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

STUDENT, **By and through PARENT,**[1] ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	))))))))))	**Bruce Ryan, Hearing Officer** **Issued: November 12, 2012**

OSSE
STUDENT HEARING OFFICE
2012 NOV 13 AM 9:42

HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

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.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed August 29, 2012, on behalf of student (the "Student") who resides in the District of Columbia and who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. He has been attending a non-public, special education day school located in Northern Virginia ("Private School") pursuant to DCPS' placement. Petitioner is the Student's mother.

Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") under the IDEA by (1) failing to provide an appropriate educational placement for the 2012-13 school year, and (2) failing to conduct a comprehensive re-evaluation of the Student. Petitioner also claims that (3) DCPS determined placement without student or parental participation.

[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

On September 7, 2012, DCPS filed a timely Response, which denies the allegations that it failed to provide a FAPE. DCPS responds (*inter alia*) that "the site selection for the implementation of an IEP is within the discretion of the LEA." *Response, p. 1.* DCPS further asserts that "the student's location of services is also being changed because the student is habitually truant and not availing himself [of] the services being offered at the current location of services." *Id., p.3.*

On September 20, 2012, the parties held a resolution meeting, which did not resolve the Complaint. The parties also did not agree to end the statutory 30-day resolution period early. The resolution period therefore ended on September 28, 2012, and the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") is due to expire on November 12, 2012.

On September 27, 2012, a Prehearing Conference ("PHC") was held to discuss and clarify the issues and requested relief. At the PHC, the parties agreed to schedule the due process hearing for October 23, 2012, 9:30 AM to 5:00 PM, an a Prehearing Order ("PHO") was subsequently issued confirming that matters discussed, agreed and/or ordered at the PHC.

On October 5, 2012, the Hearing Officer granted Petitioner's stay-put motion, which was not opposed by DCPS. *See Order,* issued Oct. 5, 2012. The Hearing Officer concluded that the Private School program, in which Petitioner had been previously placed, was his then-current educational placement for purposes of the stay-put provision when DCPS issued the Prior Written Notice ("PWN") proposing to withdraw him from that program. The Hearing Officer found that DCPS had proposed a "fundamental change in, or elimination of a basic element of" his existing educational program under *Lunceford v. D. C. Board of Education,* 745 F. 2d 1577 (D.C. Cir. 1984). *Id.,* pp. 2-3. The Hearing Officer therefore ordered that Petitioner was to remain in his current educational placement at Private School, with DCPS funding and transportation, during the pendency of this administrative due process complaint proceeding, *Id.*, pp. 2-3.

On October 16, 2012, the parties filed their five-day disclosures; and on October 23, 2012, the Due Process Hearing was held Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence.

Petitioner's Exhibits: P-1 through P-31.

Respondent's Exhibits: R-2 through R-22. [2]

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

Petitioner's Witnesses: (1) Parent-Petitioner; (2) Student; and (3) Educational Advocate ("EA").

Respondent's Witnesses: (1) Ms. Ruth Young, DCPS Case Manager; (2) LEA Representative & Progress Monitor for Private School ("LEA Rep."); and (3) Ms. Carla Watson, DCPS Program Director for LEA Monitoring & School Support Team.

Oral closing arguments were presented on the record at the conclusion of the hearing. In addition, on October 25, 2012, DCPS submitted copies of regulatory authorities cited at hearing.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*"). The statutory HOD deadline is November 12, 2012.

III. ISSUES AND REQUESTED RELIEF

As specified in the PHO, the issues presented for determination at hearing are:

(1) Failure to Provide Appropriate Placement — Did DCPS deny the Student a FAPE by failing to propose an appropriate placement for the Student for the 2012-13 school year?

(2) Failure to Re-evaluate. — Did DCPS fail to conduct a comprehensive re-evaluation of the Student prior to changing Student's placement from Private School, which is a full-time, therapeutic setting outside of general education?

