

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

Student Hearing Office  
1150 5<sup>th</sup> Street, S.E.  
Washington, DC 20003

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Through

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Date Issued: November 4, 2010

Hearing Officer: Kimm Massey, Esq.

Case No:

Hearing Dates: October 25, 2010

Room: 2004

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STUDENT HEARING OFFICE

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**HEARING OFFICER DETERMINATION**

**BACKGROUND**

Student is a \_\_\_\_\_-year-old male, who attends \_\_\_\_\_ grade at a DCPS middle school. His current IEP lists Specific Learning Disability ("SLD") as his primary disability and requires him to receive 15 hours per week of specialized instruction, 120 minutes per month of speech-language pathology services, and 90 minutes per month of behavioral support services.

On September 3, 2010, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS denied Student a free appropriate public education ("FAPE") by (1) failing to convene an MDT meeting to review Student's February 19, 2010 educational evaluation and determine whether changes to the IEP were required; (2) failing to properly follow procedures regarding suspensions for special education student by (a) failing to determine Student's suspensions prior to January 21, 2010 were a manifestation of his disability, and (b) failing to convene a manifestation determination review ("MDR") meeting for Student's suspensions subsequent to the January 21, 2010 manifestation determination meeting; (3) failing to develop an appropriate IEP containing a behavioral intervention plan ("BIP"); (4) refusing to comprehensively evaluate Student in all areas of suspected disability upon Parent's request; (5) or if the evaluations requested by Parent were completed, failing to convene an MDT to review same and make necessary changes to Student's IEP; and (6) failing to provide a proper placement. Petitioner

also asserted a claim for (7) compensatory education. As relief, Petitioner requested a placement at \_\_\_\_\_ of PG County or another school Parent's choosing; transportation to and from said school; an MDR meeting within 10 days of the resolution of this matter concerning Student's suspensions both before and after January 21, 2010; funding of Parent's compensatory education plan; and funding of independent functional behavioral, social-emotional, psychoeducational, Vineland adaptive behavioral, and academic/achievement assessments.

On September 20, 2010, DCPS filed its Response to the Complaint, asserting therein, *inter alia*, that Student's December 17, 2009 IEP was reasonably calculated to confer educational benefit based upon the information known at the time, the school social worker determined that Student's failures are due to his absences from school, and the special education teacher created a Prior Notice informing Student of her procedural rights.

On October 19, 2010, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. DCPS represented, and Petitioner confirmed, that on October 18, 2010, the day before the prehearing conference, DCPS issued an IEE letter authorizing independent comprehensive psychological and adaptive behavior evaluations. As a result, the hearing officer determined that Petitioner's alternative claim for failure to review the requested evaluations was inapplicable. Petitioner also clarified that its requested compensatory education plan consists of 6 hours of tutoring per week, 1 hour of speech/language services per week, and 1 hour of behavioral counseling per week, with all services to be provided for 1 year. The hearing officer issued the Prehearing Order on October 19, 2010.

By disclosure letters dated October 18, 2010, Petitioner disclosed fourteen documents (Petitioner's Exhibits 1 – 14), and DCPS disclosed DCPS-1 through DCPS-12, and DCPS 13-14 in a supplemental disclosure.

The hearing officer convened the due process hearing on October 25, 2010.<sup>1</sup> The parties' disclosed documents were admitted into the record without objection. Thereafter, the hearing officer received opening statements, witness testimony, and closing statements from both parties before concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

### ISSUES

The issues to be determined are as follows:

I. Did DCPS deny Student a FAPE by:

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<sup>1</sup> Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

1. Failing to convene an MDT meeting to review Student's 2/19/10 educational evaluation and determine whether changes to the IEP were required;
2. Failing to (a) determine that Student's suspensions prior to January 21, 2010 were a manifestation of his disability, and (b) convene an MDR meeting concerning Student's suspensions subsequent to January 21, 2010;
3. Failing to develop an appropriate IEP containing an BIP;
4. Refusing to comprehensively evaluate Student upon Parent's request; and
5. Failing to provide a proper placement.

