

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

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

OSSE  
Student Hearing Office  
July 25, 2014

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|-------------------------------------|---|--------------------------------------|
| STUDENT, <sup>1</sup>               | ) | Date Issued: 7/25/14                 |
| through her Parent,                 | ) |                                      |
| Petitioner,                         | ) | Hearing Officer: Keith L. Seat, Esq. |
|                                     | ) |                                      |
| v.                                  | ) |                                      |
|                                     | ) |                                      |
| District of Columbia Public Schools | ) |                                      |
| ("DCPS"),                           | ) |                                      |
| Respondent.                         | ) |                                      |
|                                     | ) |                                      |
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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, mother of Student, filed a due process complaint on 5/16/14, alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") because Student did not receive all the counseling required by her Individualized Education Program ("IEP") and needed more specialized instruction outside general education. DCPS asserted that Student's IEP was appropriate and that she had received more counseling than was recorded, and that any missed counseling was *de minimis* and not a denial of FAPE.

**Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.") and 38 D.C. Code 2561.02.

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<sup>1</sup> Personally identifiable information is provided in Appendix A.

## Hearing Officer Determination

### Procedural History

Following the filing of the due process complaint on 5/16/14, this Hearing Officer was assigned to the case on 5/19/14. DCPS filed a timely response to the complaint on 5/23/14 and made no challenge to jurisdiction.

Petitioner sought to waive the resolution meeting, but DCPS did not, so it took place on 6/2/14. At that time, the parties neither settled the case nor agreed to end the resolution period early, so the standard 30-day resolution period concluded on 6/15/14. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 7/30/14.

A prehearing conference was held on 6/16/14 and a Prehearing Order was issued on 6/16/14.

The due process hearing, which was closed to the public, took place on 7/15/14, beginning at 9:30 a.m. Petitioner was represented by Roberta Gambale, Esq. DCPS was represented by Steven Rubenstein, Esq. The parties briefly discussed settlement at the beginning of the hearing. Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person, and was excused in the afternoon.

The parties stipulated to all Findings of Fact and Background and Procedural History in the 5/11/14 HOD of Hearing Officer Kimm Massey in Case No. 2014-0095.

Petitioner’s Disclosure statement, dated 7/7/14, consisted of a witness list of 5 witnesses and documents P-1 through P-29. Petitioner’s documents were admitted into evidence over objection as to the relevance of documents P-13, P-14, P-15, P-19, P-20 and P-21.

Respondent’s Disclosure statement, dated 7/8/14, consisted of a witness list of 7 witnesses and documents R-1 through R-17. Respondent’s documents were admitted into evidence without objection.<sup>2</sup>

Petitioner presented 5 witnesses in her case-in-chief (*see* Appendix A):

1. Psychologist – qualified without objection as an expert in School and Clinical Psychology
2. Special Education Expert – qualified over objection as an expert in Special Education Programming and Development of Compensatory Education Proposals
3. Tutor

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<sup>2</sup> Pursuant to the Prehearing Order issued in this case, failure to note objections to the opposing party’s disclosures results in the disclosures being admitted without objection.

## Hearing Officer Determination

4. Petitioner
5. Educational Advocate

Respondent presented 2 witnesses in its case (*see* Appendix A):

1. School Social Worker
2. LEA Representative

Petitioner did not present any rebuttal witnesses.

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

**Issue 1** – Whether DCPS denied Student a FAPE during the 2012/13 school year by failing to provide counseling services, when she did not obtain the counseling required in the seven months from December 2012 through June 2013.

**Issue 2** – Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on or about 11/18/13 or at another time during the 2013/14 school year, when (a) teachers were complaining to Petitioner about Student’s negative behaviors, (b) Student had made no progress since 2010 in certain academic areas based on testing in October 2013, (c) Student was performing significantly below grade level and regressed in math and reading between February 2013 and November 2013, and (d) a 4/7/14 independent psychological evaluation indicating the need for increased pull out services and support for Student, indicate the need for increased pull out and push in services for Student and additional goals in writing and speech.

