

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

Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

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STUDENT HEARING OFFICE  
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STUDENT, <sup>1</sup>	)	
through the Parent,	)	
	)	Date Issued: October 28, 2012
Petitioner,	)	
	)	Hearing Officer: Virginia A. Dietrich
v.	)	
	)	Case No: 2012-0563
District of Columbia Public Schools	)	
	)	Hearing Date: October 12, 2012
	)	Hearing Room: 2006
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, the guardian of [REDACTED], filed a due process complaint notice on August 21, 2012, alleging that the District of Columbia Public Schools ("DCPS") had denied Student a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Act ("IDEA").

Petitioner specifically alleged that (1) DCPS should have developed and implemented a Behavior Intervention Plan on or about February 2012 after reviewing a Functional Behavioral Assessment that indicated that Student had problem behaviors that interfered with his learning and the learning of others; (2) DCPS should have changed Student's disability classification from Specific Learning Disability to Intellectual Disability in April or May 2012 based on the most current data available to the Individualized Education Program ("IEP") team, and this would have resulted in a change in the type of services to be provided to Student; (3) DCPS should have provided Student with more special education service hours in April or May 2012 to address Student's behavior problems and academic struggles; and (4) DCPS should have included Student's present levels of academic achievement and functional performance in Student's 05/30/12 IEP. According to Petitioner, DCPS' failure to do each of these things resulted in Student being denied a FAPE. For relief, Petitioner requested that Student's primary

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<sup>1</sup> Personal identification information is provided in Appendix A.

disability classification be changed to Intellectual Disability and that Student receive appropriate special education services, per an appropriate IEP with increased services, in a public location.

DCPS asserted that it had followed the procedural requirements of the IDEA by including Petitioner in all discussions about development of the IEP and taking into account the most current data available to the IEP Team, and as a result, the IEPs developed during the 2011-2012 school year were appropriate. DCPS asserted that it had not denied Student a FAPE.

### **Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R."); and 16 D.C. Code Section 2301(21), 38 D.C. Code Section 2561.01.

### **Procedural History**

The due process complaint was filed on 08/21/12. This Hearing Officer was assigned to the case on 08/21/12. The case was scheduled for a hearing on 10/12/12.

Neither Petitioner nor DCPS waived the resolution meeting. The resolution meeting took place on 08/30/12, at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The resolution period ended on 09/20/12, the 45-day timeline to issue a final decision began on 09/21/12, and the final decision was due on 11/04/12.

On the day preceding the hearing, DCPS filed Respondent's Emergency Motion to Dismiss The Complaint, asserting that the complaint should be dismissed for the following reasons: (1) Since Student no longer lived in the District of Columbia, DCPS was not obligated to provide Student with a FAPE because the requirement to provide Student with a FAPE was triggered by the child's residency, not the child's school of enrollment; and (2) Petitioner was not the legal guardian of Student and was not vested with the educational rights to proceed with the due process hearing.

Respondent's Emergency Motion to Dismiss The Complaint was addressed on the record as a preliminary matter at the start of the due process hearing by allowing parties to present evidence to substantiate their respective positions; i.e., DCPS asserted that Petitioner had been divested of his educational decision making rights and had no standing to pursue the due process complaint, and Petitioner asserted that he was still Student's legal guardian and empowered to make educational decisions on behalf of Student.

After reviewing the evidence on the motion that was presented by both parties, the Hearing Officer determined that DCPS, as the moving party, had not met its burden of proof of showing that Petitioner no longer had legal custody of Student or that Petitioner had been divested by a court of his educational decision making authority or that Petitioner lacked

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standing to pursue the due process complaint. Respondent's Emergency Motion to Dismiss The Complaint was denied for the reasons stated more specifically herein.

The due process hearing was a closed hearing that took place on 10/12/12. Petitioner were represented by Harry Goldwater, Esq. and DCPS was represented by William Jaffe, Esq. Petitioner participated in the hearing in person.

Petitioner presented two witnesses: Petitioner; and CBI case manager with First Home Care ("FHC case manager").

DCPS presented two witnesses: Special education coordinator ("SEC") at Wheatley Education Campus ("Wheatley EC"); and social worker at Wheatley EC ("social worker").

Petitioner's disclosures dated 10/04/12, containing a witness list and Exhibits P-1 through P-17, were admitted into evidence without objection.

