DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

2012 JUL -7 AM 9:02 STUDENT HEARING OFFICE

PETITIONER,
ON BEHALF OF STUDENT,[1]

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: July 8, 2012

Hearing Officer: Peter B. Vaden

Case No: 2012-0368

Hearing Date: June 21, 2012

Student Hearing Office, Room 2006
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the "Petitioner" or "Mother"), 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, Petitioner alleges that DCPS denied Student a free appropriate public education ("FAPE") by failing to implement Student's March 12, 2012 Individualized Education Program ("IEP"), by refusing Petitioner's March 201 request to transfer Student to NONPUBLIC

[1] Personal identification information is provided in Appendix A.

PLACEMENT 1, by failing to implement strategies to address Student's "school avoidance" problems, by transferring Student to PUBLIC ACADEMY in June 2010 without an IEP meeting, by failing to conduct a proper triennial reevaluation in December 2010 and by failing to provide Student homebound instruction.

Student, an AGE young woman, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on May 15, 2012, named DCPS as respondent. The undersigned Hearing Officer was appointed on May 17, 2012. The parties met for a resolution session on May 24, 2012, but did not come to an agreement. The parties agreed that no agreement was possible prior to hearing and that the case should proceed to the due process hearing. The 45-day deadline for issuance of this HOD began on May 25, 2012. On June 12, 2012, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on June 21, 2012 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified and called Student as witness. DCPS called no witnesses. Petitioner's Exhibits P-1 through P-16 were admitted into evidence without objection. Exhibit P-17 was withdrawn. Exhibits P-18 through P-21 were admitted over DCPS' objection as to relevance. DCPS' Exhibits R-1 through R-25 were admitted without objection, with the exception of Exhibit R-10 which was not introduced.

Counsel for Petitioner made an opening statement. Counsel for DCPS elected not to make an opening statement. Counsel for both parties made closing arguments. Neither party requested leave to file a post-hearing brief.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO PROVIDE THE HOURS OF SPECIALIZED INSTRUCTION SPECIFIED IN STUDENT'S MARCH 12, 2012 IEP;
- WHETHER DCPS DENIED STUDENT A FAPE BY CONTINUING HER PLACEMENT AT NONPUBLIC PLACEMENT 2, AFTER PETITIONER'S MARCH 2010 REQUEST TO TRANSFER STUDENT FROM NONPUBLIC PLACEMENT 2 TO NONPUBLIC PLACEMENT 1;
- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO DEVELOP A BEHAVIOR INTERVENTION PLAN TO ADDRESS STUDENT'S "SCHOOL AVOIDANCE" PROBLEMS;
- WHETHER DCPS DENIED STUDENT OF FAPE BY TRANSFERRING HER TO PUBLIC ACADEMY IN JUNE 2010 WITHOUT REVISING HER IEP OR CONVENING AN IEP MEETING;
- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO CONDUCT A TRIENNIAL REEVALUATION IN DECEMBER 2010, THAT MET THE REQUIREMENTS OF THE IDEA; and
- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO PROVIDE HER HOMEBOUND INSTRUCTION FROM MAY 2010 TO THE PRESENT TO ADDRESS HER "SCHOOL AVOIDANCE" PROBLEMS.

For relief, Petitioner seeks an order for DCPS to conduct a full eligibility reevaluation, including a clinical psychological evaluation, psychiatric evaluation, processing testing, testing for learning disability and an evaluation for assistive technology needs. Petitioner requests that, after the evaluations are completed, DCPS be ordered to convene Student's IEP Team to review

the evaluation data, revise her IEP and determine an appropriate placement. In addition, Petitioner requests that DCPS be ordered to provide Student a laptop computer as a related service. Petitioner also seeks an award of compensatory education to compensate for deficits since DCPS failed to grant Petitioner's March 2010 request for Student's transfer to Nonpublic Placement 1 and for DCPS' failure to address Student's school avoidance problems.

FINDINGS OF FACT

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

1. Student is an age resident of the District of Columbia, where she lives with her Mother. Testimony of Mother.

2. Student was last found eligible, as a student with a disability who continued to need special education and related services, on December 9, 2010 at Public Academy, under the disability categories Emotional Disturbance (ED) and Other Health Impairment (OHI). Exhibit R-14.

