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

Student Hearing Office  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

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PARENT, on behalf of  
[STUDENT],<sup>1</sup>

Petitioner,

v

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

Date Issued: October 4, 2010

Hearing Officer: Peter B. Vaden

Case No:

Hearing Date: September 21-22, 2010

1150 5<sup>th</sup> Street, S.E., Room 6-B  
Washington, D.C.

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**HEARING OFFICER DETERMINATION**

**BACKGROUND**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner PARENT (the "Parent"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400 *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint the Petitioner alleges that since the 2008-2009 school year, District of Columbia Public Schools

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

("DCPS") has failed to evaluate appropriately the Student and to furnish the special education and related services that she requires to make educational progress.

The Student, an AGE adolescent, is a resident of the District of Columbia and is eligible for special education services under the primary disability, Other Health Impairment ("OHI"). The Parent's Due Process Complaint, filed on July 20, 2010, named DCPS as respondent. The undersigned Hearing Officer was appointed on July 21, 2010. The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

The due process hearing was held before the undersigned impartial hearing officer on September 21 and 22, 2010 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an audio electronic recording device. The Petitioner appeared in person and was represented by counsel. Respondent DCPS was represented by SPED COORDINATOR and by counsel. The Parent testified and called as witnesses NFP CASE MANAGER, NFP CBI WORKER, IEE PSYCHOLOGIST, EDUCATIONAL CONSULTANT AND PS DIRECTOR. DCPS called as witnesses SPED COORDINATOR, REGULAR EDUCATION TEACHER, SPECIAL EDUCATION TEACHER, SCHOOL SOCIAL WORKER, AND SCHOOL PSYCHOLOGIST. Petitioner Exhibits P-1 through P-65 were admitted without objection, with the exception of Exhibits P-9, P-11, P-13, P-18, P-46, P-48, P-49, P-50, P-51, P-62 and P-63. Exhibits P-9, P-18, P-48, P-49, P-62 and P-63 were admitted over DCPS' objection. DCPS' objections to Exhibits P-11 and P-13 were sustained. Exhibits P-46, P-50 and P-51 were withdrawn. DCPS Exhibits 1-13 were admitted without objection.

## ISSUES

- a. The Petitioner alleges that, since the 2008-2009 school year, DCPS has failed to properly evaluate the Student and identify her disabilities for purposes of providing appropriate special education and related services;
- b. The Petitioner alleges that, since the 2008-2009 school year, DCPS has failed to develop and implement an appropriate IEP for the Student, including failure to identify all IDEA disabilities and failure to provide sufficient hours of specialized instruction outside the general education setting;
- c. The Petitioner alleges that DCPS failed to implement Student's November 2009 and April 2010 IEPs;
- e. The Petitioner alleges that since the 2008-2009 school year, DCPS has failed to make an appropriate placement for the Student;
- f. The Petitioner alleges that DCPS has failed to maintain, and to provide her access to, the Student's educational records, including past IEPs; and
- g. The Petitioner alleges that DCPS failed to conduct a manifestation determination after Student was removed for more than 10 days in the 2009-2010 school year.

## FINDINGS OF FACT

After considering all the evidence, as well as the arguments and post-hearing memoranda of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia. She was last found eligible for specialized instruction and related services in March 2009 as a qualified child with Other Health Impairment ("OHI") based on a diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD").
2. Student moved to the District of Columbia in the spring of 2008. Before moving to the District, she was receiving special education services under an Individualized Education Program ("IEP") developed by a local education agency ("LEA") in Ohio.

3. Student was enrolled at ELEMENTARY SCHOOL for the 2008-2009 and 2009-2010 school years. She is currently enrolled in GRADE at MIDDLE SCHOOL.

4. Student's Elementary School September 24, 2008 IEP, for the 2008-2009 school year, contained the following academic goals:

Student will demonstrate growth in the identified areas of weakness in mathematics computation: apply the order of operations to solve a problems [sic], solve problems involving multiplication and division of any whole numbers, use the relationship between multiplication and division to simplify computations and check results, represent the possible outcomes for a simple probability situation, add and subtract fractions with like and unlike denominators, each with 80% accuracy as measured by formal and informal assessment.

Student will demonstrate growth in the identified areas of weakness in Reading: identify the purpose and main points of a text and summarize it's [sic] supporting details, explain how the plot, setting or characters influence the events in a story using evidence from the text as support, read aloud grade appropriate text fluently, accurately, and with comprehension, retell important facts from a text heard or read, use context clues to define unfamiliar words in a reading selection, each with 80% accuracy as measured by formal or informal assessment.

