

**District of Columbia**  
**Office of the State Superintendent of Education**

Student Hearing Office  
810 First Street, N.E., Suite 2001  
Washington, DC 20002

OSSE  
Student Hearing Office  
July 26, 2013

<p><b>STUDENT<sup>1</sup>,</b> <b>By and through PARENT,</b></p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p><b>DISTRICT OF COLUMBIA</b> <b>PUBLIC SCHOOLS,</b></p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Case No.</p> <p>Impartial Hearing Officer: Charles M. Carron</p> <p>Date Issued:</p> <p>June 26, 2013</p> <p>Representatives:</p> <p>Donovan W. Anderson, Esq. for Petitioner</p> <p>Tanya Joan Chor, Esq. and Maya L. Washington, Esq. for Respondent</p>
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**HEARING OFFICER DETERMINATION**

**I. PROCEDURAL BACKGROUND**

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed June 26, 2013, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student’s Parent, against Respondent, District of

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<sup>1</sup> Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

Columbia Public Schools (“DCPS”). The 20-school-day timeline for the Due Process Hearing (“DPH”) started to run that date<sup>2</sup> and ended on July 24, 2013.

An amended DPC was filed later on June 26, 2013.

On June 28, 2013, Bruce Ryan was appointed as the Impartial Hearing Officer.

On July 8, 2013, Respondent filed its Response, which was two dates late, stating, *inter alia*, that Respondent has not denied the Student a free appropriate public education (“FAPE”).

A resolution meeting was held on July 11, 2013, the last day of the 15-day resolution period applicable to expedited cases under 34 C.F.R. § 300.532(c)(3)(ii). The resolution meeting failed to resolve the DPC.

Impartial Hearing Officer Ryan held a Prehearing Conference (“PHC”) by telephone on July 11, 2013, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by July 15, 2013 and that the Due Process Hearing (“DPH”) would be held on July 22, 2013.

At the PHC, Respondent took the position that only the discipline claim should be expedited and that the case should be bifurcated with an expedited DPH on the disciplinary issues and a non-expedited DPH on the remaining issues. Petitioner opposed bifurcation. Impartial Hearing Officer Ryan determined not to bifurcate the case while permitting Respondent to file a motion to bifurcate “for good cause shown.”

On July 15, 2013, Respondent filed a “Motion for Reconsideration” of Impartial Hearing Officer Ryan’s determination that this case should not be bifurcated.

On July 18, 2013, the undersigned was appointed as the Impartial Hearing Officer *vice* Impartial Hearing Officer Ryan.

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<sup>2</sup> See discussion of bifurcation, *infra*.

On July 19, 2013, the undersigned issued an Order denying Respondent's Motion for Reconsideration and an Order rejecting Respondent's proposed supplemental disclosure for reasons explained in those Orders.

The DPH was held on July 22, 2013 from 9:42 a.m. to 11:47 a.m. at the Student Hearing Office, 810 First Street, NE, Room 2004, Washington, DC 20002. Petitioner elected for the hearing to be closed.

This Hearing Officer Determination ("HOD") is due no later than 10 school days after the DPH, *i.e.*, August 5, 2013.

At the DPH, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-6<sup>3</sup>

Respondent's Exhibits: R-1 through R-4

Hearing Officer's Exhibits: HO-1 through HO-10

The following witnesses testified on behalf of Petitioner at the DPH:

Petitioner, who is the Student's Parent

Program Director of the Non-Public School

Respondent called no witnesses to testify at the DPH.

The parties gave oral closing arguments and did not file written closing arguments or briefs.

## II. JURISDICTION

The DPH was held pursuant to the IDEA, 20 U.S.C. §§1415(f) and (k); IDEA's implementing regulations, 34 C.F.R. §§300.511 and 300.532, and the District of

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<sup>3</sup> P-3, as disclosed to Respondent, was missing pages 7 and 8. Respondent objected to Petitioner supplementing the exhibit at the DPC, and the undersigned sustained the objection based upon Respondent's right to exclude evidence not disclosed five business days prior to the DPH. 34 C.F.R. § 300.512(a)(3).

Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030 and E2510.14 *et seq.* This decision constitutes the HOD pursuant to 20 U.S.C. §§ 1415(f) and (k)(3)(B)(i), 34 C.F.R. §§300.513 and 300.532, and §§1003 and 1008 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures.*

### **III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT**

The circumstances giving rise to the DPC are as follows:

The Student is male, Current Age, and attends Current Grade at a public charter school (the “Charter High School”). The Student has been determined to be eligible for special education and related services as a child with Multiple Disabilities under the IDEA.

