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DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION  
STUDENT HEARING OFFICE

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STUDENT, <sup>1</sup>	)	
By and through PARENT,	)	
	)	
<i>Petitioner,</i>	)	Case No.
v.	)	
	)	Bruce Ryan, Hearing Officer
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	Issued: September 3, 2010
	)	
<i>Respondent.</i>	)	

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**HEARING OFFICER DETERMINATION**

**I. PROCEDURAL BACKGROUND AND RECORD**

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations. The Complaint was filed June 11, 2010, against Respondent District of Columbia Public School ("DCPS"). It concerns a year old student (the "Student") who resides in the District of Columbia, attends his neighborhood DCPS senior high school (the "School"), and has been determined to be eligible for special education and related services as a child with a disability under the IDEA. Petitioner is the Student's mother.

Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") by: (1) failing timely to complete triennial re-evaluations of the Student; (2) failing timely to conduct an annual review meeting for the Student; (3) failing to include the parent on the team that developed the student's individualized educational program ("IEP") in March 2010; (4) failing to develop an appropriate IEP in March 2010; and (5) discontinuing speech services as part of the Student's current IEP.

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

DCPS filed a Response on June 22, 2010, which states that DCPS has not denied a FAPE to the Student and that no relief is warranted. DCPS further responded, *inter alia*, that: (1) “the student’s evaluations are current and no reevaluations are warranted”; (2) the team met in March 2010 without the parent “because the Parent was not responsive to DCPS’ multiple letters of invitation”; (3) another meeting was convened in May 2010 with the Parent, but was unable to conclude, and “DCPS asserts the meeting is on-going at this time to finalize the student’s IEP”; and (4) DCPS discontinued speech services due to poor attendance. DCPS denies the Student has suffered any educational harm because “the student has not been attending school on a regular basis this entire school year.” *DCPS Response*, p. 2.

The resolution process was not successful, and the 30-day resolution period ended on July 11, 2010. A Prehearing Conference (“PHC”) was held on July 26, 2010, at which the parties discussed and clarified the issues and requested relief; and a Prehearing Order was issued August 3, 2010. *See P-1* (Prehearing Order, issued Aug. 3, 2010), ¶ 6 (statement of Issues and Requested Relief).

At the July 26 PHC, Petitioner discussed the need for a brief continuance to re-schedule the hearing to accommodate Petitioner’s availability. Petitioner then filed an unopposed motion for continuance that would extend the timeline for issuance of the Hearing Officer Determination (“HOD”) by nine (9) days, to September 3, 2010. The motion for continuance was granted.

Five-day disclosures were thereafter filed by both parties as directed on or about August 18, 2010; and the Due Process Hearing was held on August 24, 2010. Petitioner elected for the hearing to be closed. During the hearing, the following Documentary Exhibits were admitted into evidence without objection:

**Petitioner’s Exhibits: P-1 through P-36.**

**DCPS’ Exhibits: DCPS-1 through DCPS-12.**

In addition, the following Witnesses testified on behalf of each party:

**Petitioner’s Witnesses:** (1) Parent-Petitioner; (2) Educational Advocate; (3) Speech/Language Pathologist (“SLP”), Parker Diagnostics; (4) Dr. Natasha Nelson, Psychologist, Parker Diagnostics; and (5) (compensatory education expert).

**DCPS' Witnesses:** (1) DCPS School Psychologist and (2) DCPS Speech/Language Pathologist.

This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*.

## **II. ISSUES AND REQUESTED RELIEF**

A discussion at the prehearing conferences of the issues and requested relief raised by Petitioner resulted in the following issues being presented for determination at hearing:

- (1) **Procedural –Re-evaluations** — Did DCPS fail to conduct timely re-evaluations of the Student (including review of findings and appropriate IEP revisions)? And did such procedural violation result in a denial of FAPE or otherwise satisfy the criteria specified in 34 CFR 300.513(a)?
- (2) **Procedural – IEP Meetings** — Did DCPS fail to include the parent on the team that developed the March 2010 IEP and/or fail to conduct a timely annual IEP review meeting in March 2010? And did such procedural violation result in a denial of FAPE or otherwise satisfy the criteria specified in 34 CFR 300.513(a)?
- (3) **Inappropriate IEP** — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP in March 2010 for the reasons alleged at paragraphs 29 and 30 of the Complaint? This issue includes the alleged discontinuation of speech services.

