

District of Columbia  
Office of the State Superintendent of Education  
Office of Review and Compliance  
Student Hearing Office  
Frances Raskin, Due Process Hearing Officer  
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**Confidential**

STUDENT, through the legal guardian<sup>1</sup> )  
 )  
 Petitioner, )  
 )  
 v. ) Case No. 2009-1183  
 ) Hearing Date: October 1, 2009,  
 )  
 )  
 THE DISTRICT OF COLUMBIA )  
 PUBLIC SCHOOLS, )  
 )  
 Respondent. )  
 )

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STUDENT HEARING OFFICE

**HEARING OFFICER DETERMINATION**

**Counsel for Petitioner:** Chike Ijeabunwu, Esquire  
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<sup>1</sup> Personal identification information is provided in Attachment A.

## **I. JURISDICTION**

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"), re-promulgated on February 19, 2003; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

## **II. BACKGROUND**

Petitioner is the mother of a [REDACTED]-old, special-education student ("Student") at a District of Columbia Public Schools ("DCPS") senior high school. Both Petitioner and the Student reside in the District of Columbia.

On August 14, 2009, Petitioner filed a Complaint alleging that DCPS has failed to reevaluate the Student triennially; the Student has been performing below grade level in math for several years; and that the Student was retained in ninth grade at the end of the 2008-2009 school year. She alleges that DCPS failed to conduct a psychological evaluation, despite that the Student has been suspended from high school numerous times, including numerous ten-day suspensions for disruptive behavior in class, fighting, and walking out of the classroom. Petitioner alleges that DCPS has failed to convene a manifestation meeting and conduct a functional behavioral assessment ("FBA") and failed to evaluate the Student in all areas of suspected disabilities. Petitioner alleges that DCPS also failed to conduct a speech and language evaluation even though the Student exhibits speech and language difficulties.

Petitioner further alleges that DCPS has failed to provide the Student special education and related services, including behavioral support services and extended school year ("ESY"), as required by his individualized educational program ("IEP") and provide the Student an appropriate educational placement. Finally, Petitioner alleges that DCPS failed provide access to the Student's records and failed to convene an IEP meeting to review the Student's evaluations, review and revise the Student's IEP as necessary, and discuss and determine the Student's educational placement, or if DCPS held any such meeting, it failed to include Petitioner.

Petitioner seeks relief that includes an order placing the Student at the nonpublic school for the 2009-2010 school year at DCPS expense and requiring DCPS to perform "all necessary evaluations" and convene an IEP meeting.

On August 27, 2009, Counsel for DCPS filed a Response to Parent's Administrative Due Process Complaint Notice ("Response"). The Response was three days late. Respondent asserted that Petitioner had attended IEP meetings in November 2007 that included the Student's general and special education teachers, the school counselor, and the special education coordinator ("SEC"). Respondent asserts that the team developed an IEP at that meeting and that Petitioner signed the IEP to indicate that she agreed with its contents. DCPS contends that this IEP was reasonably calculated to provide educational benefit.

Respondent asserts that Petitioner attended another IEP meeting in January 2009 and provided consent to evaluate the Student at that meeting. It asserts that DCPS convened an IEP meeting in February 2009 and that Petitioner, the SEC, special education teacher, and school psychologist all participated in the meeting. DCPS contends that the IEP developed at this meeting was reasonably calculated to provide educational benefit.

On September 18, 2009, counsel for DCPS filed a Supplemental Response. This Supplemental Response provides more background on the Student's educational history and asserts that the Student does not require a full-time IEP. The Supplemental Response also includes as attachments the Student's educational records, as requested by counsel for Petitioner during the prehearing conference. Finally, in the Supplemental Response, DCPS offers to conduct a psychologist assessment and an FBA within thirty days of an order.

The due process hearing commenced on October 1, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.

For the reasons explained below, this Hearing Officer finds that Petitioner proved that DCPS failed to provide the Student an appropriate educational placement. Petitioner also proved that DCPS failed to convene a manifestation meeting even though the Student was suspended for at least thirty days during the 2008-2009 school year. Petitioner failed to prove, however, that the Student should receive a functional behavioral assessment.

This Hearing Officer further finds that Petitioner failed to present any evidence to support her claims DCPS failed to convene an IEP meeting to review the Student's evaluations, review and revise the Student's IEP as necessary, and discuss and determine the Student's educational placement. Petitioner also did not prove that DCPS failed to provide the Student special education and related services, including behavioral support services and ESY, as required by his IEP.

