

**STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA  
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)  
SPECIAL EDUCATION PROGRAMS**

---

**STUDENT,<sup>1</sup> by and through his Parent,**

**Petitioners,**

**Case No. 2009-1287  
Bruce Ryan, Hearing Officer**

**v.**

**DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,**

**Decided: October 26, 2009**

**Respondent.**

---

**HEARING OFFICER DECISION**

**I. PROCEDURAL BACKGROUND**

The due process complaint in this matter was filed September 14, 2009, pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations. The complaint concerns a six-year old student who currently attends Malcolm X Elementary School in the District of Columbia and has been determined to be eligible for special education as a student with Multiple Disabilities including ED and OHI/ADHD.

The complaint alleges that Respondent District of Columbia Public Schools ("DCPS") has denied the Student a free appropriate public education ("FAPE") during the 2008-2009 and 2009-2010 school years by: (a) failing to timely identify, locate, and/or evaluate the Student as a child with a suspected disability; (b) failing to follow legally mandated disciplinary procedures when it suspended the Student; (c) failing to provide an appropriate individualized education program ("IEP"); and (d) failing to provide an appropriate educational placement. The complaint further alleges that DCPS committed procedural violations by (e) failing to provide required public notices, and (f) failing to provide and/or timely provide a copy of the procedural safeguards to the parent upon her request for evaluations. Petitioners seek an immediate non-

---

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

2009 OCT 27 11:10:27

OFFICE OF THE HEARING OFFICER

public placement to a full-time therapeutic psycho-educational day school for children with emotional disturbance, and compensatory education for the period in which the student was denied a FAPE from August 2008 to the present..

Based on the allegations in the complaint, the case was treated as an expedited, discipline-related hearing; expedited hearing dates and an HOD deadline of October 26, 2009, were specified by the Student Hearing Office; and an expedited resolution meeting was held on or about September 24, 2009, which failed to reach an agreement to resolve the complaint. The expedited resolution period ended September 29, 2009. A prehearing conference ("PHC") was held and a Prehearing Order ("PHO") was issued on October 2, 2009.

DCPS filed a late Response on October 2, 2009, immediately prior to the PHC. The response asserted, *inter alia*, that: (a) "DCPS will offer compensatory education for the delay in locating and evaluating the student"; (b) DCPS could not make a manifestation determination in 2008-2009 because the student was not yet eligible; and (c) the student did not have an IEP or placement for 2008-2009 because he was not yet eligible. For the 2009-2010 school year, DCPS stated that it now "proposes to increase the hours of specialized instruction on the student's IEP" and "proposes to change the student's placement to a full-time special education placement" at the [REDACTED] a DCPS public school which it asserts can implement the IEP (as it is proposed to be changed). However, DCPS counsel confirmed at the PHC that the Student's MDT/IEP team has not determined, or even met to consider, either of the proposed actions referenced in the response. With respect to the alleged procedural violations, DCPS asserted only that "Petitioner now has a copy of the Procedural Safeguards."

On October 5, 2009, both parties filed their required five-day disclosures. On or about the same date, Petitioners also filed a Motion for Summary Judgment and a Motion in Limine; and DCPS then filed written oppositions to each motion. In a *Memorandum and Order* issued October 10, 2009, the Hearing Officer granted in part and denied in part the motion for summary judgment, and denied the motion in limine. The Hearing Officer held that the pleadings established that no genuine issue of material fact existed regarding DCPS' failure to provide the Student with a FAPE, as alleged in the complaint. Specifically, DCPS' response and opposition to the motion together conceded that (a) DCPS failed timely to identify and evaluate the Student as a child with a disability, (b) DCPS suspended the Student without a manifestation meeting, (c)

the Student's current IEP and placement are not appropriate, (d) the Student requires a full-time placement, and (e) DCPS failed to provide appropriate prior notices and procedural safeguards to Petitioners, with the substantive effects alleged in the complaint. However, the motion for summary judgment was denied in so far as an evidentiary hearing was still needed for Petitioners to demonstrate that they were entitled to the specific equitable relief requested in the complaint (including compensatory education and prospective private placement).

In addition, the 10/10/09 *Memorandum and Order* directed DCPS to show cause at the Due Process Hearing as to what facts, if any, set forth at pages 11-14 of Petitioners' Motion for Summary Judgment should not be accepted as undisputed material facts for purposes of this case. Petitioners also were permitted to present rebuttal evidence following presentation of DCPS' case with regard to the appropriateness of the [REDACTED] as a proposed 2009-2010 placement, since this alternative possible placement had not previously been raised or discussed at the MDT/IEP team meetings or at the resolution session. *See Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")* (hearing officers authorized to consider equities of the circumstances in determining how to proceed on case-by-case basis under *SOP* Section 303(D)).

The Due Process Hearing was held on October 13 and 14, 2009. At the hearing, 33 documentary exhibits submitted by Petitioners (identified as "P-1" through "P-33") and one documentary exhibit submitted by DCPS (identified as "DCPS-01") were admitted into evidence without objection. In addition, most of the facts set forth at pages 11-14 of Petitioners' motion for summary judgment were agreed and accepted on the record (in whole or in part) as undisputed material facts, and are accordingly reflected in the Findings of Fact below (hereinafter "*Stipulated Facts, 10/13/09*").