Petitioner requested the following relief:

1. DCPS to promptly modify Student’s IEP as needed, and provide for (a) 5 hours per week of pull out in reading, (b) 5 hours per week of pull out in writing, (c) 5 hours per week of pull out in math, (d) goals in speech to address defining words, (e) goals in writing to address syntax and paragraph formation, and (f) push in services in other academic classes, including science, music and history; and
2. DCPS to fund compensatory education for any denials of FAPE.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact<sup>3</sup> are as follows:

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<sup>3</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. 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

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1. Student is a resident of the District of Columbia. Petitioner is Student's mother ("Parent").<sup>4</sup>

2. Student has Attention Deficit Hyperactivity Disorder ("ADHD") and recent testing confirmed her classification as Other Health Impairment ("OHI"); Student also has a Specific Learning Disability ("SLD").<sup>5</sup>

3. Student completed 6<sup>th</sup> and 7<sup>th</sup> grade at School during 2012/13<sup>6</sup> and 2013/14, and advanced to 8<sup>th</sup> grade.<sup>7</sup>

4. Student was having behavior problems in 2012/13 and Parent was getting calls from School about once a month. The situation worsened in 2013/14 and Parent was getting calls from School about Student every week or every other week. In both school years, Parent had to go to school to sit in Student's class or see the assistant principal. Student was often disrespectful, "cussing out" her teachers if they didn't give her help. Student would get up and walk out of class, at least once kicking over a trash can. Student was often in conflict with her peers and sometimes threatened to hurt others. She often argued if she didn't get her way, called her classmates names and used foul language; she was also disrespectful and disruptive. Student was suspended for 5 days in December 2013; the assistant principal threatened to send Student to a less desirable school.<sup>8</sup>

5. Student's behavior problems need to be addressed through behavioral support/counseling. The value of counseling is diminished by interruptions in service; it is important to receive counseling services consistently.<sup>9</sup>

6. Pursuant to her 2/27/13 and earlier IEPs, Student was entitled to receive 120 minutes of Behavioral Support Services outside general education each month.<sup>10</sup> DCPS's Service Trackers indicate that she did not consistently receive behavioral support/counseling at that level throughout 2012/13:<sup>11</sup>

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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, 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.

<sup>4</sup> Parent.

<sup>5</sup> P-4-14, 15; Educational Advocate; Local Educational Agency ("LEA") Representative.

<sup>6</sup> All dates in the format "2012/13" refer to school years.

<sup>7</sup> Parent.

<sup>8</sup> Parent; P-4-10, 2.

<sup>9</sup> Psychologist.

<sup>10</sup> P-16-10; P-15-8.

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

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| Date (120 Minutes Due per Month)       | Minutes on DCPS Service Tracker <sup>12</sup> | Missed (or Extra) Minutes |
|--|---|---------------------------|
| September 2012                         | 150   | (30)                      |
| October 2012                           | 285   | (165)                     |
| November 2012                          | 180   | (60)                      |
| December 2012                          | 0   | 120                       |
| January 2013 (missing Service Tracker) | 0   | 120                       |
| February 2013                          | 30  | 90                        |
| March 2013                             | 30  | 90                        |
| April 2013                             | 30  | 90                        |
| May 2013                               | 30  | 90                        |
| June 2013                              | 0   | 120                       |

7. School Social Worker sometimes greeted and had conversations with Student at the beginning of the day as Student entered the school building; she was available to Student at other times if Student sought her out. School Social Worker sometimes sat in Student's class to observe her. School Social Worker did not log the time for these activities as counseling.<sup>13</sup>

8. Student was in an inclusion classroom in 2013/14, although it was not a regular general education class, as the academic work was not at normal 7<sup>th</sup> grade level. Student's inclusion class only had about 15 students. Student was bubbly and social and would be most successful in learning to apply her skills inside and outside the classroom. In informal observations, Student was working with her peers in the inclusion setting and fitting in well. There was no way to pick her out as a student with a difficulty.<sup>14</sup>