II. Is Student entitled to compensatory education as a result of DCPS's alleged denials of FAPE?

### **FINDINGS OF FACT**

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

1. Student's current IEP is dated December 17, 2009. The IEP lists SLD as Student's primary disability and require him to receive 15 hours per week of specialized instruction, 120 minutes per month of speech-language services, and 90 minutes per month of behavioral support services. The IEP does not contain a BIP. The IEP indicates in the present level of educational performance sections that Student's scores on the WIAT-II were in the extremely low range in the academic areas of mathematics, reading, and written expression. The present level of educational performance section for the emotional, social and behavioral development portion of the IEP indicates that Student has an "inability to appropriately manage his frustrations and utilize appropriate coping skills to remain in the classroom, on task and following staff directives[, which is] evidenced by his frequent in school suspensions, staff concerns, and tardies and absences that contribute to his poor academic and behavioral performance." The IEP further indicates that Student is not to receive any aids, services or other supports in school beyond the modifications and accommodations provided for him when he is taking the DC-CAS.<sup>2</sup>
2. Student's most recent comprehensive psychological evaluation report, which was issued on or about March 9, 2009, reveals that Student has a history of learning and attentional problems, and he began receiving special education services in 2<sup>nd</sup> grade. During the 2008/2009 school year ("SY"), Student's first year at his current DCPS middle school, Student's teachers informed the psychological evaluator that Student had great difficulty meeting the demands of the classroom, demonstrated very disruptive behaviors, and completed very little of the assigned work. The teachers further reported that the

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<sup>2</sup> Petitioner's Exhibit 5; DCPS-9.

numerous interventions had been attempted but had little or no effect on Student's behavior.

Student's performance on the various assessments administered during the evaluation resulted in intellectual ability and cognitive efficiency scores in the low range, verbal ability and working memory scores in the low average range, and a perceptual skills score in the average range. The assessments results also revealed that Student's social emotional functioning is poor. Based on these findings, the evaluator noted that Student is in need of continued academic support from the special education program at school, and that Student's profile seems to be consistent with those of students with emotional disturbance. However, the evaluator stated that he would "defer on making a recommendation regarding [Student's] disability classification until academic achievement testing [had] been conducted." The evaluator recommended, *inter alia*, that Student spend most of his academic time in a classroom setting that is highly structured and can provide intensive remediation and behavior modification with a small student to teacher ratio.<sup>3</sup>

3. During SY 2009/10, Student's teachers completed numerous disciplinary referral forms concerning the following types of undesirable behavior by Student: refusing to follow teacher instructions, verbally harassing/taunting classmates, cursing, throwing objects, leaving class without permission, coming to class late, unauthorized presence in hallway, inappropriate physical contact with classmates, disruptive behavior, excessive unexcused absences, and leaving school without permission. Between August 24, 2009 and January 4, 2010, Student was suspended for a total of at least 8 days.

On January 21, 2010, DCPS convened an MDR meeting for Student and determined that an incident involving "fighting" was not a manifestation of his disability. The written MDR meeting notes are 1 page long and indicate that the IEP team considered evaluation and diagnostic results and information from Parent, observation(s) of Student's behavior, and Student's current IEP and behavior intervention plan. Parent participated in the meeting by phone, and at the time of the meeting, Student did not have a behavior intervention plan.

After the MDR meeting, Student was suspended from January 22 through February 1, 2010, for a total of 7 school days. Student was also suspended on the following days: February 2 – 4, 2010; March 4 – 10, 2010; April 21, 2010; May 3, 2010; May 10, 2010; and for an extended period of more than 1 month at the end of SY 2009/10. DCPS did not conduct another MDR meeting for Student concerning his suspensions subsequent to the January 2010.<sup>4</sup>

4. During students' many suspensions during SY 2009/10, no school work was sent home with him and DCPS failed to send service providers to the home to provide Student with counseling and speech/language services.<sup>5</sup>
5. During SY 2009/10, Student also had many unexcused absences from school and/or individual classes. DCPS generated two letters to Parent in September 2010 indicating

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<sup>3</sup> Petitioner's Exhibit 7.

<sup>4</sup> Petitioner's Exhibits 3, 10, and 11; DCPS-7 and DCPS-11; testimony of Parent.

<sup>5</sup> Testimony of Parent.

that Student had at least 3 and then 5 unexcused absences. DCPS generated a letter to Parent on December 3, 2009 indicating that Student had at least 10 unexcused absences. DCPS generated two letters to Parent in January 2010 indicating that Student had at least 10 and then 15 unexcused absences. On March 5, 2010, DCPS generated a letter to Parent indicating that Student had at least 20 unexcused absences from school.<sup>6</sup>