Testifying at the hearing on behalf of Petitioners were: (1) the Parent-Petitioner; (2) Michael Wilson, an investigator at the Children's Law Center ("CLC"); (3) Emily Peltzman, another CLC investigator; (4) Diane King-Shaw, Ph.D, Clinical Director of the [REDACTED] in Rockville, Maryland; and (5) Sheila [REDACTED] Ph.D, an educational consultant and expert witness. Testifying on behalf of DCPS was Debbie Guillaume, Special Education Coordinator ("SEC") at the [REDACTED]

This decision constitutes the Hearing Officer's determination 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**

The following IDEA liability issues were presented and determined on summary judgment, as reflected in the 10/10/09 *Memorandum and Order*:<sup>2</sup>

- a. ***Child find*** — Whether DCPS has denied the Student a FAPE by failing to timely identify, locate, and/or evaluate the Student as a child with a suspected disability;
- b. ***Disciplinary procedures*** — Whether DCPS has denied the Student a FAPE by failing to follow legally mandated disciplinary/manifestation determination procedures when it suspended the Student;
- c. ***Inappropriate IEP*** — Whether DCPS has denied the Student a FAPE by failing to provide an appropriate individualized education program ("IEP") for the 2008-2009 and 2009-2010 school years;
- d. ***Inappropriate placement*** — Whether DCPS has denied the Student a FAPE by failing to provide an appropriate placement for the 2008-2009 and 2009-2010 school years; and
- e. ***Procedural violations*** — Whether DCPS failed to provide and/or timely provide Petitioners with appropriate prior notices and a copy of the procedural safeguards, and such procedural inadequacies had one or more of the substantive effects provided in 34 CFR 300.513(a).

The following equitable relief issues were presented for determination at the Due Process Hearing:

- f. ***Prospective placement*** — Whether Petitioners are entitled to their requested relief of immediate placement of the Student at the [REDACTED] School in Rockville, Maryland;
- g. ***Compensatory education*** — Whether the Student is entitled to compensatory education for DCPS' past denial of FAPE.

---

<sup>2</sup> The undisputed material facts supporting the summary judgment are included in the Findings of Fact below, and the legal conclusions on those issues are included in the Discussion and Conclusions of Law section below.

### III. FINDINGS OF FACT <sup>3</sup>

1. The Student is a [REDACTED] old resident of the District of Columbia who has been diagnosed with Attention-Deficit Hyperactivity Disorder (“ADHD”) and Post-traumatic Stress Disorder (“PTSD”). The Student currently attends [REDACTED] See *Stipulated Facts, 10/13/09.*

2. The Student has been determined to be eligible for special education as a child with Multiple Disabilities, as defined in the IDEA, specifically Emotional Disturbance (“ED”) and Other Health Impairment (“OHI”). See *P-1 (6/24/09 Eligibility Meeting Report).*

3. In April 2008, the Student returned to the District of Columbia from [REDACTED] [REDACTED] to live with his mother (Petitioner). The undisputed testimony shows that while living with his father in [REDACTED] Student was subjected to neglect and physical, emotional, and sexual abuse; and that upon returning, he began to show signs of emotional instability and extreme behavioral difficulties. See *Parent Testimony; Iseman Testimony; P-19 (Social Work Report by DCPS).* As a result, Petitioner brought the Student to his pediatrician, who provided referrals for therapy to address his recurring behavioral problems. *Parent Testimony; P-17.* The Student was subsequently expelled from a neighborhood pre-school nursery for his misbehavior. See *Parent Testimony.*

4. In August 2008, the Student was enrolled at [REDACTED] He attended kindergarten at [REDACTED] from August 2008 to January 2009. While at [REDACTED] Joshua displayed frequent uncontrollable behavior including running outside of the classroom, running outside of the school building, disrespect towards school staff, and uncontrollable temper tantrums. On at least one instance at [REDACTED] the Student escaped from the school building and ran unaccompanied down Alabama Avenue, SE. School staff at [REDACTED] frequently called parent-Petitioner to report the Student’s behavior. On at least one occasion [REDACTED] suspended Joshua without providing Petitioner with any written notice. *Stipulated Facts, 10/13/09, ¶¶ 4-7, 9.*

---

<sup>3</sup> As noted above, these Findings are supported by the list of undisputed facts contained at pages 11-14 of Petitioners’ Motion for Summary Judgment, as modified and agreed to by both parties at the beginning of the due process hearing session held October 13, 2009, in addition to the specific record citations contained below.