DCPS' disclosures dated 10/04/12, containing a witness list and Exhibits R-01 through R-17, were admitted into evidence without objection.

The four issues to be determined in this Hearing Officer Determination are as follows:

Issue #1 – Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on 02/10/12; specifically, DCPS failed to include a Behavior Intervention Plan ("BIP") in Student's IEP following review of a Functional Behavioral Assessment.

Issue #2 – Whether DCPS denied Student a FAPE (a) by failing to consider the concerns of the parent, the meaning of the most current data, and the functional needs of Student when it developed the IEP on 04/17/12 and 05/30/12 and didn't change Student's disability classification to Intellectual Disability, Emotional Disturbance or Multiple Disability and the failure to change the disability classification resulted in DCPS providing Student with inappropriate educational services, and (b) when there was insufficient data to support a disability classification of Specific Learning Disability on 04/17/12 and 05/30/12.

Issue #3 - Whether DCPS denied Student a FAPE by failing to consider the concerns of the parent, the meaning of the most current data, and the functional needs of Student when it developed the IEP on 04/17/12 and 05/30/12 and didn't increase Student's special education service hours.

Issue #4 - Whether DCPS denied Student a FAPE by failing to include a statement of Student's present levels of academic achievement and functional performance in Student's 05/30/12 IEP.

For relief, Petitioner requested a finding of a denial of a FAPE on the issues presented; DCPS to amend Student's IEP to reflect the appropriate disability classification(s); DCPS to amend Student's IEP to reflect an appropriate increase in special education services and provide an appropriate public location of services to implement the revised IEP; and an award of

compensatory education for DCPS' failure to provide Student with a Behavior Intervention Plan since 02/10/12 and an increase in special education services since 04/17/12 or 05/30/12.

### **Respondent's Emergency Motion to Dismiss The Complaint**

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005). DCPS, who filed Respondent's Emergency Motion to Dismiss The Complaint, had the burden of proving that the hearing should not go forward on jurisdictional grounds. Jurisdictional issues can be decided at any stage in the proceedings.<sup>2</sup>

As stated previously herein, DCPS asserted that the complaint should be dismissed for the following jurisdictional reasons: (1) Since Student no longer lived in the District of Columbia, DCPS was not obligated to provide Student with a FAPE because the requirement to provide Student with a FAPE was triggered by the child's residency, not the child's school of enrollment; and (2) Petitioner was not the legal guardian of Student and was not vested with the educational rights to proceed with the due process hearing.

The sworn testimony of Petitioner and the SEC at Wheatley EC, as well as the e-mail attachments to Respondent's Emergency Motion to Dismiss The Complaint, were all considered as evidence in ruling on Respondent's motion. With respect to the motions hearing, neither party introduced into evidence any court documents affirming or negating Petitioner's authority as legal guardian of Student for educational purposes. The biological father of Student, who according to DCPS, allegedly had physical and legal custody of Student following a court hearing in late September 2012 and had paperwork from the court demonstrating that he had legal custody of Student, did not appear for the due process hearing although he had previously indicated his intention to be present via e-mail correspondence with the SEC.<sup>3</sup>

Petitioner had standing to file the due process complaint on 08/21/12 based on the subject matter of the complaint and based on Petitioner's relationship with Student. The issues presented in the due process complaint all pertained to DCPS' alleged failure to provide Student with an appropriate IEP and a location of services that could implement an appropriate IEP. Since a parent may file a complaint on any matter relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to a child, the subject matter of Petitioner's complaint fell squarely within the parameters of the IDEA. See 34 C.F.R. 300.507.

At the time the complaint was filed on 08/21/12, Student was living with Petitioner, Petitioner was raising Student as his own son, and Petitioner had been making educational

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<sup>2</sup> The Federal Rules of Civil Procedure, Rule 12(b)(1), 12(h)(3), 12(i), are used by analogy. IDEA due process hearings are not governed by formal rules of procedure or evidence. See District of Columbia Special Education Student Hearing Office Special Education Standard Due Process Hearing Standard Operating Procedures ("SOP") Section 700.4. The conduct of the due process hearing is left to the discretion of the Hearing Officer, subject to review under 34 C.F.R. 300.514, 300.516. *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995). Parties may file pre-hearing motions and Hearing Officers may use the Federal Rules of Civil Procedure ("FRCP") by analogy in ruling on motions. See SOP Section 401.