3. At the end of the 2011-2012 school year, Student was enrolled in the GRADE at DC HIGH SCHOOL 2. Testimony of Mother, Exhibit R-17.

4. Student's school problems began in 2007 at MIDDLE SCHOOL, when she began having a lot of absences, behavior issues with staff, and failing grades. Testimony of Mother.

5. In October 2007, PSYCHOLOGIST conducted a psychological evaluation of Student upon the referral of Student's educational advocate. Psychologist diagnosed Student with Attention Deficit/Hyperactivity Disorder, Combined Type and Oppositional Defiant Disorder. Psychologist recommended that Student would benefit from a small, structured classroom and that she should receive counseling in school so that she could process her daily

school challenges and peer conflicts. Exhibit P-7.

6. In August 2008, Student enrolled in at NONPUBLIC PLACEMENT 1, where she was an honor roll student. She did not have absenteeism problems at Nonpublic Placement 1. Nonpublic Placement 1 had small class sizes with 3 to 4 children per classroom. Testimony of Mother, Exhibit P-15.

7. For the 2009-2010 school year, Mother decided to move Student to NONPUBLIC PLACEMENT 2. Mother does not remember her reason for changing Student's school. Testimony of Mother.

8. At Nonpublic Placement 2, Student stopped going to school regularly. She started being disruptive and had behavior problems. Testimony of Mother.

9. At Nonpublic Placement 2, there were some 15 children in each classroom. Testimony of Mother.

10. Student's IEP Team convened at Nonpublic Placement 2 on March 25, 2010. The team decided that Student would receive 27.5 hours of Specialized Instruction services per week outside general education and 2.5 hours per week of Behavioral Support Services. Exhibit R-20. The IEP Team noted that Student wanted to return to Nonpublic Placement 1 because the school was smaller. However, the IEP Team decided that Student's placement would continue to be Nonpublic Placement 2 and that she continued to be eligible for "100 % out of regular education placement." At the March 25, 2010 meeting, Student's IEP Team agreed to request a psychological, clinical and educational evaluation and to further discuss a new location of services after the evaluations were received. Exhibit R-12. However, the evaluations were never conducted. Testimony of Mother.

11. At the March 25, 2010 meeting, Student's poor school attendance was discussed.

A goal of 90% attendance was set for Student. Exhibit R-12.

12. For the 2009-2010 school year at Nonpublic Placement 2, Student had 61 absences out of a total of 161 school days (37.9 %). Exhibit P-16. Her grades were three D's, two C's and one B. Exhibit P-15.

13. On June 14, 2010, DCPS convened a Multidisciplinary Team ("MDT") meeting at Nonpublic Placement 2 to discuss ongoing concerns about Student's school attendance. The MDT team was unable to contact Mother to notify her of the meeting. The team reported that up to June 14, 2010, Student had 61 days of unexcused absences for the school year and that her last date of attendance had been June 4, 2010. At the MDT meeting, DCPS "discharged" Student from Nonpublic Placement 2 and changed her location of services to Public Academy, because "[d]ue to sporadic attendance [Student] has not received educational benefit from" Nonpublic Placement 2. The MDT team issued a Prior Written Notice changing Student's location of services to Public Academy. Exhibit R-11.

14. Mother did not receive notice of the June 14, 2010 MDT Team meeting and she did not attend. When it was time for Student to go back to school in the fall of 2010, Mother received a packet that Student had been put out of Nonpublic Placement 2 and that Student had been placed at Public Academy. Testimony of Mother.

15. Student enrolled at Public Academy for the 2010-2011 school year. Public Academy implemented Student's March 25, 2010 IEP. At Public Academy, Student's poor school attendance continued. Exhibit R-13. She was absent for 24.5 out of 111 school days. Her grades were all F's. Exhibit P-15.

16. DCPS provided Prior Written Notice to Petitioner on December 7, 2010 that

Student's IEP Team was in agreement that Student's disability had not changed and that the team had enough information to make decisions about her educational needs. Exhibit R-6.

17. On December 9, 2010, Student's IEP Team met at Public Academy for her special education triennial reevaluation. The team reviewed classroom-based assessments, in-class observations, Student's worksheets and quizzes, the Scholastic Reading Inventory, Read 180 writing assessments, and the Ohio Mental Scales. The team concluded that Student continued to meet the criteria for Multiple Disabilities ("MD"), including ED and OHI. Exhibits R-14 and R-15.