5. In December 2008, Petitioner requested that the Student be evaluated for special education and related services. DCPS refused to evaluate the Student for special education and referred Petitioner to the Student Support Team (“SST”). The SST never developed strategies for addressing the Student’s behavior. Despite the Student’s obvious behavioral difficulties, [REDACTED] never referred the Student for evaluation for special education. *See Stipulated Facts, ¶¶ 10-13.*

6. In January 2009, Petitioner withdrew the Student from [REDACTED] out of concern for his safety and apparent lack of academic progress, and she enrolled the Student at [REDACTED] Elementary School. The Student immediately began exhibiting behavioral problems at [REDACTED], including running outside of the classroom and running outside of the school building. *See Stipulated Facts, ¶¶ 14-16.*

7. [REDACTED] the Student for 18 days of school between March 2009 and June 2009. DCPS failed to provide Petitioner with all required written notices. DCPS also failed to convene a behavior manifestation determination meeting to determine whether the Student’s behavior was related to his disability. *See Stipulated Facts, ¶¶ 17-19.*

8. DCPS failed to conduct a functional behavior assessment of the Student. *Stipulated Facts, ¶20.*

9. DCPS failed to complete an initial evaluation of the Student and failed to hold an MDT/IEP Team meeting to determine the Student’s eligibility for special education services until June 24, 2009. *Stipulated Facts, ¶¶ 21-22.*

10. DCPS did not provide Joshua with an IEP or a special education placement during the 2008-2009 school year. *Stipulated Facts, ¶¶ 23-24.*

11. The purpose of the June 24, 2009 MDT/IEP Team meeting was to review recent evaluations, determine the Student’s eligibility for special education services, develop an IEP, and discuss placement. However, the IEP Team was unable to develop an IEP or discuss placement because DCPS failed to convene all necessary members of the IEP Team. Specifically, the Student’s general education teacher did not attend the June 24, 2009 IEP meeting, and there was no special education teacher present at the June 24, 2009 IEP meeting. *Stipulated Facts, ¶¶ 27-30.*

12. On or about July 9, 2009, the Student's MDT/IEP Team reconvened for a second IEP meeting. The Student's general education teacher again did not attend the meeting. The team developed an IEP that did not contain full-time specialized instruction. *Stipulated Facts, ¶¶ 32-33, 35.* The IEP provided 15 hours per week of specialized instruction in a setting outside general education, plus one hour per week of behavioral support services and one hour per week of speech-language therapy. *P-3.* The parent disagreed with the appropriateness of the IEP. *Id.*

13. At the July 9, 2009 IEP meeting, DCPS issued a Prior Notice placing the Student at Malcolm X Elementary School. *Stipulated Facts, ¶41.* The parent disagreed with the appropriateness of the placement. *P-3.*

14. ██████████ Elementary School cannot provide full-time specialized instruction with the necessary therapeutic services and accommodations for the Student. *Stipulated Facts, ¶42.*

15. The Student has continued to exhibit behavioral problems at ██████████ during the 2009-2010 school year. He began exhibiting behavioral problems at ██████████ during the first week of this school year, including but not limited to aggressive conduct towards school staff, uncontrollable temper tantrums, and running unsupervised throughout, and outside of, the school. *Stipulated Facts, ¶¶ 43-44.*

16. The July 9, 2009 IEP was insufficient to address the Student's behaviors. *See Stipulated Facts, ¶46.* These behaviors affect the Student's ability to access his education and make him unavailable for learning. *See Parent Testimony; ██████████ Testimony.*

17. On or about September 1, 2009, the MDT/IEP Team reconvened to discuss the Student's behavioral difficulties and to review the appropriateness of the July 9, 2009 IEP. DCPS added a dedicated aide to the Student's IEP at this meeting. *Stipulated Facts, ¶¶ 46-48; P-6; P-7.*

18. Petitioner consented to the provision of services under the 9/1/09 IEP, but did not agree to the contents of the IEP or placement. *P-6.* Petitioner again stated her concerns about the appropriateness of the Student's IEP and the inappropriateness of his placement at ██████████ and her belief that the Student requires a full-time therapeutic placement to address his needs. *Stipulated Facts, ¶49. See also Parent Testimony.*

19. Since the addition of the dedicated aide, the Student has continued to exhibit daily behavioral problems, including but not limited to, aggressive conduct towards school staff, uncontrollable temper tantrums, and running unsupervised throughout, and outside of, the school. *Stipulated Facts*, ¶51. The evidence suggests that the Student's negative behaviors have only worsened as they have intensified and become more entrenched. *See Iseman Testimony*.

20. The Student requires a full-time therapeutic placement to meet his unique needs. [REDACTED] continues to be an inappropriate placement for the Student that cannot meet his unique needs. *Stipulated Facts*, ¶¶ 52-53.

21. The evidence shows that the Student has been harmed by DCPS' failure to provide a FAPE during the 2008-2009 school year and continuing to the present. As a result of the Student's inability to control his behavior and access his education due to untimely and/or inadequate special education services, the Student has been unable to make appropriate academic progress or social emotional development. *See Iseman Testimony; P-17 to P-21*. The Student has significant difficulty with reading, writing, and simple math; in fact, the Student only recognizes a few letters of the alphabet, cannot add or subtract, cannot identify numbers, and cannot write his name. *See Parent Testimony; Iseman Testimony. See also P-8, P-9 (2008-2009 Report Cards from Ann Beers and [REDACTED] P-17 to P-21 (DCPS evaluations indicating that the Student is functioning approximately two years below age/grade level).*

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

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

1. 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). For the reasons discussed below, the Hearing Officer concludes that Petitioners have met their burden of proof on both liability and remedy issues.

##### **B. Denials of FAPE**

2. The legal conclusions on the denial of FAPE issues were reached on summary judgment based on the concessions in DCPS' pleadings and opposition, as well as the stipulations and undisputed material facts agreed to by the parties as set forth in the Findings of Fact above. *See Memorandum and Order* (Oct. 10, 2009); discussion at pages 2-3, *supra*.

