

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

Student Hearing Office  
810 First Street, NE, Second Floor  
Washington, DC 20002

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██████████, on behalf of  
██████████

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No: 2012-0541

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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STUDENT HEARING OFFICE  
2012 OCT -4 AM 8:05

**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY**

Student is a ██████████, who presently attends a specialized program at a DCPS senior high school. On August 8, 2012, Petitioner filed a Complaint against DCPS, alleging the following ten claims: (1) violation of IDEA's Child Find provision; (2) failure to make an eligibility determination within 120 days of Parent's request for special education services; (3) failure to evaluate in all areas of suspected disability; (4) failure to comply with the proper disciplinary procedures during school year ("SY") 2011/12; (5) failure to provide Student with transportation during SY 2011/12; (6) illegal withdrawal of Student from his school of attendance; (7) failure to issue prior notices; (8) failure to update Student's IEP annually; (9) failure to place Student in an appropriate school for SY 2011/12; and (10) failure to provide Student with educational benefit. As relief for these alleged denials of FAPE, Petitioner requested placement and funding at a specified private school with transportation via a school bus; an MDT/IEP meeting within 30 days of the requested placement; and compensatory education in the form of placement at the specified private school in the event the hearing officer declines to order it based on appropriateness.

On August 17, 2012, DCPS filed its Response, which asserted the following defenses to the ten claims alleged by Petitioner: (1) DCPS did not violate IDEA's Child Find provision because there were no clear indications while Student was attending his previous school that he suffered from a disability that impacted his ability to learn; (2) DCPS denies making a determination more than 120 days after Parent's request for special education services; (3) DCPS did not fail to evaluate in all areas of suspected disability because there are various agencies that are providing

services to Student, including Child and Family Services, Court Social Services and the Department of Youth and Rehabilitation Services, and upon information and belief, DCPS did not order a social history for Student; (4) DCPS did not fail to comply with proper disciplinary procedures because, despite Petitioner's allegation to the contrary, DCPS denies that Student was ever suspended for 10 days, so DCPS was not required to conduct a manifestation determination meeting for Student; (5) Student was homeless during various points in the school year and DCPS was not always provided with updated addresses, so DCPS could not always send a school bus to pick up Student, but DCPS nevertheless attempted to provide Student with daily metro cards although those efforts were unsuccessful because Student refused to come to school; (6) DCPS did not illegally withdraw Student from school, as he was dropped from the rolls due to non-attendance; (7) no Prior Notice was required pursuant to IDEA upon dropping Student from the rolls for non-attendance; (8) Student's IEP was updated on March 28, 2012 at an IEP meeting; (9) Student's assigned school was able to implement his IEP but Student failed to avail himself of the services offered; and (10) despite the efforts made by school staff, Student failed to avail himself of the services that were put in place to ensure he received some educational benefit.

The parties concluded the Resolution Meeting process by participating in a resolution session on August 24, 2012. This is an expedited discipline case, so the timeline will end on October 3 2012, which is 10 school days after the hearing and is also the HOD deadline.

On August 30, 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 issued a Prehearing Order on September 5, 2012.

By letter dated September 11, 2012, DCPS disclosed fifteen documents (Respondent's Exhibits 1-15). By letter dated September 12, 2012, Petitioner disclosed seventy documents (Petitioner's Exhibits 1-70).

The due process hearing was scheduled for two days, but the parties only required one day to completely present their respective cases. The hearing officer convened the hearing on September 19, 2012.<sup>1</sup> Both parties' exhibits were admitted without objection. Thereafter, DCPS raised the affirmative defense of the statute of limitations with respect to Petitioner's first three claims. The hearing officer acknowledged Petitioner's position that the defense should have been raised earlier, but as the statute of limitations goes to jurisdiction and jurisdictional objections can be raised at any time during the proceeding, the hearing officer received arguments in favor of and against the defense. After careful consideration, the hearing officer ruled that (1) Petitioner's first claim regarding Child Find is time-barred by IDEA's two-year statute of limitations because the alleged violation occurred during SY 2009/10, which is outside the limitations period, and Parent knew or should have known of the claim because she was aware of Student's alleged struggles in school during that year, and (2) Petitioner's second claim regarding failure to evaluate within 120 days is time-barred because the request for evaluations was made on March 29, 2010 and the claim accrued once 120 days passed, which was on or about the end of July, which is outside of the 2-year limitations period, but (3) Petitioner's third claim regarding the failure to evaluate is not time-barred because the alleged failure to evaluate

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<sup>1</sup> Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

is an ongoing violation which has not yet been remedied, so if Petitioner can prove the claim as of two years prior to the filing of the Complaint and moving forward into the present, Petitioner can prevail on the claim.

Thereafter, the hearing officer received Petitioner's opening statement, DCPS reserved its opening statement to the start without objection from Petitioner, and Petitioner presented its testimonial evidence. At the close of Petitioner's case, DCPS made a motion for a directed verdict with respect to Petitioners' third, fourth and ninth claims. After carefully considering the parties' arguments and highlighted documentary and testimonial evidence for and against the motion, the hearing officer denied DCPS's motion for a directed verdict. Thereafter, DCPS presented the testimony of its witnesses and the hearing officer received both parties' closing statements prior to bringing the hearing 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 IDEA, 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. Did DCPS fail to evaluate Student in all areas of suspected disability?
2. Did DCPS fail to comply with proper disciplinary procedures during SY 2011/12?
3. Did DCPS fail to provide Student with transportation during SY 2011/12?
4. Did DCPS illegally withdraw Student from his school of attendance?
5. Did DCPS deny Student a FAPE by failing to issue prior notices?
6. Did DCPS fail to update Student's IEP annually?
7. Did DCPS fail to place Student in an appropriate school for SY 2011/12?
8. Did DCPS fail to provide Student with educational benefit?