<sup>3</sup> See e-mail chain attached to Respondent's Emergency Motion to Dismiss The Complaint.

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decisions on behalf of Student since Student's biological mother had passed away five years ago.<sup>4</sup>

Under the IDEA, 34 C.F.R. 300.30, a parent is defined as:

“A biological or adoptive parent of a child” (300.30(a)(1));

“A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State)” (300.30(a)(3));

“An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare” (300.30(a)(4));

And, “except when a judicial decree or order identifies a specific person or persons to act as the “parent” of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the “parent” for purposes of 34 C.F.R. 300.30(a). Otherwise, the biological or adoptive parent, when attempting to act as the parent under the IDEA and when more than one party is qualified under the IDEA to act as a parent, must be presumed to be the parent for purposes of the IDEA unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.” 34 C.F.R. 300.30(b).

On the date that the complaint was filed, Petitioner fit within the IDEA definition of “parent” as an individual acting in the place of a biological or adoptive parent with whom the child lives, or an individual who is legally responsible for the child's welfare. Petitioner had standing to file the complaint based on his relationship with Student. Moreover, during the preceding three years that Student had been attending Wheatley EC, up to and including the date when the complaint was filed, DCPS had acknowledged Petitioner as the “parent” of Student for educational purposes.<sup>5</sup>

At the motions hearing, there was credible testimony by Petitioner that: (1) Student lived in the same household with Petitioner in the northeast quadrant of the District of Columbia at all times since Student was four months old until late September 2012; (2) Petitioner lived with Student's biological mother and had raised Student as his son since Student was 4 months old and Petitioner had been Student's sole caretaker and guardian since Student's biological mother passed away five years ago; (3) Petitioner went to court shortly after the death of Student's mother and was awarded legal custody; (4) For the past five years, Petitioner has made all educational and medical decisions on behalf of Student, both verbally and in writing; (5) Petitioner has been the legal representative for Student's receipt of death benefits arising from the death of Student's mother; (6) In late September 2012, Student was arrested for making threats of bodily harm to Petitioner's parents who lived in the same household and the juvenile court judge determined that Student would not return to Petitioner's home pending a trial on the charges that was scheduled for 10/23/12; (7) Student was initially placed in a shelter house by the juvenile court judge, but then temporarily placed with his biological father pending the outcome of the juvenile court proceeding; (8) Petitioner never received a copy of any court document that transferred legal custody away from him; and (9) Petitioner had no independent

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<sup>4</sup> Testimony of Petitioner.

<sup>5</sup> Testimony of Petitioner, SEC.

knowledge of whether or not Student's biological father lived in the District of Columbia or Maryland.

The SEC at Wheatley EC also provided credible telephone testimony as follows: (1) For the last three years that Student has attended Wheatley EC, Petitioner and Petitioner's father appeared interchangeably on behalf of Student and during the preceding school year, Petitioner functioned in the role of educational representative for Student; (2) Since Student has been living with his biological father for the past few weeks, as told to her by Student and Student's biological father, the school was unsure as to who had the educational decision making rights for Student; and (3) the school had been asking the biological father for paperwork attesting to his educational decision making rights, but had not received it.

DCPS, as the moving party, had the burden of proving that Petitioner lacked educational decision making authority for Student, and DCPS failed to do so. Based on the evidence presented, the Hearing Officer determined that despite Student's temporary placement with his biological father, Petitioner's continuous educational decision making authority over Student for the past five years had not been interrupted or divested by virtue of a recent juvenile court proceeding in the District of Columbia that had yet to be concluded; Student still resided in the District of Columbia; Petitioner still had legal custody of Student; Petitioner could make educational decisions on behalf of Student; and Petitioner had standing to pursue the complaint within the definition of "parent" under the IDEA.

