

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> floor  
Washington, D.C. 20002

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STUDENT, a minor, by and through  
his Parent<sup>1</sup>

Petitioner,

v

Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

OSSE  
STUDENT HEARING OFFICE  
2011 DEC 12 AM 9:03

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**HEARING OFFICER DETERMINATION**

**STATEMENT OF THE CASE**

On September 15, 2011 Parent, on behalf of her child ("Student"), filed an Administrative Due Process Complaint Notice ("Complaint"), HO 1,<sup>2</sup> requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education ("FAPE") to Student by District of Columbia Public Schools ("DCPS") under the Individuals with Disabilities Education Act, as amended ("IDEA"). 20 U.S.C.A. §1415(f)(1)(A) (Supp. 2010). Respondent filed a Response to Parent's Administrative Due Process Complaint Notice (HO 4) on October 19, 2011. A resolution meeting was held on September 27, 2011. The parties were not able to reach an agreement and executed a Resolution Period Disposition Form

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<sup>1</sup> Personal identifying information is provided in Appendix A, attached hereto.

<sup>2</sup> Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioner's Exhibits will be referred to as "P" followed by the exhibit number; and Respondent's Exhibits will be referred to as "R" followed by the exhibit number.

on the same date so indicating. HO 6. The 45 day timeline began to run on October 16, 2011, the day following the end of the 30 day resolution period.

At the close of Petitioner's presentation of her case, Respondent made a Motion for Directed Findings. Petitioner requested additional time beyond the original 45 day timeline to respond to the Respondent's Motion and made a Motion for a Continuance on the record. Respondent did not oppose the continuance. I granted the continuance on the record and further required Petitioner to file a written Motion for Continuance on the date of the request. I then granted the Continuance by written Order of the same date, November 22, 2011. HO 11. I also set a briefing schedule for the Motion for Directed Findings. Respondent was to file his supporting memorandum by 11:59 PM on Monday, November 28, 2011 and Petitioner was to file her response by 11:59 PM on Friday, December 2, 2011. My Hearing Officer Determination is due on December 9, 2011.

I held a telephone prehearing conference on October 20, 2011. HO 8. By agreement of the parties, the hearing was scheduled for November 10 and November 22, 2011.<sup>3</sup> The hearing was held in the Student Hearing Office on both dates.

At the start of the hearing on November 10, 2011 I heard argument on Petitioner's Motion re Burden of Proof which had been filed on November 4, 2011. Respondent argued that the Motion was untimely noting that a Motion of this magnitude requires time to appropriately

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<sup>3</sup> Je'Tonya Govan served as party representative during the first day of hearing. Joseph Selbka, Hearing Officer of the Student Hearing Office, observed the first day of hearing with Petitioner's permission.

respond. I agreed. The Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures at §401C.4. requires that all motions be filed no later than the 5 day disclosure. Any motion filed after that date must be considered untimely and may be denied at the hearing officer's discretion. The hearing officer may consider whether there is good cause for the delay in filing. Here, when asked about the reason for the delay in filing, Petitioner's counsel did not provide good cause for the late filing. I, therefore, found the motion was untimely and denied Petitioner's request to shift the burden of proof. <sup>4</sup>

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

#### ISSUE(S)

The issues are:

Whether DCPS denied Student a free, appropriate public education ("FAPE") by

- 1) Failing to hold a meeting to develop an IEP that provides Student a FAPE as defined by the Hearing Officer Determination dated August 18, 2011;
- 2) Failing to provide a community based worker to provide Student the services, as defined in the August 18, 2011 Hearing Officer Determination. Student does have a community based worker(s) assigned from \_\_\_\_\_ but the services being provided are not sufficient to provide the student a FAPE ; and
- 3) Failing to allow Student to enroll at \_\_\_\_\_ his assigned school, until September 20, 2011 and not providing needed transportation services until September 28, 2011 thereby causing Student to miss school and IEP required programs and services.

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<sup>4</sup> I note that I would have denied the motion had it not been untimely. The Motion was predicated on a denial of FAPE resulting from the failure to implement a pre-existing HOD of August 2011. This argument is founded on a presumption of harm resulting from a failure to implement an HOD. Such a presumption cannot be made in the instant matter. See discussion below at pp. 11 -14.