### **III. RECORD**

Due Process Complaint Notice, filed August 14, 2009;  
DCPS Response to Parent's Administrative Due Process Complaint Notice, filed August 27, 2009;  
DCPS Supplemental Response to Parent's Administrative Due Process Complaint Notice, filed September 18, 2009;  
DCPS Five-Day Disclosure Statement, listing three witnesses and including seven proposed exhibits, filed September 24, 2009;  
Petitioner's Five-Day Disclosure Statement, listing four witnesses and including ten proposed exhibits, filed September 25, 2009;  
DCPS Amended Five-Day Disclosure Statement, listing four witnesses and including no additional proposed exhibits, filed September 28, 2009; and  
Prehearing Conference Order, issued September 30, 2009.

### **IV. ISSUES PRESENTED**

At the outset of the due process hearing, the parties reached an agreement on Petitioner's claim that DCPS had failed to evaluate the Student. The parties agreed that DCPS would conduct comprehensive psychological and speech-language evaluations of the Student within thirty calendar days. The parties further agreed that, if DCPS fails to complete the comprehensive psychological and speech-language evaluations within thirty calendar days, Petitioner may obtain the evaluations independently at DCPS expense.

This Hearing Officer interprets Petitioner's remaining claims as essentially:<sup>2</sup>

A. Whether DCPS failed to convene an IEP meeting to review the Student's evaluations, review and revise the Student's IEP as necessary, and discuss and determine the Student's educational placement.

B. Whether DCPS failed to convene a manifestation meeting and conduct a functional behavioral assessment ("FBA") after the Student received numerous suspensions of more than ten days;

C. Whether DCPS failed to provide the Student special education and related services, including behavioral support services and ESY, as required by his IEP; and

D. Whether DCPS failed to provide the Student an appropriate educational placement.

## V. FINDINGS OF FACT

1. The Student is a sixteen-year-old, ninth-grade, special-education student who attends a District of Columbia senior high school.<sup>3</sup> The Student was not promoted from ninth grade after he failed the 2008-2009 school year.<sup>4</sup> The Student's February 26, 2009, IEP classifies his disability as learning disabled.<sup>5</sup> The Student has difficulty pronouncing words with "sh" and "ch."<sup>6</sup>

2. Petitioner attended by phone the February 26, 2009, meeting at which the Student's IEP was developed.<sup>7</sup> This IEP requires the Student to receive twenty hours per week of specialized instruction outside the general education setting, and one hour per week of behavioral support services.<sup>8</sup>

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<sup>2</sup> Petitioner also did not pursue her claim that DCPS failed to provide access to the Student's educational records.

<sup>3</sup> Testimony of Petitioner.

<sup>4</sup> *Id.*; Petitioner Exhibit 4 (2008-2009 DCPS transcript).

<sup>5</sup> Petitioner Exhibit 6.

<sup>6</sup> Testimony of Petitioner.

<sup>7</sup> Testimony of Petitioner.

<sup>8</sup> Petitioner Exhibit 6.

3. The Student's previous IEP was developed on January 31 2008.<sup>9</sup> Petitioner signed the March 31, 2008, IEP and indicated that she agreed with its contents.<sup>10</sup>

4. The Student missed thirty days of school during the 2008-2009 school year.<sup>11</sup> These absences reflect suspensions because Petitioner drops the Student off at school every day and watches him enter the building.<sup>12</sup> The Student was suspended for walking out of his classroom, lingering in the hallways, and behavioral issues.<sup>13</sup> Even though the Student was suspended for a total of more than ten days, DCPS never invited Petitioner to a manifestation meeting or any other meeting to discuss the Student's suspensions.<sup>14</sup>

5. DCPS did not provide the Student psychological counseling during the 2008-2009 school year.<sup>15</sup> Of the nine classes on the Student's 2008-2009 transcript, only one to three of the classes were resource classes (taught outside of the general education setting).<sup>16</sup> Thus, DCPS was not providing the Student twenty hours per week of specialized instruction outside of the general education setting.

6. The non-public school is a therapeutic environment that offers both individual and group therapy to its students.<sup>17</sup> It has a behavior modification program based on a point system that rewards the students for good behavior.<sup>18</sup> The non-public school has full-time social workers on staff to provide counseling to its students, and offers occupational therapy, physical therapy, and speech and language therapy.<sup>19</sup>

7. The Student would receive individualized programming and individual support at the non-public school.<sup>20</sup> The Student's classes at the non-public school would be comprised of ten students, including the Student, one special education teacher, and one teaching assistant.<sup>21</sup> The non-public school also employs a full-time reading specialist who can help the Student progress in reading.<sup>22</sup>

8. The non-public school offers vocational programs including cosmetology, barbering, information technology, graphic design, and childcare.<sup>23</sup> Thus, the non-public school would be an appropriate educational setting for the Student.