***Issue (a): Child Find***

3. Under its “child find” mandate, DCPS has an affirmative duty to identify, locate and evaluate a potentially disabled child. 20 U.S.C. §1412(a) (3) (A); DCMR 5-3002.1(d). In that regard, DCPS also “must conduct a full and individual initial evaluation” within the District of Columbia’s time frame of 120 days from the date of a referral. *IDEA Public Charter School v. McKinley*, 570 F. Supp. 2d 28 (D.D.C. 2008); *see also* 34 C.F.R. §300.301(a); DCMR §5-3005.2. DCPS must (*inter alia*) ensure that the child “is assessed in all areas related to the suspected disability,” and that the evaluation is “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child [is] classified.” 34 C.F.R. §300.304 (c) (4), (6). DCPS must not only complete and review the evaluations, but must also determine eligibility, develop an IEP if the Student is found eligible, and determine an appropriate placement, all within the prescribed time line. *See Hawkins v. District of Columbia*, 539 F. Supp. 2d 108 (D.D.C. 2008); *District of Columbia v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007); *see also* DCMR §§ 5-3002, 5-3013.

4. DCPS’ response and opposition to the motion for summary judgment have conceded that DCPS failed timely to identify and evaluate the Student as a child with a disability. *See* 10/10/09 Memorandum and Order, at 2. The Hearing Officer concludes that DCPS should have identified the Student as a potentially disabled child whom DCPS needed to evaluate shortly after the Student enrolled at Ann Beers in August 2008.<sup>4</sup> DCPS therefore should have completed an initial evaluation, determined eligibility, developed an IEP, and determined an appropriate placement within 120 days, *i.e.*, by approximately January 2009. DCPS’ failure to do so violated D.C. Code § 38-2561.02 (a) and constituted a denial of FAPE.<sup>5</sup>

---

<sup>4</sup> *See IDEA Pub. Charter Sch. v. McKinley*, 570 F. Supp. 2d 28 (D.D.C. 2008) (“Child Find obligation extends to all children suspected of having a disability” and “LEA’s duty to locate and complete the evaluation of a student starts ‘as soon as a student is identified as a *potential* candidate for special education services’”) (quoting *Hawkins* at 114 and *Abramson* at 85).

<sup>5</sup> *See, e.g., IDEA Pub. Charter School, supra* (failure to perform child-find duty and comply with DC’s 120-day timeline constitutes denial of FAPE); *Hawkins, supra* (same); *Abramson, supra* (noting that DCPS is obligated to “offer FAPE by evaluating the student, convening an eligibility meeting, determining eligibility, developing an IEP if the student is eligible, and determining and offering an appropriate placement”). *See also Harris v. DC*, 561 F. Supp. 2d 63, 68-69 (D.D.C. 2008) (failure to act on request for independent evaluation is not a “mere procedural inadequacy”; “such inaction jeopardizes the whole of Congress’ objectives in enacting the IDEA”).

***Issue (b): Disciplinary Procedures***

5. DCPS also conceded that it suspended the Student without a manifestation meeting. See 10/10/09 Memorandum and Order, at 2; DCPS' Opposition to Motion for Summary Judgment, at 1, n.1. The undisputed evidence shows that ██████████ suspended the Student for 18 days of school between March 2009 and June 2009, Findings ¶7, and thus DCPS should have convened an MDT/IEP Team meeting for the purpose of conducting a manifestation determination review ("MDR") to determine whether the Student's behavior was related to his disability. See 34 C.F.R. § 300.530.<sup>6</sup> If DCPS had conducted an MDR and determined that the Student was suspended from Malcolm X based on an incident found to be a manifestation of his disability, DCPS would then have been required to conduct an FBA and implement a behavioral intervention plan as part of the Student's IEP. See 34 CFR 300.530(f)(1).

6. Moreover, despite evidence of continued behavioral concerns, DCPS apparently never conducted an FBA. See Findings, ¶8; Stipulated Facts, ¶20. An FBA is "essential to addressing a child's behavioral difficulties, and, as such it plays an integral role in the development of an IEP." *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008). Under IDEA, the "IEP Team must – in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 C.F.R. §300.324(a)(2)(i). DCPS should have conducted an FBA and then developed a behavior intervention plan ("BIP") to be incorporated into the IEP. The failure to conduct an FBA is more than a procedural violation; it is a denial of FAPE. See *Harris, supra*.

***Issue (c): Inappropriate IEP***

7. Under IDEA, an IEP must be "reasonably calculated" to confer educational benefits on the Student. See, e.g., *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982);

---

<sup>6</sup> DCPS' response asserted that "Because the student was not yet eligible, a manifestation determination could not be made." *DCPS Response*, p. 1. However, the IDEA expressly provides that a "child who has not been determined to be eligible for special education and related services under [IDEA, Part B] and who has engaged in behavior that violated a code of conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this subsection) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." 34 C.F.R. §300.534(a). Paragraph (b) of that section goes on to provide that a "public agency must be deemed to have [such] knowledge ...if...[t]he parent of the child requested an evaluation of the child pursuant to [IDEA]." *Id.* § 300.534(b)(2). Because the parent had requested an evaluation of the Student by December 2008, DCPS was deemed to have knowledge that the Student was a child with a disability at the time of the March-June 2009 disciplinary actions.

*Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009). The issue of whether an IEP is appropriate is a question of fact. *See, e.g., S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003).

8. In this case, DCPS concedes that it did not provide the Student with any IEP during the 2008-2009 school year. DCPS also concedes that the Student's current IEP is not appropriate. *See 10/10/09 Memorandum and Order*, at 2; *Stipulated Facts*, ¶¶ 23-24. It is undisputed that the Student requires full-time specialized instruction (as opposed to the 15 hours per week provided in the IEP), and that the IEP is insufficient to address the Student's behaviors. *See Findings*, ¶¶ 12, 14, 16. The failure to develop and implement an appropriate IEP by at least January 2009 constitutes a denial of FAPE.

***Issue (d): Inappropriate Placement***

9. DCPS concedes that it did not provide the Student with a special education placement at any point during the 2008-2009 school year, that the Student's current 2009-2010 placement at ██████████ not appropriate, and that the Student requires a full-time, special education placement. *See 10/10/09 Memorandum and Order*, at 2; *DCPS' Opposition to Motion for Summary Judgment*, at 1, n.1. It is undisputed that the Student requires a full-time special education placement to meet his unique needs; that Malcolm X cannot provide full-time specialized instruction with the necessary therapeutic services and accommodations for the Student; and thus that ██████████ to be an inappropriate placement for the Student. *See Findings*, ¶¶ 10, 14, 20. The failure to provide an appropriate educational placement for the 2008-2009 and 2009-2010 school years constitutes a denial of FAPE.

***Issue (e): Procedural Violations***

10. Finally, DCPS concedes that it failed to provide appropriate prior notices and procedural safeguards to Petitioners, with the substantive effects alleged in the complaint. *See 10/10/09 Memorandum and Order*, at 2; *DCPS' Response*, at 2. The Hearing Officer thus concludes on the basis of the undisputed evidence presented by Petitioners<sup>7</sup> that these procedural inadequacies have (i) impeded the Student's right to a FAPE, (ii) significantly impeded the

---

<sup>7</sup> The parent testified (*inter alia*) that DCPS failed to provide her with any written notice of its decision not to evaluate the Student, or a copy of the procedural safeguards upon her request for evaluation. *See Parent Testimony*. DCPS effectively conceded both points in its October 2, 2009 response. *See DCPS Response* ¶ G.

parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, and/or (iii) caused a deprivation of educational benefit. 34 C.F.R. §300.513(a).

**C. Appropriate Equitable Relief**

11. Following summary judgment on the liability issues, an evidentiary hearing was held to determine what, if any, relief was appropriate, including whether Petitioners were entitled to the specific equitable relief requested in the complaint (*i.e.*, prospective private placement and compensatory education). The IDEA authorizes district courts and hearing officers 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*, 401 F.3d at 521-23. In this case, the Hearing Officer has exercised his discretion to fashion appropriate equitable relief, based on the record developed in this proceeding and the particular violations and denials of FAPE adjudicated herein. The appropriate relief is discussed further below.

***Issue (f): Prospective placement***

12. Because the Student currently remains in what both parties agree is an inappropriate placement for the 2009-2010 school year [REDACTED] appropriate equitable relief in this case must include an immediate change in placement. Petitioners request that the Hearing Officer order DCPS to place the Student at The [REDACTED] School, a private full-time special education school in Rockville, Maryland, where he has been accepted for admission. DCPS proposed at hearing that the Student be placed in a full-time special education program at the [REDACTED] a public school in D.C. which DCPS now claims can implement the Student's IEP.

13. As the U.S. Court of Appeals for the D.C. Circuit has explained, "an award of private-school placement is not...retroactive relief designed to compensate for *yesterday's* IDEA violations, but rather prospective relief aimed at ensuring that the child receives *tomorrow* the education required by IDEA." *Branham v. District of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005). Thus, placement awards "must be tailored to meet the child's specific needs" through a fact-intensive inquiry. *Id.* at 11-12. "To inform this individualized assessment, '[c]ourts [and hearing officers] fashioning [such] discretionary equitable relief under IDEA must consider all relevant factors.'" *Id.* at 12, quoting *Florence County School District Four v. Carter*, 510 U.S. 7,

16 (1993); *see also Reid v. District of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). The relevant considerations in determining whether a particular placement is appropriate for a particular student include the following:

“the nature and severity of the student’s disability, the student’s specialized educational needs, the link between these 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.”

*Branham*, 427 F.3d at 12, *citing Board of Education v. Rowley*, 458 U.S. 176, 202 (1982).

(i) [REDACTED]

14. The Hearing Officer concludes that the only educational placement shown on this record that can fully meet the Student’s unique needs is Petitioner’s proposed placement at the [REDACTED]. It is undisputed that the Student requires a full-time therapeutic placement to meet his unique needs (*see Findings, ¶ 20*), and Petitioners’ expert testified at hearing that the Student must be placed in a full-time therapeutic special education placement in order for him to be able to access his education and make academic progress. *See* [REDACTED] y. Petitioners’ expert also testified that, based on her knowledge of the Student’s needs, he should be placed at the [REDACTED] — a school that can provide the Student with the high level of therapeutic interventions and services that he needs to access his education. And she testified that without placement at the [REDACTED] the Student’s negative behaviors are likely to continue to escalate. *See* [REDACTED].