6. Student frequently failed to attend his classes when he was in school during SY 2009/10. He would wander the hallways and leave classes at will. He was also difficult to engage and/or he would try to start conflict with other students when he was in class. Student slipped out of his general education social studies class often. Toward the beginning of SY 2009/10, the social studies teacher would call security to go look for Student. However, as the year progressed, the teacher would merely write a referral to the Dean of Students. As a result of these referrals, Student received in-school suspensions and out-of-school suspensions as a “consequence” for his behavior, even though his absences from class negatively impacted his performance/progress in class. The social studies teacher tried several interventions with Student and found that he generally was more successful with 1-on-1 assistance. Special seating near the front of the room and modified worksheets also tended to help Student. The social studies teacher believes that Student may have used negative behavior to mask his educational deficits, especially since he was very far behind in math and reading.<sup>7</sup>
7. Parent believes that Student’s classes were too big, with the result that he could not concentrate and was not getting enough attention. This left him ashamed and embarrassed because he did not understand the work and did not know how to do it, which caused other students to tease and pick on him, which, in turn, led to his acting out, wanting to fight, and not wanting to do the work.<sup>8</sup>
8. Student’s social worker was of the general opinion that Student could do the work when he focused on it. On the other hand, however, the social worker also wondered whether Student’s schoolwork was very difficult for him to complete.<sup>9</sup>
9. Student’s frequent absences due to repeated suspensions and his failure to attend school and/or his classes during SY 2009/10 interfered with his ability to learn.<sup>10</sup>
10. On February 19, 2010, Student received an educational evaluation, and his performance on the assessment resulted in the following grade equivalencies (“GE”): broad reading – 1.8 GE; broad math – 3.2 GE; and broad written language – 1.6 GE. Based on Student’s scores on all of the tests/subtests administered, the evaluator noted that Student’s academic skills, reading ability, spelling, academic fluency, reading and writing fluency, and passage comprehension ability are negligible. Moreover, Student’s math calculation

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<sup>6</sup> Petitioner’s Exhibits 9 and 10; DCPS-11.

<sup>7</sup> Testimony of previous case manager; testimony of social worker; testimony of social studies teacher.

<sup>8</sup> Testimony of Parent.

<sup>9</sup> Testimony of social worker.

<sup>10</sup> Testimony of special education math teacher; testimony of social worker; *see also*, Petitioner’s Exhibit 4 and DCPS-10.

skill, ability to apply his academic skills, and quantitative reasoning skills are very limited, while his fluency with mathematics problems and his writing ability are limited.<sup>11</sup>

11. During February and March of 2010, Student's homeroom teacher/case manager repeatedly sent Consent to Evaluate letters to Parent to facilitate team decision-making with respect to possible triennial evaluations of Student. The case manager also attempted to reach Parent by telephone several times in February 2010 and even went to Parent's home approximately 3 times in an attempt to pick up Parent so that she could attend an IEP meeting for Student, but the case manager's efforts were unsuccessful in getting Parent to attend an IEP meeting.<sup>12</sup>
12. On March 24, 2010, DCPS conducted an Eligibility Determination meeting for Student. The following IEP team members attended the meeting: DCPS's social worker, psychologist, speech language pathologist, and special education coordinator, as well as two DCPS special education teachers. Neither Parent nor Student participated in the eligibility meeting. The team determined that Student meets all of the criteria for SLD, which impacts Student in the following areas: academic-mathematics, academic-written expression, academic-reading, and emotional, social and behavioral development. The Eligibility Determination Report indicates that of the 180 days enrolled, Student was absent 102 days and tardy 31 days. The Report further indicates that the team reviewed Student's 2/19/10 educational evaluation, observations consisting of 1/19/10 class work that was reviewed on 1/20/10 and an 11/20/09 classroom log that was reviewed on 2/19/10, and Student's January 2010 DC-BAS scores.

In the area of mathematics, the report indicates that Student completes his work when he understands the concept but he misses a lot when he has been out a lot and the teacher has to explain and catch Student up on what he's missed. In the area of reading, the report indicates that Student does not attempt to complete assignments or attend class frequently, and it will be difficult to assess/track Student's progress until he can remain on tasks and complete assignments on his instructional level. In the area of written expression, the report indicates that there is no accurate data to assess Student's present levels of performance because he did not attempt to accurately complete the DC-BAS tests, and that it will be difficult to move Student beyond his present performance level due to his absences from class and incomplete assignments. Finally, in the area of emotional, social and behavioral development, the report indicates that Student continues to struggle with displaying and maintaining appropriate behaviors, and his poor coping skills leads to in-school and out-of-school suspensions and to his choosing not to remain in class.<sup>13</sup>

13. On June 2, 2010, Parent, through her then attorney, requested in writing that Student "be evaluated for special education and its related services" as a result of his ongoing academic difficulties. The writing specifically requested comprehensive evaluations including, but not limited to, the following evaluations: "a social emotional assessment,

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<sup>11</sup> Petitioner's Exhibit 6; DCPS-6.