### **FINDINGS OF FACT**<sup>2</sup>

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<sup>2</sup> 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.

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 currently attends a specialty program at a DCPS school.<sup>3</sup>
2. On May 4, 2010, DCPS developed a Student Evaluation Plan, which provided for Student to receive a comprehensive psychological evaluation, a social history, and an educational assessment. The Notes from Student's May 4, 2010 MDT meeting indicate that Student had been attending a DCPS middle school when he was transferred to YSC, that the coordinator at YSC would ensure the psychological evaluation, educational assessment and social history would be administered or at least started, and if Student left YSC and returned to a DCPS school that DCPS school would finish any of the tests that hadn't been completed.<sup>4</sup>
3. Student's May 25, 2010 psychoeducational evaluation, administered when Student was 14.5 years old in the 8<sup>th</sup> grade, resulted in Verbal Comprehension and Working Memory and Full Scale IQ scores in the Borderline range, a Perceptual Reasoning score in the Low Average range, and a Processing Speed score in the Extremely Low range. Moreover, Student received the following grade equivalency ("GE") scores: Broad Reading – 3.5 GE; Broad Math – 7.3 GE; Broad Written Language – 4.5 GE; and Academic Skills – 4.9 GE.<sup>5</sup>
4. In approximately July or August of 2010, Student was sent to a residential treatment center ("RTC"), where he began receiving grades of primarily Bs and Cs, as opposed to the Ds and Fs he had begun receiving in 7<sup>th</sup> grade during SY 2009/10. The student-teacher ratio at the RTC is 8 to 1, with a maximum of 10-12 students per class. The RTC uses mental health technicians as aides, and there are currently 85 students in total at the school. Student performed fairly well at the school because he completed his work, although he did have difficulty dealing with authority figures. Upon Student's discharge from the RTC, the RTC's Director of Education recommended a private day school with a small therapeutic setting for him because she felt a public school would be too large for Student and it would be too difficult for Student to go from the full-time therapeutic environment at the RTC to no therapeutic services at all in a public school setting.<sup>6</sup>
5. Student's August 13, 2010 identified his disability as Emotional Disturbance ("ED") and required him to receive 26 hours per week of specialized instruction and 1.5 hours of counseling.<sup>7</sup>

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<sup>3</sup> See Complaint at ¶ 1.

<sup>4</sup> Petitioner's Exhibit 53; Respondent's Exhibit 1.

<sup>5</sup> Petitioner's Exhibit 50; Respondent's Exhibit 15.

<sup>6</sup> Testimony of Parent; testimony of Director of Education at RTC; see Petitioner's Exhibit 40.

<sup>7</sup> Petitioner's Exhibit 46; Respondent's Exhibit 6.

6. Student's May 11, 2011 IEP identifies Student's primary disability as ED and requires him to receive 26 hours per week of specialized instruction and 1.5 hours per week of behavioral support services, with all services to be provided outside general education. The IEP indicates that Student does not require transportation services.<sup>8</sup>
7. The Notes from Student's May 11, 2011 Step Down IEP meeting indicate that Student's discharge from the RTC was pending and the MDT proposed that Student transition to a school with a small classroom size and therapeutic education model. DCPS proposed a program at a DCPS school, but parent and her attorney requested a nonpublic day program. DCPS represented that the DCPS program could provide FAPE in the LRE and that it offered programming with small classroom sizes, as well as therapeutic and staff supports which would provide Student with the recommended structured setting. The Notes also indicate that Student would require transportation upon his discharge from the RTC.<sup>9</sup>
8. DCPS assigned Student to attend the proposed DCPS program, although it had been moved to Student's current DCPS school. Student began attending that program in September 2011 and continues to attend the program in the current school year.<sup>10</sup>
9. The DCPS program was designed to be a therapeutic facility for students who are ED, SLD or MD. It is intended to provide a self-contained small learning environment with special education teachers in every class, and it also has social workers and behavioral support staff. The average class size is approximately 10 students.<sup>11</sup>
10. Beginning in approximately October of 2011, the DCPS school began calling Parent and saying that Student was misbehaving. Initially, the school would call and say that Student was being sent home for misbehavior approximately three to four times each week. Then later, the school stopped calling and began sending Student home with a slip he had been given to prevent him from being picked up by truancy officers. Student was sent home in this manner throughout the entire 2011/12 SY. However, Parent did not save the slips Student received and cannot say with certainty exactly how many times Student was sent home and how many hours of school he missed on each occasion. Parent is sure, however, that Student was suspended for three days in November prior to the Thanksgiving holiday.<sup>12</sup>
11. Although an IEP team decided at Student's December 13, 2011 IEP meeting that Student would be allowed to take breaks in school, those breaks were never implemented.<sup>13</sup>

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<sup>8</sup> Petitioner's Exhibit 43.

<sup>9</sup> Petitioner's Exhibit 42.

<sup>10</sup> Petitioner's Exhibits 41 – 42; testimony of Parent.

<sup>11</sup> See testimony of Dean of Students at current DCPS school.

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

<sup>13</sup> See Petitioner's Exhibit 37; testimony of Parent.