(3) Procedural/Parent Participation. — Did DCPS propose to change the Student's placement from Private School without parental participation, and did such procedural violation have substantive impacts on the Student and/or Petitioner pursuant to 34 CFR 300.513 (a) (2)?

---

[2] DCPS Exhibits R-2 through R-11, R-14, R-15, and R-19 through R-22, as well as all of Petitioner's exhibits, were admitted without objection. Exhibits R-12, R-13, and R-16 through R-18 were admitted over Petitioner's objections, which were overruled for the reasons stated on the record. Exhibit R-1 was not admitted. DCPS' admitted Exhibits R-1 through R-11 included an Exhibit 6A, but there was no Exhibit 8.

Petitioner requests that DCPS be ordered (a) to continue placement at Private School or provide some other appropriate public or non-public school; (b) evaluate the Student in the areas of psychological, speech/language, occupational therapy ("OT"), and functional behavioral assessment ("FBA"); (c) include the parent in the attendance-plan process and any placement determinations; (d) update and revise the Student's IEP, inclusive of comprehensive attendance interventions; and (e) award reasonable compensatory education. *See Prehearing Order,* ¶ 7.[3]

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. 5-E DCMR §3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005).

IV. FINDINGS OF FACT

Based upon the evidence presented at the due process hearing, this Hearing Officer makes the following Findings of Fact:

1. The Student is a resident of the District of Columbia. Petitioner is the Student's mother. *See Parent Test.; P-1.*
2. The Student has been determined to be eligible for special education and related services as a child with an Other Health Impairment ("OHI"), as defined in the IDEA, due to his diagnosed condition of Attention Deficit Hyperactivity Disorder ("ADHD"). *See P18.* The Student's ADHD condition has been found to limit his alertness to the educational environment and to adversely affect his educational performance. *P18-4. See also Parent Test.; Student Test.; P-12* (09/23/2010 comprehensive psychological report).
3. In March 2011, the Student was placed at Private School pursuant to a prior HOD issued January 31, 2011, which found that DCPS had denied the Student a FAPE by failing to provide an appropriate IEP and placement during the 2010-11 school year. *See P28; Parent Test.*
4. On or about April 14, 2011, DCPS convened an annual and 30-day review meeting of the Student's MDT/IEP Team. The Team reviewed evaluations/reports and developed an IEP for the Student. *See P9* (meeting notes). The IEP provided 29 hours per week of

[3] Petitioner failed to include a written plan for compensatory education in her five-day disclosures as agreed and ordered at the PHC, and she then withdrew that element of requested relief at hearing.

Specialized Instruction in an Outside General Education setting and one hour per week of Behavioral Support Services in an Outside General Education setting. *See P23-12.*

5. At the 04/14/2011 meeting, the IEP Team determined that neither the general education setting nor the combined general education/special education setting were appropriate for the Student, as these settings did not provide the level of services and support needed to address the Student's special education needs. *P9-3.* The Team also found that Private School was able to implement the IEP. *P9-4.* DCPS then issued a Prior Written Notice ("PWN") proposing that the Student continue to receive his IEP services at Private School. *P29.*
6. At the 04/14/2011 meeting, the IEP Team also recommended that the Student be assessed in the areas of speech/language and occupational therapy ("OT"). *P9-3, P9-7.*
7. On or about February 16, 2012, DCPS convened a meeting of the Student's MDT/IEP Team to review the Student's progress at Private School. Petitioner participated by telephone. *P19-2.* Due to the impact of the Student's disability on his academic and behavioral performance, the Student continued to require a separate special education environment outside of general education. *P19-5.*
8. At the 02/16/2012 meeting, the IEP Team also discussed the Student's attendance, noting that he had 16 unexcused and seven (7) excused absences as of that date during the 2011-12 school year. *P19-2–P19-3.* And there were no transportation issues noted. *P19-5.* As a result, the Team decided that an "attendance contract" would be implemented. *P19-3.*
9. On or about March 16, 2012, DCPS convened a meeting of the Student's MDT/IEP Team to conduct an annual review. *See P22* (meeting notes). Petitioner attended this meeting by telephone. *P18-2* (03/14/2012 IEP document). At this meeting, the IEP Team reviewed all relevant evaluations and other existing data, and determined that the Student continued to meet all eligibility criteria for special education and related services as a child with OHI. *P18-5; see also P18-7* (03/16/2012 PWN). No material changes were made in the Student's IEP, which continued to call for full-time specialized instruction and related services in an Outside General Education setting. The Team also decided to conduct a speech and language assessment based on information reviewed at the meeting, and again reviewed attendance issues. *P18-8; P22-3; P22-8.*