## SUMMARY OF THE EVIDENCE

### A. Exhibits

Exhibits admitted on behalf of Petitioner are:<sup>5</sup>

- P-1 August 2011 Hearing Officer's Determination;
- P-2 June 7, 2011 MDT Team Meeting Notes;
- P-3 May 6, 2009 Psychological Evaluation;
- P-4 August 1, 2011 Individualized Education Program;
- P-8 June 21, 2011 Final Progress Report;<sup>6</sup>
- P-9 June 7, 2011 Advocate Meeting Notes;
- P-10 June 7, 2011 Accotink Meeting Notes;
- P-11 June 7, 2011 DCPS Meeting Notes;
- P-12 June 7, 2011 MDT Meeting Notes;
- P-13 June 7, 2011 Prior Written Notice;
- P-17 October 26, 2011 Email Correspondence;
- P-18 October 26, 2011 Email Correspondence;
- P-19 October 26, 2011 Email Correspondence;
- P-20 October 25, 2011 Email Correspondence;
- P-21 October 20, 2011 Email Correspondence;
- P-22 October 20, 2011 Email Correspondence;
- P-23 October 17, 2011 Email Correspondence;
- P-24 October 12, 2011 Email Correspondence;
- P-25 October 4, 2011 Email Correspondence;
- P-26 October 4, 2011 Email Correspondence;
- P-27 September 28, 2011 Email Correspondence;
- P-28 September 20, 2011 Email Correspondence;
- P-29 September 13, 2011 Email Correspondence;
- P-30 September 6, 2011 Email Correspondence;
- P-32 August 24, 2011 Email Correspondence;
- P-33 October 20, 2011 Compensatory Education Proposal;<sup>7</sup>
- P-34 2011-2012 SY Student Enrollment Information;
- P-35 October 20, 2011 Email Correspondence;
- P-36 October 4, 2011 Email Correspondence;
- P-37 September 27, 2011 Resolution Disposition Form;
- P-40 2010-2011 SY Student Attendance Sheet;
- P-41 2010-2011 SY Student Report Card;
- P-42 2010-2011 SY Quarterly Grade Report Card;

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<sup>5</sup> The exhibits below are identified by the numbers used in Petitioner's 5 day disclosure. Where there are breaks in numbers the proposed exhibit was withdrawn or I disallowed its entry into evidence following Respondent's objection and Petitioner's response to the objection.

<sup>6</sup> Exhibits 9 – 12 were admitted subject to Petitioner's showing their relevance to Petitioner's allegation that Student was not allowed to enroll at \_\_\_\_\_ and subject to Petitioner establishing a foundation for the documents

<sup>7</sup> This exhibit was admitted subject to Petitioner establishing a denial of FAPE. Petitioner has established a denial of FAPE. However, as discussed below, this Compensatory Education Proposal does not address the necessary factors to be used to address the denial of FAPE below.

- P-44 Curricula Vitae for Dr. Natasha Nelson;
- P-45 Curricula Vitae for Dr. Sharon Lennon;
- P-46 Advocate Notes from 11-3-11 meeting.

In addition to the above exhibits Petitioner offered an email chain in rebuttal. I allowed the record to remain open until COB on 11/22/2011 to provide Respondent the opportunity to add additional items to this email chain if they existed. Respondent provided no further emails.

Exhibits admitted on behalf of Respondent are:

- |     |   |                        |
|-----|---|------------------------|
| R 1 | Email Correspondence                      | 10/25/2011             |
| R 2 | Email Correspondence                      | 10/26/2011             |
| R 3 | Communication Log Entry in Student's File | 09/27/2011             |
| R 4 | Communication Log Entry in Student's File | 09/28/2011             |
| R 5 | Communication Log Entry in Student's File | 10/21/2011             |
| R 6 | Communication Log                         | Sept 28 – Oct 26, 2011 |
| R 7 | Resolution Meeting Notes <sup>8</sup>     | 09/27/2011             |

Exhibits admitted on by the Hearing Officer are:

- 1 Administrative Due Process Complaint Notice dated September 15, 2011
- 2 Notice of Hearing Officer Appointment dated September 16, 2011
- 3 Prehearing Conference Scheduling Letter and Timeline Order of September 16, 2011
- 4 Prehearing Conference Notice dated September 24, 2011<sup>9</sup>
- 5 Resolution Period Disposition Form executed September 27, 2011<sup>10</sup>
- 6 District of Columbia Public Schools Response to Petitioner's Complaint dated October 19, 2011
- 7 Prehearing Conference Order dated October 23, 2011
- 8 Miscellaneous emails
- 9 Proposed Hearing Officer Exhibits
- 10 Petitioner's Motion re Burden of Proof