12. On or about December 13, 2011, DCPS and Parent, respectively, executed a "Standard IEP Amendment Form (Parent Initiated)," which provided for the following change: "Add transportation services." Accordingly, on December 13, 2011, DCPS issued an Amended IEP for Student that added transportation services. The handwritten MDT Notes from Student's December 13, 2011 are less than clear; however, they indicate that (1) when DCPS stated that transportation tokens could only be delivered at 3:15 pm Parent said she wanted Student to take a school bus, (2) Parent's Attorney asked the school to come up with a plan for Student to take formal breaks during the class day, (3) an IEP meeting was scheduled for January 10, 2012 to consider placement, and (4) Student's BIP was formalized.<sup>14</sup>
13. Approximately one week after the December 13, 2011 IEP meeting, the bus began coming to pick up Student at Address #1, which represented the place where he resided at the time of the meeting.<sup>15</sup>
14. DCPS issued Student Transportation Forms for the periods from December 14, 2011 to December 12, 2012, and from January 11, 2012 to January 9, 2013, which provided that Student was to be transported by bus to and from Student Address #1.<sup>16</sup>
15. On December 29, 2011, DCPS issued a Prior Written Notice – IEP Amendment form regarding the addition of transportation services to Student's IEP.<sup>17</sup>
16. On January 9, 2012, Petitioner's substitute counsel advised DCPS by email that she would be standing in for Parent's Attorney, who was on maternity leave, and wished to reschedule the MDT meeting scheduled for that week because substitute counsel had just received the case. Thereafter, by emails dated January 10 and 23, Petitioner's substitute counsel again requested that DCPS reschedule Student's IEP meeting.<sup>18</sup>
17. Parent moved on January 30, 2012 to temporary housing in a hotel and left messages for the SEC and principal at Student's current school on the following Monday to advise them of the address change. When Parent moved again in February to a homeless shelter, she left the SEC a message indicating the address change. However, the school bus never came to pick Student up at either of his new addresses. Instead, DCPS began giving Student tokens to catch public transportation to and from school. However, the school's SEC began giving Student his tokens at the end of the school day to prevent him from leaving early, which made Student angry and resulted in complications because Student felt it was difficult for him to obtain the tokens and he could not understand why he was not allowed to get his tokens earlier in the day like the other students.<sup>19</sup>

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<sup>14</sup> Petitioner's Exhibits 35 - 37.

<sup>15</sup> Testimony of Parent.

<sup>16</sup> Petitioner's Exhibit 32; Respondent's Exhibit 13.

<sup>17</sup> Petitioner's Exhibit 12.

<sup>18</sup> Petitioner's Exhibits 27, 29 - 31.

<sup>19</sup> Testimony of Parent; testimony of DYRS Case Manager.

18. DCPS's current procedures require an amendment to a student's IEP to change the student's address. As a result, DCPS acknowledges that there were processing delays on DCPS's part in updating Student's address when he had several address changes.<sup>20</sup>
19. An IEP meeting for Student was scheduled for February but it did not take place. Student's Department of Youth Rehabilitation Services ("DYRS") Case Manager let several messages for the SEC at Student's school during the months of February and March in an attempt to have the meeting rescheduled. The Case Manager wanted to have a meeting to address Student's truancy issues, but no one at the current DCPS school ever spoke with her regarding things the school could do to improve attendance.<sup>21</sup>
20. On March 13 and April 2, 2012, DCPS prepared Letters of Invitation ("LOIs") to Parent for a March 28, 2012 meeting. However, there is no evidence that Parent actually received the LOIs. To the contrary, Parent credibly testified that she did not know about the meeting.<sup>22</sup>
21. On March 14, 2012, Student's current DCPS high school sent Parent a notice advising that Student was having academic problems and was in danger of failing biology due to missing assignments and excessive absences. On March 14 2012, the school sent Parent a notice stating that Student was having academic problems and in danger of failing Algebra I for the third advisory due to lack of effort, excessive absences, and missing absences.<sup>23</sup>
22. On March 22, 2012, Petitioner's second substitute counsel advised DCPS by email that she and substitute counsel had gone to DCPS for the scheduled IEP meeting on February 28, 2012 and were advised that the meeting had been cancelled and would be rescheduled by DCPS, but DCPS failed to follow up even though second substitute counsel had called and left a message regarding the rescheduling of the meeting. Second substitute counsel also advised DCPS that Student and Parent were homeless and residing in a hotel, and inquired whether DCPS would be able to provide bus transportation or tokens for Student.

By reply email on March 22, DCPS confirmed an MDT meeting for April 17<sup>th</sup> and offered to amend Student's IEP to change his address of record for purposes of bus transportation. DCPS asked counsel to forward the new address if the IEP amendment would be acceptable.<sup>24</sup>
23. On March 26, 2012, Petitioner's second substitute provided DCPS with Student Address #2.<sup>25</sup>

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<sup>20</sup> Testimony of SEC at current DCPS school.

<sup>21</sup> Testimony of DYRS Case Manager.

<sup>22</sup> Respondent's Exhibits 9 - 10; testimony of Parent.

<sup>23</sup> Petitioner's Exhibits 24 - 25.

<sup>24</sup> Petitioner's Exhibits 22-23.

<sup>25</sup> Petitioner's Exhibit 20.

