

DCPS filed a Response on October 11, 2011, which denies the allegations of the Complaint. DCPS responds (*inter alia*) that “the IEP developed with the information and data available at the time is reasonably calculated to provide educational benefit,” that the IDEA does not provide a right to observe a student in the classroom, and that the BIP is reasonably calculated to achieve the objective of improved attendance. *10/11/2011 Response*, pp. 1-2:

On October 25, 2011, DCPS held a resolution meeting that did not resolve the Complaint, and the parties did not agree to end the 30-day resolution period early. The resolution period therefore ended October 30, 2011, and the 45-day timeline expires on December 14, 2011.

On October 31, 2011, a Prehearing Conference (“PHC”) was held to discuss and clarify the issues, and a Prehearing Order was then issued. On November 8, 2011, the parties filed five-day disclosures. To accommodate Petitioner and her witnesses, the Due Process Hearing was then held in two sessions on November 16 and 29, 2011. Petitioner elected for the hearing to be closed.

At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner’s Exhibits: P-1 through P-17.

Respondent’s Exhibits: R-1.

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

Petitioner’s Witnesses: (1) Parent-Petitioner; (2) Psychologist (who testified as an expert in clinical and school psychology); and (3) Educational Advocate (“EA”).

Respondent’s Witnesses: DCPS presented no witnesses.

At the conclusion of the hearing, both parties presented oral closing statements. The Hearing Officer also invited the parties to submit any additional legal authorities in writing by December 2, 2011. Petitioner submitted a statement of legal authorities, and DCPS did not

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* DCMR §§ 5-E3029, E3030. 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 December 14, 2011.

III. ISSUES AND REQUESTED RELIEF

The following issues were presented for determination at hearing:

- (1) **Failure to Evaluate.** — Did DCPS deny the Student a FAPE by failing to evaluate him in all areas of suspected disability — specifically, a clinical psychological evaluation and a functional behavioral assessment (“FBA”) — in a timely manner?
- (2) **Refusal to Allow Observation.** — Did DCPS deny the Student a FAPE by failing to allow his representative to observe him at school upon parental request on or about September 29, 2011?
- (3) **Failure to Develop an Appropriate IEP.** — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP in January and/or June, 2011?

Specifically, Petitioner claims that the Student’s IEP fails to provide (a) an appropriate post-secondary transition plan; and (b) an appropriate behavior intervention plan (“BIP”), for the reasons alleged at pp. 6-7 of the Complaint. As confirmed at the PHC, Petitioner does not challenge any other IEP goals or the amounts or types of services provided in the IEP.

Petitioner’s Complaint requested that the Hearing Office make findings in her favor on each issue and order DCPS to: (a) fund independent evaluations (*i.e.*, clinical psychological and FBA); (b) convene an IEP team meeting to review and revise the IEP and determine an appropriate educational placement; and (c) fund Petitioner’s compensatory education plan.

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. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Petitioner also had the burden of proposing a well-articulated plan for compensatory education, in accordance with the standards of *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

IV. FINDINGS OF FACT

1. The Student _____ has been determined to be eligible for special education and related services under the IDEA as a child with a disability. His primary disability is Specific Learning Disability (“SLD”). *P-1; P-2; Parent Test.*
2. The Student is a resident of the District of Columbia, and Petitioner is the Student’s mother. *P-9; Parent Test.* The Student presently resides in a group home due to truancy-related legal issues and substance abuse problems. *Parent Test.*

