

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

Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

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STUDENT, <sup>1</sup>	)	
through the Parent,	)	
	)	Date Issued: August 24, 2015
Petitioners,	)	
	)	Hearing Officer: John Straus
v.	)	
	)	Case No: 2015-0190
District of Columbia Public Schools (“DCPS)	)	
	)	Hearing Dates:
Respondent.	)	July 20, 2015 Room: 2006
	)	July 21, 2015 Room: 2006
	)	

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**HEARING OFFICER DETERMINATION**  
**(CORRECTED)<sup>2</sup>**

**Background**

The Petitioner, who is the parent of the Student, filed a due process complaint notice on May 29, 2015, alleging that the Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”). The Petitioner alleged DCPS denied the Student a FAPE by failing to 1) provide IEPs during the 2014-2015 school year that are reasonably calculated to provide educational benefit; 2) provide an appropriate placement for the 2014-2015 school year; 3) conduct an appropriate manifestation review and determination of an appropriate interim alternative setting on May 8, 2014 and January 22, 2015 following the Student’s suspensions; 4) develop an IEP on January 25, 2015 that is reasonably calculated to provide educational benefit; 5) incorporate the findings of the February 18, 2015 psychological assessment in the March 23, 2015 and March 27, 2015 IEPs; and 6) by changing the service delivery of Behavior Support Services (“BSS”) from direct services to consult services on March 27, 2015.

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<sup>1</sup> Personal identification information is provided in Appendix A.

<sup>2</sup> Paragraph 5 of the Order on page 15 was corrected on August 24, 2015. The Hearing Officer found that the Student was denied a FAPE as a result the IEP team’s failure to address the Student’s consistent truancy from his classes and need for a placement in a therapeutic school to address the Student’s Emotional Disturbance, as well as placing the Student in a school where the IEP could not have been implemented during his suspensions. The Hearing Officer determined the Student could have completed 3 Carnegie Units if the IEP team did not deny the Student a FAPE. DCPS was ordered to fund 225 hours of tutoring for credit recovery classes; however, the order did not specifically state DCPS was to fund 3 Carnegie Unit in credit recovery as the Hearing Officer intended.

DCPS argued, with respect to each issue raised, that 1) the Petitioner's assertions regarding the IEP deficiencies are either not based in law or inaccurate and the January 2014 IEP was appropriate and reasonably calculated at the time developed; 2) the student has been provided with a FAPE appropriately on the continuum of educational placements as would be necessary to provide him with a floor of opportunity; 3) the theft of a security wand in May 2014 was not a manifestation of the Student's disability and that the prior written notice indicates the appropriate interim appropriate placement; 4) the parent, her educational advocate, the student's special education teacher, LEA representative, general education teacher, social worker, and court appointed attorney all attended the January 20, 2015 IEP team meeting and participated in this meeting and BSS were discussed at this meeting; 5) there is no requirement to implement the finding of the assessment in the IEP; and 6) the IEP allows greater flexibility to conduct routine teacher/parent consultations and behavior interventions support for the Student moving forward.

### **Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the IDEA, as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R."); and 38 D.C. Code 2561.02.

### **Procedural History**

The due process complaint was filed on May 29, 2015 and this Hearing Officer was assigned to the case on June 2, 2015. Neither the Petitioners nor the Respondent waived the resolution meeting. The resolution meeting took place on June 10, 2015. At the resolution meeting, parties agreed to keep the 30-day resolution period open. The 30-day resolution period ended on June 28, 2015 and the 45-day timeline to issue a final decision began on June 29, 2015. A final decision is due no later than August 12, 2015.

The Petitioner was represented by Alana Hecht, Esq. and DCPS was represented by Tanya Chor, Esq. Neither party objected to the testimony of witnesses by telephone. The Petitioner participated in person throughout the hearing.

The Petitioner presented eight witnesses: an Educational Advocate, Clinical Psychologist, Attorney, Probation Officer, Senior Educational Advocate, Tutor, Education Director, and Petitioner. DCPS presented four witnesses: Special Education Coordinator, School Social Worker, and Special Education Teacher.

The Petitioner's disclosures dated July 13, 2015, containing a witness list and Exhibits P-1 through P-45 were timely filed and admitted into evidence, with the exception of Exhibit P-39, which the Petitioner withheld. DCPS' disclosures dated July 13, 2015, containing a witness list and Exhibits R-1 through R-40, were timely filed and admitted into evidence.