Petitioner claims that during the entire 2012-2013 school year, during which the Student attended the Charter High School, Respondent provided no specialized education or related services to the Student despite the fact that the Student had an Individualized Education Program (“IEP”) requiring such services. Petitioner further claims that the Charter High School disciplined and ultimately expelled the Student without conducting a Manifestation Determination Review (“MDR”) as required by IDEA.

Respondent maintains that after the Student changed schools to the Charter High School, Petitioner failed to inform the Charter High School that the Student was eligible for specialized instruction and related services and had an IEP. Respondent asserts that a student’s privacy rights under both the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (“FERPA”) and a policy of the District of Columbia Office of the State Superintendent of Education (“OSSE,” the State Educational Agency for, *inter alia*, DCPS) would be violated if one school within a Local Educational Agency (“LEA”) advised another school in that LEA that a Student had a disability and was eligible for specialized instruction and related services under IDEA. Respondent further maintains

that the Charter High School “disenrolled” the Student due to his absences, rather than “expelling” him, and that no MDR therefore was required.

#### **IV. ISSUES**

At the PHC, as confirmed in Impartial Hearing Officer Ryan’s Prehearing Order (HO-7), the following issues were presented for determination at the DPH:

1. Failure to Implement IEP—Did DCPS as LEA deny [the] Student a FAPE by materially failing to implement the requirements of his IEP during the 2012-13 school year?

2. Transmittal of Records—Did DCPS as LEA violate procedural requirements under IDEA and/or deny [the] Student a FAPE by failing to take reasonable steps to obtain [the] Student’s records (including his IEP and supporting documents) from his previous school and ensure that they were transmitted to [the Charter High School]?

3. Disciplinary Procedures/MDR—Did DCPS as LEA fail to comply, and/or fail to ensure that [the Charter High School] complied, with the disciplinary procedures of the IDEA pursuant to 34 C.F.R. §§ 300.530-33, in connection with the Student’s expulsion from [the Charter High School] in May 2013?

At the DPH, Petitioner could cite no authority for issue #2, and the undersigned therefore struck that issue, while permitting Petitioner to introduce evidence that Respondent failed to ensure the transfer of records to the Charter High School in support of issues #1 and #3.

## V. RELIEF REQUESTED

Petitioner requests the following relief:<sup>4</sup>

1. an Order that Respondent place and fund the Student in an appropriate “therapeutic day program,” *i.e.*, a full-time outside general education program with appropriate behavioral supports and a small structured setting;
2. compensatory education for Respondent’s failure to implement the Student’s IEP during the 2012-2013 school year; and
3. an Order that Respondent reevaluate the Student and develop a current IEP and appropriate placement for the 2013-2014 school year.<sup>5</sup>

## VI. FINDINGS OF FACT

### Facts Related to Jurisdiction

1. The Student is a male, Current Age. P-4-1.<sup>6</sup>
2. The Student resides in the District of Columbia. P-1-1.
3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with Multiple Disabilities. P-3-1, Stipulation of Counsel at the DPH.

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<sup>4</sup> In the DPC, Petitioner also requested reimbursement of Petitioner’s attorney’s fees, which the undersigned lacks the authority to award.

<sup>5</sup> At the PHC, Petitioner informed Respondent and Impartial Hearing Officer Ryan that at the DPH, Petitioner would propose that the Student be placed at the Non-Public School, both as a prospective placement remedy and as compensatory education.

<sup>6</sup> When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

4. One of the Student's disabilities is Other Health Impairment ("OHI") based upon his Attention Deficit Hyperactivity Disorder ("ADHD").<sup>7</sup> Stipulation of Counsel at the DPH.

#### Facts Related to the Student's IEPs

5. The Student's February 25, 2011 IEP reduced his services from 31 hours of specialized instruction outside of general education to 15 hours of specialized instruction in the general education setting. *Id.*

6. The Parent agreed with the Student's February 25, 2011 IEP. P-2-1.

7. The services remained the same in the Student's February 16, 2012 IEP, which is his last IEP, and which expired February 15, 2013. Stipulation of Counsel at the DPH.

8. The Parent has not challenged the content of the February 16, 2012 IEP and the undersigned therefore finds it appropriate and reasonably calculated to provide the Student educational benefit.

#### Facts Related to the 2011-2012 School Year

9. During the 2011-2012 school year, the Student attended eighth grade at Previous School, a District of Columbia Public School. P-3-1, testimony of Parent.

10. During the 2011-2012 school year, the Student earned Cs, Bs and one A; he had some challenges, sometimes his behavior was out of control, sometimes he was

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<sup>7</sup> Counsel for Petitioner asserted that the other disability was Emotional Disturbance ("ED") but counsel for Respondent would not so stipulate. The nature of the Student's other disability is not material to deciding the issues in this case.

disruptive in class, and he was suspended eight days; however, the Student did not fail eighth grade. Testimony of Parent.