18. In Student's December 13, 2010 IEP, Student's IEP Team continued her special education and related services, including 28.5 hours per week of Specialized Instruction outside general education and 4 hours per month of Behavioral Support Services. Exhibit R-19.

19. Public Academy closed at the end of the 2010-2011 school year. Exhibit R-9. For the 2011-2012 school year, Student enrolled in DC HIGH SCHOOL 1. At DC High School 1, Student exhibited behavior problems including disruptions, issues with staff, and poor attendance. Testimony of Mother. She failed to make progress on her IEP goals and objectives due to her frequent absences. Exhibit R-11,

20. Student's IEP Team convened at DC High School 1 on December 16, 2011. Neither Mother nor Student attended the IEP meeting. The IEP Team reduced Student's special education services to 27.5 hours per month of Specialized Instruction outside general education and 2 hours per month of Behavioral Support Services. Exhibit P-11.

21. At DC High School 1, Student's grades for the 2011 fall term were all F's.

22. Student's school attendance issues were discussed at MDT/IEP meetings at Private Placement 2 on March 25, 2010 and June 14, 2010 (Exhibits R-12, R-11), at Public

Academy on December 7, 2010 (Exhibits R-15) and at DC High School 1 on December 16, 2011 and March 12, 2012 (Exhibits P-11, R-18).

23. On March 12, 2012, Mother went to DC High School 1 to request Student's transfer to DC High School 2, because the family had moved in the fall of 2010 and DC High School 2 was Student's new neighborhood school. Testimony of Mother. The IEP coordinator at DC High School 1 told Mother that Student's IEP was not up-to-date, but that if she would wait a while, he would change it. The IEP coordinator told Mother that he was going to change some things in the IEP but not change the hours of services for Student. The IEP coordinator obtained Mother's signature on the revised IEP and took the document around for other staff at DC High School 1 to sign. Testimony of Mother, Exhibit R-18.[2]

24. In the revised March 12, 2012 IEP, the DC High School 1 IEP Team determined that Student could only make progress on her IEP goals and objectives by being removed from general education and placed full time in a small structured environment that can provide academics at her level and at her pace. Exhibit R-18.

25. Mother took Student's paperwork from DC High School 1 to DC High School 2. It took a few days for Mother to enroll Student at DC High School 2 because the registration person was not available. Student first attended DC High School 2 on or about March 27, 2012. Exhibits P-18, R-21. After Mother enrolled Student at DC High School 2, Mother did not, at first, receive any notices from DC High School 2 regarding Student's special education program or the March 12, 2012 IEP from DC High School 1. Testimony of Mother.

26. On May 2, 2012, Student's IEP Team at DC High School 2 convened for a 30-day review of Student's IEP. Mother and Student did not attend. Student was reported to be failing

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[2] Whether this procedure for revising Student's IEP complied with IDEA was not raised as an issue in Mother's Due Process Complaint.

her classes because of her poor attendance. Exhibit R-10. The team retained the goals and transition plan for Student set out in her March 12, 2012 IEP from DC High School 1, but reduced her Specialized Instruction services to 5.33 hours per week Outside General Education and 15 hours per week in the General Education Setting. Exhibit R-10, R-17. The IEP Team cut Student's Specialized Instruction services, because 5.33 hours per week was the maximum pull-out services that DC High School 2 was able to provide. Exhibit R-9.

27. On May 9, 2012, CASE MANAGER sent Mother an email attaching a copy of Student's May 2, 2012 IEP for Mother to review before an IEP meeting. Case Manager asked Mother to let her know what time would work best for her to schedule a meeting to review the IEP together with Mother and Mother's attorney. Exhibit P-14. Mother responded to Case Manager's e-mail that the IEP was unacceptable. She asked Case Manager for a meeting and told her that she wanted Petitioner's Counsel to be there. Mother never received a copy of a signed IEP from DC High School 2. Testimony of Mother.

28. For the 2011-2012 school year at DC High School 1 and DC High School 2, Student had 483 unexcused class absences out of a total of 507 class periods. Exhibit R-21. Student was reported to have made no progress on any of her IEP academic goals. Exhibit P-15.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, and 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:

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel.*

Schaffer v. Weast, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

ANALYSIS

1. DID DCPS DENY STUDENT A FAPE BY FAILING TO PROVIDE THE HOURS OF SPECIALIZED INSTRUCTION SPECIFIED IN STUDENT'S MARCH 12, 2012 IEP?

