DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

[redacted], on behalf of
[redacted]

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Respondents.

Hearing Officer: Kimm Massey, Esq.

Case No: 2012-0667

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STUDENT HEARING OFFICE
2012 DEC 10 AM 9:02

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is a [redacted] who presently attends a DCPS elementary school. On September 25, 2012, Petitioner filed a Complaint against DCPS, alleging that DCPS denied Student a FAPE by (1) failing to provide an appropriate placement; (2) failing to provide an appropriate placement despite IEP team recommendation; (3) failing to convene a placement meeting, and with all relevant and necessary team members, to discuss and recommend an appropriate placement as necessary; (4) failing to develop and implement an appropriate IEP; (5) failing to perform an FBA and develop a BIP; (6) failing to provide behavioral support services; (7) failing to perform required appropriate triennial evaluation; (8) failing to perform evaluations recommended by the MDT; (9) failing to evaluate him in all areas of suspected disability; (10) failing to perform a Vineland; and (11) failing to invite Student and Parent to meeting. As relief for these alleged denials of a free appropriate public education ("FAPE"), Petitioner requested findings in Petitioner's favor, and that DCPS be ordered to (i) provide an immediate placement at High Road Primary School, (ii) develop an appropriate IEP, and (iii) perform necessary evaluations, including recommended evaluations, and convene an MDT/IEP meeting with all necessary team members within 30 days of the hearing to review the evaluation reports and review/revise Student's IEP.

On October 5, 2012, DCPS filed its Response, which asserted the following defenses: (1) the IEP and related services are appropriate and based on the evaluations and recommendations of the IEP team, and a Least Restrictive Environment ("LRE") Review was conducted which concluded that DCPS can implement the IEP; (2) the IEP and related services are appropriate

and the current location of services can implement the IEP; (3) meetings were held to discuss location of services, including the March 29, 2012 meeting, and the team was appropriate and consisted of individuals with personal knowledge of Student; (4) the IPE is appropriate and was developed by a team of individuals with knowledge of Student as well as the assessments and evaluations; (5) under IDEA DCPS had no obligation to perform an FBA and develop a BIP; (6) behavioral support services are not included in Student's IEP; (7) evaluations were conducted; (8) IDEA does not require an agency to perform all recommended evaluations, as the agency is allowed to exercise some discretion in determining what evaluations to perform; (9) Student was evaluated and assessed appropriately, and thereafter an IEP was developed; (10) the agency was under no obligation to complete a Vineland; and (11) parent attended the meetings held on March 29 and September 19, 2012.

The parties failed to participate in a resolution session meeting. Hence, the 45-day timeline began on October 26, 2012 and will end on December 9, 2012, which is the HOD deadline.

On November 7, 2012, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer merged Petitioner's claims 1 and 2, as well as Petitioner's claims 7 through 10, and Petitioner withdrew its claims for failure to evaluate in all areas of suspected disability and failure to invite Student and Parent to a meeting. The hearing officer issued a Prehearing Order on November 12, 2012.

By letter dated November 15, 2012, DCPS disclosed thirteen documents (Respondent's Exhibits 1-13). By letter dated November 16, 2012, Petitioner disclosed eighteen documents (Petitioner's Exhibits 1-18).

The hearing officer convened the due process hearing on November 8, 2012.[1] DCPS's disclosed documents were admitted into the record without objection. DCPS objected to the admission of Petitioner's documents, on the ground that they were submitted subsequent to the 5-day disclosure deadline. However, further discussion revealed that Petitioner had timely disclosed its documents using a DCPS number that is currently only used for Complaints but previously was disclosed to the Petitioner's bar in a memorandum indicating that the number was to be used for service of all documents. As a result, the hearing officer admitted Petitioner's documents into evidence over DCPS's objection. Thereafter, the hearing officer received the parties' opening statements, testimonial evidence and closing statements, then the hearing was brought to a close.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issues to be determined are as follows:

[1] Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

1. Did DCPS deny Student a FAPE by failing to provide an appropriate location of service despite an alleged IEP team recommendation, and by failing to convene a meeting with all necessary team members to discuss and recommend an appropriate location of services?