#### Facts Related to the 2012-2013 School Year

11. During the summer of 2012, the Parent advised the Previous School that she intended to enroll the Student at the Charter High School. Testimony of Parent.

12. The Previous School did not provide any instructions or forms to the Parent in connection with her intent to enroll the Student at the Charter High School. *Id.*

13. During the 2012-2013 school year, the Student attended ninth grade at the Charter High School. Stipulation of Counsel at the DPH.

14. The Parent enrolled the Student at the Charter High School because she believed it would offer him structure that he needed and small “classroom settings,” which she did not believe the high school proposed by Respondent would provide. Testimony of Parent.

15. At the time of the ninth grade orientation at the Charter High School, the Parent informed one of the deans of the Charter High School that the Student had an IEP, to which the dean responded that the Parent should go to the Previous School, tell the Previous School that the Student was now attending the Charter High School, and ask the Previous School to send the Student’s IEP to the Charter High School. *Id.*

16. Halfway through the 2012-2013 school year, the Parent again met with one of the deans of the Charter High School and asked him about the Student’s IEP, to which he replied that the Parent would have to talk to the Previous School again. *Id.*

17. The Parent spoke with someone at the Previous School, who advised her that she needed to speak with a specific person at the DCPS high school that was in the “network” with the Previous School and ask that person to send the IEP to the Charter High School. *Id.*

18. The Parent called the person referred to in Paragraph 17 *supra*, but either the call was not answered or she got voice mail; in any event, she did not speak with the person at the “network” high school. *Id.*

19. The Student received no special education services—specialized instruction or behavioral support services—at the Charter High School (*Id.*), which the undersigned finds to be a material failure to implement the Student’s February 16, 2012 IEP.

20. There were no IEP meetings regarding the Student while he attended the Charter High School. Testimony of Parent.

21. The Student was not successful at the Charter High School; rather, he failed all of his courses (R-4-1) and earned numerous “detentions” and suspensions (Testimony of Parent, R-3).

22. Based upon all of the record evidence, the undersigned finds that the Student’s academic failures during the 2012-2013 school year were due to Respondent’s failure to provide the specialized instruction and related services required by the Student’s February 16, 2012 IEP.

23. According to the Parent, the Student had more than 15 suspensions. Testimony of Parent.

24. According to the Charter High School’s records, the Student had seven days of suspension. R-3-1.

25. The undersigned finds the Charter High School's records to be more reliable than the Parent's memory and therefore finds that the Student was suspended for a total of seven days during the 2012-2013 school year.

26. The Charter High School's records indicate that the Student had 24 days of unexcused absence (not counting the days of suspension) and 46 days of tardiness. R-3-1.

27. The Parent had numerous conversations with one of the deans of the Charter High School concerning the Student's absences. Testimony of Parent.

28. The Parent testified that the Student had no unexcused absences, *i.e.* that his absences were all excused or suspensions. *Id.*

29. The undersigned credits the documentary evidence of the Student's absences over the vague and occasionally contradictory testimony of the Parent; accordingly, the undersigned finds that the Student had 24 days of unexcused absence not counting the days of suspension, and 46 days of tardiness.

30. The Parent testified that she was advised at some time prior to May 2012 that if the Student "continued to receive" days when he was not in school, his case would be referred to the Charter High School's home office and he would be expelled. *Id.*

31. Upon questioning by the undersigned, the Parent testified that she was told by two of Charter High School deans that if the Student "misbehaved," he would be expelled. *Id.*

32. The Parent interpreted the warning of expulsion to be based upon absence days due to discipline, specifically suspensions, including suspensions resulting from the Student's failure to comply with disciplinary detention (*Id.*), which is consistent with the Charter High School's treatment of absences under its code of conduct (R-1-40 through -

46, the Student Discipline Code section of the Charter High School's Parent and Scholar Handbook).<sup>8</sup>

33. The Parent testified that the Student was expelled from the Charter High School on May 2, 2013.<sup>9</sup> *Id.*

34. The Parent does not recall having received any correspondence or having attended any meetings regarding the Student's alleged expulsion. *Id.*

35. Neither the Charter High School nor DCPS advised the Parent of another school that the Student could attend for the remainder of the 2012-2013 school year, and the Parent did not seek to enroll the Student in another school for the remainder of the 2012-2013 school year. *Id.*

36. Based upon the entire record, the undersigned finds that the Student was

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<sup>8</sup> Respondent's counsel argued, without any evidentiary support, that the Student's "disenrollment" from the Charter High School was the result of the Student's unexcused absences *rather than* his disciplinary actions. However, the Charter School's code of conduct links the two. Specifically: Students who are late to class or to school lose "citizenship points" and must serve after-school detention that day. R-1-41. Five missed classes result in reducing the student's grade by ten percent (10%). *Id.* Cutting class or school or skipping detention results in a short-term suspension. R-1-43.