10. Around the time of the 03/16/2012 meeting, the Student began to be monitored by DCPS' truancy staff due to his level of unexcused absences, which included numerous phone calls and letters to Petitioner. *See Young Test.; R12* (Easy IEP communications log); *R13* (contact sheet); *R17, p. 1.*
11. On or about May 17, 2012, DCPS developed a "Non-Public Unit Student Attendance Intervention Plan" to address the Student's attendance issues. *P15-2; R18; Young Test.* The plan noted teacher reports that the Student was having difficulty keeping up with class work and was falling behind academically because of his absences and behaviors. *P15-3.* The plan then included several interventions, including written documentation, better communication, and other actions to be taken by the parent, Private School personnel, and the DCPS Case Manager. *P15-4.*
12. During the 2012 summer, DCPS referred the Student's truancy case to its Office of Youth Engagement ("OYE") and the D.C. Child & Family Services Agency ("CFSA"), and Petitioner then responded to the CFSA investigation. *See R20; R16, p. 2; Parent Test.; Young Test.; LRE Rep. Test.* As of the end of the 2011-12 school year, the Student was reported as having 24 unexcused absences and 12 excused absences for the 2011-12 school year.[4] The Student also did not attend ESY services that summer. *LEA Rep. Test.*
13. On or about August 9, 2012, DCPS convened another meeting of the Student's MDT/IEP Team without Petitioner's participation. *R16.* Multiple attempts were made to contact Petitioner, but DCPS was not able to reach her prior to the meeting. *Id.,* pp. 1-2.; *LEA Rep. Test.*
14. At the 08/09/2012 meeting, DCPS' LEA representative stated that, as a result of Student's excessive absences and DCPS' inability to make contact with his parent/guardian, the Student would be withdrawn from Private School and his individualized special education program. *R16, p. 2; R17,* p. 2. According to the LEA representative, "[t]his means he will have to return to his home school & begin the process again to re-enroll." *R16, p. 2. See also LEA Rep. Test.*

---

[4] *R17; P24-3* (Private School attendance record 2011-12). Absences were deemed unexcused where no appropriate written documentation was received from the parent up to five days thereafter, consistent with DCPS policy. *See Young Test.*

15. At the 08/09/2012 meeting, the School Psychologist reported that efforts had been made for the past two years for the Student to receive speech/language and OT evaluations. The Psychologist noted that it is important that the evaluations be completed to ensure that the Student is getting the services that he needs. *R16, p. 2.*
16. On or about August 9, 2012, DCPS issued a PWN that described the following proposed action: "As a result of [Private School] & DCPS' inability to make contact with the parent/guardian of [Student], ... [he] will be withdrawn from [Private School] and the individualized education program. [Student] and his parent/guardian have the right to pursue reenrollment & special education services at any time in the future." *P8-2; R15. See also LEA Rep. Test.*
17. The Student has continued to attend Private School during the 2012-13 school year pursuant to his stay-put rights under the IDEA. The evidence indicates that he is doing better this year in terms of his school attendance and behavior; the Student believes that he is learning; and Petitioner would like for the Student to remain there. *See Parent Test.; Student Test.; EA Test.*
18. Private School is a full-time, therapeutic, special education day school located outside the District of Columbia. Private School can implement the requirements of the Student's March 14, 2012 IEP and can provide educational benefit to the Student.
19. Since August 2012, DCPS has taken no further action to propose any alternative school placement and/or location of services that can fulfill the requirements set forth in the Student's IEP or to convene another MDT/IEP Team meeting for that purpose.