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

2015-0190  
Hearing Officer Determination

1. Whether DCPS denied the Student a FAPE by failing to provide IEPs during the 2014-2015 school year that are reasonably calculated to provide educational benefit; specifically, the IEPs do not have positive behavior interventions and supports, and other strategies to address the Student's truancy/attendance problems.
2. Whether DCPS denied the Student a FAPE by failing to provide an appropriate placement along the continuum of alternative placements capable of addressing both the academic and behavioral needs for the 2014-2015 school year.
3. Whether DCPS denied the Student a FAPE by failing to conduct an appropriate manifestation review and determination of an appropriate interim alternative setting on May 8, 2014 and January 22, 2015.
4. Whether DCPS denied the Student a FAPE by failing to develop an IEP on January 25, 2015 that is reasonably calculated to provide educational benefit; specifically, the IEP does not provide an appropriate placement and lacks sufficient hours of BSS.
5. Whether DCPS denied the Student a FAPE by failing to incorporate the findings of the February 18, 2015 psychological assessment in the March 23, 2015 and March 27, 2015 IEPs because the team failed to determine the appropriate least restrictive environment and placement along the continuum.
6. Whether DCPS denied the Student a FAPE by changing the service delivery of BSS from direct services to consult services on March 27, 2015.

For relief, Petitioner requested the Hearing Officer to order DCPS to 1) fund tuition and transportation at a non-public school of the parent's choice; 2) issue documentation reversing the May 8, 2014 and January 22, 2015 manifestation determinations; 3) conduct or fund a Functional Behavioral Assessment ("FBA"); 4) within 15 school days of the receipt of the FBA, Respondent to convene a meeting to review the FBA, revise Student's IEP to reflect a disability category of Multiple Disabilities ("MD") that include Specific Learning Disability ("SLD") and Emotional Disturbance ("ED") and provide one hour per week of direct BSS, determine the student's placement as a placement in a full-time separate special education day school; and 5) order compensatory services to redress the lack of special education and related services based on the claims alleged in the instant Due Process Complaint.

A previous Hearing Officer Determination ("HOD") was issued on February 25, 2014 deciding the following issues.

Issue #1 – Whether DCPS denied Student a FAPE by failing to implement the HOD dated 02/12/12; specifically, the IEP that was developed on 02/22/12 failed to include the following provisions that were ordered by the HOD: (a) a therapeutic setting, (b) small group special education instruction in all academic subjects for the entirety of each academic classroom period during the school day; and (c) behavioral support services that included immediate crisis intervention as necessary.

Hearing Officer Determination

Issue #2 - Whether DCPS denied Student a FAPE by failing to develop an IEP on 02/22/12 that was designed to meet Student's educational needs, in that the IEP failed to include (a) a therapeutic setting, (b) small group specialized instruction in all academic subjects for the entirety of each academic classroom period, (c) behavioral support services that included immediate crisis intervention as necessary; all of which were required by the 02/12/12 HOD and Student's current behavioral and academic needs, and (d) goals and present levels of performance that were sufficient to reflect Student's educational needs.

Issue #3 – Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on 01/31/13; specifically, the IEP failed to include (a) a therapeutic setting, (b) small group specialized instruction in all academic subjects for the entirety of each academic classroom period, (c) behavioral support services that included immediate crisis intervention as necessary; all of which were required by the 02/12/12 Hearing Officer Determination, and (d) goals and present levels of performance that were sufficient to reflect Student's educational needs.

Issue #4 – Whether DCPS denied Student a FAPE by failing to implement Student's 01/31/13 IEP; specifically, the IEP was not implemented at DCPS School B during the 2012/13 school year and not implemented at DCPS School C during the 2013/14 school year, in that each school failed to provide the full amount of specialized instruction outside of general education that was required by the IEP, which contributed to the poor academic and behavioral performance of Student.

Issue #5 – Whether DCPS denied Student a FAPE by failing to provide Student with a location of services during the 2012/13 and the 2013/14 school years that could service an IEP that required (a) all specialized instruction in academic areas to be provided outside of general education, (b) a therapeutic setting, (c) specialized instruction in a small group setting, and (d) behavioral support services that required crisis intervention, as necessary.

Issue #6 – Whether DCPS denied Student a FAPE by failing to provide Prior Written Notice (a) when DCPS told Student to attend DCPS School C at the beginning of the 2013/2014 school year, and (b) when Student's IEP was revised on 01/31/13 to reflect a different educational placement that consisted of more specialized instruction outside of general education.

The Hearing Officer found that the Petitioner failed to meet her burden of proof on all of the issues presented. DCPS argued that the Hearing Officer is bound by the findings in the previous HOD. However, the issues in the HOD are significantly different from the issues in the instant complaint and the time period is different from the relevant period in this instant complaint. Therefore, *res judicata* or *collateral estoppel* do not apply.