24. DCPS developed an IEP for Student on or about March 28, 2012, which identifies Student's primary disability as ED and requires him to receive 26 hours per week of specialized instruction, 1.5 hour per week of behavioral support services, and 45 minutes per month of behavioral support consultation services in an out of general education environment. The IEP also states that Student requires transportation services. The first page of the IEP indicates that an Annual Review meeting was held for Student on March 28, 2012, which Student's special education teacher/evaluator, the school SEC and a general education teacher attended in person, but Parent and Student did not attend.<sup>26</sup>
25. Parent did not attend the March 28, 2012 meeting because she did not know about it and was not invited to attend the meeting. As far as Parent was aware, there were no additional IEP meetings held for Student after his December 13, 2011 meeting.<sup>27</sup>
26. By email on the morning of April 17, 2012, Petitioner's substitute counsel advised DCPS that Parent and counsel wished to go forward with the IEP meeting at 2 pm that day. A representative of Petitioner's counsel's office contacted DCPS again on April 18, 2012. Then by email dated April 23, Parent's Attorney advised DCPS that she was back from maternity leave and wished to reschedule Student's IEP meeting as soon as possible. Counsel again provided DCPS with Student Address #2 and advised that Parent wanted to have the bus begin transporting Student to and from that location.<sup>28</sup>
27. By letter dated April 26, 2012, and emails dated April 30 and July 30, Parent's Attorney requested that DCPS reschedule Student's IEP meeting. The April 26<sup>th</sup> letter also requested bus transportation for Student.<sup>29</sup>
28. A DCPS Notes and Incidents Report indicates that during SY 2011/12 indicates that DCPS sent Attendance and/or Failure/Attendance notices to Parent on October 18 and October 27 of 2011, and on January 9 and March 5, and March 26 of 2012. However, other evidence in this case demonstrates that any letters sent subsequent to January 30, 2012 were not sent to Parent's correct address. DCPS also called Parent and either spoke to her or left messages regarding Student's attendance and/or behavior issues on November 3 and November 6 of 2011, and on March 11 of 2012. DCPS attempted to call Parent but was unable to get through on October 17, 2011 and March 14, 2012.<sup>30</sup>
29. Student's attendance at his current DCPS school during SY 2011/12 was very poor. On average, he attended school approximately one to two times per week from the beginning of the school year. The school attempted to contact Parent by phone

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<sup>26</sup> Respondent's Exhibit 11.

<sup>27</sup> Testimony of Parent.

<sup>28</sup> Petitioner's Exhibit 16.

<sup>29</sup> Petitioner's Exhibits 12 - 15.

<sup>30</sup> Testimony of Parent.

several times and sent letters home; however, the school never conducted a functional behavior assessment (“FBA”) or prepared a behavior intervention plan (“BIP”) to address Student’s attendance issues. The school made two attempted home visits, but one was to a home where Student no longer lived, and it is possible the second visit was to an outdated address as well. In any event, there was no connection with Parent on either visit.<sup>31</sup>

30. In April 2012, DCPS dropped Student from the rolls of his current school. Parent received a call from the attendance counselor at the school and she advised the counselor that an IEP meeting was scheduled to take place within a week or two. Nevertheless, Student went to school one day before the meeting was to take place and came back home saying that he had been dropped from the rolls. The scheduled meeting never went forward, and no other meeting was held before or after Student was dropped. DCPS did not inform Parent of another school that Student could attend after he was dropped. As a result, Student did not attend school at all after he was dropped from the rolls.

Parent attempted to re-enroll Student in April but was told that Student had to come to the school with her first. Parent scheduled a meeting, which took place in or about May, and Student was re-enrolled after he signed an agreement stating that he would go to school. The attendees at the meeting were Parent, Student, the attendance counselor, the school principal, the secretary for Student’s program, and the school social worker. Hence, the social worker was the only DCPS member of Student’s special education team in attendance at the meeting.<sup>32</sup>

31. DCPS dropped Student from its rolls because it has very strict truancy guidelines. After 25 days of absenteeism and multiple efforts to try to help a student, the student is dropped from the rolls.<sup>33</sup>

32. Parent visited Student’s school frequently during SY 2011/12 – at least once per month. On her first visit in September, the school seemed very orderly and under controlled. But on every visit thereafter beginning in October, students were running through the halls, the door that separated Student’s program from the rest of the high school was unlocked, and there was not an orderly and controlled environment.<sup>34</sup>

33. At the end of SY 2011/12, Student received Ds in his Physical Education and Employability Skills classes, and Fs in his remaining 8 classes.<sup>35</sup>

34. As of August 21, 2012, Student had earned 1.5 credits toward graduation.<sup>36</sup>

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<sup>31</sup> Testimony of Dean of Students at current DCPS school.

<sup>32</sup> Testimony of Parent.

<sup>33</sup> Testimony of Dean of Students at current DCPS school.

<sup>34</sup> Testimony of Parent.

<sup>35</sup> Petitioner’s Exhibit 9.

<sup>36</sup> Petitioner’s Exhibits 10.

35. Student is in the 9<sup>th</sup> grade, but he should be in 10<sup>th</sup> grade based on his age. Student reads on a 2<sup>nd</sup> grade level and cannot read a book of 150 pages because he will give up due to not knowing the words in the book.<sup>37</sup>

36. By email dated August 27, 2012, Parent's Attorney advised DCPS that the Parent Transportation Call Center still had Student's "very old address" in its system, provided Student's Address #3 at a group home as well as Parent's phone number, and asked DCPS to ensure Student's address was changed in the system because the Call Center indicated that Student's school of attendance had to make the change. This email was prompted by a call Parent received prior to the start of SY 2012/13, which advised her that the bus would pick Student up from Student Address #1 on the first day of school.