9. Student's academic work in the inclusion setting was modified for her.<sup>15</sup> The modification of Student's academic work was so she could access the material and move toward grade level.<sup>16</sup>

10. Although she tests far below her grade level academically<sup>17</sup>, Student did reasonably well in her inclusion class. Student was on Honor Roll for the first half of 2013/14.<sup>18</sup> Student's teacher stated that Student gets along well with her peers in class, when distracted is easily redirected, and "never has any issues."<sup>19</sup>

11. At the multidisciplinary team ("MDT") meeting on 11/5/13 preceding the 11/18/13 IEP at issue in this case, Educational Advocate's written notes report that Student's teachers stated she "has been doing very well," "Ranks at the top of the class"

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<sup>12</sup> P-11-1 through P-11-12

<sup>13</sup> School Social Worker.

<sup>14</sup> LEA Representative.

<sup>15</sup> Tutor; LEA Representative.

<sup>16</sup> LEA Representative.

<sup>17</sup> P-9-4

<sup>18</sup> P-4-2, 13; Parent.

<sup>19</sup> P-4-12.

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and “is one of the highest achieving students in the class.”<sup>20</sup> At that MDT meeting, the Team concluded that a Behavior Intervention Plan was not needed for Student.<sup>21</sup>

12. Despite the efforts of Petitioner’s representatives to get pull out services, Student’s 11/18/13 IEP continued to provide only specialized instruction within general education, at a rate of 45 minutes per day for each Reading, Written Expression and Mathematics.<sup>22</sup> This was the same as Student’s previous 2/27/13 IEP and the earlier 10/19/10 IEP.<sup>23</sup>

13. After Educational Advocate emailed DCPS on 2/24/14 seeking additional goals and 15 hours of pull out, DCPS emailed back the next day agreeing to include most of the goals but rejecting the extensive pull out because that would have resulted in Student effectively being back in a self-contained setting. DCPS understood that Parent did not want a self-contained setting as she had filed a complaint against DCPS the year before to get Student out of a self-contained ID classroom. However, DCPS was willing to add 3 hours of pull out.<sup>24</sup>

14. Even though DCPS responded on 2/25/14 to the email from Educational Advocate that was sent at the end of the day on 2/24/14, Petitioner’s counsel filed a complaint against DCPS on 2/25/14 before they received DCPS’s response. Petitioner’s representatives never responded to DCPS’s offer, which DCPS nonetheless included in Student’s IEP.<sup>25</sup>

15. DCPS revised Student’s IEP on 3/25/14 to include 3 hours per week of specialized instruction outside general education, while maintaining the same level of support in general education.<sup>26</sup> This was unchanged in Student’s most recent 6/2/14 IEP, which added Extended School Year Services.<sup>27</sup>

16. Student’s IEP Progress Reports show that Student generally made Progress.<sup>28</sup> Student’s Report Card for 2013/14 shows that she got good grades (A’s and B’s, with one C) at the beginning of the year, had some challenges in the middle (when absences increased), and then generally recovered at the end of the year.<sup>29</sup>

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<sup>20</sup> P-6-1; *see also* R-5-1.

<sup>21</sup> P-6-2.

<sup>22</sup> P-7-10.

<sup>23</sup> P-16-10; P-15-8.

<sup>24</sup> LEA Representative; R-11.

<sup>25</sup> LEA Representative; Stipulated facts from HOD.

<sup>26</sup> P-2-11.

<sup>27</sup> P-1-15.

<sup>28</sup> Special Education Expert; R-15.

<sup>29</sup> R14-1, 2.