15. Petitioners also provided testimony from the Clinical Director of the [REDACTED], who explained in detail why the [REDACTED] would be an appropriate placement for the Student, based on her knowledge and observations of the Student, and the [REDACTED] program offerings. *See* [REDACTED]. The [REDACTED] has expertise in working with children, like the Student, who require constant therapeutic support in order to access their education at school and make academic progress. *Id.* It provides the small, self-contained classroom and high teacher-student ratio that the Student requires. The [REDACTED] proposes to place the Student in a classroom with five other students, including at least one academic peer who is functioning at his same academic level. The [REDACTED] also uses a special education curriculum that does not include general education materials, which the

testimony showed could appropriately address the Student's academic deficits in reading, writing, and mathematics. The school could also provide a safe environment for the Student to develop age-appropriate social and emotional skills. See [REDACTED]

*Testimony.*

16. From a behavioral services standpoint, the [REDACTED] employs a staff of mental health professionals who are available to provide individual and group counseling five days per week, including during times of crisis. [REDACTED] The [REDACTED] also employs a school-wide behavior modification program with immediate rewards that the Student requires to reinforce good behavior throughout the school day. *Id.* [REDACTED] Additionally, the daily social skills training embedded in the school's curriculum is provided by the students' therapists so that the social skills lessons reinforce what students have been working on during previous therapy sessions. [REDACTED]. The [REDACTED] also has staff trained in crisis intervention,<sup>8</sup> and provides the weekly family therapy and parent training that the Student requires to reinforce the same strategies at home. Finally, the [REDACTED] [REDACTED] is a full-time, eleven-month program that is able to provide the Student with the consistent therapeutic interventions he requires for his emotional stability. *See id.*, [REDACTED]

*Testimony.*

17. Thus, the evidence shows that [REDACTED] can provide an appropriate program for the Student, that it can meet all of the Student's specialized educational needs, and that it can provide all services required under an appropriate IEP (including all of the services called for in the most recent, September 1, 2009 IEP). The proposed placement otherwise meets the criteria for private placement determinations and appears to be appropriately "tailored to meet the child's specific needs." *Branham v. District of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir. 2005); *Roark v. District of Columbia*, 460 F. Supp. 2d 32, 35 (D.D.C. 2006).

(ii) [REDACTED]

18. Based on the evidence presented at the due process hearing, DCPS requests that the Student be placed at the [REDACTED]. The special education coordinator ("SEC") testified about the services available at [REDACTED] including both academics and behavioral and emotional issues. *See SEC Testimony.* The testimony indicated that [REDACTED] can provide

---

<sup>8</sup> When a student is in crisis, the crisis intervention team, all of whom are properly trained in therapeutic restraints, de-escalates the student, and safely transfers the student to a de-escalation room if necessary. *King-Shaw Testimony.*

significant educational benefits to special education students with emotional disturbances and other health impairments,<sup>9</sup> which would appear to address many (though certainly not all) of the Student's needs in this case.<sup>10</sup> In addition, [REDACTED] is obviously much closer to the Student's home in Southeast D.C. than is the [REDACTED]. See 34 C.F.R. § 300.116(b). Notwithstanding these benefits, however, there are several fundamental problems with DCPS' proffered prospective placement in this case.

19. *First*, the [REDACTED] has never been determined to be an appropriate educational placement by the Student's MDT/IEP Team; it has only been advanced by DCPS counsel as a proposed remedy in this litigation. This is an important distinction, especially since IDEA mandates that DCPS "must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child."<sup>20</sup> U.S.C. § 1414(e); 34 C.F.R. § 300.327. See also 34 C.F.R. § 300.116(a)(1) ("each public agency must ensure that the placement decision is made by a group of persons, including the parents...."); *T.T. v. District of Columbia*, 48 IDELR 127 (D.D.C. 2007). Moreover, in the particular case of [REDACTED] there are significant issues and consequences that DCPS recognizes should be discussed with the parent in the context of an MDT meeting and special intake process before deciding on this unique program.

---

<sup>9</sup> See *SEC Testimony*. At [REDACTED] the Student would be the sixth student in the first grade class, which is taught by a certified special education teacher with the assistance of a classroom aide and two dedicated aides. The lead teacher uses differentiated instruction to meet the academic needs of his students, and the instruction may be further supplemented by skill reinforcement in a multi-purpose room, instructional software in the computer lab, and/or support by a resource teacher/ instructional coach. *Id.* With respect to emotional and behavioral issues, virtually all of the staff is trained in therapeutic crisis intervention; there is a school-wide behavior intervention plan where students earn and lose points on an hourly basis; and the behavior team is trained in the use of restraints and provides additional training and support for the rest of the staff. *Id.* The school also has a student support center where students who are having difficulty in class can be moved to a different setting to do work, as well as a "reflection room" where students in crisis can go, which is monitored by two adults who help the student calm back down. Teachers also are trained to keep a staff person near the door if one of the students is a "runner" and to anticipate triggers to running. Further, there is security at both doors to the outside, and if a student runs into the hall, a code is called and the behavior team responds immediately. *Id.* Finally, through a partnership with the D.C. Department of Mental Health, the school implements a social skills curriculum serving the entire school population. Students receive the counseling hours on their IEPs either by DCPS staff or, if the parent agrees, by DMH staff. *Id.* See also *DCPS' Closing Argument* (Oct. 19, 2009).