**Findings of Fact<sup>3</sup>**

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The Student attended High School for the 2013-2014 and 2014-2015 school years. He has repeated the 9<sup>th</sup> grade three times. (Senior Education Advocate's testimony)

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<sup>3</sup> Parentheticals in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. The Hearing Officer has declined to base a finding of fact on a witness's testimony based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

2. On April 30, 2009, the Student received an academic achievement assessment that yielded scores at the seven to nine year old level or grade equivalent scores in the 2<sup>nd</sup> to 4<sup>th</sup> grade level. (Exhibit P-38 and Clinical Psychologist's testimony)
3. On December 5, 2011, the Student received a psychological assessment. The assessment yielded below average to very low academic achievement scores. Specifically, his academic achievement ranged between that of a six and nine year old level or the 1<sup>st</sup> and 4<sup>th</sup> grade levels. The evaluator noted the Student presents with clinically significant behaviors; specifically aggression, depression, attention problems, learning problems, withdrawal, and social skills deficits. The evaluator concluded the Student is a student with dysthymic disorder, disruptive behavior disorder and learning disorder; however, the Student does not have an Attention Deficit with Hyperactivity Disorder ("ADHD"). The evaluator recommended the IEP team determine the Student is a student with an ED under the IDEA in addition to SLD; with ED as the Student's primary disability. The evaluator also recommended the Student receive counseling for at least one hour per week. The evaluator further recommended the Student receive a FBA that pinpoints antecedents to behaviors in the classroom and a Behavior Intervention Plan ("BIP"). (Exhibit P-34 and Clinical Psychologist's testimony)
4. On January 24, 2014, the IEP team determined the Student required 7.5 hours of Reading per week to be provided outside the general education setting, 2.5 hours of Written Expression per week to be provided outside the general education setting, 5 hours of Mathematics per week to be provided outside the general education setting 10 hours of Specialized Instruction per week to be provided outside the general education setting, and 240 minutes of BSS per month to be provided outside the general education setting. The IEP team did not determine the Student's placement; however, the Petitioner did not agree that the Student be placed in High School. (Exhibit P-2, P-10, P-11, R-15, R-16 and R-31 and Senior Educational Advocate's and Special Education Coordinator's testimony)
5. On January 24, 2014, the IEP team developed a BIP that states the Student will arrive to school on time and attend all day; refrain from impulsive and aggressive responses towards adults or peers; and comply with directives and follow school rules and regulations. Strategies used to address these behaviors include attending BSS as prescribed on the IEP; verbal encouragement when staff see compliant behavior; time out when the Student appears to be angry; and picking up an attendance sheet daily to have signed by teachers. The BIP states the Student would be rewarded with verbal praise and agreed upon incentives, positive verbal reports home; and classroom privileges. No FBA was conducted before the BIP was developed. (Exhibit P-8 and R-17 and Senior Education Advocate's and School Social Worker's testimony)
6. On April 28, 2014, the Student was proposed for long-term suspension for 36 days for taking a security wand that was on a table near a security station in High School. He returned the security wand to the table. On May 8, 2014, the IEP team convened to discuss the incident. A special education coordinator stated that the Student's disability

## Hearing Officer Determination

was a SLD; therefore, the incident was not a manifestation of his disability. The parent and her educational advocate disagreed with DCPS's refusal to consider whether the Student is a student with ED, as identified in the December 5, 2011 psychological assessment. The team did not determine an interim alternative setting and no prior written notice was issued to the Petitioner. Twenty one days after the Student was suspended, he was allowed to return to school. (Exhibit P-2, P-14, P-16, P-17, P-18, R-18, R-19 and R-21 and Senior Education Advocate's and School Social Worker's testimony)

7. DCPS proposed another 45 day suspension for an incident that took place on January 14, 2015. On January 22, 2015 the IEP team discussed the incident that led to the proposed 45 day suspension. The IEP team determined that the incident was not a manifestation of the student's disability solely because his disability classification is SLD. The Petitioner and her representatives all indicated that the incident was a manifestation of the Student's disability as identified in the December 5, 2011 psychological assessment. The team did not determine an interim alternative setting but assumed the Student would attend Alternative School. (Exhibit P-2, P-19 and P-22 and Attorney's and Senior Education Advocate's testimony) Alternative School cannot implement the Student's IEP. (Education Advocate's testimony)
8. On January 22, 2015, an IEP meeting was held to conduct an annual review of the Student's IEP. The IEP team noted the Student is unable to read and write at the first grade level. The School Social Worker stated that the Student does not attend BSS. As a result, the Student's hours of BSS were reduced. The team determined the Student required 25 hours per week of specialized instruction outside the general education setting and 120 minutes of BSS per week outside the general education setting. (Exhibit P-20 and Senior Educational Advocate's testimony)
9. On February 10, 2015, the Student received a psychological assessment from the Clinical Psychologist. The report states the Student skips class often and, when he does attend class, he is often tardy and won't follow directions. The assessment revealed the same cognitive scores and academic achievement at a 1<sup>st</sup> through 4<sup>th</sup> grade. The Clinical Psychologist stated, "He appears disengaged not only from school, but from life in general." The Student's school absences are a function of his depression. The Clinical Psychologist diagnosed the Student with Persistent Depressive Disorder (Dysthymia), Unspecified Disruptive Impulse Control Disorder (Disruptive Behavior Disorder), and Specific Learning Disabilities. The Clinical Psychologist found the Student continues not to be a Student with ADHD based on his teacher's responses. Although the Student is a student with SLD, his primary disability should be ED. The Clinical Psychologist recommended the Student be placed in a therapeutic school for students with an ED and SLD. If the Student does not attend the therapeutic school, after 2 months, the Student should be placed in a residential school. The IEP team should develop a BIP, which will work toward getting the Student to attend his classes; change the Student's disability category to ED under the IDEA; and provide behavioral support in school in the form of individual counseling for one hour per week. (Exhibit P-33 and Clinical Psychologist's testimony)