<sup>9</sup> The Parent's testimony regarding the circumstances of the Student's alleged expulsion was vague. Upon questioning by the undersigned, the Parent testified that she did not know at the time that the Student had been expelled. Upon redirect examination, she testified that she found out the Student had been expelled because he was at home, she called the Charter High School, and someone there told her the Student had been expelled. Due to the inconsistencies and vagueness in the Parent's testimony, the undersigned has given it no weight when contradicted by documentary evidence. See Section VIII *infra*. However, even discounting the Parent's testimony on the circumstances of the Student's removal from the Charter High School, Respondent's counsel acknowledged that the Student was removed ("disenrolled") and that the reason was his absence record. Because unexcused absences are violations of the Charter High School's code of conduct, even Respondent's version of the facts supports a finding that Respondent changed the Student's placement in May 2013 for violations of the Charter High School's code of conduct without conducting an MDR.

expelled or “disenrolled”<sup>10</sup> from the Charter High School due to his violations of the Charter High School’s code of conduct, including the code’s provisions on suspension, absences, tardiness and failure to serve detention, and that this expulsion or “disenrollment” combined with failure to assign the Student to another school constituted a change in placement exceeding 10 school days.

37. Based upon the entire record, the undersigned finds that if Respondent had provided all of the services required by the Student’s IEP during the 2012-2013 school year, (a) the Student would have achieved passing grades in all of his courses as he did in the 2011-2012 school year when he received the services required by his IEP, (b) the Student would not have had excessive absences or tardiness, and (c) the Student would not have been expelled or “disenrolled” due to violations of the Charter High School’s code of conduct.

38. DCPS is the LEA for the Charter High School for purposes of providing special education services. Stipulation of Counsel at the DPH.

#### Facts Related to the School Proposed by Petitioner

39. The Non-Public School serves only students with full-time IEPs, *i.e.*, children with disabilities who receive all of their education outside general education. Testimony of Program Director.

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<sup>10</sup> The parties’ disagreement as to whether the Student was “expelled” or “disenrolled” is not material to resolution of the issues in this case. Terminology aside, the Student was prohibited from attending the Charter High School after May 2, 2013, without being provided an alternative location of services, thereby effecting the most extreme change in placement—inability to attend school.

40. The Non-Public School's Program Director reviewed the Student's three previous IEPs (P-1, P-2 and P-3), the report of his psychological evaluation in February 2011 (P-4) and a progress report from the Charter High School (P-5). *Id.*

41. The Non-Public School's Program Director interviewed the Student and the Parent. *Id.*

42. The Non-Public School's Program Director did not speak with the Student's teachers. *Id.*

43. The Non-Public School's Program Director is not familiar with the Charter High School other than what she was told by the Student, *i.e.*, that the classrooms are large making it difficult for him to remain focused. *Id.*

44. The Non-Public School's Program Director is not aware of the Student's specific deficits resulting from his failure to receive specialized instruction and related services during the 2012-2013 school year. *Id.*

45. Based entirely upon the four documents reviewed and the interviews of the Parent and the Student, the Program Director concluded that the Non-Public School can meet the Student's needs because it has a therapeutic, structured setting, small class size, low teacher-student ratio, and behavior management support including a school-wide behavior management system. *Id.*

46. According to the Program Director, the Non-Public School could remediate the harm caused to the Student during the 2012-2013 school year<sup>11</sup> from the lack of specialized instruction and related services through the following: (a) providing a small,

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<sup>11</sup> The undersigned gives this testimony little weight because the Program Director testified that all she knew about the Student's "deficits" at the Charter High School were that he was failing academically and that he reported the class size was too large for him to focus.

structured setting; (b) offering electives and skill-building in math and reading; (c) the availability of teachers at lunchtime, during “home room,” and after school for additional support; and (d) the ability to earn up to seven credits for graduation outside of normal school hours. *Id.*

47. Based upon all of the record evidence, the undersigned finds that the Non-Public School is a more restrictive environment than the Student requires because it does not provide permit the Student to be educated to any extent with children who are not disabled.<sup>12</sup>

## VII. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR § 5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR § 5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

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<sup>12</sup> Petitioner’s counsel, in closing argument, drew the conclusion that because the less restrictive setting of the Charter High School did not provide the Student educational benefit, that was proof that he required a more restrictive setting. What Petitioner’s counsel overlooked was that the Student received no specialized instruction or related services at the Charter High School. The undersigned finds that it was the absence of these services, rather than the lower level of restrictiveness, that led to the Student’s failure.