By emails dated August 28, 29 and 30, Parent's attorney advised DCPS that the school bus never arrived to pick up Student on those mornings and asked DCPS to take action to correct the situation. Counsel once again provided DCPS with Student's Address #3 in the August 30, 2012 email.<sup>38</sup>

37. By letter dated August 24, 2012, the private school referenced in Petitioner's request for relief advised Parent that Student had been accepted for admission into the school and could begin attending the school once the school received the necessary placement documents and transportation had been arranged. Student's DYRS Case Manager completed the referral form for Student for this school. She found the school when looking for another school for Student to attend, and she believed the school would be good for Student because it offers a year-round program with a component to address truancy and programs that would allow Student work with his hands.<sup>39</sup>

38. The private school that has accepted Student for admission is located in the District of Columbia and services males from grade 9 through 12 that have ED or are learning disabled. The mission of the school is to create an emotionally supportive, nurturing, safe environment that honors each student's individuality in both the academic and vocational components of the school. The school services District of Columbia students and aligns the curriculum to follow District standards for these children. The school offers diplomas for children from the District.

There are currently a total of 20 students enrolled at the school. A maximum of 8 students are allowed in each class, although there are only a maximum of 6 students in each class at the present time. There are also one teacher and one paraprofessional in each class. There are also dedicated aides in some classes, as four of the students at the school have dedicated aides.

There is a clinical therapist at the school, and all students receive 1-on-1 therapy. Each student has an individualized behavior program, and the school offers a token reward program that allows students to earn points in each class and then use

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<sup>37</sup> Testimony of Parent.

<sup>38</sup> Petitioner's Exhibits 1-3, 5; testimony of Parent.

<sup>39</sup> Petitioner's Exhibit 7; testimony of DYRS Case Manager.

total points earned at the school store at the end of the week. Students can also earn special activities with their points.

If a student gets really out of control at the school, as a last resort they will restrain the student. However, prior to that step, they will try to talk a student down or escort a student to the transition room where the student can transition and de-escalate. Students are also allowed to walk around and process with staff to calm down.

If a District of Columbia student has attendance issues, the school follows the District's attendance rules. These rules involve contacting the parent, documenting absences, contacting the LEA, and scheduling a meeting for parent come in and discuss truancy issues. The school also does home visits.

The school offers a variety of vocational programs, including automotive, barbering, emergency medical technician, computer technology, and carpentry.<sup>40</sup>

39. The private school that has accepted Student for admission can implement Student's IEP. The school currently services students who are funded by the District of Columbia, and the school has a provisional Certificate of Occupancy from OSSE.<sup>41</sup>
40. The private school is appropriate for Student, and it is reasonably calculated to confer the educational benefits Student is entitled to receive under IDEA.

### 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 Evaluate in All Areas of Suspected Disability**

Under IDEA, a public agency conducting the evaluation of a disabled child must ensure that a variety of assessment tools and strategies are used to gather relevant functional, developmental, and academic information about the child, including information provided by the parent. *See* 34 C.F.R. § 300.304(b)(1). The public agency must also ensure that the 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).

In the instant case, Petitioner argues that DCPS denied Student a FAPE by failing to conduct a social history for Student, even though Student's May 4, 2010 SEP required Student to receive a social history. DCPS argues that Petitioner did not meet its burden of proof on this claim. However, the evidence proves otherwise. Petitioner's documentary evidence includes Student's May 4, 2010 SEP plan, which was developed by DCPS and required Student to receive a social history as part of his initial evaluation. Moreover, the Notes from Student's May 4, 2010 IEP meeting clearly indicate that although Student was committed to DYRS when the SEP was

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<sup>40</sup> Testimony of private school's Education Director.

<sup>41</sup> *Id.*

developed, if he left DYRS and returned to a DCPS school that DCPS school would finish any of the tests that hadn't been completed.

There is no dispute here that a social history was never conducted for Student. Instead, DCPS initially argued that the claim was time-barred, and it later argued that there was no proof DCPS ordered a social history for Student. The hearing officer ruled as a preliminary matter that this claim involves a continuing violation, such that Petitioner can pursue the claim back to August 8, 2010, which is two years prior to the filing of the Complaint. And as noted above, the hearing officer has determined herein that Petitioner met its burden of proving that DCPS ordered a social history for Student but one was never conducted. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proof on this claim.

Moreover, based upon the evidence in this case demonstrating that Student has issues with authority figures, has experienced severe attendance issues since he began attending his current school, and has also exhibited repeated behavior problems at his current school since October 2011, which was a month after he began attending the school, the hearing officer concludes that DCPS's failure to conduct a social history for Student so it could gather information that potentially could have been helpful in attempting to address Student's behavior and attendance issues rose to the level of a substantive violation. *See* 34 C.F.R. § 300.513(a)(2) (hearing officer may find denial of FAPE where procedural inadequacies impeded child's right to a FAPE or caused a deprivation of educational benefit); *Lesesne v. D.C.*, 447 F.3d 828 (D.C. Cir. 2006) (IDEA claim viable where procedural violations affect student's substantive rights). As a result, the hearing officer will order DCPS to conduct the required social history for Student.

## **2. Alleged Failure to Comply with Proper Disciplinary Procedures During SY 2011/12**

IDEA provides that after a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must continue to provide educational services to the student. *See* 34 C.F.R. § 300.530(b)(2) and (d)(1)(i). The child must also receive, as appropriate, an FBA, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. 34 C.F.R. § 300.530(d)(1)(ii). These services may be provided in an interim alternative educational setting. 34 C.F.R. § 300.530(d)(2).