10. On February 19, 2015, the School Social Worker conducted a FBA. The assessment consisted of an interview with the Student's teacher. The School Social Worker identified socializing in the hallways instead of going to class and defiance with respect toward school rules, including attending class, as target behaviors. The School Social Worker hypothesized that the Student's behavior is a result of the Student's Dysthymia. (Exhibit P-23 and R-27 and School Social Worker's testimony)
11. On February 19, 2015, The School Social Worker created a BIP for the Student that included implementing effective communication strategies during BSS sessions, a token economy system, and journaling activities as a self-monitoring tool. The BIP was never implemented. (Exhibit P-23 and R-28 and School Social Worker's testimony)
12. On February 20, 2015, the IEP team met at High School and determined the Student continues to be a student with SLD under the IDEA. At that meeting, the BIP was reviewed by the School Social Worker. The School Social Worker indicated they would be reducing the student's hours of BSS to 240 minutes per month of consultation services for the Student's teachers. The Senior Educational Advocate, advised the team that Alternative School could not implement the student's IEP and that the student required an interim alternative placement at which to serve his suspension where his IEP could be implemented. The Special Education Coordinator responded that Alternative School was the only option for the Student during his suspension. (Exhibit P-24, P-25, R-2, R-3, and R-29 and Senior Education Advocate's and School Social Worker's testimony)
13. On March 23, 2015, the IEP team convened at High School to review the Psychological assessment. At that meeting, the IEP team determined that the Student is a student with SLD and Other Health Impaired ("OHI") under the IDEA. The team determined the Student is a Student with OHI under the IDEA because they thought the Student was a student with ADHD. The School Social Worker stated that he was available if the student needed him, but the Student was not attending BSS. The IEP team determined the Student did not need a separate special education therapeutic school because the Student was provided appropriate services at High School. (Exhibit P-2, P-26, P-27 and P-28 and Attorney's, Senior Education Advocate's and School Social Worker's testimony)
14. On March 27, 2015, the IEP team convened again. The team noted that while the Student has emotional needs the most profound disability continues to be his SLD which has him several grade levels behind; however, the IEP team refused to determine the Student is a student with ED under the IDEA. The team determined the Student is a student with Multiple Disabilities ("MD") under the IDEA because the Student is a student with a SLD and OHI. The IEP team stated the Student is a student with OHI because the Student may have ADHD. (Exhibit P-29, P-30, R-30, R-38 and R-39 and Attorney's, Senior Education Advocate's and School Social Worker's testimony)
15. On April 24, 2015, the IEP team developed goals; such as the Student will acquire and implement adaptive communication skills, attend classes on a daily basis and use an

attendance tracker that will be used to monitor progress, and use journaling activities to record positive attributes about himself in ¾ trials to mitigate his mild depression. The team determined the Student requires 25 hours per specialized instruction per week outside the general education setting and 240 minutes of BSS per month on a consultative basis. (Exhibit P-31, P-32 and R-4 and Clinical Psychologist's testimony)

16. On July 8, 2015, the Student was accepted at Nonpublic School. Nonpublic School provides services to 24 male students with LD and ED under the IDEA; divided into four groups. The staff include special education teachers, teacher assistants, clinical social workers, and behavior intervention specialists that provide specialized instruction in a seven to one ratio. Nonpublic School offers vocational training programs in automotive technology, computer technology, carpentry, and cosmetology and barbering. All of the teachers have walkie-talkies to ensure the Student's do not walkout of class without intervention. Students may graduate with a District of Columbia High School diploma and Nonpublic School is approved by the Office of the State Superintendent. (Exhibit P-42 and P-45 and Education Director's testimony)
17. The Student attend High School during the 2014-2015 school year. However, he rarely attended class while he was there and instead was "messing around in the halls" or walked out of class. The Petitioner and group home staff took the Student to school. (Exhibit P-21 and Attorney's, Probation Officer's, and Senior Education Advocate's testimony) None of the programs at High School have been successful for the Student because he does not attend. (Special Education Coordinator's and Special Education Teacher's testimony)
18. The Petitioner requests 300 hours of tutoring to assist with credit recovery classes and 100 hours of mentoring. (Exhibit P-1 and Senior Education Advocate's testimony) It takes no less than 75 hours of instruction for a student to earn one credit recovery Carnegie Unit. (Tutor's testimony)