Student will demonstrate growth in the identified areas of weakness in Written Expression: identify that homophones are words that sound the same but are not spelled the same and have different meanings, will construct new words by adding suffixes or prefixes to familiar words, list details in order to form expository text, each with 80% accuracy as measured by formal or informal assessment.

5. An additional goal for Emotional, Social and Behavioral Development was added in the Student's May 29, 2009 IEP.

6. Student's 2008-2009 academic goals, were carried over, unchanged, to her IEPs for the 2009-2010 school year.

7. Student's Individualized Education Program ("IEP") for the 2008-2009 school year provided that Student would receive fifteen hours per week of specialized instruction, outside of the general education setting. Accommodations for the Student in the general education setting were small group work, extended time on subtests and repetition of directions.

8. Student's May 29, 2009 Individualized Education Program ("IEP") for the 2009-2010 school year provided that Student would receive 15 hours per week of specialized instruction, all outside of the general education setting, and one hour per week of Behavioral Support Services.

9. Student's October 15, 2009 IEP provided that she would receive ten hours per day Specialized Instruction in the general education setting, five hours per week of specialized instruction outside of the general education setting, and one hour per week of behavioral support services.

10. Parent, who worked for a time with SPED Coordinator at Elementary School, participated in all IEP Team meetings for the Student. She gave her consent to implement the Student's IEPs developed at IEP meetings on September 24, 2008, March 10, 2009, May 29, 2009, October 15, 2009 and November 9, 2009.

11. Student was hospitalized at PSYCHIATRIC FACILITY in September 2009 for "Out of Control" behavior. Her discharge diagnoses were ADHD, Oppositional Defiance Disorder ("ODD") and Parent-child relational problems.

12. Since February 2009, Student has received mental health services from NFP. Initially NFP Case Worker worked with Student. Since October 2009, Community Based Initiative ("CBI") counselors have provided more intensive services to Student in school and at other settings.

13. On March 24, 2010, Parent and her attorneys requested that an Independent Educational Evaluation ("IEE") of Student be conducted. DCPS agreed to fund the IEE.

14. Student was hospitalized at Psychiatric Facility again in March 2010. Her March 31, 2010 discharge diagnoses were Bipolar Disorder (Not Otherwise Specified) and Adjustment Disorder (Not Otherwise Specified).

15. After Student's March 2010 hospitalization, her Multi-Disciplinary Team ("MDT") met on April 13, 2010 to develop an updated IEP. In addition to the required IEP Team members, the Parent's attorneys and Student's NFP counselors participated. The MDT/IEP Team developed a new, comprehensive IEP with updated academic goals and new behavioral goals.

16. The April 13, 2010 IEP provided for 19 hours per week of Special Education Services. Over one-half of the services would be provided outside of the general education classroom, including 7.5 hours to address reading skills, 3 hours to address math skills and 1.5 hours to address written expression.

17. The Parent agreed to implementation of the April 13, 2010 IEP as a temporary program until the results of the IEE would be received. The MDT/IEP team agreed to reconvene upon completion of the IEE.

18. At the April 13, 2010 IEP meeting, School Social Worker attempted to present her progress report on addressing Student's behavior issues. The Parent, who had never met the social worker before the meeting, verbally abused School Social Worker and told the IEP Team that she did not want School Social Worker working with Student. School Social Worker left the meeting.

19. At the April 13, 2010 IEP meeting, the Elementary School had proposed conducting a Functional Behavioral Assessment ("FBA"), to be made by School Social Worker, to attempt to determine what occurrences at school were "triggering" Student's emotional outbursts. The Parent denied consent for the FBA.

20. IEE Psychologist completed the IEE report on July 7, 2010. The Parent's attorney forwarded the IEE to DCPS on July 14, 2010. On July 16, 2010, SPED Coordinator sent Parent's attorney a Letter of Invitation ("LOI") for the Parent to attend a meeting to review the IEE evaluation data and to review and update Student's IEP, including a discussion of possible changes in the Student's Placement/Location Assignment. Parent's attorney responded by letter of July 20, 2010, stating that because the Parent had recently filed a due process complaint, the Parent believed it preferable for the issues related to the Student's IEP and placement to be addressed "through the Dispute Resolution Session."

