ the MDT/IEP team shall convene to review and revise Student's IEP to reflect a disability classification of ED and LD, and full time specialized instruction outside of general education, with 1.5 hours/week of individual counseling, and any other related services deemed appropriate by the MDT/IEP team; and

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- (3) Within 60 calendar days of Student's enrollment at a Functional Behavior Assessment shall be completed and a Behavior Intervention Plan developed.

**IT IS SO ORDERED.**

**This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).**

*Virginia A. Dietrich /s/*

Virginia A. Dietrich, Esq.  
Impartial Due Process Hearing Officer

08/06/09

Date

Issued: August 6, 2009