Student's March 12, 2012 IEP, developed at DC High School 1, provided that Student would receive 27.5 hours per month of Specialized Instruction services, all outside of the general education setting. DC High School 2, where Student transferred on March 27, 2012, was only able to offer Student 5.33 hours per week of Specialized Instruction outside of general education and 15 hours per week of Specialized Instruction in the general education classroom. On May 2, 2012, Student's IEP Team at DC High School 2 revised Student's IEP to cut her Specialized Instruction services to the limited level of services that the school was able to provide. Significantly, DCPS did not obtain any new educational evaluations or other data to justify this reduction of services to Student.

Petitioner contends that DCPS' failure to implement the March 12, 2012 IEP, after Student transferred to DC High School 2, denied Student a FAPE. I agree. In *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C. Cir. Sept. 11, 2007), U.S. District Judge Kennedy followed the standard for failure-to-implement claims articulated by the Fifth Circuit Court of Appeals in *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 348-49 (5th Cir. 2000). In *Bobby R.*, the court wrote:

> [T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the

> IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. *Bobby R.*, 200 F.3d at 349. Thus, a court reviewing failure-to-implement claims under IDEA must ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material."

Catalan, supra 478 F.Supp. at 75. The materiality standard does not require that the child suffer demonstrable educational harm in order to prevail on a failure-to-implement claim. Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld. *lson v. Dist. of Columbia.*, Civil Action 09-02424 (D.D.C. Mar. 18, 2011).

In this case, Student's IEP Team at DC High School 1 determined on March 12, 2012 that Student could only make progress on her IEP goals and objectives by being removed from general education and placed full time in a small structured environment that could provide academics at her level and at her pace. After Student transferred from DC High School 1 to DC High School 2, DCPS failed to implement the Specialized Instruction in a small structured environment settings specified in Student's March 12, 2012 IEP. For a period of about four weeks (excluding DCPS' Spring Break days), Student was denied some 22 hours per week of Specialized Instruction outside the general education setting. I find that this deviation from the requirements of Student's March 12, 2012 IEP was material and resulted in denial of FAPE to Student. Petitioner prevails on this issue.

2. DID DCPS DENY STUDENT A FAPE BY CONTINUING HER PLACEMENT AT NONPUBLIC PLACEMENT 2, AFTER PETITIONER'S MARCH 2010 REQUEST TO TRANSFER STUDENT FROM NONPUBLIC PLACEMENT 2 TO NONPUBLIC PLACEMENT 1?

In August 2008, Student enrolled at Nonpublic Placement 1, where she was an honor roll student. For the 2009-2010 school year, Petitioner decided to move Student to Nonpublic

Placement 2 for reasons she does not now remember. At Nonpublic Placement 2, Student stopped going to school regularly. She was disruptive in school and had other behavior problems. Student requested that she be transferred back to Nonpublic Placement 1. When Student's IEP Team at Nonpublic Placement 2 met on March 25, 2010, the team denied the transfer request. Petitioner contends this was a denial of FAPE. I disagree.

The IDEA's guarantee of a FAPE is that of a "basic floor of opportunity . . . [that] consists of access to specialized instruction and related services which are individually designed to provide education benefit to the handicapped child." *Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 201, 102 S.Ct. 3034. The School District satisfies its requirements under the IDEA by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expenses, must meet the state's educational standards, must approximate the grade levels used in the state's regular education and must comport with the child's IEP. *Board of Educ. of Oak Park v. Ill. State Bd. of Educ.*, 21 F.Supp.2d 862, 876 (N.D. Ill., 1998), *quoting Rowley*, 458 U.S. at 203, 102 S.Ct. at 3049. There is no requirement for a state to provide services to maximize each child's potential, *Rowley*, 458 U.S. at 198, 102 S.Ct. 3034, nor must the FAPE "be designed according to the parent's desires." *Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 45 (D.D.C. 2006). DCPS is obligated to devise IEPs for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C.Cir. 1991). Once an IEP is developed, the government must also ensure that the student is provided an appropriate placement "based on the child's IEP." 34 C.F.R. §

300.116.