In fact, there was no actual conflict between Petitioner and the biological father, as contemplated by 34 C.F.R. 300.30(b). There was no evidence, either testimonial or documentary, that indicated that the biological father was asserting his statutory presumptive right to proceed with or terminate the IDEA proceedings or to make educational decisions on behalf of Student. The biological father did not appear in person or by telephone to assert any educational decision making rights. On the other hand, Petitioner did appear in person to pursue the IDEA complaint he had filed on behalf of Student and Petitioner gave credible testimony that his educational decision making authority was still in tact. Moreover, the testimony of Petitioner about the actions he had taken with respect to Student over the past five years was consistent with a person who has legal custody over a minor, as defined by 16 DC. Code 2301(21).<sup>6</sup>

DCPS' Emergency Motion to Dismiss The Complaint was denied. The due process hearing on the merits of the complaint then began. The sworn testimony of witnesses during the motions hearing was incorporated into the due process hearing.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

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<sup>6</sup> "The IDEA left intact a state's authority to determine who may make educational decisions on behalf of a child, so long as the state does so in a manner consistent with federal statutes." *Taylor v. Vermont Department of Public Education*, 38 IDELR 32 (2002). 16 D.C. Code Section 2301(21) defines the term "legal custody" as "a legal status created by Division order which vests in a custodian the responsibility for the custody of a minor which includes – (A) physical custody and the determination of where and with whom the minor shall live; (B) the right and duty to protect, train, and discipline the minor; and (C) the responsibility to provide the minor with food, shelter, education, and ordinary medical care."

**Findings of Fact**

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

#1. Student, [REDACTED], is a resident of the District of Columbia who has attended Wheatley EC, a District of Columbia public school, for the past three years. Student is currently in the 8<sup>th</sup> grade and has had an IEP since the first grade.<sup>7</sup> Not only is Student well known by the special education staff at Wheatley EC, he is well liked, and school educators tried diligently and in every way possible to assist Student during the 2011-2012 school year to find the appropriate educational program for Student so that he could thrive academically and remain at Wheatley EC, which is his neighborhood school.<sup>8</sup> Petitioner wanted to keep Student at Wheatley EC if at all possible.<sup>9</sup>

#2. From the time that Student was four months old until late September 2012, Student has lived in the same household as Petitioner. Until approximately five years ago when Student's biological mother passed away, both Student's mother and Petitioner acted in the parental role with respect to educational decision making for Student. After the death of Student's mother, Petitioner went to court in the District of Columbia and was awarded legal custody of Student. Since the award of legal custody, Petitioner, along with Petitioner's father, have made all educational decisions on behalf of Student, and up until late September 2012, DCPS had comfortably acknowledged Petitioner's educational decision making authority for Student. Also since the court award of legal custody, Petitioner has made all medical decisions for Student, up to and including the day prior to the due process hearing.<sup>10</sup>

#3. On 10/21/11, DCPS and Petitioner's father developed Student's IEP. The IEP classified Student as having a Specific Learning Disability and prescribed the following special education services: 5 hours/week of specialized instruction in reading, 2.5 hours/week of specialized instruction in written expression, 7.5 hours/week of specialized instruction in mathematics, and 30 minutes/week of behavioral support services, with all services to be provided outside of general education.<sup>11</sup>

#4. At the time the 10/12/11 IEP was developed, Student's behaviors often served as deflectors of his academic insecurities, distracted from his academic needs and resulted in him spending less time in the classroom receiving the necessary instruction. Student also exhibited defiance and a lack of motivation, engaged in power struggles with his teachers and often refused to accept direction and redirection. At the time the 10/12/11 IEP was developed, Student needed supportive behavioral support services to assist him in developing and utilizing a set of coping skills to implement in the classroom.<sup>12</sup>

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<sup>7</sup> Petitioner.

<sup>8</sup> Petitioner, SEC.

<sup>9</sup> SEC.

<sup>10</sup> Petitioner.

<sup>11</sup> P-5-1, P-5-8.

<sup>12</sup> P-5-6.

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#5. Between January – May 2012, Student’ behavior in school was undesirable and behavior meetings took place to discuss Student’s behavior. Student’s behavior was marked by disruption in the classroom and the hallway, fighting, cursing at students and teachers, disrespect to teachers and several suspensions towards the end of the year due to behavior. During this period of time, Student also struggled with academics.<sup>13</sup>