V. DISCUSSION AND CONCLUSIONS OF LAW

As the party seeking relief, Petitioner carries the burden of proof on each issue. *See* 5-E DCMR §3030.3; *Schaffer* v. *Weast,* 546 U.S. 49 (2005). "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a Free Appropriate Public Education (FAPE)." 5-E DCMR §3030.3. The hearing officer's determination is based on the preponderance of the evidence standard, which generally requires sufficient evidence to make it more likely than not that the proposition sought to be proved is true.

For the reasons discussed below, the Hearing Officer concludes that Petitioner has met her burden of proof ***in part*** on Issues 1 and 2, but she has failed to prove her claim under Issue 3. Appropriate equitable relief will be granted.

A. <u>Issues/Alleged Denials of FAPE</u>

Issue 1: Failure to Provide Appropriate Placement

Under Issue 1, Petitioner claims that DCPS has denied the Student a FAPE by failing to propose any educational placement and/or location of services for him for the 2012-13 school year.

FAPE means "special 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); *see* 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)). *See* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. 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." *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 Kerkam v. McKenzie,* 862 F. 2d 884 (D.C. Cir. 1988).

"Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes ***offering placement in a school that can fulfill the requirements set forth in the IEP.***" *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (emphasis added). Moreover, local statutory law in the District of Columbia requires that "DCPS shall ***place*** a student with a disability in ***an appropriate special education school or program***" in accordance with the IDEA. D.C. Code 38-2561.02 (b) (emphasis added). *See also Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005), *citing McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (affirming "placement based on match between a student's needs and the services offered at a particular school"); *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C.

Cir. 1991) ("If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school."). Educational placement under the IDEA must be "based on the child's IEP." 34 C.F.R. 300.116 (b) (2). DCPS must also ensure that its placement decision is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA. *See* 34 C.F.R. §§ 300.114-300.116.

As noted above, on August 9, 2012, DCPS issued a Prior Written Notice ("PWN") proposing that the Student "will be ***withdrawn from [Private School] and the individualized education program.***" *R15* (emphasis added). However, no new school placement and/or location of services was provided in the PWN, or has been proposed for the Student since that date. Instead, the PWN simply stated that the Student and his parent "have the right to pursue reenrollment & special education services at any time in the future." *Id.*

DCPS defends this action by arguing that this case does not really involve a change in program, placement or location of services, but rather involves a student "simply not presenting" to the LEA because he is no longer attending his assigned non-public school. *DCPS' Opening Statement* (Oct. 23, 2012). According to DCPS, if a student "does not present," then the LEA has to take action in the form of the 08/09/2012 PWN. *Id.* DCPS asserts that the circumstances are similar to where a student may have moved out of the jurisdiction or where a student has transferred to another LEA, citing a recent OSSE policy memorandum dated July 29, 2011.[5] *Id.* Similarly, DCPS witnesses testified at hearing that the 08/09/2012 PWN language was derived from this OSSE policy memorandum. *See LEA Rep. Test.; Watson Test.*

The OSSE memorandum cited by DCPS provides guidance to LEAs for handling certain "circumstances in which children with IEPs may exit LEAs but continue to have a right to access educational services at any point in the future." *R21, p. 1.* These include parental withdrawals, transferring from one LEA to another, and other situations where a student no longer attends school. *Id.* "In the case that a child with an IEP is not withdrawn by the parent, ***and the LEA does not know the whereabouts of the child,*** it is expected that LEAs follow the truancy guidelines." *Id., p. 2.* "In addition, the LEA must make reasonable attempts to reach the parent

[5] *See R21* (OSSE Entry & Exit Guidance Related to Special Education Records).

and attempt to contact the parent using multiple modalities on multiple dates and times...." *Id.* (emphasis added).