<sup>12</sup> Testimony of previous case manager.

<sup>13</sup> Petitioner's Exhibit 2; DCPS-8.

psycho educational evaluation, FBA/BIP as well as academic testing in the form of a cognitive (IQ) evaluation as well as an achievement (academic) evaluation.”<sup>14</sup>

14. Student’s grades during SY 2009/10 were very poor and included Fs.<sup>15</sup>
15. On September 3, 2010, Petitioner filed the Complaint that initiated this action.
16. On September 10, 2010, DCPS completed a functional behavioral assessment of Student to address his off-task behaviors that include non compliance, refusal to follow directives, disrespect of peers, being out of assigned location, skipping classes, and overall disruptive interactions and engagement in negative peer behaviors that occur daily and with severe intensity during the entire school day. Also on September 10, 2010, DCPS drafted a BIP for Student to address the following targeted behaviors: lack of ability to focus and stay on task in the classroom, display of disruptive attention seeking behaviors, lack of academic motivation, easily frustrated, and poor impulse control.<sup>16</sup>
17. On October 18, 2010, DCPS issued an IEE letter authorizing Parent to obtain the following independent evaluations for Student: a comprehensive psychological evaluation, which includes cognitive, educational, and social/emotional components, as well as a social history; and an adaptive behavior assessment.<sup>17</sup>
18. Petitioner’s written compensatory education plan for Student proposes that Student receive the following amounts of specialized instruction and related services for 1 full year: 6 hours per week of specialized instruction; 1 hour per week of speech and language services; and 1 hour per week of behavioral support/counseling. Petitioner asserts that the proposed compensatory education plan will compensate Student for DCPS’s failure to provide Student with a full-time IEP during SY 2009/10, to review Student’s 2/19/10 educational evaluation and incorporate the results of same into the IEP, to find at Student’s 1/21/10 MDR meeting that Student’s suspensions were manifestation of his disability, to hold another MDR meeting to address Student’s suspensions subsequent to the 1/21/10 MDR meeting, to develop and implement a BIP for Student, and to evaluate Student in accordance with parent’s June 2, 2010 request.  
Petitioner’s proposed compensatory education plan contains significantly less hours of service and instruction than Petitioner maintains Student actually missed, because the intent is to provide services and instruction that will stop the “gaps” in Student’s learning and help him to learn new concepts. The plan is designed to bring Student up to the level of his same age peers.<sup>18</sup>
19. Student has been accepted to attend a specific private day school in the District of Columbia that offers a therapeutic environment primarily for ED students, but also for

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<sup>14</sup> Petitioner’s Exhibit 12.

<sup>15</sup> Testimony of Parent.

<sup>16</sup> Petitioner’s Exhibit 8.

<sup>17</sup> DCPS-14.

<sup>18</sup> Petitioner’s Exhibit 1; testimony of Director of private Educational Services (“Petitioner’s compensatory education witness”).

students who are LD, Other Health Impaired, or multiply disabled. The school offers small class sizes, with a maximum ratio of 6 students to 1 teacher, and it supports children with emotional problems and problems in academic achievement by using a whole child approach. Student has been accepted to attend the school based solely on the review of documents concerning Student that were provided to the school; however, the school also intends to schedule an appointment to see Student after the completion of the due process hearing to confirm the admissions staff's observation based on Student's records.

The school's therapeutic environment is characterized by small class sizes with proximity control, a behavior management philosophy that starts with behavior intervention planning, fixed consequences, a neuropsychologist on staff who helps to determine students' needs, a point system with frequent feedback, and support to parents. The staff at the school includes certified special education teachers, 8 full-time licensed clinicians to implement cognitive behavior therapy, and behavior specialists who are trained to provide support and intervene with respect to emotional and behavioral issues. The school's interventions for students who won't go to class include proximity control, technology access (because computers stimulate children cognitively), extra time, positive reinforcement, and direct and small group counseling. The school provides therapy and other related services in the classroom and/or through pullout services, as appropriate.<sup>19</sup>