21. The Parent's due process complaint was actually filed on July 20, 2010.

22. On August 31, 2010, the Student's IEP Team from Elementary School met, although, by that time, Student had already matriculated to Middle School. No Middle School teachers attended. The Elementary School IEP Team declined to change Student's disability category or school placement until additional assessments, including an FBA, could be completed.

### CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the argument and legal memoranda of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. The 2008-2009 IEP

Parent contends that, since Student first enrolled in Elementary School for the 2008-2009 school year, DCPS has failed to develop and implement an appropriate IEP, which identified all of Student's disabilities and which provided appropriate special education and related services. The Parent maintains that the Elementary School 2008-2009 and 2009-2010 IEPs were deficient in not providing appropriate behavioral supports and services. The well-established standard for

determining the adequacy of an IEP is whether the individualized educational program developed through the IDEA's procedures was reasonably calculated to enable the child to receive educational benefits. See *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 3051 (1982). See, also, e.g., *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C. 2004) (Whether or not the IEP was reasonably calculated to provide some educational benefit.) Generally, an IEP is reviewed prospectively – not in hindsight. As the U.S. District Court for the District of Columbia has observed, “[b]ecause the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the 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.” *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008), quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008). Therefore, instead of asking whether the Student’s Elementary School IEPs were adequate in light of the Student’s subsequent progress, the inquiry must be whether the IEPs were reasonably calculated to convey a meaningful educational benefit when offered to the Student.

The Parent faults DCPS’s 2008-2009 IEP for, allegedly, failing to identify all IDEA disabilities and failing to provide sufficient hours of specialized instruction outside the general education setting. With regard to identifying all IDEA disability categories, the Parent misapprehends the requirements of the IDEA. Under 20 U.S.C. § 1412(a)(3)(B), LEAs are not required to classify IDEA-qualifying students into a specific category; rather the focus of the mandate is on adequacy of services:

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

*Id.* The IDEA “charges a school with the responsibility of developing an appropriate education, not with coming up with a proper label.” *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir.1997). At all times concerned in this case, Student has been regarded as a “child with a disability.” The issue, therefore, must be the adequacy of services offered by the IEP -- not the category of disability.

I find that the Parent has not established that the 2008-2009 IEP was inadequate. The Student moved to the District from Ohio in May 2008. The Parent provided Student’s Ohio IEP to the SPED Coordinator at Elementary School. The SPED Coordinator communicated with Student’s educators in Ohio and reviewed Student’s Ohio program. The Student’s eligibility for special education under her OHI disability was confirmed. The IEP Team concluded that the Student would benefit from a program that included small group work, extended time on tests and repetition of directions in the general education classroom, and 15 hours per week of specialized instruction outside general education. The Parent agreed with the proposed program.

Special Education Teacher, who provided support services to Student for the 2008-2009 school year, testified that Student did show some academic progress during that year. Special Education Teacher also observed that the Student benefitted from interaction with non-disabled peers in the regular classroom. Student’s Report Card for that year indicates that she “Approache[d] the Standard” in all courses, except Art, in which she met the standard [Proficient]. In sum, the evidence establishes that Student’s 2008-2009 IEP was reasonably calculated to enable her to receive some educational benefit, and that Student did in fact receive educational benefit.

2. The 2009-2010 IEP

The Parent's critique of the Student's 2009-2010 IEP is focused on DCPS's allegedly not making changes to the Student's IEP after her hospitalization at Psychiatric Facility in September 2009 for "Out of Control" behavior. Student's discharge diagnoses were ADHD, Oppositional Defiance Disorder ("ODD") and Parent-child relational problems. The LEA is required to revise an IEP, as appropriate, to address, *inter alia*, information about the child provided by the parents, the child's anticipated needs and other matters. See 34 CFR § 300.324(b).

The academic Annual Goals in the 2009-2010 IEP were identical, verbatim, with the Annual Goals from the 2008-2009 IEP. That some goals were unchanged, in and of itself, is not significant. However the IDEA requires that the IEP goals be measurable and designed to meet the child's educational needs.

The regulations are clear on the requirements for IEP goals. Section 300.320(a)(2)(i), consistent with section 614(d)(1)(A)(i)(II) of the Act, requires that annual IEP goals be measurable and 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 to meet each of the child's other education needs that result from the Child's disability.