## VIII. CREDIBILITY

The undersigned found both witnesses to be sincere.

However, the Parent's testimony was at times vague and at times contradictory, so the undersigned has credited documentary evidence over the Parent's testimony where those conflicted.

Similarly, although the Program Director of the Non-Public School appeared genuinely to believe that the Non-Public School would be an appropriate placement and location of services for the Student, and would be able to remediate the harm caused by Respondent's denial of FAPE during the 2012-2013 school year, she never discussed the Student with any of his teachers, did not evaluate the Student, and had no actual knowledge of what deficits the Student had incurred as a result of the denial of FAPE. Accordingly, the undersigned has credited documentary evidence over the Program Director's testimony where those conflicted.

## IX. CONCLUSIONS OF LAW

### Purpose of the IDEA

1. The IDEA is intended "(A) 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 [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected..." 20 U.S.C. § 1400(d)(1). *Accord*, DCMR § 5-E3000.1.

## FAPE

2. The IDEA requires that all students be provided with a free appropriate public education (“FAPE”). FAPE means:

special education and related services that –

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR 5-E3001.1.

## Purpose and Timing of the IEP

3. The “primary vehicle” for implementing the goals of the IDEA is the IEP which the IDEA “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). The IDEA defines IEP as follows:

(i) In general-- The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child’s present levels of academic achievement and functional performance, including—

(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;

\* \* \*

and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child’s other educational needs that result from the child’s disability;

(III) a description of how the child’s progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)

(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412 (a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications . . . .

20 U.S.C. §1414(d)(1)(A).

4. At the beginning of each school year, each LEA must have an IEP in effect for each child with a disability within its jurisdiction. 34 C.F.R. § 300.323(a).

#### FERPA

5. FERPA does not prohibit the release of a student's education records to other school officials within an LEA who have been determined by the LEA to have legitimate interests, including the educational interests of the child for whom consent otherwise would be required. 20 U.S.C. §1232g(b)(1)(A). Thus, FERPA does not preclude an LEA or the schools within an LEA from sharing information about the IDEA eligibility and IEP of a Student who is attending or has attended one school and intends to attend or is attending another school within the same LEA.

### OSSE Policy on Sharing of Education Records

6. Respondent did not introduce evidence of the asserted OSSE policy prohibiting a school from informing another school in the same LEA that a student leaving the former and enrolling in the latter is eligible under IDEA and has an IEP. Even if there were such an OSSE policy, State Educational Agency policies must be in compliance with IDEA. Any policy precluding the sharing of a student's eligibility and IEP information between a sending and receiving school would interfere with an eligible student's right to receive a FAPE and such a policy—if it in fact exists—therefore is void.

### Least Restrictive Environment

7. The IDEA requires that special education be provided in the “Least Restrictive Environment” (“LRE”):

To the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). *Accord*, DCMR 5-E3011.1. *See also*, 34 C.F.R.

§ 300.114(a)(2).

8. Parental choice does not supersede the LRE requirement. *See* 71 Fed. Reg. 46541 (August 14, 2006).

9. Based upon the entire record in the instant case, the undersigned concludes that the Non-Public School is not the LRE for the Student because it is a much more

restrictive environment than the Student's last two IEPs required and no evidence has been introduced that the Student requires a more restrictive environment.<sup>13</sup>

### Enrollment

10. As noted by the U.S. District Court for the District of Columbia in *District of Columbia v. West*, 54 IDELR 117 (D.D.C. 2010), quoting *James ex rel. James v. Upper Arlington City School Dist.*, 228 F.3d 764,768 (6<sup>th</sup> Cir. 2000):

Under the IDEA, “the obligation to deal with a child in need of services, and to prepare an IEP, derives from residence in the district, not from enrollment.” ... The District’s offer to convene an MDT meeting for A.C. was always predicated upon her re-enrollment, a condition that was not required by the IDEA. As such, A.C. was neither required to re-enroll before requesting an MDT nor required to re-request an MDT after her re-enrollment.

11. The undersigned therefore concludes that Respondent’s (and/or OSSE’s) asserted policy that a student must enroll or reenroll in a DCPS school in order to be offered a FAPE is inconsistent with IDEA and provides no defense to a claim of denial of FAPE.

### Respondent’s Responsibility for the Charter High School’s Compliance with IDEA

12. If a public charter school in the District of Columbia elects, as the Charter High School has, to have DCPS serve as its LEA for purposes of the IDEA, “DCPS shall be the LEA responsible for meeting the requirements applicable to an LEA under the IDEA, Part B and its implementing regulations

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<sup>13</sup> In particular, the Student’s expressed need for small class size could be accommodated in the general education setting, if the Student’s IEP Team or Multidisciplinary Team (“MDT”) determined that small class size was required to provide the Student a FAPE.