### **CONCLUSIONS OF LAW**

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

#### **1. Failure to Review 2/19/10 Educational Evaluation**

As part of any reevaluation of a child with a disability, the IEP team must review existing evaluation data on the child and determine what additional data, if any, are needed to determine whether the child continues to have such a disability and the educational needs of the child. 34 C.F.R. § 300.305(a)(1)-(2). In this case, Petitioner has alleged that DCPS violated IDEIA by failing to convene an IEP meeting to review Student's 2/19/10 educational evaluation and revise Student's IEP in accordance with the evaluation results. However, the evidence in this case reveals that DCPS repeatedly attempted to secure Parent's participation in an MDT meeting during February/March 2010 and even went to Parent's home on approximately 3 occasions to attempt to pick her up for a meeting.<sup>20</sup> As a result, Parent is in no position to complain about DCPS's failure to convene an MDT meeting, as Parent's refusal to participate in such a meeting was likely the reason the meeting was not held. Under these circumstances, the hearing officer concludes that it would be appropriate to dismiss and deny Petitioner's claim that DCPS failed to review Student's 2/19/10 educational evaluation.

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<sup>19</sup> Testimony of Educational Consultant.

<sup>20</sup> Finding of Fact ("FOF") 9.

## 2. MDR Meetings

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student code, the LEA, the parent, and relevant members of the child's IEP Team must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information to determine, *inter alia*, if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability. The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and the relevant IEP team members determine that this condition was met. See 34 C.F.R. § 300.530(e).

### a. The January 21, 2010 MDR Meeting

In this case, Petitioner has alleged that DCPS violated IDEIA by failing to determine that Student's behavior, which led to his repeated suspensions prior to January 21, 2010, was not a manifestation of his disability. To support this assertion, Petitioner primarily relies upon Student's 2009 comprehensive psychological evaluation, which determined that Student's profile seems to be consistent with those of students with ED. Petitioner also asserted that Student's behavior was likely related to his disability in that he was acting out and leaving/failing to attend class due to his embarrassment over not understanding his class work. On the other hand, DCPS's position is that Student has been solidly determined to be LD and the behaviors at issue do not relate to LD.

The evidence in this case reveals that Student has a history of learning and attentional problems going as far back as 2<sup>nd</sup> grade.<sup>21</sup> Student's March 9, 2009 comprehensive psychological evaluation report reveals that, according to his teachers during SY 2008/09, Student had great difficulty meeting the demands of the classroom, demonstrated very disruptive behaviors, and completed very little of the assigned work.<sup>22</sup> Similarly, Student's general education teacher for SY 2009/10 believes he may have used negative behavior to make his significant educational deficits, his social worker for SY 2009/10 wondered whether his schoolwork was very difficult for him to complete, and Parent believes that Student's acting out behavior stems from his inability to understand and do the class work.<sup>23</sup> Moreover, Student's December 17, 2009 IEP indicates that Student had scored in the extremely low range on the WIAT-II in the areas of mathematics, reading and written expression, and that Student's "inability to appropriately manage his frustrations and utilize appropriate coping skills to remain in the classroom, on task and following staff directives" was "evidenced by his frequent in school suspensions, staff concerns, and tardies and absences that contribute to his poor academic and behavioral performance."<sup>24</sup>

Hence, Student's IEP, his teachers' observations, and other relevant information, such as his existing evaluation results and Parent's beliefs about the cause of Student's negative behavior, indicated that Student's disruptive behavior at issue in the 1/21/10 MDR meeting – namely,

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<sup>21</sup> FOF 2.

<sup>22</sup> *Id.*

<sup>23</sup> FOFs 6, 7, and 8.

<sup>24</sup> FOF 1.

fighting, had a direct and substantial relationship to Student's disability of LD. Under these circumstances, the hearing officer concludes that DCPS erred in determining at the January 21, 2010 MDR meeting that Student's disruptive behavior was not a manifestation of his disability. As a result, Petitioner has met its burden of proof with respect to this claim.

**b. Suspensions Subsequent to January 21, 2010**

Petitioner has also alleged that DCPS violated IDEIA by failing to convene another MDR meeting for Student to determine whether his suspensions subsequent to January 21, 2010, which added up to more than 10 school days, were a manifestation of his disability.

As noted in subsection (a) above, pursuant to 34 C.F.R. § 300.530(e), an MDR meeting must be held within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct. For these purposes, a change of placement occurs if the removal is for more than 10 consecutive school days, or the child has been subjected to a series of removals that constitute a pattern because the series of removals total more than 10 school days in a school year, the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals, and because of additional factors such as, *inter alia*, the proximity of the removals to one another. See 34 C.F.R. § 300.536(a).