As relief, Petitioner requests that DCPS be ordered to: (1) revise the IEP to provide for additional counseling and increased speech services (one hour); (2) identify a suitable full-time therapeutic placement for the Student or fund the private placement selected by the parent; and (3) provide compensatory education for denials of FAPE.

## **III. FINDINGS OF FACT**

1. The Student is a -year old student who resides with Petitioner in the District of Columbia and currently attends his neighborhood DCPS senior high school (the "School").
2. The Student has been determined to be eligible for special education and related services as a child with Multiple Disabilities under the IDEA. *See P-10; P-11; Parent Testimony; Advocate Testimony.*

3. On or about March 12, 2009, an Individualized Education Program (“IEP”) was developed for the Student that provided for the following services: 17.5 hours per week of specialized instruction (7.5 hours inclusion support in General Education and 10 hours in an Outside General Education setting); 30 minutes per week of speech/language therapy; and one hour per week of behavioral support (counseling) services. *P-10- p. 4*. The Parent/Petitioner did not participate in the March 12, 2009 IEP meeting, although she was invited to attend. *See DCPS-11; DCPS-12; Parent Testimony*.
4. On or about June 23, 2009, Petitioner sent a letter through counsel requesting DCPS to conduct a re-evaluation of the Student, to include at least a comprehensive psychological, social history, and vocational assessment, as well as other evaluations if warranted. *P-25*. On or about November 2, 2009, Petitioner wrote DCPS to follow up on this request. *P-31*.
5. In December 2009, DCPS authorized independent evaluations of the Student in the following areas: The authorization of independent evaluations resulted in Petitioner’s withdrawal of an earlier due process complaint she had filed.
6. On or about January 6, 2010, Petitioner provided DCPS with a completed speech/language evaluation of the Student based on testing conducted on December 18, 2009. *P-28*. Petitioner also appears to have forwarded a signed copy of this same evaluation report to DCPS on or about April 19, 2010. *P-30; see also DCPS-4* (review of independent speech/language evaluation). Based on the 12/18/09 testing, the evaluator found, *inter alia*, that the Student continued to need speech and language therapy to address certain areas of weakness in both expressive and receptive language that may impact performance in the classroom, and thus she recommended he receive services for one hour per week. *P-16; DCPS-3; Ross Testimony*.
7. On or about January 21, 2010, the DCPS Speech Language Pathologist (“SLP”) wrote Petitioner to inform her that the Student was not attending his speech/language therapy services as provided in his IEP and to enlist Petitioner’s assistance in encouraging the Student to attend. *DCPS-5*. The SLP did not receive any response

from the Parent. *See DCPS SLP Testimony; DCPS-11*. The SLP also spoke with the Parent by telephone regarding her attendance concerns and occasionally talked with the Student in the hallways to encourage him to come to the speech/language therapy sessions. *DCPS SLP Testimony*.