(34 C.F.R. Part 300), as well as all local laws, regulations, and policies, with respect to the children enrolled in the District Charter.” DCMR § 5-E3019.4.

13. Moreover, even if there were a change in LEAs, “[p]ursuant to 34 C.F.R. § 300.323(e), if a child with an IEP in effect transfers between an LEA Charter, a District Charter, or DCPS, the receiving LEA shall be responsible upon enrollment for ensuring that the child receives special education and related services according to the IEP, either by adopting the existing IEP or by developing a new IEP for the child in accordance with the requirements of IDEA.” DCMR § 5-E3019.5(d).

#### Failure to Implement IEP

14. If an appropriate IEP is developed, but the LEA fails to implement the IEP fully, the failure constitutes a denial of FAPE if the failure is “material.” *See, e.g., Banks v. District of Columbia*, 54 IDELR 282, 110 LRP 39207 (D.D.C. 2010).

15. The undersigned has found that the Student’s last IEP, dated February 2012, was appropriate (Finding of Fact 8), that Respondent failed to implement any aspect of the IEP during the 2012-2013 school year (Finding of Fact 19) and that the failure to implement was material (*Id.*). Accordingly, Respondent’s failure to implement the IEP constitutes a denial of FAPE. *Banks v. District of Columbia, supra.*

#### Disciplinary Actions

16. School personnel may remove a child with a disability who violates a code of student conduct from the child’s current placement to an appropriate interim alternative

educational setting, another setting, or suspension, for not more than 10 school days, to the extent such alternatives are applied to children without disabilities. 20 U.S.C. §1415(k)(1)(B). *See also*, 34 C.F.R. § 300.530(b).

17. If school personnel seek to order a change in placement that would exceed 10 school days, the relevant disciplinary procedures applicable to children without disabilities may be applied to a child with a disability in the same manner and for the same duration in which the procedures would be applied to children without disabilities, provided the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability. 20 U.S.C. §1415(k)(1)(C); 34 C.F.R. § 300.530(c); DCMR §§ 5-E2510.3-.4.<sup>14</sup>

18. To determine whether the behavior that gave rise to the violation of the school code was a manifestation of the child's disability, within 10 school days of a 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 IEP Team (as determined by the parent and the LEA) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if (i) the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) if the conduct in question was the direct result of the LEA's failure to implement the IEP.

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<sup>14</sup> A child who is removed from the child's current placement for more than 10 consecutive school days must continue to receive educational services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP, and receive, as appropriate, a functional behavioral assessment, 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).

20 U.S.C. §1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1). This is referred to as a Manifestation Determination Review (“MDR”). If either (i) or (ii) is found applicable for the child, the conduct shall be determined to be a manifestation of the child’s disability.

20 U.S.C. §1415(k)(1)(E)(ii); 34 C.F.R. § 300.530(e)(2).

19. If the child’s conduct was a manifestation of the child’s disability, absent special circumstances not present here,<sup>15</sup> the child is to be returned to the placement from which the child was moved.<sup>16</sup> 20 U.S.C. §1415(k)(1)(F)(iii); 34 C.F.R. § 300.530(f)(2).

20. Because the undersigned has found that the Student had a change in placement exceeding 10 school days due to alleged violations of the Charter High School code of conduct (Finding of Fact 36), the undersigned concludes that Respondent had an obligation to conduct an MDR, which it failed to do, thereby denying the Student a FAPE.

#### Compensatory Education

21. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005) (“*Reid*”). That relief may include compensatory award of prospective services:

When a school district denies a disabled child of free appropriate education in violation of the Individuals with Disabilities Education Act, a

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<sup>15</sup> These special circumstances comprise carrying or possessing a weapon, possessing or using illegal drugs, selling or soliciting the sale of controlled substances, and infliction of serious bodily injury upon another person (34 C.F.R. § 300.530(g)), none of which is alleged to have occurred in the instant case.

<sup>16</sup> There is an exception if the parent and the LEA agree to a change of placement, not relevant here.

court fashioning “appropriate” relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.

*Id.*

22. In all cases, an order of relief must be evidence-based. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005). Educational programs, including compensatory education, must be qualitative, fact-intensive, and “above all tailored to the unique needs of the disabled student.” *Id.*

23. Compensatory awards “should aim to place disabled children in the same position they would have occupied but for the school district’s violation of IDEA.” *Id.* Awards compensating past violations must “rely on individual assessments.” *Id.*

Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.