The evidence in this case reveals that subsequent to the 7-day suspension from January 22 through February 1, 2010 that initially resulted in Student's suspensions for SY 2009/10 totaling more than 10 school days, Student was also suspended on the following days: February 2 – 4, 2010; March 4 – 10, 2010; April 21, 2010; May 3, 2010; May 10, 2010; and for an extended period of more than 1 month at the end of SY 2009/10.<sup>25</sup> The evidence further reveals that these suspensions were primarily due to Student's failure to attend school and/or class and his disruptive behavior.<sup>26</sup>

Based on this evidence, the hearing officer concludes that DCPS was required to hold another MDR meeting for Student during the second half of SY 2009/10 because Student's suspensions subsequent to his January 21, 2010 manifestation meeting constituted a change in placement in that they were a series of removals that totaled more than 10 school days in the same school year, they were imposed for behavior that was substantially the same each time, and they were imposed at least once each month, thereby constituting a pattern. Hence, Petitioner has met its burden of proof on this claim.

**3. Appropriateness of the IEP without a BIP**

The IEP of a disabled child must be reviewed periodically, but not less than annually, to determine whether the child's annual goals are being achieved. In conjunction with said review, the IEP must be revised to address, *inter alia*, any lack of expected progress and the child's anticipated needs. Moreover, 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

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<sup>25</sup> FOF 3.

<sup>26</sup> See *e.g.*, FOF 6.

supports, and other strategies, to address that behavior. See 34 C.F.R. § 300.324(a)(2) and (b)(1)-(2).

In this case, Petitioner alleges that DCPS should have included a BIP in Student's December 17, 2009 IEP based on the results of Student's March 9, 2009 comprehensive psychological evaluation report and based on Student's behavior at school. On the other hand, DCPS contends that the IEP was reasonably calculated to confer educational benefit in light of the information available to the IEP Team at the time the IEP was created.

The evidence in this case reveals that at the time the December 17, 2009 IEP was developed, Student had already been suspended on numerous occasions and his teachers had already completed numerous disciplinary referral forms concerning Student's disruptive behavior in class, his failure to attend class and/or school, and his tardiness.<sup>27</sup> Hence, by December 3, 2009, DCPS was aware that Student had at least 10 unexcused absences from school.<sup>28</sup> Moreover, Student's general education social studies teacher, his special education math teacher, and his social worker were all aware that Student's frequent absences due to suspensions and his failure to attend school and/or class were interfering with his ability to learn.<sup>29</sup>

The evidence further reveals that at the time of Student's December 17, 2009 IEP meeting, the IEP team had access to Student's March 9, 2009 comprehensive psychological evaluation report, which recited that Student's teachers reported that Student was demonstrating very disruptive behaviors in class and completing very little of the assigned work, and that numerous interventions had been attempted but had little or no effect on Student's behavior.<sup>30</sup> Indeed, the IEP itself noted that Student's "inability to appropriately manage his frustrations and utilize appropriate coping skills to remain in the classroom, on task and following staff directives" was "evidenced by his frequent in school suspensions, staff concerns, and tardies and absences that contribute to his poor academic and behavioral performance."<sup>31</sup> Nevertheless, the IEP did not make provision for Student to receive any aids, services or other supports in school beyond the modifications and accommodations provided for him when he is taking the DC-CAS.<sup>32</sup>

Based on the information available to the IEP team at the time of Student's December 17, 2009 IEP meeting, which clearly indicated that Student's behavior was impeding his learning, the hearing officer is persuaded that the IEP team was required to include in Student's IEP positive behavioral interventions and supports, such as a BIP, and/or other strategies to address Student's undesirable behavior. As the evidence in this case reveals that Student's December 17, 2009 IEP does not include any such interventions, supports or strategies, the hearing officer concludes that Petitioner has met its burden of proving a denial of FAPE by DCPS with respect to this claim. However, the hearing officer notes that DCPS prepared on September 10, 2010 a BIP to address Student's disruptive and other undesirable behaviors, with the result that it would be inappropriate for the hearing officer to award Petitioner additional relief of that nature herein.<sup>33</sup>

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<sup>27</sup> FOF 3.

<sup>28</sup> FOF 5.

<sup>29</sup> FOFs 7 and 10.

<sup>30</sup> FOF 2.

<sup>31</sup> FOF 1

<sup>32</sup> *Id.*

<sup>33</sup> See FOF 16.