2. Did DCPS deny Student a FAPE by failing to develop and implement an appropriate IEP on 3/29/12?

3. Did DCPS deny Student a FAPE by failing to perform an FBA and develop and implement a BIP?

4. Did DCPS deny Student a FAPE by failing to provide behavioral support services?

5. Did DCPS deny Student a FAPE by failing to perform required appropriate triennial evaluations (speech/language evaluation), failing to perform evaluations recommended by the IEP team (OT and speech/language evaluations and FBA), and failing to perform a Vineland evaluation despite Student's ID classification?

FINDINGS OF FACT[2]

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 is a [redacted], who attends 5th grade at his neighborhood DCPS elementary school. He has attended the neighborhood school since kindergarten. However, school is not going well for Student because is struggling with his school work and academics, and he does not want to attend his pullout services.[3]

2. Student is in 5th grade but his reading level is at approximately a 1st grade level. As a result, he cannot participate in whole group instructional time in his general education reading class. Student should be focusing on phonics and reading fluency, but his reading class is focused on advanced comprehension and reading strategies so Student has to have a teacher sitting directly with him. Even when the work is on his reading level, Student has a hard time staying focused. Student generally is a respectful, joyful student, but he gets upset when it's time for his pullout sessions and it often takes from 5 to 15 minutes to get him to leave, and even then he continues to be very unwilling to leave. Student will do his homework if he understands it, which is normally the case when it comes from his special education teacher. However,

[2] To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.
[3] Testimony of Parent.

Student does not do his homework that comes from his homeroom, math or other classes because he does not understand the homework.[4]

3. Student does not have any behavior problems in school other than crying and becoming upset when it is time for him to leave his general education class for pullout services.[5]

4. Student's current IEP is dated March 29, 2012, and the IEP identifies Student's primary disability as Intellectual Disability ("ID").[6] However, the complete IEP was not presented by either party for inclusion in the administrative record. Therefore, the hearing officer is unable to determine the precise contents of the IEP.

5. At Student's March 29, 2012 IEP meeting, the team recommended a self-contained placement for Student, but the DCPS team members reported that the agency required an LRE review first. The team determined that Student requires a full-time self contained age appropriate classroom for Students with ID, because in his current DCPS school he often receives his pullout services with students well below his age and grade level, which has caused him to refuse to do work, cry and display inappropriate behaviors. The team determined that the current DCPS school's inability to educate Student with his non-disabled peers or with his disabled peers of the same age and grade has placed Student in a most restrictive environment and caused a negative impact on his educational attainment. Nevertheless, the team continued Student's IEP of 18 hours per week to allow him to remain at his current DCPS school until the end of SY 2011/12 because the team believed that a change so late in the school year would cause a negative impact. The team contemplated that after the LRE review was completed and placement was determined for SY 2012/13, the team would reconvene and update the new IEP as appropriate. The team members present included Parent, the advocate, the special education coordinator, a general education teacher, and a special education teacher, among others.[7]

6. On May 7, 2012, DCPS issued a Prior Written Notice to provide transportation services to Student for the purpose of implementing summer ESY services.[8]

7. On May 10, 2012, DCPS conducted an observation of Student that served as its LRE review. The observer saw Student in his general education class and noted, *inter alia,* that the general education teacher embarrassed Student in front of his peers after he had difficulty completing a writing project and "read aloud" in class something that was not actually written on his paper. The observer noted that Student was not observed to have behavioral concerns, contributed positively to the group, responded appropriately to the classroom management system initiated task related behaviors

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[4] Petitioner's Exhibit 4; testimony of Parent.
[5] Testimony of Parent.
[6] Respondent's Exhibit 2.
[7] Petitioner's Exhibit 6 at 1; Petitioner's Exhibit 7; testimony of advocate.
[8] Respondent's Exhibit 3.