### **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:

"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 in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

**DCPS denied the Student a FAPE by failing to provide IEPs during the 2014-2015 school year that are reasonably calculated to provide educational benefit; specifically, the IEPs do not have positive behavior interventions and supports, and other strategies to address the Student's truancy/attendance problems.**

As described by the U.S. Supreme Court, the IEP is a comprehensive statement of the educational needs of a child with a disability and the specially designed instruction and related services a district will employ to meet those needs. *School Committee of the Town of Burlington v. Dep't of Education, Massachusetts*, 471 U.S. 359 (1985). A district's obligation to provide FAPE to a student with a disability is satisfied when the district provides the student with the personalized educational program necessary to allow the child to derive an educational benefit from that instruction. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

The February 10, 2015 psychological assessment states the Student's truancy is caused by his Persistent Depressive Disorder. When the behavior is related to the child's disability, proper development of the child's IEP should include development of strategies, including positive behavioral interventions, supports, and other strategies to address that behavior. *See* 71 Fed. Reg. 46,720 (2006). DCPS states that the Student's poor attendance in his classes is due to the Student not going to school. However, the Student's probation officer, who is responsible to the Superior Court to report any attendance problems, credibly testified that the Student goes to school on a regular basis. Additionally, the School Social Worker identifies going to class as a target behavior rather than going to school.

DCPS argues that truancy and attendance are not FAPE issues. However, truancy must be taken into account in the student's placement and programming, and if the truancy is related to the student's disability, then the LEA has an obligation to address it through the student's programming. *Independent School District No., 284 v. A.C.*, 258 F.3d 769 (8th. Cir. 2001). Although, the Student attends school regularly, he rarely attends class.

The February 10, 2015 psychological assessment states the Student's absences are a function of his depression. The School Social Worker testified that he agreed with that finding. The March 23, 2015 IEP team reviewed the psychological assessment but failed to make any changes to the Student's IEP to provide any positive behavior interventions and supports and other strategies to address the Student's truancy problems. The student's truancy is due to depression and low self-esteem from continuous academic failures according to the psychological assessment and DCPS did not dispute this assertion. Moreover, the Student's truancy is the primary reason for the Student's academic failure. This creates an affirmative duty for the IEP team to address the Student's truancy. *See Springfield School Committee v. Quetzal Doe*,<sup>4</sup> 623 F. Supp. 2d 150 (D. Ct. D. Mass., 2009) (Affirming the hearing officer's finding that the student's truancy became excessive and that resulted in an "affirmative duty" on behalf of the Plaintiff to take some sort of responsive action).

DCPS did attempt to develop a BIP to address the student's truancy. However, the BIP was ineffective due to the fact that DCPS failed to conduct a FBA with necessary observations to determine the antecedents prior to the Student's failure to attend class. In addition, the Student was not consulted to determine what motivators would be effective to get his to attend class

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<sup>4</sup> In *Springfield*, the Court found that the most basic responsibility for a student is attendance. The Court then found that "behavior management services fall within the scope of services a school district may be required to provide under the IDEA." *Citing Rome Sch. Comm. v. Ms. B*, 247 F.3d 29, 32 (1st Cir. 2001)

regularly. DCPS failed in its duty to effectively address the Student's truancy, therefore, the Hearing Officer finds that DCPS denied the Student a FAPE by failing to provide IEPs that has strategies to address the Student's truancy and class attendance problems.

**DCPS denied the Student a FAPE by failing to provide an appropriate placement along the continuum of alternative placements capable of addressing both the academic and behavioral needs for the 2014-2015 school year.**

Pursuant to 34 C.F.R. § 300.115(a), DCPS "must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." The continuum, in general, ranges from the least restrictive to the most restrictive: instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115(b)(1) *See also*, 34 C.F.R. § 300.39(a)(1)(i). In this case, the IEP team placed the Student in special classes. The Petitioner argues that the IEP team should have placed the Student in a special school.