*Id.*

24. The hearing officer must base a compensatory education award on evidence regarding the student’s “specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits. . . . [T]he inquiry must be fact-specific and, to accomplish IDEA’s purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Id.*

25. A student who was denied a FAPE may not be entitled to an award of compensatory education if “the services requested, for whatever reason, would not compensate the student for the denial of a FAPE.” *Gill v. District of Columbia*, 751

F. Supp. 3d 104, 44 IDELR 191 (D.D.C. 2010)).

26. In the instant case, Respondent's failure to provide specialized instruction and related services during the 2012-2013 school year led to the Student's academic failure and need to repeat the ninth grade. Finding of Fact 22. Thus, the Student's "educational deficit" is that he is a year behind where he would have been academically if the services required by his IEP had been provided.<sup>17</sup> Instead of graduating high school in June 2016, the Student is now on track (if he succeeds academically) to graduate in June 2017.

27. To elevate the Student to the approximate position he would have enjoyed had he not suffered the denial of FAPE requires placing him in an appropriate school where he can receive the specialized instruction and related services he requires, as well as the opportunity to earn sufficient additional credits to meet all the requirements for graduation in June 2016 despite repeating ninth grade.

28. Petitioner's request for placement at the Non-Public School was based on the dual premise that the Non-Public School is an appropriate placement for the Student and that the Non-Public School could provide the Student the opportunity to earn additional credits toward graduation in June 2016. However, the undersigned has concluded that the Non-Public School is not an appropriate placement for the Student. Conclusion of Law 9. Accordingly, the undersigned concludes that placing the Student at the Non-Public School is not an appropriate compensatory education remedy for the denial of FAPE.

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<sup>17</sup> The expulsion or "disenrollment" of the Student in May 2013 without providing another location of services further deprived the Student of the ability to complete the ninth grade.

29. Petitioner's failure to justify a specific award does not waive the student's right to compensatory education. *Gill v. District of Columbia, supra; see also, Henry v. District of Columbia*, 55 IDELR 187, 110 LRP 67835 (D.D.C. 2010).

30. The undersigned concludes that Petitioner's *concept* for the Student's compensatory education—an appropriate placement for the Student prospectively with the opportunity for the Student to earn, over a period of time, the credits that the Student lost by failing ninth grade—is reasonably calculated to elevate the Student to the approximate position he would have enjoyed had he not suffered the denial of FAPE; only the proposed school (the Non-Public School) is inappropriate.

#### Summary

31. Respondent denied the Student a FAPE by materially failing to implement the requirements of his IEP during the 2012-2013 school year.

32. Respondent failed to comply and failed to ensure that the Charter High School complied with the disciplinary procedures of IDEA because the Student's expulsion (or "disenrollment") from the Charter High School in May 2013 constituted a change in placement and was due to violations of the Charter High School's code of conduct.

## **X. ORDER**

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

1. No later than August 2, 2013, Respondent shall request copies of the Student's education records from the Charter High School. Respondent shall send this request to the Charter High School via email or facsimile as well as via U.S. mail or hand-delivery.

2. If Respondent or the Charter High School determines that parental consent is required for the sharing of education records described in Paragraph 1 above, then:

(a) No later than August 9, 2013, Respondent shall provide the Parent with whatever forms Respondent or the Charter High School believes are required.

The form(s) or a cover letter or email shall indicate the name, address and facsimile number of the representative of Respondent to whom the executed form(s) should be returned.

(b) Within two business days of receiving these form(s), the Parent shall sign the form(s) and return them to Respondent's designated representative via hand-delivery, email or facsimile.

(c) Within two business days of receiving the executed form(s) from the Parent, Respondent shall request copies of the Student's education records from the Charter High School. Respondent shall send this request to the Charter High School with the executed forms, via email or facsimile as well as via U.S. mail or hand-delivery.

3. No later than August 9, 2013, without requiring Petitioner to enroll or reenroll the Student, and whether or not Respondent has received the Student's education records

from the Charter High School, Respondent shall convene an Individualized Education Program Team (“IEPT”) or Multidisciplinary Team (“MDT”) meeting to develop a new Individualized Education Program (“IEP”) for the Student and to determine his placement for the 2013-2014 School Year. If the IEP is not completed at the initial meeting, Respondent may reconvene the IEPT or MDT to complete the IEP. However, the new IEP must be complete and effective no later than August 16, 2013 to ensure that the Student’s teachers and other school staff who will implement the Student’s IEP will have it prior to the beginning of the 2013-2014 school year.

4. The new IEP shall state the Student’s disability classification as (a) Other Health Impairment or (b) Multiple Disabilities, *i.e.*, Other Health Impairment and Emotional Disturbance. The new IEP shall include at least 15 hours per week of specialized instruction, which may be in the general education setting, and at least 240 minutes per month of behavioral support services.