8. Service trackers show that the Student has been absent or unavailable for all of his scheduled speech/language therapy sessions from September 1, 2009 through April 26, 2010. *DCPS-6*. These services were made available by DCPS in accordance with the IEP throughout this time period. *DCPS SLP Testimony*.
9. On or about March 1, 2010, a draft IEP was prepared by DCPS, which essentially repeated the provisions of the 3/12/09 IEP. *P-11; DCPS-9*. "DCPS asserts the team met in March 2010 without the Parent, because the Parent was not responsive to DCPS' multiple letters of invitation." *DCPS Response*, filed June 22, 2010, p. 2. However, no actual letters of invitation to a March 2010 meeting were offered into evidence, and the DCPS log of Parent Contacts lists only one 03/04/10 "Consent to Evaluate - Letter" sent to the Parent. *DCPS-11*. Petitioner testified that she told the Special Education Teacher who contacted her that she wanted the IEP meeting to be held after the independent evaluations were completed. *Parent Testimony*.
10. On or about March 22, 2010, a comprehensive psychological evaluation of the Student was completed. *P-15*. The evaluator found, *inter alia*, that the Student was in the Extremely Low range of cognitive functioning (IQ score of 69), that his academic achievement scores showed difficulties in all academic subjects, that he showed symptoms of depression as well as acute agitation, and experienced problems with behavioral functioning. *Id. - p. 11*. The Student also reported smoking marijuana several times per week, sometimes on the way to school. *Id. - p. 4*. The evaluator concluded that the Student met the diagnostic criteria for Mood Disorder Not Otherwise Specified, Cannabis Abuse, and Learning Disorder Not Otherwise Specified. *Id. - p. 13*. The evaluator's recommendations included a psychiatric consult about available psychopharmacological interventions, an outpatient drug treatment program, behavioral interventions in school, and tutoring to develop his academic skills. *Id. - pp. 13-15*.

11. On or about March 26, 2010, a social history evaluation of the Student was completed. *P-14*. The social history described, among other things, ongoing grief and loss concerning the death of the Student's sister several years ago, which was recently reopened by criminal court proceedings filed against the individual charged with her murder. *Id.* - *p.* 6. The report recommendations included continued counseling and assistance for substance abuse, as well as review of his IEP. *Id.*-*p.* 7.
12. On or about March 26, 2010, an occupational therapy ("OT") evaluation of the Student was also completed. *P-17*. The evaluator found minor weaknesses that should be addressed with classroom accommodations and supports, but concluded that OT services were warranted at this time. *Id.* - *pp.* 7-8.
13. On or about May 5, 2010, DCPS convened another MDT/IEP Team meeting, with the Parent in attendance, for the purpose of reviewing the independent evaluations. *See P-5* (advocate's notes of 5/5/10 meeting).
14. At the May 5, 2010 MDT meeting, the DCPS School Psychologist reviewed the Student's independent Comprehensive Psychological Evaluation and found that he continued to qualify for special education services as a student with an Emotional Disturbance ("ED"), that his symptoms of depression and agitation impeded his academic success, and that he required specialized instruction for his deficits in all academic areas. *DCPS-2*. However, she found that the Student "spends too much time engaged in using [marijuana] or overcoming the effects of the drug," and "will require outpatient drug treatment for his problem." *Id.* - *pp.* 3-4.<sup>2</sup> She also found that the Student had been truant and is failing all of his classes. She recommended that "[v]arious strategies should be attempted to assist [the Student] in improving his attendance," and that "[c]ounseling services should continue to be incorporated into his program to address issues such as motivation, self-worth, grief and loss, and coping skills." *Id.* - *p.* 4.

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<sup>2</sup> The DCPS School Psychologist testified that the Student needs to discontinue his frequent marijuana usage in order to make himself available for learning, as well as related services. *See DCPS Psychologist Testimony*. Petitioner testified that she has not yet obtained medical treatment to address the Student's substance abuse problems. *See Parent Testimony* (cross examination).