Student's February 9, 2009 IEP from Nonpublic Placement 1 provided that she would receive full time Specialized Instruction outside of general education. Her March 25, 2010 IEP at Nonpublic Placement 2 continued the same level of services. Petitioner signed the March 25, 2010 IEP to affirm that she agreed with its contents. She has never claimed that the IEP did not meet the *Rowley* "basic floor of opportunity" standard. Therefore, the question is not whether Nonpublic Placement 1 or Nonpublic Placement 2 could better educate Student, but only whether Nonpublic Placement 2 was capable of fulfilling the IEP requirements. *Cf., N.T. v. District of Columbia,* Civil Action No. 11-676 (RMC) (D.D.C. January 11, 2012) (If appropriate public school program available, District need not consider private placement, even though a private school might be more appropriate or better able to serve the child.) Petitioner offered no evidence that Nonpublic Placement 2 was not capable of fulfilling Student's needs based upon the March 25, 2010 IEP. Therefore, I find that DCPS did not deny Student a FAPE by refusing Petitioner's request to transfer Student back to Nonpublic Placement 1. DCPS prevails on this issue.

3. DOD DCPS DENY STUDENT A FAPE BY FAILING TO DEVELOP A BEHAVIOR INTERVENTION PLAN TO ADDRESS HER "SCHOOL AVOIDANCE" PROBLEMS?

When Student transferred to Nonpublic Placement 2 for the 2009-2010 school year, her school attendance plummeted. Student's chronic truancy continued at Public Academy, DC High School 1 and DC High School 2. As a result of her dismal school attendance record, Student has received mostly failing grades and not progressed toward her IEP academic goals. Petitioner contends that DCPS has denied Student a FAPE by failing to develop an intervention plan to address Student's truancy issues. I agree. The IDEA requires, in the case of a child whose

behavior impedes his learning or that of others, that the IEP Team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). In some circumstances, this requires the education agency to use such behavior interventions to address truancy issues. *See, e.g, Oak Park, supra*, 21 F.Supp.2d 862, 877 (N.D. Ill. 1998) (School District's truancy interventions insufficient to meet the *Rowley* test of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.)

The evidence in this case establishes that DCPS has long been aware that Student's chronic truancy has impeded her learning.[3] At the June 14, 2010 MDT meeting at Private Placement 2, the MDT team concluded that due to Student's lack of attendance, she had "not been able to receive FAPE and [had] been unable to receive educational benefit." While it is recognized that school authorities are hard pressed to force students to attend school, the IDEA requires that the IEP Team consider the use of positive behavioral interventions and supports, and other strategies, to address such chronic truancy. *Oak Park, supra.* In Student's case, instead of adopting truancy interventions and supports designed to meet Student's unique needs, DCPS terminated Student's enrollment at Nonpublic Placement 2 after the 2009-2010 school year, and transferred her to Public Academy. Student's truant behavior continued at Public Academy and at her most recent placements at DC High School 1 and DC High School 2. I find that by not adopting truancy interventions for Student, DCPS did not meet the *Rowley* requirement to provide educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction. As

[3] Student's school attendance issues were discussed at MDT/IEP meetings at Private Placement 2 on March 25, 2010 and June 14, 2010, at Public Academy on December 7, 2010 and at DC High School 1 on December 16, 2011 and March 12, 2012.

a result, DCPS has denied Student a FAPE. The Petitioner prevails on this issue.

4. DID DCPS DENY STUDENT AF FAPE BY TRANSFERRING HER TO PUBLIC ACADEMY IN JUNE 2010, WITHOUT REVISING HER IEP OR CONVENING AN IEP MEETING?

At an MDT meeting on June 14, 2010, DCPS "discharged" Student from Nonpublic Placement 2 and changed her location of services to Public Academy, because "[d]ue to sporadic attendance [Student] has not received educational benefit from" Nonpublic Placement 2. Parent contends that the change in location was a denial of FAPE because DCPS made the transfer without revising Student's IEP or convening an IEP meeting. DCPS responds that transferring Student from Nonpublic Placement 2 to Public Academy was a change of location which did not require a revision to Student's IEP.

DCPS is correct that simply changing the location where the student receives services does not amount to a change in educational placement for which an IEP meeting is required. *See Savoy v. District of Columbia*, Civil Action No. 11-145 (CKK) (D.D.C. February 21, 2012). However, the IDEA does require that the IEP Team review a child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

> Revises the IEP, as appropriate, to address—
>
> (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;
>
> (B) The results of any reevaluation conducted under § 300.303;
>
> (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
>
> (D) The child's anticipated needs; or
>
> (E) Other matters.