<sup>10</sup> As Dr. [REDACTED] testified, based on her observations and expert opinion, [REDACTED] does not appear to be an appropriate placement for the Student at present primarily because it (a) does not have all of the services to support the Student academically and (b) lacks the therapeutic interventions and consistency of mental health services to meet the Student's unique needs. See [REDACTED] *Testimony; Petitioners' Closing Argument*, at 30-33.

20. Whenever students are considered for placement at [REDACTED] the MDT at the Student's neighborhood school conducting the placement meeting is supposed to provide the parent/guardian "detailed information" regarding the [REDACTED] and its partnership with the D.C. Department of Mental Health ("DMH"). *DCPS-1* (draft Memorandum of Understanding ("MOU") between DCPS and DMH). Specifically, the "MDT will outline and discuss the comprehensive mental health services to the children and families who attend the [REDACTED] program," and "[a]t this point the parent/guardian is informed that if [REDACTED] is selected then DMH will become the sub-provider for mental health services provided." *DCPS-1*, at 5. The intake meeting includes staff from both DMH and DCPS, as well as any other pertinent participants included by the parent, who further discuss the [REDACTED] program with the parent. If the parent ultimately "determines that this is the placement of choice it will be reiterated that the parent agrees that DMH be the sub-provider for the child in order to maximize the educational, emotional, and behavioral benefits of a comprehensive educational and mental health program." *Id.*, at 5-6.

21. Because DCPS never proposed or considered [REDACTED] within the MDT placement process, none of this was done in this case. As a result, the parent testified that she had significant unanswered questions and concerns about whether the joint DCPS-DMH program would be appropriate for the Student in light of his social/emotional needs, including the potential to disrupt his current mental health care.<sup>11</sup> *See Parent Testimony; see also SEC Testimony* (SEC at [REDACTED] has never met the parent or the Student).

22. **Second**, although judicial private placement awards may be subject to different standards,<sup>12</sup> DCPS placement decisions must be "based on the child's IEP," 34 C.F.R. § 300.116

---

<sup>11</sup> The majority of [REDACTED]'s mental health professionals are DMH staff that work with the school through DMH's partnership with DCPS. *SEC Testimony*. It is unclear whether a parent who does not wish to make DMH the "sub-provider for the child" would still have access to the same services. As the SEC testified at the hearing, the DCPS counselors are on site at [REDACTED] only two days a week, meaning that unless the parent agreed to make DMH the Student's mental health provider, he would not have access to the same services as other students at [REDACTED]. *Id.* Consequently, the Student's individual therapist might not be available to him when in crisis, something that Dr. [REDACTED] testified was extremely important given the Student's severe attachment issues. [REDACTED] *Testimony*. Finally, [REDACTED] does not provide family therapy or parent training as a related service, which the evidence shows to be necessary for the Student's social-emotional development. *Id.*

<sup>12</sup> *See Burlington v. Department of Education*, 471 U.S. 359, 369 (1985) ("In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction

(b)(2); DCMR § 5-3013.1(e), not the other way around. *See, e.g., T.T. v. District of Columbia*, 48 IDELR 127 (D.D.C. 2007) (“Once developed, the IEP is then implemented through appropriate placement in an educational setting suited to the student’s needs”); *Roark v. District of Columbia*, 460 F. Supp. 2d 32, 35 (D.D.C. 2006) (same). Here, DCPS wants to first place the Student in a special public school (██████) and then convene an MDT/IEP Team meeting after the fact to sort of “reverse engineer” a full-time IEP to fit the predetermined placement. However, if the MDT has not yet developed an appropriate, full-time IEP, it is difficult to see how DCPS can arrive at a setting/location that can implement the IEP. *See* ████████ *Testimony*. For example, the evidence indicates that family counseling services are not typically provided at ████████ but these services may well be included in the IEP because the Student appears to need them. Dedicated aide services may be another example, depending on what the MDT/IEP Team determines. *Id.* DCPS cannot haphazardly assign the Student a placement that may not actually end up meeting his needs in an attempt to fix their previous denials of FAPE.

23. **Third**, assuming *arguendo* that D.C. Code §38-2561.02 applies to a private placement ordered as an equitable remedy in due process hearing (as opposed to DCPS placement decisions), the placement priorities set forth in subsection 38-2561.02(c) would not dictate selection ████████ in this case. By its terms, subsection 38-2561.02(c) provides that “[s]pecial education placements shall be made in the following order or priority; *provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter...*” D.C. Code 38-2561.02(c) (emphasis added). This means that such limiting provision only applies when DCPS makes a placement decision in accordance with the procedures under the IDEA. DCPS was required to ensure that a formal “placement decision” was made by the team, including the parents (34 CFR 300.116, 300.501(c)(1)); and DCPS was required to use procedures consistent with those described in 300.322, which required notice to parents and scheduling of an IEP team to consider placement. *See also* DCMR 5-3013.1 (c) (requiring LEA to ensure that the educational placement decision for a child with a disability is “made within timelines consistent with applicable local and federal law”). In this case, DCPS did not provide notice to the parents, did not convene a placement meeting, did not make a placement determination, and did not offer any proposed placement to Petitioners within the MDT process

---

directing the school officials to develop and implement at public expense an IEP placing the child in a private school.”).

other than [REDACTED] (which it has now found to be inappropriate). As a result, there is no occasion to refer to the placement priorities in 38-2561.02(c).