with minimal monitoring and followed directions upon request. Ultimately, the observer concluded that Student should remain in his current educational setting.[9]

8. Student was supposed to go to extended year services ("ESY") during Summer 2012, but Parent did not send him. Parent believes the ESY 2012 papers went to the wrong address after she moved; however, Parent did not send Student to ESY during Summers 2011 and 2010, even though Student was supposed to attend. Student's failure to attend ESY during Summer 2010 caused him to regress.[10]

9. On September 19, 2012, Student's IEP team convened to discuss the results of DCPS's LRE review. The team restated the problems Student is having as a result of being pulled out to work with much younger students, and parent reported that Student does not want to go to school because his peers are taunting him for going to the baby class. The team noted its prior determination that Student requires a more restrictive environment and its referral of the matter for an LRE review which ultimately disagreed with the team's recommendation. Ultimately, the team did not revise Student's IEP to provide full-time services or provide Student with a new location of services. The team members present included Parent, the advocate, the special education coordinator, a general education teacher, and a special education teacher, among others.[11]

10. Approximately one month prior to the due process hearing in this case, DCPS conducted another LRE review for Student. This time, the observer referred the case to DCPS's Location Team, which presented a DCPS elementary school that has a full-time ID program. The school offers an intermediate ID classroom that would allow Student to be educated with age-appropriate peers in the 3rd through 5th grades. There are no general education students in the classroom. The classroom has one teacher and one classroom aide with 10-12 children.[12] However, DCPS did not advise Parent that it is proposing a new DCPS school for Student to attend until the parties were at the due process hearing for this case.

11. Student's previous IEP was dated July 28, 2011. That IEP also identified Student's primary disability as ID. Pursuant to the IEP, Student was to receive a total of 17.5 hours per week of specialized instruction outside general education and 1 hour per week of speech-language services outside general education.[13]

12. At Student's July 28, 2011 IEP meeting, the team determined that all of Student's academic instruction hours should be outside general education. Hence, the team agreed to revise Student's IEP to include the following amounts of specialized instruction per week: 5 hours of math outside general education; 2.5 hours of written

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[9] Respondent's Exhibit 4; Petitioner's Exhibit 6.
[10] Testimony of Parent; *see* Petitioner's Exhibit 11 at 3; testimony of special education teacher.
[11] Respondent's Exhibit 7; Petitioner's Exhibit 5; testimony of advocate.
[12] Testimony of special education supervisor.
[13] Petitioner's Exhibit 8.

expression outside general education; and 10 hours of reading outside general education.[14]

13. On July 7, 2011, DCPS convened an MDT meeting for Student to review his comprehensive psychological evaluation. During this meeting, the team recommended that DCPS perform speech-language and occupational therapy evaluations for Student, as well as an FBA.[15]

14. On July 7, 2011, Parent signed a Consent form to allow DCPS to reevaluate Student by administering a speech/language assessment, an occupational therapy assessment and an FBA. However, on August 18, 2011, Parent signed a statement withdrawing her request and consent for speech/language and occupational therapy evaluations, because her decision to not place Student in summer school rendered him unavailable for assessment. Although the statement indicates that Parent intended to sign a new consent form the same day she signed the statement, the record contains no evidence that the new consent form was signed.[16]

15. Student's most recent comprehensive psychological evaluation was conducted in May 2011. The evaluation results revealed that Student's full scale IQ is 62, which is in the Extremely Low range of intellectual functioning; and Student has pervasive cognitive delays with greater deficits in memory, processing speed and perceptual reasoning. At the time of the evaluation, Student was functioning significantly below grade level in reading (1st grade or below) and in math, and he refused to engage in any written tasks so the evaluator could not assess his written skills which led the evaluator to recommend an OT evaluation for Student. The evaluation also revealed that Student was also exhibiting oppositional defiant behaviors.[17]