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<sup>9</sup> DCPS Exhibit 3.

<sup>10</sup> *Id.*

<sup>11</sup> Petitioner Exhibit 4 (2008-2009 transcript).

<sup>12</sup> Testimony of Petitioner.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Testimony of DCPS special education coordinator ("SEC").

<sup>17</sup> Testimony of non-public school admissions director.

<sup>18</sup> Testimony of DCPS special education coordinator ("SEC").

<sup>19</sup> Testimony of DCPS special education coordinator ("SEC").

<sup>20</sup> *Id.*

<sup>21</sup> Testimony of DCPS special education coordinator ("SEC").

<sup>22</sup> Testimony of DCPS special education coordinator ("SEC").

<sup>23</sup> *Id.*

## VI. CREDIBILITY DETERMINATIONS

The testimony of Petitioner was credible in all aspects except her testimony regarding the number of days the Student was suspended and whether the Student received special education classes during the 2008-2009 school year. Petitioner testified that the Student was suspended 80 percent of the 2008-2009 school year, but later contradicted this testimony when she testified that the Student was suspended from fifty to fifty five days of the school year. Petitioner also could not recognize the Student's special education classes on his transcript and thus thought he was not receiving specialized instruction. Otherwise, Petitioner was credible, as were the DCPS Special Education Coordinator ("SEC") and the non-public school admissions director.

## VII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.<sup>24</sup> Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.<sup>25</sup>

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.<sup>26</sup> FAPE is defined as:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...<sup>27</sup>

Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."<sup>28</sup> FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction."<sup>29</sup>

DCPS is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."<sup>30</sup> In deciding whether DCPS provided the Student a FAPE, the inquiry is limited to (a) whether DCPS complied with the procedures set forth in IDEIA; and (b)

<sup>24</sup> *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

<sup>25</sup> 20 U.S.C. § 1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

<sup>26</sup> 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1).

<sup>27</sup> 20 U.S.C. § 1401(9), 34 C.F.R. § 300.17, 30 DCMR Sec. § 3001.1.

<sup>28</sup> 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1.

<sup>29</sup> *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

<sup>30</sup> 34 C.F.R. § 300.101.

whether the Student's IEP reasonably calculated to enable the Student to receive educational benefits.<sup>31</sup>

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.<sup>32</sup> In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.<sup>33</sup>

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.<sup>34</sup> The court should not "disturb an IEP simply because [it] disagree[s] with its content."<sup>35</sup> The court is obliged to "defer to educators' decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides."<sup>36</sup>

## VIII. DISCUSSION

### A. DCPS Convened a Timely IEP Meeting with All Necessary Participants, Including Petitioner but Failed to Convene a Manifestation Meeting after the Student was Suspended for More than Ten Days.

Every IEP Team must include the parents of the child, at least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment) and at least one special education teacher of the child. 34 C.F.R. § 300.321. Procedural inadequacies that seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of a free and appropriate public education ("FAPE").<sup>37</sup>

School personnel may remove a child with a disability who violates a code of conduct from his current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days.<sup>38</sup> School personnel may

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<sup>31</sup> *Rowley* at 206-207.

<sup>32</sup> 20 U.S.C. § 1415 (f)(3)(E)(ii).

<sup>33</sup> *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord*, *Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error").

<sup>34</sup> *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *See, e.g., W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992).

<sup>38</sup> 34 C.F.R. § 300.530.

suspend a student for not more than 10 consecutive school days in that same school year for separate incidents of misconduct.<sup>39</sup>

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, DCPS, the parent and relevant members of the child's IEP team must review all relevant information in the student's file to determine whether the conduct in question was caused by, or had a direct and substantial relationship to the child's disability.<sup>40</sup>

Here, Petitioner testified that she attended both the January 31, 2008, meeting at which the Student's IEP was developed and the February 26, 2009, meeting at which the Student's subsequent IEP was developed. The Student was suspended for at least thirty days during the 2008-2009 school year, yet DCPS never held a meeting to discuss the Student's behavioral problems or suspensions.

Thus, Petitioner proved that DCPS failed to convene a manifestation meeting.

**B. DCPS Failed to Implement the Student's 2008-2009 IEP.**

The Student's IEP required DCPS to provide him specialized instruction outside the special education environment for twenty hours a week, which is at least two-thirds of the Student's class schedule. Yet, of the nine classes on the Student's 2008-2009 transcript, all but potentially three of his classes are general education classes. Moreover, DCPS failed to provide the Student the hour-per-week of psychological counseling required by his IEP.