The guidance goes on to provide that "[i]f none of these attempts is successful, the school/LEA should issue a prior written notice (PWN)" similar to that which DCPS issued in this case, and the LEA can then proceed to "enter the appropriate exit code in the student information system." *Id.* One of those codes (1931) provides for an "Exit Withdrawal Type" of "Not enrolled, unknown status" in the following circumstance: "A student who is ***not known to be attending school, but has not informed the [LEA] of his/her intent to drop out.*** This includes students who have moved away but for whom the [LEA] cannot verify enrollment in school elsewhere; students ***dropped from attendance rosters for excessive truancy***; and students who enrolled in school but never attended." *Id., p. 17* (emphasis added).

DCPS appears to have acted in good faith in attempting to follow the OSSE policy guidance in this case, including following the truancy process and making reasonable attempts to reach the parent. However, the Hearing Officer concludes that such guidance cannot be applied to the Student's particular situation in the manner that the 8/9/2012 PWN did without denying the Student a FAPE. This is not a situation where DCPS did not know the whereabouts of the child or whether the child had moved away or transferred to another school. Nor did DCPS have any reason to suspect that a 12-year old student had dropped out of school. To the contrary, as of the August 2012 team meeting, DCPS knew that the child had been experiencing attendance problems during the prior completed school year, which were the subject of a recent CFSA referral. At the same time, there is no evidence that the Student had actually been dropped from Private School's attendance roster for excessive truancy. *See R14; P20; LEA Rep. Test.*

DCPS' LEA representative also testified that the 8/9/2012 PWN proposed to change the Student's ***LRE because of his truancy***, but she never explained why this made any sense as a justification for removing him from Private School. *See LRE Rep. Test.* The LRE analysis examines (*inter alia*) whether the nature and severity of a student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *See* 34 C.F.R. 300.114(a)(2)(ii). While excessive absences may also adversely affect a student's ability to learn and to derive educational benefit from his special education

program,[6] it is unclear how this would alter the LRE analysis. In any event, other than a passing reference in the meeting notes, [7] there is no evidence that DCPS ever actually changed or proposed to change the LRE determination in the Student's IEP document, which has provided that his "educational and social/emotional issues cannot be met within the general education [or] general/special education environment." *P23-13; see also P19-5.* The PWN also includes no statement regarding LRE, and no evaluations or other data supported a change to a less restrictive environment or a reduction of hours. *See R15; LEA Rep. Test.* (cross examination).

Accordingly, the Hearing Officer concludes that Petitioner has met her burden of proof on Issue 1. While DCPS was properly attempting to address the Student's severe attendance problems over the 2011-12 school year, DCPS was still responsible for providing a FAPE to the Student as a resident disabled child. The obligation to provide FAPE included offering an appropriate educational placement for the 2012-13 school year, which can implement his IEP.

Issue 2: Failure to Re-evaluate

The IDEA and its implementing regulations provide that a public agency "must ensure that a reevaluation of each child with a disability is conducted" if either (1) the public agency determines that the educational or related services needs ... of the child warrant a reevaluation" or (2) "the child's parent or teacher requests a reevaluation." 34 C.F.R. §300.303 (a). The regulations further provide (as a "Limitation") that such a reevaluation: "(1) ***may occur*** not more than once a year, unless the parent and the public agency agree otherwise; and (2) ***must occur*** at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary." *Id.* §300.303 (b). [8]

---

[6] *Cf. Garcia v. Board of Educ. of Albuquerque Public Schools,* 520 F.3d 1116 (10th Cir. 2008) (discussing effect of student's severe truancy); *Hinson v. Merritt Educ. Ctr.,* 579 F. Supp. 2d 89, 104 (D.D.C. 2008) (student "was not 'availing himself of educational benefit' due to extended absences").