34 CFR § 300.324(b)(ii). In this case, DCPS' stated reason for transferring Student to Public

Academy was that due to her chronic truancy, Student was not making expected progress toward the annual goals in her March 25, 2010 IEP. Under 34 CFR § 300.324(b)(ii), having determined that Student was not making expected progress, DCPS had a duty to convene the IEP Team to revise Student's IEP to address the concern, and, pursuant to 34 CFR § 300.501(b), to provide notice to Mother to ensure she and Student had the opportunity to participate in the IEP meeting. Under these facts, DCPS' transfer of Student from Nonpublic Placement 2 to Public Academy, without convening Student's IEP Team to revise her IEP, was a violation of the IDEA. Petitioner prevails on this issue.

5. DID DCPS DENY STUDENT A FAPE BY FAILING TO CONDUCT A TRIENNIAL REEVALUATION IN DECEMBER 2010, THAT MET THE REQUIREMENTS OF THE IDEA?

The IDEA requires that a public agency must ensure that a reevaluation of each child with a disability is conducted at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. *See* 34 CFR § 300.303(b)(2). The reevaluation must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors, 34 CFR § 300.304(b)(3), and must be 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. *See* 34 CFR § 300.304(c)(6); Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46643.

Petitioner contends that when DCPS conducted its triennial reevaluation of Student in December 2010, it failed to comply with the IDEA's requirements, because DCPS did not conduct psychological, clinical or educational evaluations, which had been requested on March 25, 2010 by Student's Nonpublic Placement 2 IEP Team. I disagree. The IDEA's requirements

for a triennial reevaluation do not mandate that new psychological, clinical or educational evaluations be completed, if the IEP Team and other qualified professionals determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs. *See* 34 CFR § 300.305(d). In this case, DCPS provided Prior Written Notice to Petitioner on December 7, 2010 that the IEP Team was in agreement that Student's disability had not changed and that the team had enough information to make decisions about her educational needs. In the absence of an express request from the parent, DCPS was not required to conduct additional assessments in connection with the reevaluation. *See* 34 CFR § 300.305(d)(2). No evidence was offered that the Petitioner requested additional assessments at the time the triennial reevaluation was conducted. DCPS prevails on this issue.

6. DID DCPS DENY STUDENT A FAPE BY FAILING TO PROVIDE HOMEBOUND INSTRUCTION TO ADDRESS HER "SCHOOL AVOIDANCE" PROBLEMS?

In an October 16, 2007 psychological evacuation report, Psychologist noted that Student began avoiding school in her seventh grade year. Except for the 2009-2010 school year at Nonpublic Placement 1, Student has consistently exhibited truant behaviors. Petitioner contends that DCPS denied Student a FAPE by not providing homebound instruction to address Student's so-called school avoidance behavior. I disagree. Under the IDEA's Least Restrictive Environment ("LRE") requirements, a public agency must ensure:

(1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 CFR § 300.114(a)(2). Section 300.115 further requires each public agency to ensure that a continuum of alternative placements (including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) is available to meet the needs of children with disabilities for special education and related services. *Id.* In this case, Petitioner offered no competent evidence that the nature or severity of Student's disability is such that instruction in special classes and/or in special schools would not meet Student's special education needs. To the contrary, in Student's 2007 psychological evaluation report, Psychologist recommended that Student would benefit from a small, structured classroom that offers close instruction and encouragement. DCPS prevails on this issue.

REMEDIES FOR DENIAL OF FAPE

In this determination, I have found that DCPS denied Student a FAPE by not providing the hours of Specialized Instruction specified in Student's March 12, 2012 IEP after Student transferred to DC High School 2; by not developing and adopting positive behavioral interventions and supports, and other strategies, calculated to address Student's long-term, chronic truancy; and by transferring Student to Public Academy for the 2010-2011 school year, without revising Student's IEP to address her lack of expected IEP progress at Nonpublic Placement 2. For relief, as relevant to this violations, Petitioner seeks an award of compensatory education. In my June 12, 2012 Prehearing Order I alerted counsel that under the case law in this jurisdiction, to establish a basis for a compensatory education award, the Petitioner must be prepared at the due process hearing to document with exhibits and/or testimony "the correct amount or form of compensatory education necessary to create educational benefit" to enable the hearing officer to project the progress Student might have made, but for the alleged denial of FAPE, and further quantitatively defining an appropriate compensatory education award. At the