15. Also at the May 5, 2010 MDT meeting, the DCPS SLP reviewed the independent Speech/Language Evaluation. She concluded that an “accurate assessment of language ability during therapy sessions cannot be determined at this time due to the student’s poor attendance at school, in the classroom, and his availability for speech and language services.” *DCPS-4 – p. 1*. The SLP recommended that the Student be dismissed from speech/language services due to non-attendance and then tested again at a later date for a more accurate assessment. *P-5 – pp. 3, 8*. It is unclear whether the Student’s IEP has actually been changed to reflect this recommendation. *See DCPS-9* (containing 03/01/10 draft IEP still showing 30 minutes per week of speech-language pathology services through 02/28/11).
16. At the May 5, 2010 MDT meeting, the Team reportedly determined that the Student should be classified as a student with a significant Emotional Disturbance (“ED”) only, rather than Multiple Disabilities (reflecting both ED and LD) as under his previous IEP. *See P-5; P-6; Advocate Testimony*. However, it appears that this might have been due simply to limitations in the “Easy IEP” computer system (*see P-5 – p. 8*), and it is unclear whether the Student’s IEP has actually been changed to reflect such determination. *See DCPS-9* (containing 3/01/10 draft IEP still showing “Multiple Disabilities”). In any event, it does not appear that any change in disability classification has affected DCPS’ assessment of any needs that result from the Student’s disability or the content of his educational program.
17. The May 5, 2010 MDT meeting appears to have ended without finalizing the Student’s current IEP. *See P-5; DCPS Response*, filed June 22, 2010, p. 2 (“DCPS asserts the meeting is on-going at this time to finalize the student’s IEP.”). The Team was to reconvene to review the draft IEP, to be sent to the advocate prior to the next meeting date. *P-5 – p.8*. However, no further MDT meeting has been held to date.
18. On or about June 1, 2010, a resolution meeting was held on a prior due process complaint, attended by the Parent, the Parent’s attorney, and DCPS representatives. DCPS stated that the School could implement the Student’s IEP, and that it did not propose a settlement due to the fact that the Student does not come to school and thus cannot access services that have been provided. *DCPS-8*. DCPS presented the

Student's attendance record, which indicated he had been present only 17.5 days out of 163 days the past school year. *Id.*; see also *DCPS-10* (attendance records). DCPS informed the Parent that the Student had been dropped from the School's rolls for non-attendance and would need to be re-enrolled at the School. *DCPS-8*. Once the Student was re-enrolled, DCPS would meet to review the IEP. *Id.* Parent indicated her belief that "any attendance issues are direct result of disability and inability of school to meet [the Student's] needs." *P-13-p. 2*.

19. Following the June 1, 2010 resolution meeting, the Parent re-enrolled the Student at the School. Petitioner then withdrew the prior complaint on June 10, 2010, and filed the instant complaint the next day. *P-2; P-3; Parent Testimony*.
20. On or about July 13, 2010, a resolution meeting was held on the instant complaint, also attended by the Parent, the Parent's attorney, and DCPS representatives. DCPS again proposed no settlement "due to student does not come to school." *DCPS-7*. The meeting notes state, in part, as follows: "After parent has re-enrolled student, student still has not attended school as of June 22, 2010. Student cannot receive services if he does not attend school." *Id.*, p. 1. Petitioner indicated that the Student was not attending "due to school failure to meet needs." *Id.*, p. 2 (advocate notes).
21. Due in large part to his excessive absences from classes, the Student has struggled academically and has remained a grade student for the past three years. See *P-14-p.5; P-18; Parent Testimony*. The evidence shows that the Student had a total of 647 unexcused class absences from August 2009 through May 2010. *DCPS-10*. The evidence also indicates that DCPS has made court truancy referrals in an effort to compel attendance, as recently as March 2010. See *DCPS School Psychologist Testimony*.

#### **IV. DISCUSSION AND CONCLUSIONS OF LAW**

##### **A. Burden of Proof**

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; see *Schaffer v. Weast*, 546 U.S. 49 (2005). This burden applies to any

challenged action and/or inaction, including failures to provide an appropriate IEP and/or placement, as well as failures to implement an IEP.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-E3030.3. The normal standard is preponderance of the evidence. See, e.g., *NG. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

**B. Issues/Alleged Denials of FAPE**

The Hearing Officer concludes that Petitioner has failed to meet her burden of proof on the specified issues and alleged denials of FAPE, except to the limited extent discussed below under Issue 3.