Thus, Petitioner proved by a preponderance of the evidence that DCPS failed to implement the Student's IEP.

**C. DCPS Denied the Student FAPE by Failing to Provide an Appropriate Educational Placement.**

IDEIA does not require DCPS to "maximize the potential" of this Student. *Kerkam v. McKenzie*, 882 F.2d 884, 886 (D.C. Cir. 1988) (citing *Bd. of Ed. v. Rowley*, 458 U.S. 176, 189, 197 n. 21, 198, 199 (1982)). Rather, it only has to provide a "basic floor of opportunity." *Id.*

Where the public school agency has failed to provide the child with a FAPE, hearing officers and courts are empowered to provide the equitable relief of tuition reimbursement and prospective placement in an appropriate private school. *Reid v. District of Columbia*, 401 F.3d 516, 522-523 (D.C. Cir. 2005). *See also Burlington v. Dept. of Ed.*, 471 U.S. 359, 370 (1985) (where that a private placement desired by the parents was proper under IDEA. . . . appropriate relief would include directing school officials to develop and implement an IEP placing the child in a private school, at public expense).

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<sup>39</sup> *Id.*

<sup>40</sup> 34 C.F.R. § 300.530 (e).

When, as in this case, a public school system has failed to provide an appropriate education, a private school placement is "proper under the Act" if the education provided by the private school meets the Act's educational goals. *Carter v. Florence County*, 950 F.2d 156, 163 (4th Cir. 1991) *aff'd* 510 U.S. 7 (1993); *Burlington*, 471 U.S. at 370; *Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994).<sup>41</sup>

Here, DCPS failed to implement the Student's IEP for an entire school year, which resulted in the Student failing the ninth grade. Moreover, the Student has exhibited serious behavioral problems, which resulted in suspensions of at least thirty days, yet DCPS failed to provide the Student the psychological counseling he requires. Because DCPS failed to provide the Student the floor of opportunity he requires to be successful academically, this Hearing Officer finds that DCPS failed to provide the Student an appropriate educational placement.

Thus, Petitioner proved by a preponderance of the evidence that DCPS denied the Student an appropriate placement.

### ORDER

Upon consideration of Petitioner's requests for a due process hearing, the exhibits and the testimony admitted at the hearing, it is this 26th day of September 2009 hereby:

**ORDERED** that, within 30 calendar days, DCPS shall conduct a functional behavioral assessment, comprehensive psychological evaluation and a speech-language evaluation of the Student;

**IT IS FURTHER ORDERED** that, if DCPS fails to complete the functional behavioral assessment, comprehensive and speech-language evaluations within 30 days, Petitioner shall obtain independent comprehensive psychological and speech-language evaluations within 60 day at DCPS expense;

**IT IS FURTHER ORDERED** that, if Petitioner obtains an independent functional behavioral assessment, and comprehensive psychological and speech-language evaluations, within five business days of receiving the evaluations and reports, Petitioner shall fax copies of the evaluations and reports to the Office of Special Education Resolution Team at (202) 645-8828;

**IT IS FURTHER ORDERED** that, within 10 school days of receipt of both evaluations and reports, DCPS shall hold a meeting to review the Student's comprehensive psychological and speech-language evaluations, and, as necessary, review and revise the Student's IEP, develop a behavior implementation plan, and discuss placement;

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<sup>41</sup> DCPS may not "now propose an alternative placement where its failure to do so in the first instance violated the requirements of the Act." *Wirta*, 859 F. Supp. at 5.

**IT IS FURTHER ORDERED** that DCPS shall receive one day of delay for conducting the evaluations and holding the meeting required by this Order for every day of delay caused by the Student, Petitioner, her counsel, or her educational advocate;

**IT IS FURTHER ORDERED** that the Student shall attend the non-public school at DCPS expense for the 2009-2010 school year;

**IT IS FURTHER ORDERED** that DCPS shall provide the Student transportation services to and from the non-public school on school days;

**IT IS FURTHER ORDERED** that DCPS shall ensure that Petitioner and the Student are present at all future IEP/MDT meetings before proceeding with any meeting regarding the Student's IEP; and

**IT IS FURTHER ORDERED** that this Order is effective immediately.

By: /s/ Frances Raskin  
Frances Raskin  
Hearing Officer

#### **NOTICE OF APPEAL RIGHTS**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).

Distributed to:

Chike Ijeabunwu, Attorney at Law  
Laura George, Attorney at Law  
Hearing Office