#### **4. Evaluations Upon Parent's Request**

As IDEIA does not establish a timeline for the completion of reevaluations, "reevaluations should be conducted in a reasonable period of time." *Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254 (D.D.C. 2005) ("*Herbin*") (quoting *Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone*, 21 Individuals with Disabilities Education Law Report 1127, 1129 (1995)). Moreover, in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

Although Petitioner initially alleged that DCPS denied Student a FAPE by failing to comprehensively evaluate Student upon Parent's request, the evidence in this case demonstrates that on October 18, 2010, DCPS issued an IEE letter authorizing Parent to obtain an independent comprehensive psychological evaluation and an independent adaptive behavior assessment for Student.<sup>34</sup> At the due process hearing in this matter, Petitioner argued that DCPS's delay in authorizing the independent evaluations constituted a denial of FAPE, while DCPS argued that the approximately 4-month delay was not unreasonable.

The hearing officer's review of the evidence in this case reveals that Petitioner submitted its evaluation request to DCPS on June 2, 2010, which was near the end of SY 2008/09.<sup>35</sup> At that time, however, Student was suspended from school and had been on suspension for approximately or more than one month.<sup>36</sup> Student was also earning very poor grades that included Fs.<sup>37</sup> Nevertheless, DCPS's delay in responding to Parent's evaluation request continued throughout the entire summer and into the new school year, with the result that even as of this writing more than five months after the evaluation request, there has been no adjustment to or reconsideration of Student's educational programming and/or placement. Under these circumstances, the hearing officer concludes that DCPS's delay in responding to Parent's evaluation request was unreasonable and impeded Student's right to a FAPE. *Compare Herbin*, 362 F.Supp.2d 254 (four-month delay in conducting reevaluations was not denial of FAPE where, *inter alia*, Student had current evaluations and did not have emergency needs). Hence, Petitioner has met its burden of proof on this claim.

#### **5. Placement**

Under IDEIA, a public agency must provide an appropriate educational placement for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. An LEA satisfies its obligation to provide a child with a disability with a free appropriate public education ("FAPE") by providing personalized instruction with sufficient support services to permit the child to benefit

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<sup>34</sup> FOF 17.

<sup>35</sup> FOF 13.

<sup>36</sup> FOF 3.

<sup>37</sup> FOF 14.

educationally from that instruction, and the personalized instruction provided should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982).

In this case, Petitioner has alleged that DCPS has failed to provide Student with a proper placement because Student requires more support and a more restrictive and therapeutic environment than a regular public school setting can provide. On the other hand, DCPS argued in its Response to the Complaint that Student's failures are due to his absences from school, and that Student's failure to avail himself of the educational program does not render that program inappropriate.

The evidence in this case reveals the following: Student has been earning very poor grades at his current placement; Student has had difficulty meeting the demands of the classroom and has demonstrated very disruptive behaviors but the interventions that have been attempted at his current placement have had little or no effect; Student has received repeated suspensions at his current placement, many as a result of his failure to attend class and/or school, even though his frequent absences due to suspensions and failing to attend class have negatively impacted his academic progress; and Student has generally displayed poor coping skills and an inability to maintain appropriate behaviors in his current placement.<sup>38</sup> Although Student receives less than 17 hours per week of specialized instruction and related services pursuant to his current IEP, available evaluation data suggests that Student could benefit from spending most of his academic time in a highly structured classroom setting where he can receive intensive remediation and behavior modification with a small student to teacher ratio.<sup>39</sup> Indeed, one of Student's general education teachers during SY 2009/10 found that Student generally was more successful with 1-in-1 assistance.<sup>40</sup> Finally, although available evaluation data suggests that Student may be ED, the evaluator declined to recommend a new disability classification for Student until academic achievement testing had been conducted, and after such testing was conducted DCPS was unable to convene a full IEP team to review the evaluation results.<sup>41</sup>

Based on the evidence outlined herein, the hearing officer concludes that DCPS has failed to provide Student with a placement where his needs for special education and related services can be met, because Student's current placement has been unable to provide him with sufficient support services to permit him to benefit academically from the personalized instruction that has been made available to him. As a result, Petitioner has met its burden of proof on this claim.

With respect to the relief to be awarded, the hearing officer notes that Student has been "accepted" to attend a private day school that offers a therapeutic environment primarily for ED students, but also for LD, OHI and multiply disabled students. However, the "acceptance" was based solely on a review of Student's documents, and the school did not plan to schedule an appointment to meet with Student until after the completion of the due process hearing in this

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<sup>38</sup> FOFs 2, 6, 9, 12, and 14.

<sup>39</sup> FOFs 1 and 2.

<sup>40</sup> FOF 6.