June 21, 2012 hearing, in lieu of offering evidence sufficient for this Hearing Officer to craft an award of compensatory education, counsel for Petitioner argued for entry of an order delegating responsibility to Student's IEP Team to develop a compensatory education remedy. Petitioner cites several judicial decisions in which the court ordered DCPS to convene an MDT/IEP meeting to determine the form and amount of compensatory education due to students denied FAPE. *See, e.g., Claim of Helen Barksdale, etc.*, Civil Action No. 97-1629 (PLF) (D.D.C. June 22, 2005). However recent case law in this jurisdiction provides that once a student has established a denial of the education guaranteed by the IDEA, the Court or the hearing officer must undertake "a fact-specific exercise of discretion" designed to identify those services that will compensate the student for that denial. *See, e.g., Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C. 2011), citing *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C.Cir. 2005); *Stanton ex rel. K.T. v. District of Columbia*, 680 F.Supp.2d 201, 207 (D.D.C. 2010) (emphasis supplied.). I find that a hearing officer may not properly delegate this "fact specific exercise of discretion" to DCPS or to the Student's IEP Team.

During closing argument on June 21, 2012, I alerted the parties that there did not appear to be sufficient evidence in this case to craft an award of compensatory education. Petitioner did not request a continuance to supplement the record. *Cf., e.g.,Gill v. District of Columbia*, 751 F.Supp.2d 104, 114 (D.D.C. 2010) (concluding it was appropriate to hear additional evidence concerning the appropriate compensatory education due to plaintiff.) Simply refusing to grant a compensatory education award clashes with *Reid. Stanton*, 680 F.Supp. at 207. However, under the D.C. Regs. I am constrained to issue my Hearing Officer Determination ("HOD") no later than July 8, 2012. *See* D.C. Regs. tit. 5-E, § 3030.11. Under these circumstances, I will deny, without prejudice, Petitioner's request for a compensatory education award. I encourage, but do

not order, the parties to implement a plan to compensate Student for DCPS' failure to develop and adopt positive behavioral interventions and supports, and other strategies, calculated to address Student's long-term, chronic truancy; DCPS' failure to revise Student's IEP to address her lack of expected progress at Nonpublic Placement 2 and DCPS' failure to provide the hours of Specialized Instruction, specified in Student's March 12, 2012 IEP, after Student transferred to DC High School 2. In addition, I will order DCPS to convene Student's IEP Team to revise and update Student's IEP taking into consideration, *inter alia*, recent independent educational evaluations[4], Student's chronic truancy issues, and her lack of expected progress toward annual goals in the March 23, 2010 and subsequent IEPs.[5]

ORDER

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

1. Within 10 business days of DCPS' receipt of Student's recently conducted independent educational evaluation reports, DCPS shall convene Student's IEP Team to revise and update her IEP taking into consideration, *inter alia*, the recent independent educational evaluation, Student's chronic truancy issues, and her lack of expected progress toward the annual goals in the March 23, 2010 and subsequent IEPs;

2. DCPS shall promptly convene Student's IEP Team to develop positive behavioral interventions and supports, and other strategies, designed to address Student's chronic truancy issues, to be implemented at the beginning of the 2012-2013 school year. With the consent of the parent, DCPS shall conduct any functional behavioral assessment needed to investigate the underlying cause or function of Student's truant behaviors;

3. Petitioner's request for a compensatory education award is denied without prejudice; and

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[4] Counsel for Petitioner reported on July 1, 2012 that an independent evaluator had completed testing of Student but not yet issued a report.

[5] On May 3, 2012, shortly before Petitioner's Complaint for Due Process was filed in this case, Student's IEP Team at DC High School 2 revised her IEP to reduce Specialized Instruction, outside general education, from 27.5 hours to 5.33 hours per week. The appropriateness of the May 3, 2012 IEP is not an issue in this case. However, in light of the findings of fact and conclusions of law made in this determination, the appropriateness of the IEP Team's decision to cut Student's pull-out services by almost 80 percent is suspect.

4. All other relief requested by Petitioner herein is denied.

Date: July 8, 2012

s/ Peter B. Vaden
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).