5. If the IEPT or MDT lacks sufficient information to complete any section(s) of the new IEP, and/or believes that additional assessments or evaluations of the Student are required, the IEPT or MDT shall so state on the new IEP; however, lack of information or need for additional assessments or evaluations shall not justify a delay in determining the Student’s placement for the 2013-2014 school year, nor a delay in implementing the new IEP.

6. No later than August 19, 2013, Respondent shall inform Petitioner of the Student’s location of services for the 2013-2014 school year, via a Proposed Notice of Placement or similar document.

7. In addition to the behavioral support services provided in the Student's IEP, Respondent shall provide or fund an additional 60 minutes per week of individual counseling to the Student for the first eight weeks of the 2013-2014 school year. At Petitioner's request, such individual counseling will be provided outside of instructional hours. If this individual counseling is provided or funded at a location other than the Student's school, Respondent shall provide transportation if the location is more than a half mile walk from the Student's school and more than a half mile walk from the Student's home.

8. Between September 20 and 27, 2013, Respondent shall convene another meeting of the Student's IEPT or MDT, with all necessary members, including Petitioner, to review and revise the Student's IEP as appropriate, including changes in services, placement, location and/or site of services if appropriate, based upon (a) any education records received from the Charter High School, (b) any reports of any evaluations that may have been received since the beginning of the 2013-2014 school year, and (c) the Student's academic performance, attendance and behavior since the beginning of the 2013-2014 school year. The IEPT or MDT shall specifically consider whether a Functional Behavioral Analysis ("FBA") and/or a Behavior Intervention Plan ("BIP") is appropriate.

9. Between October 18 and 25, 2013, Respondent shall convene another meeting of the Student's IEPT or MDT, with all necessary members, including Petitioner, to review and revise the Student's IEP as appropriate, including changes in services, placement, location and/or site of services if appropriate, based upon (a) any education records received from the Charter High School since the last IEPT/MDT meeting, (b) any

reports of any evaluations that may have been received since the last IEPT/MDT meeting, and (c) the Student's academic performance, attendance and behavior since the last IEPT/MDT meeting. The IEPT or MDT shall specifically consider whether an FBA and/or an initial or revised BIP is appropriate.

10. Between November 15 and 22, 2013, Respondent shall convene another meeting of the Student's IEPT or MDT, with all necessary members, including Petitioner, to review and revise the Student's IEP as appropriate, including changes in services, placement, location and/or site of services if appropriate, based upon (a) any education records received from the Charter High School since the last IEPT/MDT meeting, (b) any reports of any evaluations that may have been received since the last IEPT/MDT meeting, and (c) the Student's academic performance, attendance and behavior since the last IEPT/MDT meeting. The IEPT or MDT shall specifically consider whether an FBA and/or an initial or revised BIP is appropriate.

11. Respondent shall provide or fund the following services as compensatory education for the denial of FAPE to the Student: Commencing September 9, 2013, and continuing for the remainder of the Student's attendance at any high school or other secondary school, including summers between school terms whether or not the Student attends summer school, Respondent shall provide or fund credit recovery services. During school years, and during summer terms if the Student attends summer school, the credit recovery services will be provided after the school instructional day. During summer terms if the Student does not attend summer school, the credit recovery services may be offered during the summer school instructional day. The courses to be taken for credit recovery shall be courses that are required for high school graduation for which the

Student lacks credit and that he is not taking as part of his then-current class schedule, up to a total of seven credits.

12. If Respondent determines to provide or fund the Student's credit recovery at a location other than the Student's school, Respondent shall provide transportation if the location is more than a half mile walk from the Student's school and more than a half mile walk from the Student's home.

13. If in any week during the school year or summer school term, excluding school breaks, the Student does not attend and participate actively in credit recovery for at least four hours, he must make up the deficit within the two following weeks. If the Student fails to satisfy his obligations under the above schedule, Respondent's obligations under Paragraphs 11 and 12 above shall cease.

14. All written communications from Respondent to Petitioner concerning the above matters shall include copies to Petitioner's counsel by facsimile or email.

15. Any delay caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests within one business day) shall extend Respondent's deadlines under this Order by the same number of days.

16. Nothing in this Order requires Respondent to provide or fund, or precludes Petitioner from seeking, additional assessments or evaluations, including Independent Educational Evaluations.

17. Nothing in this Order precludes Petitioner from filing a Due Process Complaint challenging the contents of any IEP developed or amended for the Student subsequent to the IEP developed pursuant to Paragraphs 3 through 5 of this Order.

18. Petitioner's other requests for relief are DENIED.

Dated this 26<sup>th</sup> day of July, 2013.

A handwritten signature in cursive script, appearing to read "Charles Carron".

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Charles Carron  
Impartial Hearing Officer

## **NOTICE OF APPEAL RIGHTS**

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial 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. § 1415(i)(2).