The group determining the placement must select the placement option on the continuum in which it determines that the child's IEP can be implemented in the LRE." 71 Fed. Reg. 46587 (August 14, 2006), *See also*, 34 C.F.R. §§ 300.114 and 300.116. The Student's IEP can be implemented at a special school.<sup>5</sup>

What is pertinent in making the placement decision will vary, at least to some extent, based upon the child's unique and individual needs. *Rowley*, 458 U.S. 176 (1982). Although the February 10, 2015 psychological assessment recommended the Student be placed in a special school, the IEP team did not adopt the recommendation to place the Student in a special school each time it reviewed the Student's assessment.

The evidence shows that the Student is not succeeding in his current program. The psychological assessment results indicate the Student has not made any significant progress in his academic achievement over six years. He has two significant suspensions during this period and his attendance has become worse. The Student does go to school but he spends most of the school day in the hallways. The Student's attendance and behavioral issues are the cause of the Student's lack of school success. The Student's current placement is special classes on the continuum of placements and his IEP states that he requires specialized instruction on a full time basis. DCPS has not placed the Student in the next more restrictive placement on the continuum of alternative placements, a special school.

Several programs were attempted with the Student at High School, but none of the programs were successful with the Student. The Student is allowed to roam the hall and not take advantage of the services, if any that are available. In a more restrictive setting, the Student could not wander the building, which is what he is doing at High School. The fact that the Student rarely attends class shows that High School has not implemented the Student's IEP. Therefore, the Hearing Officer finds DCPS denied the Student a FAPE by failing to provide an

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<sup>5</sup> In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is based on the child's IEP 34 C.F.R. § 300.116(b)(2).

appropriate placement along the continuum of alternative placements capable of addressing both the Student's academic and behavioral needs.

**DCPS denied the Student a FAPE by failing to conduct an appropriate manifestation review and determination of an appropriate interim alternative setting on May 8, 2014 and January 22, 2015**

The Student was suspended in excess of 10 school days on two occasions; April 28, 2014 and January 14, 2015. Pursuant to 34 C.F.R. § 300.530(c), for disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, as determined by relevant members of the IEP team, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities. The sole reason the IEP team determined the Student's conduct was not a manifestation of his disability is because the Student was identified as a Student with SLD under the IDEA.

The IEP team did not consider the Student's Persistent Depressive Disorder and Unspecified Disruptive Impulse Control Disorder. A student needs to exhibit one of the five criteria of the definition of ED listed in 34 C.F.R. § 300.8(c)(4) over a long period of time<sup>6</sup> and to a marked degree<sup>7</sup> to be so classified, provided that his educational performance is thereby adversely affected. *See, e.g. Lapidus v. Coto*, 559 IDELR 387 (N.D. Cal. 1988). The five criteria are 1) An inability to learn that cannot be explained by intellectual, sensory, or health factors; 2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; 3) Inappropriate types of behavior or feelings under normal circumstances; 4) A general pervasive mood of unhappiness or depression; 5) A tendency to develop physical symptoms or fears associated with personal or school problems. In this case, the Student does have an inability to build or maintain satisfactory relationships with peers and teachers as evidenced by the Student's poor attendance and the Student has a general pervasive mood of unhappiness or depression as evidenced by the psychological assessment.

The Student's current disability is MD as a Student with SLD and OHI under the IDEA. Pursuant to 34 C.F.R. § 300.8(c)(7), MD means concomitant impairments, the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. There is nothing in the record that indicates the Student is a student with OHI under the IDEA. However, there is ample evidence that the Student is a student with ED under the IDEA. The sole reason the IEP team did not determine the Student is a student with ED is because the IEP team maintained the Student cannot be both SLD and ED under the IDEA. This contention is not correct.<sup>8</sup> Therefore, the

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<sup>6</sup> According to OSEP, a generally acceptable definition of a long period of time is a range of time from two to nine months, preliminary interventions have been implemented and proven ineffective during that period. *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989).

<sup>7</sup> OSEP takes the position that "to a marked degree" generally refers to the frequency, duration or intensity of a student's emotionally disturbed behavior in comparison to the behavior of his peers and can be indicative of either degree of acuity or pervasiveness. *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989).

<sup>8</sup> OSEP explains that children with one of the disabilities in 34 C.F.R. § 300.8 should be identified as a child with a disability using the category that is most appropriate for the child. Some children may be identified under other

Hearing Officer finds the IEP team erred in determining the Student's behavior was not a manifestation of the Student's disability.

Pursuant to 34 C.F.R. § 300.530(d)(1)(i), A child with a disability who is removed from the child's current placement 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. The child's IEP Team determines the interim alternative educational setting for services. 34 C.F.R. § 300.531. The IEP team did not determine an interim alternative educational setting. Instead, DCPS placed the Student in Alternative School. Alternative School is not able to implement the Student's IEP. Therefore, the Hearing Officer finds that DCPS denied the Student a FAPE by failing to conduct an appropriate manifestation review and determination of an appropriate interim alternative setting on May 8, 2014 and January 22, 2015.