16. Student's most recent psychiatric evaluation was conducted in November of 2010, but his most recent speech/language evaluation was conducted in August of 2008, and his previous psychological evaluation was conducted in September of 2008.[18]

17. There is no Vineland test of adaptive functioning in Student's records. Student's disability classification recently was changed to ID, and he should have received a Vineland prior to the change in classification because the ID criteria under IDEA require deficits in adaptive functioning.[19]

18. Student has been accepted for admission into the LD program at a nonpublic full-time special education school located in the District of Columbia. The elementary program at the school is academically-based and strong in academics and social/emotional emphasis. The school works with students with LD who have

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[14] Petitioner's Exhibit 9; testimony of advocate.
[15] Petitioner's Exhibit 10; Respondent's Exhibit 1; testimony of Parent.
[16] Petitioner's Exhibit 10; Respondent's Exhibit 1; testimony of Parent.
[17] Petitioner's Exhibit 11.
[18] Petitioner's Exhibit 13, 15 and 16.
[19] Testimony of psychologist; *see* 34 C.F.R. § 300.8(c)(6).

reading, math and/or writing deficits. The school offers licensed social workers and a licensed speech/language therapist, as well as a licensed occupational therapist who comes in twice per week. The students at the school range from age 9 to 11, and their grade performance levels range from kindergarten (with a dedicated aide) to a student who is in 6th grade but performs on a 4th grade level. The ratio in class is 3 students to 1 adult. All students at the school have full-time IEPs.[20]

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:

1. Alleged Failure to Provide an Appropriate Location of Service and Convene an MDT Meeting re Same

Under IDEIA, a public agency must provide an appropriate educational placement/location of services for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this regard, a FAPE consists of special education and related services that, *inter alia*, include an appropriate secondary school and are provided in conformity with the Student's IEP. *See* 34 C.F.R. § 300.17.

"Where a public school system has defaulted on its obligations under the IDEA, a private school placement is proper under the Act if the education by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *Wirta v. District of Columbia,* 859 F. Supp. 1, 5 (D.D.C. 1994) (quoting *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 456 U.S. 176, 207)). "Courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, the placement's cost, and the extent to which the placement represents the least restrictive environment." *Id.*, 556 F.Supp.2d at 37 (quoting *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Board of Education v. Rowley, supra*, 456 U.S. 176, 202)).

With respect to LRE, IDEA requires each public agency to ensure that to the maximum extent appropriate, disabled children are educated with children who are nondisabled, and special classes, separate schooling, or other removal of disabled children from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114(a)(2).

IDEA further provides that a disabled child's IEP team must include the child's parents; at least one of the child's regular education teachers; at least one of the child's special education

[20] Petitioner's Exhibit 1; testimony of special education supervisor.

teachers; a representative of the public agency who is qualified to provide or supervise the provision of specially designed instruction, is knowledgeably about the general education curriculum, and is knowledgeable about the availability of the public agency's resources; an individual who can interpret the instructional implications of evaluation results, who may be a member of the team who fulfills another function; at the discretion of the parent or the agency, other individuals with knowledge or special expertise regarding the child; and whenever appropriate, the disabled child. 34 C.F.R. § 300.321(a).

In the instant case, Petitioner has alleged that DCPS failed to provide Student with an appropriate location of services, despite an IEP team recommendation for a full-time special education setting, and failed to convene a meeting with all necessary team members to discuss and recommend an appropriate location of services. DCPS initially maintained that the current DCPS school is an appropriate location of services for Student, but at the due process hearing in this case DCPS offered a full-time program in a DCPS elementary school for Student. DCPS also maintains that Student's March 29, 2012 meeting was held to discuss location of services and the team was appropriate and consisted of people with personal knowledge of Student.