<sup>8</sup> R7 was served on Petitioner's counsel by Respondent's counsel during the first day of hearing, November 10, 2011. This hand service was effected more than 5 days prior to the second day of hearing, November 22, 2011. It should be noted that R 7 was identified as P 38 in Petitioner's original 5 day disclosures. Petitioner voluntarily withdrew P38 during the review of Petitioner's proposed exhibits and the objections thereto. There had been no objection to P 38. After Petitioner withdrew P 38, Respondent proposed it be re-identified as R 7. Petitioner objected to its introduction because I had disallowed P39 (Petitioner's counsel's notes of the resolution meeting. These notes were disallowed because Respondent could not cross examine Petitioner's counsel on the substance of her notes). I disagreed and allowed the entry of R 7 for the second day of hearing, November 22, 2011. Respondent's counsel subsequently filed R 7 as an additional disclosure on 11/15/2011, again more than 5 days before the second day of hearing, November 22, 2011. I noted on the record, in allowing this exhibit to be introduced into evidence, that Petitioner could not be surprised by the exhibit as she had originally offered the document as a potential exhibit and further, she had more than 5 days to prepare for the hearing in which the document would be used.

<sup>9</sup> The date on the proposed hearing officer exhibit list was incorrect and is corrected here.

<sup>10</sup> All exhibits from 5 through 11 have been renumbered. The proposed hearing officer exhibit list contained a nonexistent exhibit that has been removed.

11 Nov. 22, 2011 Interim Order on Continuance with Petitioner's Motion for Continuance attached

B. Testimony

Petitioner testified and presented the following witnesses:

- Natasha Nelson, Psy.D., Evaluator, Parker Diagnostics
- Colleen Wilcox, Educational Advocate, Brown & Associates
- Case Worker,
- Student

DCPS presented the following witnesses:

- Case Manager, DCPS
- Registrar, School, DCPS
- Channon Adams, Compliance Case Manager, DCPS

**FINDINGS OF FACT**

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

1. Student is years old. He is repeating the grade. He attends School Testimony of Wilcox Testimony of Petitioner; P 46.
2. Student attended Academy, a private, special education school, pursuant to an HOD, for the 2010 – 2011 school year. DCPS stipulation. On June 7, 2011, DCPS provided a Prior Notice of Placement to for the 2011-2012 school year. P13.
3. Student did not enter until the sixth week of the school year. School began on August 22, 2011. Student's enrollment date was on or about September 14, 2011, and his first day in attendance was on or about September 27, 2011. Petitioner attempted to enroll Student on

three occasions. The first time Petitioner attempted to enroll Student was the second week of school. Petitioner did not have all required paperwork. The second time she attempted to enroll Student was on the day Academy started, on or about September 7, 2011. Petitioner did not have Student's birth certificate which she was told she needed to effect the enrollment. The third time Petitioner attempted to enroll Student, a staff member at interceded and enrollment occurred. Petitioner never provided Student's birth certificate. Petitioner provided Student's IEP. Once Student was enrolled it took approximately two weeks for transportation services to begin. The DCPS School Year 2011 – 2012 Student Enrollment Information provided to parents does not indicate that a birth certificate is required for enrollment. Student's late enrollment created anxiety and confusion for Student. He had trouble following his schedule and did not understand the school rules. Student felt behind and out of place. Testimony of Petitioner; Testimony of Nelson; Testimony of Smith; Testimony of P 29; P 34; R 7.

4. Student has a history of attendance problems. As of the first date of hearing Student had been in attendance 12.5 days (out of 23) this school year. Student is making efforts to improve his attendance. Testimony of Petitioner; Testimony of Nelson; Testimony of Smith; Testimony of Wilcox; Testimony of Student.

5. On June 10, 2011 Petitioner filed a Due Process Complaint against DCPS alleging FAPE violations. Following a hearing held on August 3 and 20, 2011, the hearing officer issued a Hearing Officer Determination ("HOD") on August 18, 2011 ("August HOD"). The hearing officer found that Petitioner, Student's parent, did not prove DCPS failed to provide Student a FAPE. P1.