Moreover, 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, the LEA, the parent, and relevant members of the child's IEP team must review all relevant information in the student's file and determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or if the conduct in question was the direct result of the LEA's failure to implement the IEP. 34 C.F.R. § 300.530(e)(1)(i)-(ii). If either of these conditions is met, then the conduct must be determined to be a manifestation of the child's disability. 34 C.F.R. § 300.530(e)(2). If it is determined that the conduct in question was the direct result of the LEA's failure to implement the IEP, the LEA must take immediate steps to remedy those deficiencies. 34 C.F.R. § 300.530(e)(3). In addition, if it is determined that the behavior was a manifestation of the child's disability, the IEP team must either (i) conduct an FBA, unless one has already been conducted, and implement a BIP, or (ii) if a BIP has already been developed, review the

BIP and modify it as necessary to address the behavior; and return the child to his or her educational placement unless the parent and LEA agree to a change of placement as part of the modification of the BIP. 34 C.F.R. § 300.530(f). For purposes of these provisions, a change of placement occurs if a removal for disciplinary reasons is for more than 10 consecutive days or the child has been subjected to a series of removals that constitute a pattern (i) because the series removals total more than 10 school days in a year, (ii) because the child's behavior is substantially similar in the incidents that resulted in the series of removals, and (iii) because of additional factors, such as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 C.F.R. § 300.536(a).

In the instant case, Petitioner argues that Student was subjected to a series of removals during SY 2011/12 that constituted a pattern because Parent's testimony established that Student was sent home multiple times a week for months. Petitioner argues that these removals totaled more than 10 days altogether, and therefore, DCPS was required to conduct one or more manifestation determination reviews ("MDRs") for Student. DCPS disagrees. As an initial matter, DCPS argued that the act of sending Student home did not constitute a suspension that qualifies as a removal. DCPS further argued that Petitioner has failed to establish a pattern and is instead asking the hearing officer to speculate with respect to when Student was removed and how long the removals were for, with the result that Petitioner has failed to meet its burden of establishing that the alleged removals totaled more than 10 days.

Upon consideration of the parties' arguments, the hearing officer disagrees that the act of sending a student home for the remainder of a day cannot, under certain circumstances, constitute a removal. Indeed, the hearing officer notes that any other ruling would permit an LEA to evade the disciplinary protections IDEA provides for disabled children by simply sending the child home repeatedly and never subjecting the child to a formal, documented suspension. Nevertheless, upon review of the evidence in this case, the hearing officer is persuaded by DCPS's argument that the evidence fails to establish exactly when and for how long Student was removed from school. *See* Finding of Fact ("FOF") 10, *supra*. Hence, the hearing officer cannot determine whether Student was subjected to one or more changes of placement, and if so, how many MDRs were required and when they should have been held. As a result, the hearing officer concludes that Petitioner has failed to meet its burden of proof on this claim.

### **3. Alleged Failure to Provide Transportation During SY 2011/12**

A public agency satisfies its obligation of providing a disabled child with a FAPE by providing both the special education and related services that the disabled child requires, as determined by the child's IEP team and reflected in the child's IEP. *See* 34 C.F.R. §§ 300.17(d), 300.324(a)(1). In this regard, IDEA defines "related services" to include transportation. 34 C.F.R. § 300.34(a).

In the instant case, there is no dispute that Student's IEP team determined that he required transportation to and from school by bus, that Student's IEP was amended to reflect that need, and that DCPS initially sent the bus to pick up Student but later stopped sending the bus to pick up Student and began providing him with tokens and fare cards instead. Petitioner argues that DCPS's failure to continue sending the school bus to pick up Student contributed to his poor

attendance and ultimate failure during SY 2011/12, whereas DCPS argues that there was no failure to provide transportation in this case because DCPS determined to make the modification of providing tokens and fare cards instead of sending the bus. DCPS also argues that it was prevented from continuing to send the bus to pick up Student because he moved several times and DCPS was not provided with his new addresses.

Upon consideration of the evidence and parties' arguments, the hearing officer is persuaded by Petitioner's argument that DCPS's failure to continue sending the school bus to pick up Student contributed to Student's extreme attendance problems and ultimate failure. As an initial matter, the hearing officer notes there is no provision in IDEA that permitted DCPS to unilaterally decide to change Student's mode of transportation from the bus to tokens and fare cards. Hence, DCPS decision to change Student's mode of transportation from the bus to tokens and fare cards constituted a violation of IDEA, which requires that an IEP team decide the necessary related services for a disabled Student. The hearing officer further notes that the evidence proves that Parent and Parent's Attorney advised DCPS of Student's address changes, but DCPS failed to timely make the changes to its system due to DCPS procedures requiring an IEP amendment to change a student's address. There is also evidence that DCPS's SEC decision to only provide Student with his tokens at the end of the school day caused further complications with respect to Student's transportation services in light of Student's documented problems with authority figures. Finally, the evidence shows that Student's attendance problems after the bus stopped going to pick him up became so extreme that he ultimately was dropped from DCPS's rolls. Under these circumstances, the hearing officer concludes that Petitioner met its burden of proving a denial of FAPE with respect to this claim.

#### **4. Alleged Illegal Withdrawal of Student from School**

IDEA requires that a FAPE be made available to all children residing in a State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school. 34 C.F.R. § 300.101(a); see 5 DCMR § 3002.1(a)-(c).

In the instant case, Petitioner argues that DCPS violated the provision cited above by dropping Student from its rolls for lack of attendance. Petitioner argues that attendance issues often tie into a student's disability and the school has an obligation to address them. Petitioner further points out that DCPS did nothing to address Student's attendance problems other than send letters and make a couple of home visits to the wrong address. Petitioner points out that DCPS did not, *inter alia*, send the bus, have a meeting, conduct an FBA or develop a BIP prior to dropping Student from its rolls.

On the other hand, DCPS argues that it followed proper procedures in this case when it dropped Student from its rolls pursuant to its truancy laws, even though the truancy laws do not state that they are to be applied to disabled children. DCPS was unable to provide any other legal support for its position, even though the hearing officer instructed DCPS at the prehearing conference and in the Prehearing Order to present at the hearing any statutory, regulatory or case law support for its position that it may drop a disabled student from its rolls for attendance problems without violating the provisions of IDEA.