**DCPS did not deny the Student a FAPE by failing to develop an IEP on January 22, 2015<sup>9</sup> that is reasonably calculated to provide educational benefit; specifically, the IEP does not provide an appropriate placement.**

Under 34 C.F.R. § 300.324 (b), DCPS “must ensure that... the IEP team... revises the IEP, as appropriate, to address (A) any lack of expected progress toward the annual goals, (B) the results of any reevaluation..., (C) information about the child provided to, or by, the parents... (D) the child's anticipated needs; or (E) other matters.” In determining the educational placement of a child with a disability, DCPS must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. *See* 34 C.F.R. § 300.116(a)(1).

Although the IEP team provided a “full time” IEP, DCPS did not place language in the student's IEP that indicated the Student required a “separate school”. 34 C.F.R. § 300.116 provides that the IEP team can determine a placement in a setting that is more restrictive than a self-contained setting. The IEP team is in the best position to determine the Student's placement on the continuum, yet there is nothing in the IEP that indicates the IEP team's determination regarding placement. However the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008 (“[T]he measure and adequacy of an IEP can only be determined as of the time it is offered to the student. ... Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.” *quoting Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008)). The January 22, 2015, IEP team could not have reviewed the results of the February 10, 2015 psychological assessment which recommended the Student be placed in a special school because the assessment was not completed. Therefore, the Hearing Officer finds the Student was not denied

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disability categories. Services must meet the child's needs and cannot be determined by the child's eligibility category. 71 Fed. Reg. 46,655 (2006).

<sup>9</sup> The hearing officer recognizes that the Petitioner is referring to a January 22, 2015 IEP team because the IEP team did not convene on January 25, 2015.

a FAPE by failing to develop an IEP on January 22, 2015 that provides an appropriate placement.

**DCPS denied the Student a FAPE by failing to develop an IEP on January 22, 2015 that is reasonably calculated to provide educational benefit; specifically, the IEP lacks sufficient hours of BSS.**

The January 24, 2014, IEP team provided one hour per week (240 minutes per month) of BSS. However, the January 22, 2015 IEP team reduced the hours of BSS to thirty minutes per week (120 minutes per month). The sole reason that the team reduced the BSS was because the School Social Worker stated that he did not see the Student in session because the student does not attend. The School Social Worker never established a rapport with the Student. The January 25, 2015 IEP team erred in reducing the hours of service. The team should have looked at other options rather than reduce the Student's hours of services such as find a different social worker to provide services or develop new strategies to motivate the Student to attend his BSS. *See, e.g., Letter to Borucki*, 16 IDELR 884 (OSEP 1990). Therefore, the Hearing Officer finds DCPS denied the Student a FAPE by failing to develop an IEP on January 22, 2015 that provides sufficient hours of BSS.

**DCPS did not deny the Student a FAPE by failing to incorporate the findings of the February 18, 2015 psychological assessment in the March 23 2015 and March 27, 2015 IEPs because the team failed to determine the appropriate least restrictive environment and placement along the continuum.**

Pursuant to 34 C.F.R. § 300.324(a)(1)(iii), in developing each child's IEP, the IEP Team must consider the results of the initial or most recent evaluation of the child. The Petitioner obtained an Independent Educational Evaluation ("IEE") that recommends the Student be placed in a special school. The Hearing Officer finds that the Student requires placement in a special school. *See supra*. However, the Petitioner argues that DCPS denied the Student a FAPE by failing to adopt that recommendation. If a parent obtains an IEE at public expense or shares an evaluation obtained at private expense, the district must consider the results of that evaluation when making decisions involving the provision of FAPE to the child. 34 C.F.R. § 300.502 (c)(1). While a district must consider the results of an IEE, it has no obligation to adopt the evaluator's recommendations or conclusions. *See, e.g., T.S. v. Board of Educ. of the Town of Ridgefield*, 20 IDELR 889 (2d Cir. 1993). Therefore, the Hearing Officer finds the Petitioner did not the Student a FAPE by failing to incorporate the findings of the February 18, 2015 psychological assessment in the March 23, 2015 and March 27, 2015 IEPs.

**DCPS denied the Student a FAPE by changing the service delivery of BSS from direct services to consult services on March 27, 2015.**

The Petitioner states that the IEP team changed the Student's BSS services from 120 minutes per month of direct services to 240 minutes per month of consultation. The February 10, 2015 psychological assessment states the Student is depressed; he disengaged not only from school, but from life in general; and the Student requires one hour per week of direct and individual counseling to address his depression and low self-esteem. The March 27, 2015 IEP

team made no changes to the delivery of the Student's BSS. However, the April 24, 2015 IEP team determined the Student would receive 240 minutes per month of consultative BSS. DCPS argues that the consultative model gives the social worker more flexibility to deliver services but does not explain how the social worker has more flexibility. The team developed goals in emotional, social, and behavioral development for the social worker but it is not possible for the Student to achieve his goals without direct BSS. There is nothing in the record that indicates the Student would receive educational benefit from changing the delivery of the Student's BSS to a consultative model. Therefore, the Hearing Officer finds that DCPS denied the Student a FAPE by changing delivery of BSS from direct to consultative services on March 27, 2015.