#6. A Functional Behavioral Assessment (“FBA”) was completed on 01/22/12 and reviewed by the Multidisciplinary Team (“MDT”) on 02/10/12. The FBA indicated that Student’s behavior problems in math class occurred many times per hour and interfered with Student’s learning and the learning of others. Student also was either very disruptive or completely withdrawn in his reading class, where he often became upset, refused to do work or would argue excessively with a peer to the point of becoming physical. Student’s behavior in reading class occurred about 4 times per week and lasted the entire class period, if not the day. Student became easily frustrated when attempting tasks on his own.<sup>14</sup> Student exhibited the negative behaviors as a result of Student’s desire to avoid academic assignments, fear of academic failure and as a way to distract staff and peers from classroom activities.<sup>15</sup> Student also received six disciplinary referrals for behavior during the month of November 2011.<sup>16</sup> On 02/10/12, the MDT agreed that a Behavior Intervention Plan that included all teachers and the school counselor, was necessary to address Student’s behaviors, particularly since class period monitoring with an incentive plan and a point system in class previously had been used to address Student’s behaviors.<sup>17</sup> DCPS did not develop a Behavior Intervention Plan for Student at that time.<sup>18</sup>

#7. At the MDT meeting on 02/10/12, the team also reviewed a court ordered psycho-educational evaluation of Student that was dated 09/20/11.<sup>19</sup> That evaluation provided a provisional diagnosis of Intellectual Disability, pending review of the results of a Vineland Assessment.<sup>20</sup> The team determined that the additional information that would be revealed by the Vineland Assessment was necessary in order to determine whether or not Student had an Intellectual Disability, since Student demonstrated a very high level of adaptive social functioning which made the diagnosis of Intellectual Disability uncertain for the members of the team who had been observing Student at the school for the past three years. The team, that included DCPS, also agreed that Student was not making progress and that Wheatley EC could not offer any more special education hours although Student was in need of more services.<sup>21</sup>

#8. On 04/17/12, Student’s 10/12/11 IEP was administratively amended to include an additional accommodation of having test questions read to Student, but all other aspects of the 10/21/11 IEP remained the same. This amendment previously was agreed upon by DCPS and

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<sup>13</sup> Petitioner, FHC case manager.

<sup>14</sup> P-10.

<sup>15</sup> P-11-3.

<sup>16</sup> P-16.

<sup>17</sup> P-10.

<sup>18</sup> SEC, FHC case manager.

<sup>19</sup> R-5-6, P-10-2.

<sup>20</sup> P-6-15.

<sup>21</sup> P-10-2, SEC.

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Petitioner through means other than a meeting.<sup>22</sup> There was no evidence in the record that a MDT meeting took place on 04/17/12 or that Student's educational services were discussed on that date.

#9. A Vineland Assessment II was completed on 04/17/12. Student's Vineland Assessment II results and his reported IQ score suggested a classification of mild mental retardation.<sup>23</sup>

#10. The MDT met again on 05/30/12 and discussed Student's disruptive behavior and poor academics. The team agreed that Student's behavior was a problem and that his behavior needed more effective management. A Behavior Intervention Plan still had not been developed nor was it discussed at this meeting.<sup>24</sup> On 05/30/12, Petitioner asked for an increase in service hours to address Student's continued behavior problems and struggle with academics, but Wheatley EC indicated that it could not provide more service hours due to a staff shortage at the school.<sup>25</sup>

#11. Student's disability classification was also discussed at the MDT meeting on 05/30/12, but the team did not reach any conclusions about the appropriateness of the disability classification because the team felt that it was prudent to await the results of the Vineland Assessment II that would determine Student's level of adaptive functioning.<sup>26</sup>

#12. By the end of the 2<sup>nd</sup> term of the 2011-2012 school year, Student had received a grade of "F" in Math, Language Lab, and History; and by the end of the school year, Student had received final grades of "F" in all of those subjects. Student also received a final grade of "F" in Science, having received an "F" for both the 3<sup>rd</sup> and 4<sup>th</sup> terms.<sup>27</sup> Special education services for these subjects were all provided outside of general education and Student made no progress outside of general education during the 2011-2012 school year.<sup>28</sup>

#13. During the 2012-2013 school year, Student's behavior improved greatly and to the degree that he had no suspensions or disciplinary infractions, and Student made both behavioral and academic progress in the general education setting.<sup>29</sup> Student's classroom participation increased greatly and he was readily available for learning.<sup>30</sup>

#14. At the end of September 2012, Student was involved in an altercation with Petitioner's parents, with whom both Student and Petitioner lived. The altercation triggered police and court intervention and resulted in Student being temporarily removed from the home due to past infractions with the law and the fact that Student had just completed a term of probation with the court. Initially, Student was placed in a shelter house, but approximately one

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<sup>22</sup> P-4, R-13-1.