[7] *See also R17, p. 2* ("An outside of general education setting is not his least restrictive environment at this time").

[8] "IDEA and its implementing regulations do not set a time frame within which an LEA must conduct a reevaluation after one is requested by a student's parent." *Smith v. District of Columbia,* Civ. Action No. 08-2216 (RWR) (D.D.C. Nov. 30, 2010), slip op. at 6. In light of the lack of statutory guidance, *Herbin* concluded that "[r]e-evaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." 362 F. Supp. 2d at 259 (quoting *Saperstone,* 21 IDELR 1127, 1129 (OSEP 1995)).

In conducting evaluations or re-evaluations, DCPS must ensure that the child "is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." 34 C.F.R. §300.304 (c) (4). DCPS must also ensure 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 has been classified." *Id.,* §300.304 (c) (6). *See also Harris v. DC,* 561 F. Supp. 2d 63, 67-68 (D.D.C. 2008). Thus, evaluations are to be conducted to determine both a child's disabilities and the content of the child's IEP. 34 C.F.R. §300.304 (b) (1). Moreover, where an IEP team determines that additional data is not needed, parents have a right to request particular assessments to determine whether their child has a disability and the child's educational needs. 34 C.F.R. 300.305 (d). *See also Herbin v. District of Columbia,* 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005); *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 claims that at least as of August 2012, the Student should have been tested in the areas of speech/language, occupational therapy ("OT"), psychological, and functional behavioral assessment ("FBA"). The Hearing Officer concludes that DCPS was not required to conduct another comprehensive psychological assessment at that time since DCPS had previously issued an IEE letter for such assessment in July 2010. *See R11.* This IEE resulted in an updated assessment in September 2010, less than two years prior to the August 2012 meeting. *P12.* However, the Hearing Officer concludes that DCPS should have conducted updated speech/language and OT assessments, based on earlier recommendations and IEP team decisions discussed in the facts above. Finally, with respect to an FBA, DCPS shall be ordered to conduct one and to factor its results into an appropriate behavior intervention plan ("BIP"), but DCPS shall not be ordered to authorize an independent FBA at this time.

Issue 3: Procedural/Parent Participation

Under Issue 3, Petitioner additionally claims that DCPS changed the Student's placement from Private School without parental participation at the August 9, 2012 meeting. This is a claim for a procedural violation of the IDEA.

The IDEA requires that parents have meaningful participation in the placement decisions involving their children. *See* 20 U.S.C. 1414(e); 34 CFR 300.116(a) (1), 300.327. Specifically, each public agency 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." *Id.,* 1414(e); 34 CFR 300.327. The IDEA also requires each public agency to "take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate." 34 C.F.R. §300.322 (a). This includes "(1) notifying parents of the meeting early enough to ensure that they will attend; and (2) scheduling the meeting at a mutually agreed on time and place." *Id.* The notice must include the purpose, time, and location of the meeting, who will attend, and other required information. *Id.,* §300.322 (b).

However, a public agency may conduct a meeting without a parent in attendance "if the public agency is unable to convince the parents that they should attend." *Id.,* §300.322 (d). In that situation, the public agency "must keep a record of its attempts to arrange a mutually agreed on time and place, such as – (1) detailed records of telephone calls made or attempted and the results of those calls; (2) copies of correspondence sent to the parents and any responses received; and (3) detailed records of visits made to the parent's home or place of employment and the results of those visits." *Id.*

In this case, the evidence shows that DCPS did take reasonable steps to ensure Petitioner's attendance at the August 9, 2012 meeting, but that Petitioner chose not to participate. DCPS attempted to reach Petitioner reasonably in advance of the scheduled meeting – by multiple written notices and correspondence, and by multiple telephone calls – consistent with the requirements of the IDEA. *See R12; R13; Young Test.* [9] Thus, DCPS substantially complied with the procedural requirements of §300.322 (d) and did not violate §300.327.