Upon consideration of the evidence in this case and the applicable law, the hearing officer is persuaded by Petitioner's position that DCPS violated IDEA by dropping Student from its rolls due to his attendance problems. *See Independent School Dist. No. 284, Wayzata Area Schools, Wayzata, Minnesota, v. A.C.*, Civil Action No. 00-2346MN (8<sup>th</sup> Cir. August 3, 2001) (If a behavior issue prevents a disabled child from receiving educational benefit, it needs to be addressed in the child's overall program of special education). Moreover, as the evidence shows that Student missed school for an entire month after DCPS dropped Student from its rolls because DCPS failed to assign an alternative location of services for Student to attend between April 2011, when Student was dropped, and May 2011, when DCPS allowed Parent to re-enroll Student, the hearing officer concludes that Petitioner met its burden of proving a denial of FAPE as a result of DCPS's violation of IDEA in this respect.

#### **5. Alleged Failure to Issue Prior Notices**

IDEA requires that written notice be given to the parents of a child with a disability a reasonable time before a public agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. § 300.503(a). Said written notice must include, *inter alia*, a description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, a description of other options the IEP team considered and the reasons why those options were rejected, and a description of other factors relevant to the agency's proposal or refusal. 34 C.F.R. § 300.503(b).

In the instant case, Petitioner argues that DCPS violated IDEA by failing to issue prior notices when it (1) refused Parent's request at Student's May 11, 2011 IEP meeting for a private school placement, and (2) dropped Student from its rolls for attendance problems, thereby changing Student's educational placement from the current DCPS school to no school at all.

On the other hand, DCPS denies that prior notices were required in either of the instances identified by Petitioner. DCPS further argues that even if it was required to and failed to give a prior notice in those instances, said failure was a mere procedural violation.

Upon consideration of the evidence, arguments and applicable law, the hearing officer concludes that to the extent DCPS may have been required to issue a prior notice upon refusing Parent's request for a private school and determining to send Student to his current DCPS program/school, its failure to do so was a mere procedural violation that did not rise to the level of a denial of FAPE because DCPS explained at Student's May 11, 2011 Step Down IEP meeting exactly why it proposed to send Student to his current DCPS program instead of sending him to a nonpublic school, as requested by Parent. *See* 34 C.F.R. § 300.513(a)(2) (hearing officer may find denial of FAPE only where procedural inadequacies impeded child's right to a FAPE, impeded parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefit); *Lesesne v. D.C.*, 447 F.3d 828 (D.C. Cir. 2006) (only procedural violations that result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable).

The hearing officer also rejects Petitioner's assertion that DCPS changed Student's placement when it dropped him from its rolls for non-attendance. Instead, when DCPS dropped Student from its rolls for non-attendance, it violated IDEA in a matter that denied Student a FAPE, and the hearing has concluded as much above. Under these circumstances, the hearing officer concludes that Petitioner has failed to establish that DCPS denied Student a FAPE by failing to issue prior written notices.

#### **6. Alleged Failure to Update IEP Annually**

Under IDEA, each public agency must ensure that the IEP team reviews each disabled child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address any lack of expected progress, the results of any reevaluation, information about the child provided to, or by, the parents, the child's anticipated needs, or other matters. 34 C.F.R. § 300.324(b)(1). In this regard, IDEA requires that a disabled child's IEP team include, *inter alia*, the parents of the child, and whenever appropriate, the disabled child. *See* 34 C.F.R. § 300.321(a). Moreover, IDEA requires each public agency to take steps to ensure that one or both of the disabled child's parents are present at each IEP team meeting or are afforded the opportunity to participate, including notifying parents of the meeting early enough to ensure they will have an opportunity to attend, and scheduling the meeting at a mutually agreed on time and place. 34 C.F.R. § 300.322(a).

At the time Petitioner filed its Complaint, as far as Parent was aware Student's most recent IEP was dated May 11, 2011 and it had been developed at an IEP meeting that Parent and Parent's Attorney attended. Subsequent to the filing of the Complaint, however, DCPS disclosed that it had revised Student's IEP at a March 28, 2012 meeting that was not attended by Parent or her attorney. Moreover, the evidence in this case reveals that even as Petitioner's counsel and her colleagues were sending repeated email messages asking DCPS to schedule a meeting for Student, and even though DCPS never responded to most of the messages but indicated by email dated March 22, 2012 that a meeting was confirmed for April 17, DCPS convened an IEP meeting on March 28, 2012, without Parent's knowledge or participation, and revised Student's IEP. Then, even though Petitioner's counsel continued to send DCPS emails asking for an IEP meeting for Student, DCPS still failed to advise Parent of the March 28, 2012 meeting and the revised IEP until after the Complaint in this action was filed.

Clearly, DCPS failed to comply with its obligations under IDEA to ensure Parent was present at the IEP meeting or was afforded an opportunity to participate, and to ensure that Student's IEP team at the March 28, 2012 meeting included Parent. As a result of these failures, Parent was deprived of an opportunity to participate in the decision-making process for Student and, in fact, was unaware that IEP decisions regarding the provision of a FAPE to Student had been made in her absence. Under these circumstances, the hearing officer is persuaded by Petitioner's argument that the March 28, 2012 IEP does not constitute a valid annual revision of Student's IEP because of the significant procedural violations of IDEA that DCPS committed that rise to the level of a denial of FAPE in this case. As a result, the hearing officer concludes that Petitioner has met its burden of proof on this claim. *See* 34 C.F.R. § 300.513(a)(2), *supra*; *Lesesne v. D.C.*, *supra*.