<sup>23</sup> P-9-1, P-9-10.

<sup>24</sup> SEC, FHC case manager.

<sup>25</sup> FHC case manager.

<sup>26</sup> Petitioner, FHC case manager, social worker.

<sup>27</sup> P-2.

<sup>28</sup> SEC.

<sup>29</sup> SEC, social worker, FHC case manager.

<sup>30</sup> SEC, social worker, FHC case manager.

week later, the court allowed Student to live with his biological father pending a final resolution of the juvenile court case.<sup>31</sup> Despite Student being temporarily removed from Petitioner's physical custody, Petitioner was never legally divested of medical and educational decision making authority over Student. Despite Student's court ordered temporary living arrangement with Student's biological father since late September 2012, Student continued to legally reside in the District of Columbia.

#15. An IEP Team meeting took place on 10/03/12.<sup>32</sup> The IEP provided a District of Columbia address for Student that was Petitioner's address, and the IEP listed both Petitioner and Petitioner's father as participants in the role as parent on behalf of Student. Student's biological father was not listed as a participant on the IEP. Although DCPS invited both Petitioner and Student's biological father to the meeting as the educational representatives for Student, neither one of them attended, even though the time of the meeting was specifically reset to accommodate the schedule of the biological father.<sup>33</sup>

#16. At the IEP Team meeting on 10/03/12, Student's disability classification was changed to Intellectual Disability, and although the quantity of special education services remained the same, the setting for the services was changed from outside of general education to inside of general education.<sup>34</sup>

#### **Discussion/Conclusions of Law**

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) 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.

To comply with the overall purpose of the IDEA, all local education agencies (LEA) in the District of Columbia must ensure that all children with disabilities between the ages of three and twenty-one inclusive, who are residents or wards of the District of Columbia, have available to them a FAPE and that the rights of these children and their parents are protected. 34 C.F.R. 300.101, 5 D.C.M.R. E-3000.1. In the District of Columbia, DCPS is the public LEA. 38 D.C. Code 2561.01(2).

"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. E-3030.3. The burden of proof in an administrative

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<sup>31</sup> Petitioner.

<sup>32</sup> R-1.

<sup>33</sup> R-1-1, SEC, FHC case manager.

<sup>34</sup> R-1.

hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

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).

The first issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on 02/10/12; specifically, DCPS failed to include a Behavior Intervention Plan ("BIP") in Student's IEP following review of a Functional Behavioral Assessment.

The IEP must include a statement of the appropriate services that will enable the child to be involved in and make progress in the general education curriculum. 34 C.F.R. 300.320(a)(4). And, in the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. 300.324(a)(2).

Petitioner met his burden of proof on this issue. Student's behavior problems were identified in a Functional Behavioral Assessment ("FBA") that was reviewed by the IEP team on 02/10/12. Student's behavior problems existed prior to this meeting and at the time of the review of the FBA, Student's behavior problems occurred several times per hour throughout the day in all academic core classes and interfered with his learning and the learning of others. Around the time that the FBA was completed and discussed, Student had received a grade of "F" in three of his four core curriculum classes. By the end of the 2011-2012 school year, Student had received a final grade of "F" in all of his core curriculum classes.

On 02/10/12, the IEP Team agreed that Student's behaviors needed intensive management that could have been addressed through a Behavior Intervention Plan, but DCPS failed to ever develop and implement a Behavior Intervention Plan. The Hearing Officer determines that based on the results of the Functional Behavioral Assessment, a Behavior Intervention Plan should have been developed at the 02/10/12 meeting or shortly afterwards to address Student's behaviors that continued to deteriorate over the remainder of the school year, resulted in suspensions, and greatly contributed to him failing all of his core academic subjects because Student was unavailable for learning. Student was deprived of an educational benefit and the right to a FAPE as a result of DCPS' failure to develop and systematically implement a Behavior Intervention Plan from February 2012 through the end of the 2011-2012 school year. Student was denied a FAPE.

Student's behavior in school during the current 2012-2013 school year has been good and the evidence does not support a finding that a Behavior Intervention Plan was necessary during the 2012-2013 school year. Student was not denied a FAPE by the absence of a Behavior Intervention Plan during the 2012-2013 school year.