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17. Parent was quite happy with Student's end of year grades in 2013/14, and that she was promoted to 8<sup>th</sup> grade.<sup>30</sup> A folder of Student's work was brought to the resolution meeting and Student proudly showed her work to the adults gathered at the meeting.<sup>31</sup>

18. Psychologist used the Attention-Deficit/Hyperactivity Disorder Test ("ADHDT") as part of Student's Comprehensive Psychological Evaluation dated 4/7/14. The input from Student's teachers on that test indicated a Below Average Probability of ADHD for Student, which may not be clinically significant, and is based on Student taking medication for ADHD.<sup>32</sup> However, that is consistent with the Classroom Observation that found Student staying on task and working quietly, even though other students in the class were "talking to each other instead of doing their work"; the teacher had trouble with others in the class, but not Student.<sup>33</sup>

19. Special Education Expert prepared a compensatory education plan aimed at restoring Student to the level she would have achieved if she had not missed the counseling required in her IEP in 2012/13. The plan proposes 14 hours of one-to-one behavioral support/counseling over 14 weeks as compensatory education, which is not based on mechanistic computation of hours missed, but on a qualitative view of what Student needs.<sup>34</sup>

20. As proposed by Special Education Expert, an independent behavioral counseling therapist would work with Student, Parent and School to address the various challenges facing Student, including inattentiveness, distraction and impulsivity. Various exercises and activities would be used to emphasize coping strategies and staying on task.<sup>35</sup>

### Conclusions of Law

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

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203,

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<sup>30</sup> Parent.

<sup>31</sup> LEA Representative.

<sup>32</sup> P-4-11, 12.

<sup>33</sup> P4-5.

<sup>34</sup> Special Education Expert; P-26.

<sup>35</sup> P-26-5.

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102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

In addition, DCPS must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities 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.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof is on the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005).

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights.

***Issue 1 – Whether DCPS denied Student a FAPE during the 2012/13 school year by failing to provide counseling services, when she did not obtain the counseling required in the seven months from December 2012 through June 2013.***

Petitioner met her burden of proof on this issue, as DCPS's records demonstrate that Student only received a fraction of the counseling that she needed pursuant to her IEP. The IDEA is violated when a school district deviates materially from a student's IEP. See *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) ("a material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP"); accord *S.S. ex rel. Shank v. Howard Road Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007); *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011).

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While Student's IEP called for 120 minutes per month of counseling services, from December 2012 through June 2013 DCPS failed to provide the required services. Indeed, for 3 months DCPS apparently provided no counseling to Student, while for the other 4 months, DCPS only provide 30 minutes per month, one-quarter of the necessary amount.

In its defense, DCPS noted that extra counseling time was recorded on its Service Trackers for Student in the first few months of 2012/13. However, that extra time does not equal the amount of time missed, and DCPS cannot avoid providing required services later, even if it chose to provide extra services earlier. Student needed consistent and regular counseling, given her behavioral and academic issues, and was entitled to receive counseling on a monthly basis pursuant to her IEP.

DCPS also asserted that School Social Worker, who provided counseling to Student, sometimes greeted and conversed with Student at the beginning of the day as she entered the school building, was available to Student at other times, and occasionally observed Student in the classroom, which offset counseling sessions that DCPS failed to provide Student. As desirable as warm greetings and a listening ear may be, this Hearing Officer is not persuaded that occasional informal interactions between School Social Worker and Student as she entered the school building, or being available for Student to seek assistance, or observing Student in her class setting from time to time are sufficient to substitute for the counseling required in Student's IEP.

This is not a case of School missing a few minutes or even an occasional session, causing little or no harm. Student had significant behavioral challenges, including threatening her classmates and cussing out her teachers, that should have been addressed by the counseling called for in her IEP, allowing her to better access her education in both 2012/13 and beyond. DCPS's consistent failure over 7 months to provide Student's required counseling was much more than a "minor discrepancy," *Van Duyn*, 502 F.3d at 822, and, in the view of this Hearing Officer, constituted a denial of FAPE.