6. Despite finding that Student had not been denied a FAPE, the August HOD provided relief. The hearing officer ordered DCPS to ensure a community service worker provide a daily array of services to Student including going to Student's home each morning to assure he gets up, gets dressed, eats a healthy breakfast, goes to school, attends his classes, and has his completed homework. The community service worker also was to escort Student home, make sure Student eats a healthy snack, completes his homework, eats a healthy dinner, goes to bed at a reasonable hour and gets at least eight hours of sleep. The community service worker was to provide additional services as well. The August HOD also included a requirement for family counseling. The August HOD directed the Student's individualized education program ("IEP") be revised to include the identified relief. Testimony of Wilcox; P1.

7. Student's current IEP, dated 8/1/11, requires he receive 29 hours per week of specialized instruction and one hour per week of behavior support services. P 4.

8. An IEP review meeting was held on November 3, 2011. Attempts had been made to schedule an IEP meeting prior to this date. At the meeting Petitioner agreed to Student's receiving tutoring services rather than the community service worker based services identified in the August 2011 HOD. Petitioner agreed to these services because she did not think DCPS would be able to make the community based services available and because the community based service worker would be very intrusive. Petitioner subsequently reasserted her interest in receiving the services to be provided by the community service worker as described in the August 2011 HOD. No changes were made to the IEP at the November 3, 2011 meeting. Testimony of Petitioner; Testimony of Govan; Testimony of Adams; R 1; R 2; P 18; P 19; P 20; P 21; P 22; P 23.

9. DCPS was not able to find a community service provider agency that was able to provide the array of services identified in the August HOD. However, Petitioner found a community service provider agency that is able to provide these services. The same community service provider agency also is able to provide Student a credit recovery program. Testimony of Lennon.

10. Student receives services from a case worker who is employed by DCPS. These services were initiated at Petitioner's request approximately 10 months prior to the instant hearing and prior to the issuance of the August HOD. The services are not provided pursuant to the August HOD. This caseworker has developed a good relationship with Student and has helped address some school related issues. Testimony of Petitioner; Testimony of Smith; Testimony of Adams.

11. Petitioner's compensatory education plan includes 40 hours of counseling, 100 hours of academic tutoring and a credit recovery program. All hours under the proposed compensatory education plan are intended to address the failure to implement the August HOD. The counseling hours were to account for the counseling and family counseling. The academic tutoring was to address the loss of school programming for 8 hours per day and the credit recovery was to address the credits Student needs to makeup in order to be placed in 9<sup>th</sup> grade rather than repeating 9<sup>th</sup> grade. Testimony of Wilcox; P 33.

### DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. I note much of the testimony presented in this matter raises credibility concerns. Several witness, in what appeared to be an effort to be helpful to the case presentation, clearly testified outside their personal knowledge. In at least one instance I instructed a witness to answer questions directly and further that it was acceptable for

her to state she did not know an answer to a question rather than testifying as to what she guessed might be the answer. While some witnesses were more persuasive than others, the witnesses, in general, appeared unfamiliar with and disconcerted by the process. Thus in reaching my determinations of fact, I gave greater weight to evidence that was supported by multiple witnesses and/or documentation in addition to testimony. Of course, there were some exceptions to this overall witness credibility concerns. Two witnesses testimony, Petitioner's and Student's, were notably credible. Where differences in credibility and/or persuasiveness are relevant to my determination, I so indicate below.

There were on-going and extensive discussions with counsel regarding my authority to hear this matter. Petitioner's original complaint appeared to frame the issues as being a failure to implement a prior HOD. I explained that I did not believe I had the authority to hear such concerns. Rather IDEA limits my authority to hear issues filed by a parent or school district to those specifically identified. That is a parent or school district may initiate a due process hearing on matters relating to the identification, evaluation or educational placement of, or the provision of FAPE to a child with a disability. 34 CFR § 300.507(a); *See also* D.C. Code § 3029.1. I note at least one federal district court has found that hearing officers have the authority to hear matters alleging the failure to comply with the terms of a settlement agreement insofar as the matter involves an alleged failure to supply a child with FAPE. *See, Dukes v. Enterprise City Board of Education*, 273 F.Supp.2d 1252 (M.D. Ala. 2003). As noted above, IDEA recognizes the failure to provide FAPE as a basis for bringing a due process hearing. It is, therefore, logical that a hearing officer would have the authority to hear matters alleging the failure to comply with the terms of a settlement agreement insofar as the failure to comply involves an alleged failure to supply a child with FAPE. In the same vein, a hearing officer also logically would have the

authority to hear matters involving the failure to comply with a hearing officer determination to the extent this failure results in a denial of FAPE. It is on this basis, and this basis alone, that I heard issues 1 and 2, herein.