The second issue to be determined is whether DCPS denied Student a FAPE (a) by failing to consider the concerns of the parent, the meaning of the most current data, and the functional needs of Student when it developed the IEP on 04/17/12 and 05/30/12 and didn't change Student's disability classification to Intellectual Disability, Emotional Disturbance or Multiple Disability and the failure to change the disability classification resulted in DCPS providing Student with inappropriate educational services, and (b) when there was insufficient data to support a disability classification of Specific Learning Disability on 04/17/12 and 05/30/12.

In developing each child's IEP, the IEP Team must consider the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluation of the child; and the academic, developmental and functional needs of the child. 34 C.F.R. 300.324(a).

Nothing in the IDEA requires that children be classified by their disability so long as each child who has a disability that is listed in the IDEA and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the IDEA. 34 C.F.R. 300.111(d). Under the IDEA, the unique needs of the child must be addressed through the IEP regardless of the disability classification. See C.F.R. 300.1, 300.111(d), 300.320(a)(4).

There was no evidence in the record that an IEP Team convened on 04/17/12 to discuss Student's educational needs or that an IEP was developed on that date. Development of the IEP is a team decision. 34 C.F.R. 300.320, 300.321. An Amended IEP dated 04/17/12 existed, but that IEP was administratively amended with the consent of DCPS and Petitioner to reflect the addition of an accommodation to the existing 10/12/11 IEP. Petitioner failed to meet his burden of proof that Student's disability classification should have been changed on 04/17/12.

Petitioner failed to offer any evidence and failed to prove that on 04/17/12 or 05/30/12, Specific Learning Disability was an inappropriate disability classification for Student. Specific Learning Disability was the disability classification on Student's 10/21/11 IEP and it was clear from the evidence that beginning on 02/10/12, DCPS was systematically exploring the possibility of changing Student's primary disability classification based on formal data and not merely on speculation. On 05/30/12, Student was already classified as a child with a disability and the team was working on assembling an appropriate educational program for Student. The team knew Student well, and as acknowledged by both Petitioner and DCPS, the team was trying to develop an appropriate program so that Student could remain at Wheatley EC.

Nor was an IEP developed on 05/30/12. On 05/30/12, a team meeting occurred where Student's disability classification again was discussed. The consensus of the team was that there was insufficient data for the team to conclude that Student actually had an Intellectual Disability, absent the completion and review of a Vineland Assessment II. And, as it turned out, the Vineland Assessment II that was completed on 04/17/12 did confirm a diagnosis of Mild Intellectual Disability; however, Petitioner failed to provide any evidence from which the Hearing Officer could conclude that a change in the disability classification was directly related

to and necessary for Student to receive appropriate educational services. Student had been failing his core academic courses all year and Petitioner failed to prove that different services for the final three weeks of the 2011-2012 school year would have made any difference in Student's academic outcome for the year. Furthermore, during the following 2012-2013 school year, Student's behavioral and academic adjustment improved greatly even though his disability classification and services did not change until 10/03/12.

Petitioner failed to meet his burden of proof that Student was denied a FAPE as a result of DCPS' failure to change Student's disability classification on 05/30/12, despite the absence of an IEP being developed on that date.

The third issue to be determined is whether DCPS denied Student a FAPE by failing to consider the concerns of the parent, the meaning of the most current data, and the functional needs of Student when it developed the IEP on 04/17/12 and 05/30/12 and didn't increase Student's special education service hours.

In developing each child's IEP, the IEP Team must consider the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluation of the child; and the academic, developmental and functional needs of the child. 34 C.F.R. 300.324(a).

The term IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with the IDEA, and that must include a statement of the special education and related services that will be provided to enable the child to advance appropriately toward attaining the annual goals and to be involved in and make progress in the general education curriculum and to be educated and participate with other children with disabilities and nondisabled children. 34 C.F.R. 300.320(a)(4).

There was no evidence in the record that either a 04/17/12 or a 05/30/12 IEP ever existed. As stated previously herein, Student's existing 10/12/11 IEP was administratively amended on 04/17/12 for the sole purpose of adding an accommodation that previously had been agreed upon by DCPS and Petitioner. Petitioner failed to meet his burden of proof that an IEP was even developed on 04/17/12. Development of the IEP is a team decision and there was no evidence in the record that the team met and discussed Student's needs on 04/17/12. See C.F.R. 300.320, 300.321.