Office of Special Education and Rehabilitative Services, Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46,664 (2006). I find that carrying over both the generalized and specific academic goals from the Student's 2008-2009 IEP cannot be deemed to have met the Student's educational needs. For example, the 2008-2009 Annual Goals, repeated in the 2009-2010 IEPs, included, *inter alia*, the following specific targets:

- apply the order of operations to solve a problems ;
- add and subtract fractions with like and unlike denominators;
- explain how the plot, setting or characters influence the events in a story;

- identify that homophones are words that sound the same but are not spelled the same and have different meanings; and
- construct new words by adding suffixes or prefixes to familiar words.

If, as Special Education Teacher testified, the Student showed some academic progress during the 2008-2009 school year, it would be expected that the 2009-2010 Annual Goals would have been updated to reflect that progress. If, on the other hand, sufficient progress had not been made, one would have expected to see the Annual Goals changed to meet the Student's needs. I find that the IEP Team's duplication of Student's Annual Goals, verbatim, from year to year, shows that for this Student, establishing Annual Goals was a *pro forma* exercise for the IEP Team and not a meaningful effort designed to meet Student's educational needs.

DCPS's failure to update the Annual Goals for the Student in the 2009-2010 IEP was a procedural violation of the IDEA. However, "only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable." *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (quoting *M.M. ex rel. D.M. v. Sch. Dist.*, 303 F.3d 523, 533-34 (4th Cir.2002)). In this case, the Parent adduced no evidence to show that DCPS's failure to update the Annual Goal's in Student's 2009-2010 IEP caused her to lose educational opportunity. Put another way, Parent has not shown that if DCPS had promulgated Annual Goals that met IDEA standards, Student would have received more educational opportunity. Neither was the Parent, who participated in all IEP meetings, deprived of her participation rights.

With regard to the Special Education and Related Services, the Parent contends that the IEP Team's decision, after the Student's September 2009 hospitalization, to reduce Specialized Instruction time, outside of the general education classroom from 15 hours to five hours weekly, denied the Student FAPE. (The May 29, 2009 IEP had provided that the Specialized Instruction

would all be provided outside general education.) The evidence at the hearing did not establish why this change was made.

The Parent's Educational Consultant opined that none of Student's Elementary School IEPs were appropriate because the Student allegedly lost ground, particularly in the area of behavior problems. The Educational Consultant never observed the Student at Elementary School and, in fact, only became involved with the Student's case in July 2010. DCPS's experts, including Special Education Teacher, SPED Coordinator and School Psychologist all testified that the program offered in Student's 2009-2010 IEP was appropriate. School Psychologist, who attended the October 15, 2009 IEP Meeting, opined that the services provided in Student's IEP could adequately meet her needs. The Parent, who participated in the development of the October 15, 2009 IEP, at the time, also agreed with its contents. Being mindful of the judicial admonishments not to apply hindsight to evaluate the appropriateness of an IEP, I find that the Parent has not established that, at the time the October 15, 2009 IEP was offered to the Student, the IEP was not reasonably calculated to provide some educational benefit.

### 3. The 2010-2011 IEP

Student's MDT Team met on April 13, 2010, after Student's March 2010 hospitalization, to review and amend Student's IEP. Prior to Student's hospitalization, Parent had requested an IEE, which DCPS agreed to fund. The IEE had not been completed before the April 13, 2010 IEP meeting. The April 13, 2010 IEP increased special education services for the Student and provided that most services would be furnished outside the general education classroom. The Parent, who participated in the IEP Team meeting accompanied by counsel, noted on the IEP that she agreed to the services in the IEP "as a temporary measure until we receive the results of the IEE." In an April 14, 2010 Written Notice, the SPED Coordinator stated that the Student's IEP Team proposed to implement the April 13, 2010 IEP pending completion of the IEE.

Student's IEE was completed by IEE Psychologist on July 7, 2010 and provided to Elementary School on July 14, 2010. The SPED Coordinator notified the Parent on July 16, 2010 that he had received the IEE and was ready to set a MDT/IEP Team meeting to review the evaluation data, and review and update Student's IEP. Parent's counsel declined to meet and stated it would be preferable for the issues related to Student's IEP and placement to be addressed through the Dispute Resolution Session. Parent filed her due process complaint on July 20, 2010.<sup>2</sup>

In his report, IEE Psychologist concludes that Student is a young woman with cognitive/intellectual challenges, multiple academic learning disabilities, impairments in visual-perceptual and language processing and significant emotional/behavioral/ psychiatric issues. IEE Psychologist recommends that Student needs to be placed in a full-time special educational and therapeutic school setting for students with academic learning, intellectual and social/emotional/behavioral difficulties. He also recommends a small student-to-teacher ratio. Educational Consultant opined that Student cannot be successful unless she is placed in a full-time special education program for students with ED, LD and OHI.