With respect to the alleged failure to convene a meeting, the evidence in this case clearly proves that (1) DCPS conducted a meeting to discuss and determine location for Student on March 29, 2012, and the team recommended a self-contained placement for Student, but the DCPS team members reported that the agency required an LRE review first, and (2) DCPS conducted another meeting on September 19, 2012 to discuss and determine a location for Student after reviewing the LRE, but the LRE disagreed with the team's recommendation for another location so a new location was not offered. The evidence further proves that both meetings included Parent, the advocate, the special education coordinator, a general education teacher, and a special education teacher, among others. Although Petitioner argues that the LRE Review observer should have been present at the September 2012 meeting, the observer was not an IEP team member pursuant to IDEA, and Petitioner never requested the observer's participation. Hence, DCPS was under no obligation to include the observer in the meeting. Under these circumstances, the hearing officer concludes that Petitioner has failed to prove that DCPS failed to convene a meeting with all necessary team members to discuss and recommend an appropriate location of services.

With respect to location of services, the evidence in this case reveals that the current DCPS school is unable to educate Student with his non-disabled peers or with his disabled peers of the same age and grade, which has had a negative impact on Student's educational attainment and behavior. Hence, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to provide Student with an appropriate location of services.

As relief for this denial of FAPE, Petitioner has requested an immediate placement at the full-time special education school for LD and ED students that has accepted Student for admission in its LD program. However, Student is not LD, he is ID, and there is no evidence that the nonpublic school can service an ID student in its LD program. Moreover, although the evidence in this case proves that Student needs to receive all of his academic instruction outside general education, there is no evidence to prove that he cannot participate in non-academic classes and

lunch with his nondisabled peers. Indeed, the evidence proving that Student cries and acts out when he has to leave his nondisabled peers suggests the contrary.[21] As a result, the hearing officer concludes that it would be inappropriate to place Student in the requested nonpublic school because the school does not represent Student's LRE and there has been no proof of a link between Student's needs as a disabled child and the services offered by the school. *See N.G. v. District of Columbia, supra.* For this same reason, and also because the option was presented for the first time at the due process hearing with no advance notice to Petitioner or the hearing officer, the hearing officer further concludes that it would be inappropriate to place Student in the full-time ID class at the DCPS elementary school offered by DCPS. Instead, the hearing officer will order the parties to reconvene Student's IEP team and discuss and determine an appropriate public or nonpublic location of services for Student.

2. **Alleged Failure to Develop and Implement an Appropriate IEP**

The FAPE required by IDEA is tailored to the unique needs of a disabled child by means of the IEP. Board of Education of the *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). Hence, a school district satisfies IDEA's requirement to provide a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id; see also,* 34 C.F.R. § 300.17 (IDEA defines FAPE to mean special education and related services that, *inter alia*, are provided at public expense and in conformity with an IEP). In determining whether an IEP is reasonably calculated to provide educational benefits, the measure and adequacy of the IEP is to be determined as of the time it was offered to the student. *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009).

IDEA does not require a school district to maximize the potential of each handicapped child; instead, IDEA requires only that a school district provide a basic floor of opportunity consisting of access to specialized instruction and related services that are individually designed to provide educational benefit to the handicapped child. *Rowley, supra.* 34 C.F.R. § 300.34(a). IDEA charges the disabled child's IEP Team with the responsibility of developing, reviewing and revising the IEP, although the team must consider, *inter alia*, the parent's concerns, the results of initial and/or recent evaluations, and the academic, developmental and functional needs of the child in doing so. *See* 34 C.F.R. § 300.324(a)(1)(iii).