A team meeting did occur on 05/30/12 and Student's behavior and disability classification was discussed at that time. It was clear at that time that Student was failing all of his core academic classes due to his behavior and that the instruction outside of general education that was being provided to Student was not working. By 05/30/12, Student had made no progress with the curriculum for that academic year. And, Wheatley EC could not provide more enhanced or intensive special education services even though it was evident that Student needed more services than what he was receiving.

However, the evidence revealed that Student made good academic and behavioral adjustment during the following 2012-2013 school year; therefore, DCPS' failure to increase

Student's special education services beginning on 05/30/12 only affected Student until the end of the 2011-2012 school year, which was a period of approximately three weeks.

Although Petitioner met his burden of proof that on 05/30/12, DCPS committed a procedural violation of the IDEA by not increasing Student's special education services, Petitioner failed to show any harm to Student. At that point in time, Student had already failed all of his core curriculum classes for the year and during the next school year, Student made a vast improvement in behavior and academics without the increase in services.

The fourth issue to be determined is whether DCPS denied Student a FAPE by failing to include a statement of Student's present levels of academic achievement and functional performance in Student's 05/30/12 IEP.

Petitioner failed to meet his burden of proof on this issue. Although the SEC at Wheatley EC testified that an IEP was developed on 05/30/12, she was unsure of the contents of the IEP and her testimony in that regard was not credible. A 05/30/12 IEP was not admitted into evidence nor was there any credible testimony that a 05/30/12 IEP was ever developed.

### **Relief**

If a child is determined eligible for special education services and has been denied a FAPE, then the child's entitlement to compensatory education attaches and the child is entitled to replacement of educational services the child should have received in the first place. *Reid v. District of Columbia*, 43 IDELR 32 (2005). "Awards should not be based on the amount of services missed, but rather on the amount of services needed to place the student in the position he would have occupied if the district had fulfilled its FAPE obligations." *Phillips ex rel. T.P. District of Columbia*, 55 IDELR 101 (D.D.C. September 13, 2010).

The Hearing Officer has determined that Student was denied a FAPE due to DCPS' failure to provide Student with a Behavior Intervention Plan from February 2012 through the end of the 2011-2012 school year, a period of approximately four-five months.

On 02/10/12, the members of the IEP Team that included DCPS, all agreed that Student's behavior required aggressive and intensive management, but nothing was done. The lack of a Behavior Intervention Plan directly affected Student's availability for learning and impeded his access to the curriculum.

*Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. November 12, 2010), quoting *Reid v. District of Columbia*, 43 IDELR 32 (D.C. Cir. 2005), requires a "fact-specific exercise of discretion" in the computation of the compensatory education award and it is under this premise that this Hearing Officer makes an award of compensatory education. *Henry* clearly indicates that the denial of a FAPE entitles Student to compensatory education and that the Hearing Officer must craft a compensatory education award.

There is no way to gauge with a reasonable degree of certainty where Student would have been academically if a Behavior Intervention Plan had been developed and implemented during

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the last four-five months of the 2011-2012 school year because Petitioner offered no evidence in that regard. However, it is likely that a uniformly implemented Behavior Intervention Plan would have made Student more available for learning.

Although there was no direct or indirect evidence offered on what an appropriate compensatory education award would be, the Hearing Officer determines that 40 hours of tutoring for the lack of a Behavior Intervention Plan from Feb-Jun 2012 would be the appropriate relief for this denial of a FAPE. The extra tutoring will help Student make up some of the academic ground he lost last year when he failed all of his core academic courses, particularly in view of the fact that Student is available for learning during the current school year.

**ORDER**

(1) Within 10 business days, DCPS shall make an administrative commitment in writing, for Student to receive 40 hours of tutoring in academics, either through DCPS tutors outside of the school day or through the funding of independent tutoring.

**IT IS SO ORDERED.**

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination 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 Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

Date: October 28, 2012

*/s/ Virginia A. Dietrich*  
Hearing Officer

Copies to:

Petitioner: U.S. mail

Petitioner's Attorney: Harry Goldwater, Esq. (electronically)

DCPS' Attorney: William Jaffe, Esq. (electronically)

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