The results of the IEE Psychologist's evaluation, including his finding that Student has learning disabilities and impairments in language processing, were not available to the IEP Team in April 2010. I find that the April 13, 2010 IEP, developed before the IEE was completed, cannot now be considered reasonably calculated to provide meaningful educational benefit to the

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<sup>2</sup> On August 31, 2010, after the Parent filed her due process complaint, there was a meeting of Student's IEP Team from Elementary School. The DCPS representatives at the meeting refused to consider placing the Student at Private Placement until an FBA could be completed. This was not a valid IEP Meeting because no representatives from Middle School attended. See 34 C.F.R. § 300.321(a) (Team shall include regular education teacher and special education provider.) The special education teacher or provider should be the person who is, or will be responsible for implementing the IEP. Office of Special Education and Rehabilitative Services, Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46,670 (2006).

Student. I find also that an FBA should be conducted on the Student, as requested by DCPS. Under 34 CFR §300.324(a)(2)(i), the use of positive behavioral interventions and supports must be considered in the case of a child whose behavior impedes his or her learning or that of others. FBAs and Behavior Intervention Plans (“BIPs”) must be used proactively, if the IEP Team determines that they would be appropriate for the child. The Student’s MDT/IEP Team determined at the April 13, 2010 IEP Meeting that an FBA would be appropriate for this Student. At the time, Parent refused her consent.<sup>3</sup>

The Parent requests that I bypass the IEP process and order DCPS to place the Student immediately at Private School. However, I find that the circumstances of this case do not warrant taking the placement decision away from Student’s IEP Team, before the team has the opportunity to consider the IEE and an FBA. Student’s current IEP Team will include education professionals from Middle School who should be knowledgeable about services that school can offer. The D.C. Regs. provide that the educational placement decision is to be 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, *i.e.*, the IEP Team. *See* D.C. Regs. tit. 5-E, § 3013. The educational placement must be based upon the Student’s IEP, which in this case must be revised to address the results of the IEE. *See* 34 CFR § 300.324(b)(ii)(B). In sum, while I agree with the Parent that the April 13, 2010 IEP is not adequate, in light of the additional information provided in the IEE, I find that the Student’s Middle School IEP Team should be

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<sup>3</sup> As with other individualized evaluation procedures, and consistent with 34 CFR §300.300(a) and (c), parental consent is required for an FBA to be conducted as part of a reevaluation. U.S. Department of Education, Questions and Answers on Discipline Procedures (Rev. June 2009).

convened to review and amend Student's IEP based upon the IEE, an FBA and other relevant information.<sup>4</sup>

4. Other Issues

- A. Whether the LEA failed to implement Student's November 2009 and April 2010 IEPs.

The Parent contends that the hearing evidence established that the Student's Special Education teacher provided specialized instruction in the general education classroom for a maximum of 3.75 hours per week, far less than the 10 hours per week of specialized instruction in the general classroom set in the November 8, 2010 IEP. However the IEP does not mandate that the specialized instruction be taught by Special Education Teacher. Specially designed instruction includes adapting, as appropriate to the needs of an eligible child, "the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 CFR §300.39(b)(3).

The evidence does not establish the extent of specialized instruction provided to the Student in the regular classroom, but does show that the specialized instruction was not limited to instruction by Special Education Teacher. For example, Regular Education Teacher testified that Student was taught in small groups with differentiated instruction. The Parent also contends that the School Social Worker's records show that she did not provide the hours of Behavioral

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<sup>4</sup> Because, I am ordering the Student's IEP Team to reconvene to revise Student's IEP, I do not reach the issue of whether Private School is an appropriate placement for Student. However I anticipate that the IEP Team will consider the full continuum of public and private placements as may be required to meet the needs of this Student.

Support Services specified in the Student's IEP. Again, the IEP did not mandate that Behavioral Support Services be provided by School Social Worker. During the 2009-2010 School Year, Student received very extensive additional counseling support services, both in school and at other sites, from NFP. Moreover, in any claim for compensatory education, the award must be reasonably calculated to compensate for any loss of educational benefits resulting from failure to implement IEP services. *See, e.g., Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005). In this case, the Parent's evidence does not establish what, if any, educational benefit the Student lost as a result of DCPS's allegedly not providing the hours of specialized instruction and behavioral support services specified in the Student's IEP.<sup>5</sup> After Parent's due process complaint was filed, Student matriculated to Middle School, where her 2010-2011 IEP is presumably being implemented. Since this IEP must be reviewed and amended pursuant to Section 3 above and implementation of the IEP at Middle School is not presently before me, I do not reach Parent's allegation that DCPS is not fully implementing the 2010-2011 IEP.