In hearing these two issues, therefore, I am limiting my review to determining whether the failure to provide the programs or services required by the August HOD resulted in a failure to provide FAPE to the student. If I find that such is the case I am able to order a remedy. If, on the other hand, there has been no failure to provide FAPE resulting from the districts' actions or inactions, I can order no remedy as it is outside my authority. Within that context I am asked to determine whether DCPS' failure to hold a meeting to develop an IEP that provides Student the programs and services as defined by the Hearing Officer Determination dated August 18, 2011 and failure to provide a community based worker to provide Student the services, as defined in the August 18, 2011 Hearing Officer Determination, denied Student a FAPE. In reaching this determination I must review the evidence presented, including the August HOD. However, before I can address these issues substantively I must address the Motion for Directed Findings filed by Respondent.

***Motion for Directed Findings/ Motion to Dismiss***

At the close of Petitioner's case in full, Respondent made a Motion for Directed Findings. I took the Motion under advisement and set a schedule for counsel to file supporting documentation. Respondent was to file a supporting brief by 11:59 PM on November 28, 2011. Petitioner was to file a response by December 2, 2011 at 11:59 PM and Respondent could file a Reply, if he so chose, by December 3, 2011. No Reply was filed. Furthermore, Respondent did not file a supporting brief on November 28, 2011. Petitioner contacted me by email on November 29, 2011 and asked that I disallow the filing of Respondent's brief because it was late.

I chose not to do so. I notified the parties I would accept Respondent's brief on November 29, 2011 noting that Respondent's Motion, made on the record, remained outstanding and I would have to rule on the Motion whether or not I received the brief and further that Petitioner was not prejudiced by the one day late filing as she still had 3 days to respond by December 2, 2011.

Respondent filed his Motion on November 29, 2011. The form of Respondent's filing changed, however, when he filed his Motion. Rather than filing a Motion for Directed Findings, Respondent filed a Motion to Dismiss. It is my opinion that this change does not constitute a substantive change in the Motion. Whether a Motion for Directed Findings or a Motion to Dismiss Petitioner's Due Process Complaint the Motion seeks a finding from me that Petitioner has not raised a claim for which relief can be granted either because she has not met the burden of proof (under the Motion for Directed Findings made on the record) or because she has not made a legally cognizable claim (under the Motion to Dismiss).

Under the Federal Rules of Civil Procedure, a Motion to Dismiss<sup>11</sup> should be granted only when it can be shown beyond doubt that Petitioner can prove no set of facts under his pleadings for which relief can be granted. See Fed. R. Civ. P 12(b)(6); *Friendship Edison Public Charter School Collegiate Campus. v. Murphy*, 48 F. Supp. 2d 166, 169 (D.D.C. 2006) ("*Friendship*") citing, *Warren v. Dist. of Columbia*, 353 F.3d 36, 37 (D.C.Cir.2004); *Kingman Park*, 348 F.3d at 1040. While the Federal Rules of Civil Procedure are not binding in an IDEA due process hearing, it is well settled law that a complaint should not be dismissed unless it is likely the petitioner can prove no set of facts that would entitle him to relief. *Friendship*, 48 F. Supp. 2d 166, 169. In deciding a motion to dismiss, the petitioner's factual allegations, as well as

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<sup>11</sup> While I discuss the standards for a Motion to Dismiss filed at the pleading stage, a Motion for Directed Findings would involve similar legal standards. For clarity of discussion, therefore, I refer to the Motion to Dismiss and note I would make similar, if not identical statements and findings regarding the Motion for Directed Findings. In reading this section either Motion can be interposed in the discussion.

mixed questions of law and fact are treated as true and all reasonable inferences drawn are resolved in petitioner's favor. *Friendship* at 169 citing *Macharia v. United States*, 334 F.3d 61, 64, 67 (D.C.Cir.2003); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C.Cir.2003); *Browning*, 292 F.3d at 242. These standards are viewed particularly broadly in an IDEA due process hearing where the Federal Rules of Civil Procedure are not binding. "IDEA hearings are deliberately informal and intended to give [hearing officers] the flexibility they need to ensure that each side can fairly present its evidence." *Schaffer v. Weast*, 546 U.S. 49 (2005). IDEA imposes "minimal pleading standards, requiring parties to file complaints setting forth 'a description of the problem,' and 'a proposed resolution of the problem to the extent known and available. . . at the time'" *Id.* Therefore, for the reasons discussed below, this Hearing Officer concludes the Petitioner has met the minimal standards needed to withstand a Motion to Dismiss on one count and has not met the standards needed to proceed on two counts.