<sup>41</sup> See FOFs 2, 10 and 11.

case.<sup>42</sup> Moreover, Student has existing educational evaluation data that has not yet been reviewed by his IEP team, and Student has recently been awarded comprehensive independent evaluations that have not yet been conducted. Under these circumstances, the hearing officer has no assurance that the private school will actually accept Student into its program, and the hearing officer further concludes that it would be inappropriate to award Student a permanent placement for SY 2010/11 before his independent evaluations have been conducted and his IEP team has had an opportunity to review the evaluations and revise his IEP, if necessary, and/or determine an appropriate placement for him based on the evaluation results.

Nevertheless, the hearing officer has already concluded that Student's current placement has been unable to provide him with the support services he requires to receive educational benefit at the school, and the evidence in this case demonstrates that the private school has the ability to provide Student with, *inter alia*, a therapeutic environment, small class sizes with proximity control, and a behavior management philosophy that includes behavior intervention planning, fixed consequences, and a point system with frequent feedback.<sup>43</sup> As a result, the hearing officer concludes that the private school is reasonably calculated to provide Student with educational benefits, and the hearing officer will award Student an interim placement at the private school, if it will have Student, until such time as his independent evaluations have been completed and DCPS has had an opportunity to convene an IEP team to review the evaluations, revise Student's IEP if necessary, and determine an appropriate placement for Student. *See N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (citations omitted) (where public school has defaulted on its obligations under IDEA, a private school placement is proper if it is reasonably calculated to enable the child to receive educational benefits).

## **6. Compensatory Education**

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 Columbia*, 401 F.3d 516, 522 (D.C. 2005). 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. *Id.* at 524.

In the instant case, Petitioner seeks compensatory education in the form and amount of 6 hours per week of specialized instruction, 1 hour per week of speech and language services, and 1 hour per week of behavioral support/counseling, with all services to be provided for one full year. However, Petitioner's compensatory education plan is based partly on the faulty assumption that DCPS was required to provide Student with full-time special education during SY 2009/10 when there has no been finding to that effect. Moreover, one of the goals of Petitioner's compensatory education plan is to bring Student up to the level of his same age peers, instead of providing the educational benefits Student likely would have received from the special education services DCPS should have provided.<sup>44</sup> Under these circumstances, the hearing officer concludes that Petitioner has failed to provide the type of information necessary to fashion a compensatory

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<sup>42</sup> FOF 19.

<sup>43</sup> *Id.*

<sup>44</sup> *See* FOF 18.

education award that complies with the dictates of *Reid*. Therefore, the hearing officer will order DCPS to determine and award Student an appropriate form and amount of compensatory education services when it convenes the IEP meeting to review Student's independent evaluation results, revise Student's IEP if necessary, and determine an appropriate placement for Student.

### **ORDER**

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

1. Petitioner's claim that DCPS failed to review Student's 2/19/10 educational evaluation is **Dismissed and Denied**.
2. Student is awarded an interim placement at the private school that has recently accepted him for admission, if the school is actually willing to admit Student into its program. Said interim award shall last until Student's independent evaluations have been completed and DCPS has had an opportunity to convene an IEP team to review the evaluations, revise Student's IEP if necessary, and determine an appropriate placement for Student. Moreover, Petitioner shall be allowed 30 days from the issuance of this HOD to complete Student's independent evaluations and forward the evaluation reports to DCPS; and DCPS shall be allowed 3 weeks from the date of its receipt of the evaluation reports to convene an IEP meeting for Student. If Petitioner fails to complete the evaluations and forward the results to DCPS within 30 days, DCPS's obligation to fund Student's interim private placement shall cease until it has received the evaluation reports. If DCPS fails to convene an IEP meeting within 3 weeks of receiving the evaluation reports from Petitioner, it must continue funding Student's interim private placement until such time as it convenes the IEP meeting and determines an appropriate placement for Student.
3. When DCPS convenes the IEP meeting ordered in Paragraph 2 above, DCPS shall ensure that the IEP team determines and awards Student an appropriate form and amount of compensatory education services to compensate Student for DCPS's denials of FAPE in failing to (i) determine at Student's 1/21/10 MDR meeting that his behavior was a manifestation of his disability, (ii) conduct an additional MDR meeting concerning Student's suspensions during the second half of SY 2009/10, (iii) include in Student's 12/17/09 IEP positive behavior interventions and supports, such as a BIP, and/or other strategies to address Student's undesirable behaviors, (iv) timely evaluate Student upon Parent's request, and (v) provide Student with an appropriate educational placement for SY 2009/10.

### **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 USC §1415(i).

Date: 11/4/2010

/s/ Kimm Massey  
Kimm Massey, Esq.  
Hearing Officer