Accordingly, the Hearing Officer concludes that Petitioner has not met her burden of proving a separate procedural violation under Issue 3. However, as noted under Issue 1 above, Petitioner did prove that DCPS denied the Student a FAPE by failing to provide an educational placement for the 2012-13 school year.

---

[9] Ms. Young testified that correspondence was always sent to both Petitioner's mailing (PO Box) and residence addresses. Petitioner gave the PO Box address to Ms. Young at the March 2012 meeting. *See Young Test.* Thus, even if Petitioner's residence address had changed, *see Parent Test.,* she still should have received the notices.

B. 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, 521-24 (D.C. Cir. 2005). In closing, Petitioner requested updated assessments (psychological, speech/language and OT) and continued placement at Private School. Petitioner withdrew any request for compensatory education relief. *See Pet's Closing* (Oct. 23, 2012).

The Hearing Officer concludes that the following relief (as detailed In the Order below) is appropriate under all the facts and circumstances demonstrated in this case:

> The Student will continue to be placed at Private School – on an interim basis only, and subject to a 90% attendance condition – until DCPS can convene a meeting of the Student's MDT/IEP Team to (a) review the Student's IEP, and (b) discuss and determine an appropriate special education school or program for the Student in accordance with the IDEA and D.C. Code § 38-2561.02. DCPS shall convene the meeting within the next 45 days and subject to the procedural requirements of 34 C.F.R. §§ 300.322, 300.327 regarding parental participation; [10]

> Petitioner shall be authorized to obtain independent assessments in speech/language and OT over the next 60 days; and

> DCPS shall conduct an FBA of the Student and convene a meeting to review all further assessments and to develop an updated BIP over the next 60 days.

[10] To the extent DCPS believes it to be necessary, it may require Petitioner to register and/or "re-enroll" the Student at his neighborhood school in light of the prior truancy case and OSSE policy memorandum before proceeding to convene an MDT/IEP Team meeting, provided that the Student is maintained at his current educational placement at Private School in the interim.

VI. ORDER

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

1. DCPS shall place and fund the Student at **Private School,** [11] with transportation, on an **interim basis** pending the MDT/IEP Team meeting provided in Paragraph 3 of this Order, and subject to the requirements of Paragraph 2 of this Order.

2. The interim placement ordered under Paragraph 1 is conditioned upon the Student's maintaining at least a 90% attendance record, including excused absences.

3. Within **45 days** of the date of this Order (*i.e.*, by **December 27, 2012**), DCPS shall convene an MDT/IEP Team meeting (a) to review the Student's IEP as appropriate based upon his performance to date this school year, and (b) to discuss and determine an appropriate educational placement for the remainder of the 2012-13 school year.

4. Petitioner shall be authorized to obtain a **speech and language assessment** and an **occupational therapy assessment** of the Student independently, at the expense of DCPS and consistent with DCPS' publicly announced criteria for independent educational evaluations ("IEEs"). Upon completion of the assessments, Petitioner shall submit copies of the final written reports to DCPS. The independent assessment shall be completed and submitted to DCPS no later than **January 12, 2013.**

5. Within **60 days** of the date of this Order (*i.e.*, by **January 12, 2013**), DCPS shall conduct a functional behavioral assessment (FBA) of the Student, to include attendance issues. The results of such FBA shall be used to develop an appropriate updated behavior intervention plan (BIP) to be incorporated into the Student's IEP within 30 days of receiving such results.

6. Any delay in meeting any of the deadlines in this Order caused by Petitioner or Petitioner's 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.

7. Petitioner's other requests for relief in her Due Process Complaint filed August 29, 2012, are hereby **DENIED;** and

8. The case shall be **CLOSED.**

Dated: November 12, 2012

Impartial Hearing Officer

[11] **Private School** is identified in the Appendix to this HOD.

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).