**1. Procedural –Re-evaluations**

The IDEA provides that DCPS “shall ensure that a reevaluation of each child is conducted ...at least once every 3 years, unless the parent and [LEA] agree that a reevaluation is unnecessary.” 34 C.F.R. §300.303 (b) (2); see, e.g., *Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005) (giving effect to clear statutory language, without triggering conditions). This includes the requirement that the evaluation be “sufficiently comprehensive to identify all of the child’s special education and related services needs....” *Id.* §300.304(c) (6); see also *Letter to Tinsley*, 16 IDELR 1076 (OSEP June 12, 1990) (triennial reevaluation “must be a complete evaluation of the child in all areas of the child’s suspected disability....”).

In this case, Petitioner alleges that DCPS failed to conduct a timely re-evaluation because it failed to re-evaluate the Student pursuant to the parent’s request and the recommendations of prior evaluations. See *P-2 – pp. 6-8*. Based on the findings and record developed at hearing, the Hearing Officer concludes that Petitioner failed to carry her burden of proof on this issue.

*First*, Petitioner has not shown that any re-evaluation was untimely. For example, the most significant evaluation (comprehensive psychological) was conducted in December 2007, and then updated in March 2010, approximately 2 ¼ years later. See *P-15; P-20*. And the DCPS SLP testified that the speech/language goals were still current. *DCPS SLP Testimony*. Moreover,

the IEP anniversary date is in March, when a comprehensive triennial re-evaluation would normally be due.

*Second*, even assuming *arguendo* that any re-evaluation was late, Petitioner has not shown that any delay resulted in an effective denial of FAPE or other substantive harm to the Student under the circumstances. *See* 34 CFR 300.513; *Lesesne v. District of Columbia*, 447 F.3d 828 (D.C. Cir. 2006). Even if DCPS had conducted a triennial re-evaluation more quickly, and the MDT/IEP Team had used that data to update the Student's educational needs and program, it is unlikely to have benefited the Student when he was not attending classes regularly or accessing the educational opportunities afforded to him. *See also Garcia v. Board of Educ. of Albuquerque Public Schools*, 520 F.3d 1116 (10<sup>th</sup> Cir. 2008) (affirming decision not to award denial of FAPE remedy in light of student's severe truancy).

## **2. Procedural – IEP Meetings**

Petitioner next claims that DCPS failed to include the parent on the team that developed the March 2010 IEP, and thus that the parent was deprived of an opportunity to participate in the decision-making process regarding the provision of a FAPE. *See P-2 – pp. 8-9.*

DCPS does not appear to have satisfied all IDEA procedural requirements for conducting an IEP Team meeting without a parent in attendance in March 2010. While DCPS witnesses testified concerning their attempts to obtain the parent's presence at the meeting, DCPS has not included in its five-day disclosures written corroboration of such attempts (*e.g.*, detailed records of telephone calls, copies of correspondence, detailed records of visits), as required under 34 C.F.R. 300.322 (d). Nevertheless, this procedural violation does not appear to have impeded the Student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the Student, or caused a deprivation of educational benefit. *See* 34 C.F.R. 300.513(a) (2). During this time period, the undisputed evidence shows that the Student was not available for services because he was not attending the service sessions being offered. Moreover, the IEP has not yet been reviewed and finalized in light of the independent evaluations, which is what the Parent had originally requested when she asked to defer the annual IEP meeting. Finally, it appears that any possible harm resulting from a procedural violation would be effectively cured by the Parent's

participation at the May 5, 2010 MDT meeting and at the further MDT meeting yet to be held to finalize the current IEP.

As a result, the Hearing Officer concludes that any procedural violation did not result in a denial of FAPE or other substantive harm entitling Petitioner to relief under the IDEA. *See* 34 CFR 300.513; *Lesesne v. District of Columbia*, 447 F. 3d 828 (D.C. Cir. 2006).