Respondent's Motion to Dismiss relies on the position that I do not have the authority to enforce a hearing officer determination, and, as noted above, with this I agree. Petitioner's response is that I do have authority to hear matters relating to a denial of FAPE that may occur as a result of a public agency's failure to comply with an HOD.<sup>12</sup> Again, as noted above, I also concur with this position. For the reasons that follow I find that Petitioner has not met her burden as to issues 1 and 2 and further that she could not meet the burden as the issues raised are not legally cognizable. I therefore grant the Motion to Dismiss as to these two issues.

1) *Whether DCPS denied Student a FAPE by failing to hold a meeting to develop an IEP that provides Student a FAPE as defined by the Hearing Officer Determination dated August 18, 2011.*

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<sup>12</sup> In making this argument Petitioner cites *Jersey Shore Area School District*, 32 IDELR 194 (PA SEA 1999) including a reference to *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995). However, *Matula* addresses whether a § 1983 claim can be used to address an IDEA based claim, and it was subsequently reversed by the Third Circuit in *AW v. Jersey City Public Schools* 486 F. 3d 791 (3d Cir. 2007)

2) *Whether DCPS denied Student FAPE by failing to provide a community based worker to provide Student the services, as defined in the August 18, 2011 Hearing Officer Determination. Student does have a community based worker(s) assigned from First Home Care, but the services being provided are not sufficient to provide the student a FAPE.*<sup>13</sup>

The August HOD specifically finds Petitioner failed to prove that DCPS denied the Student a FAPE and states Petitioner is not the prevailing party on the claims addressed during the hearing. The Hearing Officer then orders relief based on an issue that was not raised in the complaint nor addressed by the evidence presented during the hearing. Thus the issues before me which turn on whether Student was denied a FAPE by DCPS' failure to comply with the August HOD must be dismissed. I cannot find a failure to provide FAPE for a failure to comply with an order when the Order itself specifically states there was no denial of FAPE. There is no way for me to determine there is a denial of FAPE because the ordered relief was not founded on a claim based on FAPE. Rather it was based on a hearing officer's determination that Student required services that had not been requested. I, therefore, find DCPS Motion to Dismiss Petitioner's Administrative Due Process Complaint is granted as to issues 1 and 2 above.<sup>14</sup>

3) *Whether DCPS denied Student a FAPE by failing to allow Student to enroll at Woodson SHS, his assigned school, until September 20, 2011 and not providing needed transportation services until September 28, 2011 thereby causing Student to miss school and IEP required programs and services.*

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<sup>13</sup> These two issues are discussed together as both issues address the potential denial of FAPE resulting from DCPS' alleged failure to implement the August HOD.

<sup>14</sup> While, as discussed earlier at pp. 10 and 11, I find a hearing officer does not have the authority to enforce a prior HOD but only to review possible denials of FAPE resulting from the LEA's alleged failure to implement an HOD, this is not to suggest Petitioner was without recourse regarding her allegations that the HOD had not been implemented. The IDEA provides for appeal of an HOD to the state education agency. 34 C.F.R. §300.514. I note, in addition, the Office of Special Education Programs recently stated that a State is to have "procedures and practices that ensure that all corrective actions that a due process hearing officer specifies in a due process hearing decision are implemented." Letter to Torlakson, p.4 (United States Department of Education Programs 2011). Thus OSSE appears to be the appropriate forum in which to seek enforcement of an HOD. Petitioner chose instead to seek a determination on an alleged denial of FAPE resulting from the alleged failure to implement the August HOD. When identifying the possible avenue Petitioner could have selected for enforcing the August HOD I am aware the August HOD is now on appeal. I have not received notice of a related order staying implementation of the August HOD. I mention the appeal here in an effort to assure the parties are mindful of the posture of this case as it moves forward.