B. Whether DCPS failed to maintain, and to provide Parent access to the Student's educational records, including past IEPs.

The hearing evidence establishes that DCPS was slow to provide Student's records to the Parent and her attorneys, and never provided copies of Special Education Teacher's daily/weekly progress reports on Student. The evidence was unclear as to whether Special Education Teacher maintained a copy of the reports, or whether the only copy was retained by Student. I will order DCPS to use diligence to locate these reports and furnish copies to the Parent.

C. Whether Manifestation Determination Review was required based upon Student's being suspended for more than 10 days in the 2009-2010 school year.

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<sup>5</sup> Educational Consultant opined that a reasonable compensatory education award would be 600 hours. Educational Consultant's estimate was apparently based upon her opinion that Student had been denied an appropriate placement for the last two years at Elementary School, not on failure to implement the 2009-2010 IEP.

Under the IDEA, a disciplinary change of placement occurs if a student is subject to a series of removals that total more than 10 school days in a school year. 34 CFR § 300.536. In such cases, the LEA must conduct a Manifestation Determination Review (“MDR”) to determine if the conduct in question was caused by or had a direct relationship to the student’s disability. 34 CFR § 300.530(e). The Parent contends that Student was removed for a cumulative total of more than 10 school days in the 2009-2010 school year. The testimony and records are inconclusive. Parent testified that Student received two out-of-school suspensions. The school records show three out-of-school suspensions: five days beginning March 16, 2010, one day on May 27, 2010 and an indeterminate number of days at the end of the school year in June 2010. The Parent testified that the June suspension was for five days. SPED Coordinator testified the June suspension was for no more than three days. Because Elementary School failed to keep accurate records of Student’s disciplinary removals, I will credit Parent’s testimony that the total of removals exceed 10 days for the school year. If so, an MDR was required and it is undisputed that Elementary School did not conduct an MDR. However, my authority to remedy DCPS’s failure to conduct an MDR is limited to ordering Student’s return to her prior placement at Elementary School. *See* 34 CFR § 300.532(b)(2). Since Student has now matriculated to Middle School, returning the student to Elementary School is not an option.

#### SUMMARY

In summary, I find that Parent has not met her burden of proof to establish that the Student was denied FAPE as a result of DCPS’s failure to develop appropriate IEPs for the 2008-2009 and 2009-2010 school years. I find that DCPS’s IEP for the 2010-2011 school year is not adequate, and must be reviewed and amended based upon IEE Psychologist’s July 7, 2010 evaluation report and other relevant evaluations. I find that the evidence does not establish that DCPS failed to implement Student’s 2009-2010 IEP. I find that the Parent has established that

DCPS failed to provide her access to all of the Student's educational records. Lastly, I find that, under the facts in this case, there is no remedy, within my authority, to address DCPS's failure to conduct an MDR, after Student was removed from school for more than 10 days during the last school year.

### **ORDER**

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

1. DCPS shall convene an MDT/IEP meeting, within 15 business days of this HOD, to review and revise the Student's IEP and to make an appropriate placement to meet the needs of the Student. DCPS shall ensure that the IEP Team includes all of the members required by 34 CFR § 300.321. In the event that a private placement is under consideration, DCPS shall ensure that a representative of the private school attends the IEP meeting. Preliminary to the MDT/IEP meeting, within 5 business days of this HOD, DCPS shall inform the Parent, through her attorneys, in writing, of all additional evaluations it contends must be completed before the IEP Meeting and DCPS shall promptly complete the evaluations. Notwithstanding, if the Parent withholds consent for an FBA or other reasonably requested evaluations, DCPS may pursue the procedures set forth in 34 CFR § 300.300(c)(ii).
2. DCPS shall make a diligent search for all school records pertaining to Student, for the 2008-2009 and 2009-2010 school years, and provide copies to Parent of all such records, which DCPS cannot document have already been furnished to her.
3. All other requests for relief made by the Parent herein are denied, without prejudice to Parent's right to file a new due process complaint on the adequacy of

the Student's current IEP, after amendment pursuant to this HOD, including the appropriateness of the Student's ongoing placement.

Date: October 4, 2010

  
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Peter B. Vaden, Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(I).