*Issue 2 – Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on or about 11/18/13 or at another time during the 2013/14 school year, when (a) teachers were complaining to Petitioner about Student's negative behaviors, (b) Student had made no progress since 2010 in certain academic areas based on testing in October 2013, (c) Student was performing significantly below grade level and regressed in math and reading between February 2013 and November 2013, and (d) a 4/7/14 independent psychological evaluation indicating the need for increased pull out services and support for Student, indicate the need for increased pull out and push in services for Student and additional goals in writing and speech.*

Petitioner has not met her burden of proving that Student's 11/18/13 IEP did not provide a FAPE. Petitioner has not shown that when developed her IEP did not provide personalized instruction with sufficient support services to permit Student to benefit educationally. *See Smith*, 846 F. Supp. 2d at 202 (FAPE requirement is satisfied when a school district provides the disabled child with "personalized instruction with sufficient

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support services to permit the child to benefit educationally from the instruction.” *quoting Rowley*, 458 U.S. at 203, 102 S.Ct. 3034.)

Student is far below grade level as shown by standardized testing, and her situation may be getting worse instead of better. However, “the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated” to provide benefit. *Shank*, 585 F. Supp. 2d at 66 (citation and internal quotations omitted). Here, Student seems to be doing reasonably well in an inclusion setting at School, as reported by her teachers and based on her Report Card for 2013/14 and IEP Progress Reports. Indeed, credible testimony suggested that Student might not do as well in a much more restrictive setting. *See* 300 C.F.R. 300.114(a) (to the “maximum extent appropriate,” children with disabilities are to be educated with nondisabled children).

Moreover, DCPS has worked to adjust Student’s 11/18/13 IEP by including pull out hours and modifying goals in response to requests from Petitioner’s representatives in late February 2014, even though Petitioner filed a new complaint the day after seeking changes from DCPS without waiting to see whether DCPS would accept the changes. At bottom, however, many of the problems that Student is exhibiting are related to her behavior, which may be addressed through additional counseling to which Student is entitled under Issue 1, above.

### Compensatory Education Request

In cases in which a compensatory education award is sought, “the hearing officer first determines whether there is sufficient evidence of an IDEA violation that entitles the student to a compensatory education.” *Banks ex rel. D.B. v. District of Columbia*, 720 F. Supp. 2d 83, 90 (D.D.C. 2010) (citation omitted). “If the hearing officer determines there was such a violation, then the hearing officer applies the *Reid* [*ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005)] standard to craft an award.” *Id.* Here, Petitioner has established that there has been an IDEA violation that entitles Student to compensatory education.

Compensatory education is designed to place disabled children in the same position they would have occupied but for the violation of IDEA. The proper amount of compensatory education depends on how much more progress a student might have shown if she had received the required special education services, and the type and amount of services that would place the student in the same position she would have occupied but for the LEA’s violations of the IDEA. *See Walker v. District of Columbia*, 786 F. Supp. 2d 232, 238-239 (D.D.C. 2011), *citing Reid*, 401 F.3d 516.

The challenge of determining what additional benefits would have accrued if DCPS had provided counseling to Student from December 2012 through June 2013 does not permit the effort to be avoided. *See Henry v. District of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required “to have a perfect case to be entitled to

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compensatory education.” *Cousins v. District of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, Student did not receive the counseling she needed in 2012/13 in order to address the various behavioral problems that she exhibited both then and later. As Psychologist explained, consistency in the provision of counseling services is important and might well have helped Student avoid behavioral difficulties and stay more focused on her studies. Accordingly, it is the conclusion of this Hearing Officer that Special Education Expert’s proposal for 14 hours of behavioral support/counseling services provided over a 14 week period appears reasonably calculated to provide the educational benefits that likely would have accrued from special education services which DCPS should have supplied Student in the first place. *See Reid*, 401 F.3d at 524; *Gill*, 770 F. Supp. 2d at 116-117. As ordered below, DCPS shall promptly fund independent behavioral support/counseling services.

### **ORDER**

Petitioner has met her burden of proof on the first issue, as set forth above. Accordingly, **it is hereby ordered that:**

(1) DCPS shall provide a letter of funding within 10 business days for independent compensatory education consisting of 14 hours of one-on-one behavioral support/counseling services.

(2) Any and all other claims and requests for relief are **dismissed with prejudice**.

**IT IS SO ORDERED.**

Dated in Caption

*/s/ Keith Seat*

Keith L. Seat, Esq.  
Hearing Officer

### **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).