In the instant case, Petitioner argues that DCPS failed to develop and implement an appropriate IEP on March 29, 2012, while DCPS argues that the IEP is appropriate. A review of the evidence in this case reveals that while it is unclear precisely what are the contents of the March 29, 2012 IEP, Student's July 28, 2011 IEP provided Student with 17.5 hours of specialized instruction outside of general education (plus 1 hour of speech/language services) so that he could receive all of his academic instruction outside general education, and at the March 29, 2012 meeting Student's IEP team decided to continue the existing IEP hours to allow Student to remain at his current DCPS school until the end of SY 2011/12. Moreover, as noted above, although the evidence also proves that Student needs to receive all of his academic instruction

[21] The hearing officer acknowledges that Student's IEP team has recommended a self-contained setting for Student. However, the evidence proves that this recommendation was based on the current DCPS school's inability to properly service Student and was not based on Student's actual needs.

outside general education, there is no evidence to prove that he cannot participate in non-academic classes and lunch with his nondisabled peers. Hence, the evidence tends to prove that Student requires all of his academic instruction outside general education to receive educational benefit and his March 29, 2012 IEP provides him with just that. As a result, the hearing officer concludes that Petitioner has failed to meet its burden of proof on this issue.

3. Alleged Failure to Perform an FBA and Develop/Implement a BIP

Under IDEA, a public agency must ensure that a disabled child is assessed in all areas related to his or her suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. § 300.304(c)(4). Moreover, in developing a disabled child's IEP, the IEP team must, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.304(c)(4).

In the instant case, Petitioner alleges that DCPS denied Student a FAPE by failing to perform an FBA and develop and implement a BIP for Student, while DCPS argues that it had no obligation under IDEA to perform an FBA and develop a BIP for Student. A review of the evidence reveals that Student generally is a respectful, joyful student who does not have any behavior problems in school other than crying and becoming upset when it is time for him to leave his general education class to go for pullout services with children who are much younger than him, and the hearing officer has already determined above that DCPS denied Student a FAPE by leaving him in a school that is unable to educate him with his non-disabled peers or with his disabled peers of the same age and grade. Under these circumstances, Petitioner has failed to prove that Student requires an FBA and/or BIP because his behavior impedes his learning or the learning of others or is somehow otherwise related to his suspected disability, and therefore, the hearing officer concludes that Petitioner has failed to meet its burden of proof on this claim.

4. Alleged Failure to Provide Behavioral Support Services

As noted above, a school district satisfies IDEA's requirement to provide a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley, supra.* IDEA does not require a school district to maximize the potential of each handicapped child; instead, IDEA requires only that a school district provide a basic floor of opportunity consisting of access to specialized instruction and related services that are individually designed to provide educational benefit to the handicapped child. *Id.* In this regard, "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, including, *inter alia*, psychological services, counseling services, and social work services in school. 34 C.F.R. § 300.34(a).

In the instant case, Petitioner argues that DCPS denied Student a FAPE by failing to provide him with behavioral support services, while DCPS notes that behavioral support services are not included on Student's IEP. A review of the evidence in this case confirms DCPS's assertion that behavioral support services are not included on Student's IEP. Moreover, as noted above, the

evidence further reveals that Student generally is a respectful, joyful student who does not have any behavior problems in school other than crying and becoming upset when it is time for him to leave his general education class to go for pullout services with children who are much younger than him, and the hearing officer has already determined above that DCPS denied Student a FAPE by leaving him in a school that is unable to educate him with his non-disabled peers or with his disabled peers of the same age and grade. Hence, the evidence does not tend to suggest that Student requires behavioral support services. Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of proof on this claim.

5. Alleged Failure to Perform Evaluations

A public agency must ensure that a reevaluation of each child with a disability is conducted if the public agency determines one is warranted, or if the child's parent or teacher requests a reevaluation. *See* 34 C.F.R. § 300.303(a). Moreover, a reevaluation must occur at least once every 3 years unless the parent and the public agency agree that a reevaluation is unnecessary. 34 C.F.R. § 300.303(b)(2). However, prior to conducting any reevaluation of a disabled child, the public agency must obtain informed parental consent. 34 C.F.R. § 300.300(c)(1)(i).

In conducting an evaluation of a disabled child, the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child. 34 C.F.R. § 300.304(b)(1). IDEA also requires the public agency to ensure that a disabled child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. § 300.304(c)(4).