### **Relief**

As a remedy, Petitioner asserts that appropriate relief in this matter is to order placement at Nonpublic School and compensatory services. When school districts deny Students a FAPE, courts have wide discretion to insure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the court to "grant such relief as [it] determines is appropriate." The ordinary meaning of these words confer broad discretion on the court. *See, Burlington* at 371.

In *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005), the District of Columbia Circuit Court laid forth rules for determining when it is appropriate for Hearing Officers to order funding of non-public placements. First, the court indicated that "(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school." *Id.* at 9 (citing *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991)). DCPS has failed to provide a FAPE to the Student during his tenure at High School. The Student goes to school but refuses to attend his classes. No interventions attempted by High School has resulted in the Student attending his classes at High School.

The *Branham* court then explained that such relief "must be tailored" to meet a student's "unique needs." *Id.* at 11-12 (citing to *Florence County School Dist. v. Carter*, 510 U.S. 7, 16 (1993)). Courts must consider "all relevant factors" 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 private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12. Nonpublic School is a very small school for students with LD and ED under the IDEA. There is a seven to one student to teacher ratio making it not possible for the Student to skip any of his classes. Nonpublic School offers vocational training programs in automotive technology, computer technology, carpentry, and cosmetology and barbering. Given his academic achievement level, it is appropriate to provide the Student with a vocational program. The Student has not made any academic progress in the last six years and he requires an academic program that will allow him to make real progress. The program at Nonpublic School is the only option presented to the Hearing Officer that will provide the Student a FAPE. The cost of Nonpublic School is \$352.15 per diem. No FBA will be required because the student will be in a therapeutic milieu.

The Petitioner also seeks compensatory education for the period of FAPE denial. The Hearing Officer finds the Student was denied a FAPE from at least March 23, 2015 as well as during the time the Student was suspended on April 28, 2014 for 21 days and again for 45 days on

January 14, 2015. He was harmed as a result of being retained. One of the equitable remedies available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA, is compensatory education. Under the theory of compensatory education, courts and hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the 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.*, 401 F. 3d at 524; *See also, Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "qualitative, fact-intensive" inquiry used to craft an award 'tailored to the unique needs of the disabled student").

A Petitioner need not "have a perfect case" to be entitled to a compensatory education award. *Stanton v. District of Columbia*, 680 F. Supp. 201 (D.D.C. 2011) Under the IDEA, if a Student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010). The Petitioner seeks 300 hours of tutoring in credit recovery classes and 100 hours of mentoring. The Petitioner asserted that 300 hours of tutoring is the number of hours required for the student to receive 6 credits through credit recovery classes and the 100 hours of mentoring is to address the Student's truancy. The Tutor testified that a credit recovery class can be completed in 75 hours. The Student was denied a FAPE for a least half of a year where he could have earned 3 Carnegie Units. Therefore, the Hearing Officer will order DCPS to fund 225 hours of tutoring through credit recovery classes and 100 hours of mentoring services.

### **ORDER**

As a result of DCPS' failure to provide a full time program for the student, DCPS is ordered to do the following:

- (1) DCPS shall place the Student at Nonpublic School for the 2015-2016 school year with transportation;
- (2) DCPS shall convene an IEP team meeting at Nonpublic School within 30 school days of the Student's enrollment at Nonpublic School to review and revise the student's IEP to change the Student's disability category of MD to reflect ED as the Student's primary disability and provide one hour per week of direct counseling services;
- (3) Scheduling of the above referenced IEP team meeting shall be through the Petitioner's attorney;
- (4) For every day of delay by the Petitioner, DCPS shall have one day to convene the meeting;
- (5) DCPS shall fund 3 credit recovery classes, 225 hours of independent tutoring services for credit recovery classes, and 100 hours of independent mentoring services, as well as transportation to credit recovery classes to be completed by the end of the 2015-2016 school year; and
- (6) No further relief is granted.

**IT IS SO ORDERED.**

**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: August 24, 2015

*/s/ John Straus*  
Hearing Officer

Copies to:

Petitioner (U.S. mail)  
Petitioner's Attorney: Alana Hecht, Esq. (electronically)  
DCPS' Attorney: Tanya Chor, Esq. (electronically)  
DCPS (electronically)  
ODR (electronically)