### 3. Appropriateness of March 2010 IEP

The IDEA requires that all students be provided with a Free Appropriate Public Education (“FAPE”). FAPE means:

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

20 U.S.C. § 1401(9) (emphasis added); 34 C.F.R. § 300.17; DCMR 5-E3001.1.

The “primary vehicle” for implementing the goals of the IDEA is the IEP, which the statute “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)). An IEP is a comprehensive written plan that must include, among other things: (1) “a statement of the child’s present levels of academic achievement and functional performance, including ... how the child’s disability affects the child’s improvement and progress in the general education curriculum”; (2) “a statement of measurable annual goals, including academic and functional goals, designed to ... 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 meet each of the child’s other education needs that result from the child’s disability”; (3) “a description of how the child’s progress toward meeting the annual goals...will be measured”; (4) “a statement of the special education and related services and supplementary aids and services ...and a statement of the program modifications or supports for school personnel that will be provided for the child”; and (5) an explanation of the extent, if any, to which the child will not participate with non-disabled children in any regular classes. 20 U.S.C. 1414(d)(1)(A)(i).

To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child, but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.”<sup>3</sup> Judicial and hearing officer review of IEPs is “meant to be largely prospective and to focus on a child’s needs looking forward; courts thus ask whether, at the time an IEP was created, it was ‘reasonably calculated to enable the child to receive educational benefits.’”<sup>4</sup> In addition, “[b]ecause the IEP must be ‘tailored to the unique needs’ of each child, *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982), it must be regularly revised in response to new information regarding the child’s performance, behavior, and disabilities, and must be amended if its objectives are not met. See 20 U.S.C. 1414 (b)-(d).”<sup>5</sup>

In this case, Petitioner claims that the March 24, 2010 IEP was inappropriate because it: (a) failed to include “adequate academic support and/or emotional support” for the Student in light of the findings and recommendations of his evaluations; and (b) “discontinues speech services based on attendance without consideration of the fact that goals for the student in this area have not been mastered and he has deficits.” *P-2-p.6*. The Hearing Officer concludes that the first claim has merit, in part, but that the second claim does not.

On the first point, the Hearing Officer concludes that Petitioner has shown a deficiency in the IEP insofar as it fails to include any social/emotional goals, and that such defect is so significant that the IEP fails to offer a FAPE. As noted above, the IDEA requires a statement of measureable annual goals (including both academic and functional) that are designed to meet the

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<sup>3</sup> *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *J.G. v. Abington School*, 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 (“while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit.”).

<sup>4</sup> *Schaffer v. Weast*, 554 F.3d 470, 477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207); see also *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993) (whether an IEP is appropriate “can only be determined as of the time it is offered for the student, and not at some later date”).

<sup>5</sup> *Maynard v. District of Columbia*, 54 IDELR 158 (D.D.C. 2010), slip op. at p. 6. The issue of whether an IEP is appropriate is a question of fact for hearing. See, e.g., *S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003). “Ultimately, the question ... is whether or not [the] defects in the ... IEP are so significant that [DCPS] failed to offer [the Student] a FAPE.” *N.S. v. District of Columbia*, 2010 WL 1767214, Civ. Action No. 09-621 (CKK) (D.D.C. May 4, 2010), p. 20).

child's educational needs that result from his disability. 34 CFR 300.320(a)(2)(i). Where a child has been determined to have a severe emotional disturbance and is being provided counseling services for emotional support under his IEP, it is not reasonable for the IEP to omit social, emotional and behavioral goals entirely. Otherwise the agency cannot hope to measure the child's progress along these lines.<sup>6</sup>

In addition, the IEP Team must consider the use of "positive behavioral interventions and supports, and other strategies," to address any behavior that "impedes the child's learning or that of others." *Id.*, 300.324(a)(2)(i). Petitioner did not prove that the Student's extremely poor attendance record is a result of his disability, but there is no question that this behavior impedes his learning. *See DCPS-2; P-15; DCPS-9 – p. 6* (3/01/10 IEP indicating that Student "has a serious attendance problem" and requires "emotional support for school attendance"). While DCPS witnesses testified concerning past *ad hoc* attendance counseling, efforts to file truancy reports, and the like, there was insufficient evidence of any coordinated behavioral intervention plan or strategies. The Hearing Officer finds that the Student would benefit from a more formal written behavior intervention plan ("BIP") being developed and incorporated into his IEP designed to target the serious attendance issues. This should be considered at the forthcoming MDT/IEP Team meeting to finalize the IEP.