Under IDEA, mental retardation, now known as ID, means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance. 34 C.F.R. § 300.8(c)(6).

In the instant case, Petitioner has alleged that DCPS denied Student a FAPE by failing to perform a required speech/language triennial reevaluation, failing to perform OT and speech/language evaluations recommended by Student's IEP team, and failing to perform a Vineland assessment despite Student's ID classification. DCPS counters that triennial evaluations were conducted for Student, IDEA does not require the agency to perform all recommended evaluations and the agency is allowed to exercise discretion, and the agency was under no obligation to complete a Vineland.

A review of the evidence in this case reveals that Student receives speech/language services under his current IEP, but his most recent speech/language evaluation was conducted in 2008 at or about the same time his previous psychological evaluation was conducted. Although DCPS conducted a psychological reevaluation of Student approximately three years later in 2011, DCPS did not conduct a speech-language reevaluation of Student at or about that time. Moreover, in July of 2011, Student's IEP team recommended speech/language and OT evaluations, as well as an FBA, but the recommended evaluations have not yet been conducted. While there is evidence proving that Parent signed a consent form for the recommended

evaluations in July 2011 and withdrew said consent the following month, there is also evidence that Parent was willing to sign another consent form but it appears that neither Parent nor DCPS ever followed up on the issue. The hearing officer has already determined above that Student does not require an FBA at the present time; however, there is no evidence tending to suggest that Student no longer requires the recommended speech/language and OT evaluations. To the contrary, the fact that Student is currently receiving speech/language services without any current speech/language evaluation data suggests that that particular evaluation is especially required. Under these circumstances, the hearing officer concludes that DCPS has denied Student a FAPE by failing to conduct speech/language and OT evaluations for Student. However, the hearing officer recognizes that DCPS is unable to proceed with those evaluations without Parent's consent, and it does not appear that Parent has provided such consent. Therefore, the hearing officer will order DCPS to seek consent from Parent and conduct the evaluations for Student, and Parent will be ordered to provide the requested consent.

With respect to the Vineland assessment, the evidence in this case reveals that Student recently was reclassified as ID in the absence of any data regarding his adaptive functioning, although IDEA defines ID to include deficits in adaptive behavior. Based on this evidence, the hearing officer concludes that DCPS has denied Student a FAPE by failing to conduct a Vineland assessment for Student. *See* 34 C.F.R. § 300.304(c)(4), *supra* (disabled child must be assessed in all areas related to suspected disability). Hence, the hearing officer will order DCPS to seek consent from Parent and administer a Vineland assessment to Student, and Parent will be ordered to provide the requested consent.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. Within 10 calendar days of the issuance of this Order, DCPS shall reconvene Student's IEP team to discuss and determine an appropriate public or nonpublic location of services that can provide Student with all of his academic instruction outside of the general education environment. DCPS shall coordinate with Parent, so as to schedule the meeting in accordance with her schedule, and Parent shall attend the meeting.

2. Within 7 calendar days of the issuance of this Order, DCPS shall seek from Parent written informed consent to conduct speech/language, occupational therapy and Vineland assessments for Student.

3. Within 7 calendar days of DCPS's request for consent to evaluate pursuant to Paragraph 2, above, Parent shall provide DCPS with written informed consent to evaluate.

4. Within 21 calendar days of Parent's provision of written informed consent to evaluate, DCPS shall administer speech/language, occupational therapy and Vineland assessments to Student and provide Parent with copies of the written reports concerning the assessment results.

5. Within 14 calendar days of DCPS's provision of the written assessment results to Parent, as ordered above in Paragraph 4, DCPS shall reconvene Student's IEP team to review the assessment results and revise Student's IEP as necessary.

6. All remaining claims and requests for relief in Petitioner's September 25, 2012 Complaint are **DENIED and DISMISSED WITH PREJUDICE.**

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: 12/9/2012

/s/ *Kimm Massey*
Kimm Massey, Esq.
Hearing Officer