## **7. Alleged Failure to Provide an Appropriate School for SY 2011/12**

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, as here, there is no contention that the student's IEP is inappropriate, the determination of whether the current location of services is appropriate turns on whether the school can implement the student's IEP. *See Hinson v. Merritt Educational Ctr.*, 579 F.Supp.2d 89, 104 (D.D.C. 2008) (to show placement is inappropriate, plaintiff must show school is unable to implement the IEP as written); *T.T. v. District of Columbia*, 2007 U.S. District Lexis (D.D.C. July 23, 2007) (plaintiffs' challenge to public schools selected by DCPS was rejected where plaintiffs could not prove public schools were unable to implement the student's IEP).

In the instant case, Petitioner argues that Student's current DCPS school is inappropriate because it is unable to provide Student with the small structured environment he needs, despite how the program was designed to operate, and that such inappropriateness is reflected in the facts that while attending his current school during SY 2011/12 Student was sent home frequently, his attendance dropped off significantly, his behavior deteriorated, and he was in an environment that, in practice, was chaotic and uncontrolled. DCPS, of course, disagrees.

Upon a review of the evidence in this case, the hearing officer is persuaded that the evidence fully supports Petitioner's position. The evidence indicates that the current DCPS school is designed to be a therapeutic facility for students that provides a self-contained small learning environment, but in reality, the students in DCPS's current program routinely ran through the halls during SY 2011/12, the door that was supposed to separate Student's program from the rest of the high school was routinely unlocked, and the program did not provide Student with an orderly and controlled environment. In fact, instead of providing Student with the therapeutic and behavioral supports he requires, the school dealt with Student's behavior problems by frequently sending him home, and it dealt with Student's severe attendance problems that developed over time by dropping him from the rolls. As a result, although the school theoretically could implement Student's IEP during SY 2011/12, in reality it was unable to provide Student with the 26 hours per week of specialized instruction and 1.5 hours per week of behavioral support services he required under his May 11, 2011 IEP. Under these circumstances, the hearing officer concludes that Petitioner met its burden of proof on this claim.

## **8. Alleged Failure to Provide Educational Benefit**

A public agency satisfies its obligation to provide a disabled student with a FAPE by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). The instruction and special education services provided to a disabled child must provide more than trivial or *de minimis* benefits. *See Alexis v.*

*Board of Ed. for Baltimore County Public Schools*, 286 F. Supp.2d 551 (D. Md. 2003) (citation omitted). Indeed, the provision of a FAPE requires the provision of significant learning and meaningful education benefit. See *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 30 IDELR 41 (3d Cir. 1999).

The evidence in this case reveals that Student earned final grades of two Ds and eight Fs at the end of SY 2011/12, and by the start of SY 2012/13 he had earned a total of a mere 1.5 credits toward graduation. The evidence further reveals that Student missed significant instruction time during SY 2011/12 as a result of being sent home frequently due to misbehavior and being dropped from the rolls for one month during SY 2011/12 due to severe truancy issues. Based on this evidence, the hearing officer concludes that DCPS failed to provide Student with personalized instruction and support services he required to receive meaning educational benefit. As a result, the hearing officer concludes that Petitioner has met its burden of proof on this claim with respect to SY 2011/12.

### **9. Relief To Be Awarded**

“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)).

Moreover, where a student has been denied FAPE based on DCPS's failure to adequately address his needs at the DCPS school assigned, a hearing officer may award as compensatory education for that denial of FAPE an educational placement requested by the child's parent as relief where the parent has proven that the requested educational program is reasonably calculated to confer the remedial and contemporary educational benefits contemplated by IDEA. See *Diatta v. D.C.*, 319 F. Supp. 2d 57, 67 (D.D.C. 2004); see also, *Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005) (under theory of compensatory education, courts and hearing officers may award educational services to be provided prospectively to compensate for past deficient program).

In the instant case, Petitioner has proven that DCPS violated IDEA and denied Student a FAPE in many respects, as outlined above, which included illegally dropping Student from its rolls in SY 2011/12, failing to provide Student with an appropriate school placement in SY 2011/12, and failing to provide Student with educational benefit during SY 2011/12. The evidence in this case further reveals that DCPS has reassigned Student to attend the same inappropriate location of services for SY 2012/13, with the result that Student currently attends the school.

To remedy the proven denials of FAPE in this case and/or as compensatory education to compensate Student for the denials of FAPE, Petitioner has requested that Student be placed at a specified private school at DCPS's expense. The evidence in this case proves that the school is appropriate for Student because it can implement his IEP and provide him with the specialized instruction and related services he requires in his LRE, which a full-time out of general education environment. The evidence further proves that an educational placement at the requested private school would constitute an appropriate award of compensatory education in this case because the private school is reasonably calculated to confer upon Student the remedial and contemporary educational benefits he is entitled to receive under IDEA. Based on this evidence, the hearing officer has determined to award Petitioner a placement for SY 2012/13 at the specified private school.

### **ORDER**

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

1. Within 15 calendar days of the issuance of this Order, DCPS shall conduct a social history for Student.
2. Within 15 calendar days of the issuance of this Order, DCPS shall ensure that Student begins attending the private school that accepted him for admission by letter dated August 24, 2012.
3. On or before 30 days after the issuance of this Order, DCPS shall convene an IEP meeting for Student to review his social history and his progress at the private school, and to review and revise his IEP.

### **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: 10/3/2012

/s/ Kimm Massey

Kimm Massey, Esq.  
Hearing Officer