With respect to speech/language services, however, there is no evidence that DCPS has failed to provide such services consistent with the IEP or that it otherwise failed to make a FAPE available to the Student. The Student simply was not available for services because he would not attend any of the sessions. Moreover, there is no evidence in the record to suggest that the Student would avail himself of any additional speech services if they continued to be offered by DCPS, at least under present circumstances. Some effective response to appropriate behavioral interventions to address the Student's serious attendance problems would first appear necessary. *Cf. Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 104 (D.D.C. 2008) (parent "has not shown that the student's poor academic performance resulted from lack of appropriate services rather

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<sup>6</sup> Beyond that, however, there is no denial of FAPE simply because the MDT/IEP Team fails to include all recommendations of evaluators. Especially where the Student has not made himself available for services, Petitioner has not shown that the other goals the team developed (*e.g.*, to address reading, written expression, and mathematics) are not reasonably calculated to meet the child's needs that result from the child's disability so as to enable the child to be involved in and make progress in the general education curriculum. *See* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320(a).

than the student's own extended absences"; thus, HO's conclusion that student "was not 'availing himself of educational benefit' under these circumstances was a reasonable determination.").

**C. Appropriate Relief**

The IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005). Based on the findings and record developed at hearing, the Hearing Officer has exercised his discretion to order appropriate equitable relief, as described in the Order issued below, which requires DCPS to reconvene a meeting of the MDT/IEP Team to complete review of the Student's updated IEP. The Hearing Officer notes that even DCPS appears to acknowledge that a further team meeting is required to finalize the IEP.

Petitioner also presented a witness to testify concerning compensatory education, but the Hearing Officer concludes that Petitioners have failed to meet their burden of proving that compensatory education services were warranted in accordance with the fact-specific evidentiary showing required under *Reid v. District of Columbia*, 401 F. 3d at 521, 524 ("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"); *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"). Petitioner's testimony consisted largely of a mechanical, hour-for-hour formula of the type specifically disapproved in *Reid*, 401 F. 3d at 523-24 (rejecting "cookie-cutter" or mechanical-formula remedies), *see Lennon Testimony* (cross examination), and it was overbroad in any event given the much more limited basis for the decision in this case.

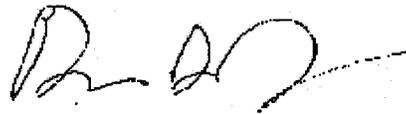
V. ORDER

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

1. Within **30 calendar days** of this Order (*i.e.*, by **October 4, 2010**), DCPS shall convene a meeting of the Student's MDT/IEP Team with all necessary members (including Petitioner) to review and finalize the Student's draft IEP dated March 1, 2010.
2. At the meeting held pursuant to paragraph 1 above, the Team shall: (a) develop and incorporate appropriate Annual Goals in the area of Emotional, Social, and Behavioral Development; (b) develop and incorporate an appropriate Behavioral Intervention Plan to address the Student's behaviors that impede his learning, including but not limited to his severe attendance problems; (c) determine whether speech-language pathology services should continue to be included in the IEP for the 2010-11 School Year; and (d) consider any other appropriate subjects for Team discussion at this time.
3. Petitioner's other requests for relief in her Complaint are **DENIED**; and.
4. This case shall be, and hereby is, **CLOSED**.

***IT IS SO ORDERED.***

Dated: September 3, 2010



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Impartial Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).