Student's enrollment at \_\_\_\_\_ School is an entirely different situation. DCPS provided Student a Prior Notice of Placement to \_\_\_\_\_ on June 7, 2011. Petitioner then attempted to enroll Student at \_\_\_\_\_ during the second week of classes. While this attempted enrollment is late, it would only have resulted in Student missing the first few days of school. However, \_\_\_\_\_ refused to enroll Student because Petitioner did not have all the required paperwork. Subsequently, Student was not allowed to enroll on a second occasion when petitioner attempted to enroll Student during the third week of school. Petitioner had all the required paperwork, including a DCPS IEP. However, Student was not allowed to enroll because petitioner did not have a copy of his birth certificate. It is noteworthy that among the documents Petitioner provided was a copy of Student's DCPS IEP which includes his birth date. Student was finally able to enroll during the sixth week of school when a staff member interceded on Student's behalf. Petitioner never provided a birth certificate.

Petitioner provided evidence showing that a birth certificate is not among the required documentation identified in DCPS' 2011-2012 SY Student Enrollment Information. Therefore, Petitioner has provided evidence to withstand a Motion to Dismiss, or by analogy a Motion for Directed Findings. It is possible that Student was denied a FAPE by DCPS' delaying Student's enrollment. I therefore deny the Motion to Dismiss as to Issue 3 above and make a decision on the merits of this issue below.

#### ***Discussion on the Merits***

DCPS provides a system of free, publically supported education to residents of the District of Columbia who meet the eligibility prerequisites for the school or program. See D.C. Code §2000.1. These requirements include, among other items, proof of both age and residency eligibility. Under D.C. Code § 5-E2002.6 a parent is required to provide documentary evidence

of the date of birth of a student prior to his/her admission to the DCPS. This regulation addresses the requirement of establishing the student's age. In the instant matter Petitioner was not seeking admission to DCPS for Student. He was enrolled in DCPS and had been for many years. Thus the need to establish age eligibility should not have been at issue. Student had a DCPS Prior Notice of Placement from June 2011 placing him at \_\_\_\_\_ While he had not attended \_\_\_\_\_ in the prior year, he had attended \_\_\_\_\_ Academy pursuant to an HOD from the Student Hearing Office. Student had an IEP developed by DCPS in August 2011 using the DCPS format, and it had been provided to \_\_\_\_\_. Petitioner had established Student's residency through the other documentation she provided. Thus both Student's age and residency were confirmed.

The \_\_\_\_\_ registrar testified that Student was denied enrollment to \_\_\_\_\_ because Petitioner, the parent, had not provided a birth certificate. Yet DCPS has not provided a legal basis for this requirement. It is not in the D.C. municipal regulations. The regulations regarding transfer,<sup>15</sup> both voluntary and involuntary, do not indicate a student must again provide proof of age. See , D.C. Code §§5-2105 -2107. Moreover, DCPS own IEP establishes Student's birthdate and thus continued eligibility for enrollment. The Woodson registrar noted the IEP and other forms providing the necessary information for registration may have been available on line, but she did not have access to the system with the relevant data. This does not, in my view, justify keeping Student out of school. IDEA eligibility establishes an entitlement to FAPE which is to be provided to a Student from the first day of school. If the \_\_\_\_\_ registrar cannot access the computer system which she testified may have included the information needed to enroll Student, this deficit in available information could be readily addressed. Student should have

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<sup>15</sup> It is clear Student was transferring from one DCPS placement to another. He had attended Accotink pursuant to an HOD. DCPS had decided to move him to a different school and had issued a PNOP to Woodson. Student was to receive IDEA services pursuant to a DCPS IEP.

been enrolled when Petitioner made her second attempt to enroll him. She had the appropriate documentation at that time. Student's birth certificate was not needed. I therefore conclude there was no basis to deny Student enrollment to \_\_\_\_\_ when the proper paperwork was presented on or about September 7, 2011.

The question then becomes whether the denial of enrollment on or about September 7, 2011 resulted in a denial of FAPE, and if so, what is the appropriate remedy. Testimony established that Student has attendance issues. As of the first hearing date, he had only attended school approximately 12.5 days since his enrollment. DCPS notes this is significant thereby implying Student does not avail himself of the education provided to him. Petitioner notes this is significant and argues this means Student requires greater interventions than he is receiving. Student's attendance needs, however, are not before me, and I cannot determine whether his limited attendance this school year is in any way attributable to the delay in enrollment.