24. Finally, the relative equities in this case support Petitioner's requested placement award. The parent specifically requested that DCPS provide the Student with an appropriate placement at the first IEP meeting on June 24, 2009, the second IEP meeting on July 9, 2009, the third IEP meeting on September 1, 2009 and as recently as the dispute resolution session on September 24, 2009. *See Parent Testimony; Wilson Testimony; P-3 to P-7*. It was only on October 2, 2009, after litigation had commenced and only hours before the pre-hearing conference, that DCPS belatedly considered that the Student might need another placement. To permit DCPS to have another chance now, and potentially delay the provision of an appropriate placement even further, would be contrary to the intent of the IDEA. *Cf. Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994) (finding "no authority which permits a school system a second opportunity to ... propose an alternative placement where its failure to do so in the first instance violated the requirements of the Act.").<sup>13</sup>

25. Accordingly, the Hearing Officer concludes that DCPS' proffered placement of the [REDACTED] is not an appropriate remedy in response to the present due process complaint. An immediate private placement at the [REDACTED] will be awarded. Of course, it remains within the discretion of the MDT/IEP Team to consider [REDACTED] as a possible placement at the next annual IEP review in summer 2010, depending on the needs of the Student at that time.<sup>14</sup>

***Issue (g): Compensatory education***

26. Compensatory education is an equitable remedy available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA. 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*

---

<sup>13</sup> Here, as in *Wirta*, DCPS has unreasonably delayed in making available a FAPE and "failed to propose an appropriate special education program and placement" for the current school year. 859 F. Supp. at 4. Because DCPS has thereby "defaulted on its obligations under the IDEA," a private school placement that is "proper under the Act" is an appropriate remedy for the denial of FAPE. 859 F. Supp. at 5.

<sup>14</sup> *See, e.g., Green v. District of Columbia*, 45 IDELR 240 (D.D.C. 2006) ("While [private school] might be an appropriate placement for [student] at the current time, another school – including a D.C. public school – might be an appropriate placement at a later date depending on [student's] progress. Indeed, the purpose of a student's annual MDT/IEP meeting is to track his or her progress and determine what educational and other services are needed.").

*Columbia*, 401 F. 3d at 521 (quotations omitted). “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.” 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’”).

27. In this case, Petitioners demonstrated that DCPS’ failure to provide the Student with an appropriate special educational program and placement from January 2009 to the present has resulted in harm to the Student, see [REDACTED] *Testimony*, and DCPS did not rebut this showing at hearing. DCPS’ failure to provide the Student with the appropriate special education services that he needed harmed the Student as he fell further behind academically, and his disruptive and dangerous behaviors increased. *Id.*; *Wilson Testimony*; P-17 to P-21; *Findings*, ¶ 21. .

28. The Hearing Officer concludes, however, that Petitioners have failed to meet their burden of demonstrating how the particular compensatory education award they propose satisfies the *Reid* standard and would therefore be an appropriate equitable remedy under the circumstances. The general request for a “therapeutic summer bridge program” has not been set forth with sufficient specificity. Moreover, the proposed award has not been shown to be (a) reasonably calculated to provide the educational benefits that likely would have accrued from special education services that DCPS should have supplied in the first place during the relevant time period, and (b) reasonably tailored to the unique needs and deficits of the Student. *Reid*, *supra*; see [REDACTED] *Testimony*; *Petitioners’ Closing Argument*, at 2, 27-28.

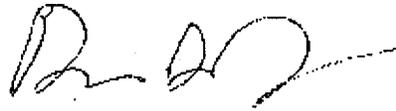
## V. ORDER

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

1. The Student shall be placed at the [REDACTED] **School in Rockville, Maryland**, on an interim basis until the completion of the 2009-2010 school year, commencing immediately.
2. DCPS shall issue a Prior Notice of Placement, and provide funding and transportation, for the Student to the [REDACTED] School within **five (5) school days** of this Order (*i.e.*, **by November 3, 2009**).

3. Within **30 calendar days** of placement at the [REDACTED] School, the Student's MDT/IEP team shall meet to review and revise, as appropriate, the Student's IEP to govern the provision of specialized instruction and related services in the full-time special education program in which he becomes enrolled at the [REDACTED] DCPS shall also conduct an annual review of the Student's IEP and placement by **July 9, 2010**.
4. Petitioners' other requests for relief, including compensatory education, are hereby **DENIED**.
5. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioners, Joy M. Purcell, Esq., of the Children's Law Center, via facsimile (202-552-7125), or via email ([jpurcell@childrenslawcenter.org](mailto:jpurcell@childrenslawcenter.org)).
6. Any delay in meeting any of the deadlines in this Order caused by Petitioners or Petitioners' representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadlines by the number of days attributable to such delay.
5. This case shall be, and hereby is, **CLOSED**.

Dated: October 26, 2009



---

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).