It is clear, however, that Student did not have his IEP services available to him until on or about September 27, 2011. This date falls in the sixth week of the DCPS school year. Student therefore, missed the first five weeks of school. The initial delay in enrollment is not attributable to DCPS. Petitioner attempted to enroll Student after the school year had begun and she did not provide the required information during her first effort. On or about September 7, 2011, however, Student should have been enrolled when Petitioner provided all the appropriate paperwork but did not provide Student's birth certificate. At that time there was sufficient information available to effect Student's enrollment. Yet Student was not enrolled until on or about September 14, 2011, and this enrollment occurred without Petitioner providing a birth certificate. Student did not actually appear at \_\_\_\_\_ to attend classes, however, until September 27, 2011 when transportation began. I, therefore, conclude Student was denied a

FAPE due to DCPS failure to enroll him and provide needed transportation from September 14, 2011, the date when the necessary paperwork was provided, through September 26, 2011, the date when transportation services began. This denial of FAPE totals 8 school days.

Student's current IEP requires he receive 29 hours per week of specialized instruction and 1 hour per week of behavior support services. Twenty-nine hours of instruction per week is equivalent to 5.8 hours of specialized instruction per day. The compensatory education plan proposed by Petitioner is not designed to address the failure to provide services as defined on Student's current IEP. Rather it is designed to address the alleged denial of FAPE resulting from DCPS' failure to implement the August HOD. As such, the compensatory education plan is not useful in the current situation. It does not address the denial of IEP specified services for 8 days. I, therefore, must create my own remedy. In formulating this remedy I apply the *Reid* standard.

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

Having found Student was denied 8 days of special education services I conclude he is to be compensated for the loss of 46.4 hours of specialized instruction<sup>16</sup> (5.8 hours per day multiplied by 8 days of missed service) and one hour of behavior support services for one full

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<sup>16</sup> Student's IEP requires he receive 29 hours of specialized instruction outside general education per week. This is equivalent to 5.8 hours per day.

week in which behavioral support services could have been provided but were not due to the denial of FAPE resulting from Student's delayed enrollment. Compensatory education is to take the form of one on one tutoring for the missed specialized instruction. However, one on one tutoring need not and should not be provided on a one hour make up for one hour missed basis. The intensity of service provided through one on one tutoring results in more learning taking place during tutoring than would occur in a similar time frame in a classroom with many other students. Thus in order to compensate student and place him in the position he would have been had he not missed the eight days of instruction, Student is to receive one hour of tutoring for every three hours of specialized instruction missed. This is a total of 15.5 hours (46.4 hours of specialized instruction divided by 3) of tutoring. He also is to receive one hour of compensatory behavioral support services to compensate for the hour lost.

### **CONCLUSIONS OF LAW**

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

1. DCPS' Motion to Dismiss is **DENIED**, in part, and **GRANTED**, in part.
  - a. DCPS Motion to Dismiss is **DENIED** as to Issue 3, above.
  - b. DCPS Motion to Dismiss is **GRANTED** as to Issues 1 and 2, above.
2. DCPS denied Student a FAPE by failing to enroll him at School and provide needed transportation starting on September 14, 2011.

### **ORDER**

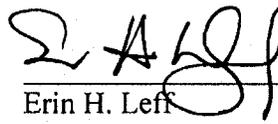
Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that:

1. Within 10 school days of receipt of this Hearing Officer Determination, DCPS is to provide Petitioner authorization for tutoring services for Student. In addition to the authorization for the tutoring services, DCPS is to provide Petitioner a list of available, independent tutors, who are not current DCPS employees, from which Petitioner can select a tutor. Petitioner may select from this list or, if she chooses, provide DCPS with the name of a tutor she would prefer. When Petitioner notifies DCPS of the tutor she has selected, Petitioner, after consulting with her educational advocate if she so chooses, also is to notify DCPS of the subject area(s) in which she would like Student to be tutored. Any tutor providing service to Student must be certified in special education as well as the subject matter(s) on which Student is being tutored. Once Petitioner has notified DCPS of her choice of tutor, DCPS is to make all needed arrangements, within 14 business days, to cover the costs of the tutoring and related expenses, including transportation if needed. The tutoring service is to be provided at the current approved DCPS rate.
2. DCPS is to assure the 15.5 hours of academic tutoring are completed by March 31, 2012. This tutoring is to be provided outside of normal school hours and at a location agreeable to Petitioner and Student.
3. The one hour of compensatory behavioral support is to be completed in January 2012.

**IT IS SO ORDERED:**

December 9, 2011

Date



Erin H. Leff  
Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).