3. In January 2011, DCPS developed an IEP for the Student dated 01/11/2011, which provided 22.5 hours per week of specialized instruction in a General Education setting and 240 minutes per month of behavioral support services in a setting Outside General Education. *P-2*.
4. In March 2011, DCPS administered the Woodcock-Johnson III Tests of Achievement to assess the Student's levels of academic achievement. When compared to others at his grade level, the Student's overall academic skills and fluency with academic tasks were found to be in the low range. *P-6*. His performance was measured as low average in math calculation and low in broad reading and mathematics. *Id.*
5. At about this same time, the Student was experiencing significant attendance problems. *See P-7* (Attendance Summary, 08/18/2010-04/26/2011, listing days absent and tardy); *P-5* (03/08/2011 Evaluation Summary Report, noting that Student's "excessive absences have a negative impact on his ability to be on grade level"). Due in part to his excessive absences, the Student was receiving failing grades in most subjects. *See P-8* (03/25/2011 Report to Parents on Student Progress).
6. On or about May 3, 2011, Petitioner transmitted to DCPS through her counsel a written request for evaluations of the Student. The evaluations requested in the letter included a comprehensive psychological (including cognitive, educational and clinical components) and a functional behavioral assessment. *See P-12*. The letter stated that the parent was making the request as a result of the Student's ongoing academic difficulties. *Id.*
7. In June 2011, DCPS issued another IEP for the Student dated 06/17/2011, which provides the same special education and related services as the January 2011 IEP. *P-1*.
8. Both the 01/11/2011 IEP and the 06/17/2011 IEP contain a behavior intervention plan for the Student to address problematic behaviors that may impede the learning of the Student or others.
9. Both the 01/11/2011 IEP and 06/17/2011 IEP also include a Post-Secondary Transition Plan containing post-secondary education and training goals. *Id., p. 17*.
10. The Post-Secondary Transition Plan does not include appropriate measureable post-secondary goals based upon age appropriate transition assessments related to training, education, employment and independent living skills, and it is not reasonably calculated to provide meaningful educational benefit to the Student.

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Issues/Alleged Denials of FAPE

Under the IDEA, FAPE means:

[S]pecial 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); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

For the reasons discussed below, the Hearing Officer concludes that Petitioner proved by a preponderance of the evidence that DCPS has denied the Student a FAPE under Issues 1 and 3. Petitioner failed to prove any denial of FAPE under Issue 2.

1. Failure to Evaluate

As part of either an initial evaluation or re-evaluation, DCPS must (*inter alia*) ensure that the child “is assessed in all areas related to the suspected disability,” and that the evaluation is “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.” 34 C.F.R. §300.304 (c) (4), (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. *See, e.g.*, 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).

In this case, Petitioner claims that DCPS should have performed a clinical psychological evaluation and a functional behavioral assessment (“FBA”) to better assess the Student’s needs and determine the content of his IEP. Based on the testimony and other evidence adduced at hearing, the Hearing Officer concludes that Petitioner met her burden of proof on this issue. The record reveals significant emotional and behavioral issues that may affect the Student’s learning, which reasonably warrant further assessment. *See Psych. Test.; P-3 (02/07/2011 Analysis of Existing Data*, noting “concerns about roots of substance abuse in anxiety and depression”).

Additionally, an FBA is generally acknowledged to be a useful tool in developing an appropriate BIP since it helps to understand the antecedents of the poor behaviors. *Psych. Test*. Finally, Petitioner expressly exercised her statutory right to request these assessments to determine the Student's educational needs and programming. *See P-12*; 34 C.F.R. 300.305 (d).

The Hearing Officer concludes that DCPS' failure to evaluate the Student in these circumstances constituted a substantive denial of FAPE. *Cf. Harris v. DC*, 561 F. Supp. 2d at 68-69. Alternatively, assuming *arguendo* that DCPS' failure to evaluate is deemed to be a procedural violation only, the violation has affected the student's substantive rights. *See Lesesne v. District of Columbia*, 447 F. 3d 828 (D.C. Cir. 2006). Such procedural inadequacy has impeded the Student's right to a FAPE and has significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child. 34 C.F.R. 300.513 (a) (2) (i), (ii).

2. Refusal to Allow Observation

Petitioner claims that the Student's educational advocate has the right to observe him in the classroom "because a parent can delegate to their [sic] representative their right to meaningfully participate in the IEP and placement process" and as part of the right to "inspect and review educational records." *Complaint*, p. 5. DCPS responds that classroom observation policies are within the discretion of its individual school principals, and that the IDEA does not require DCPS to admit a student's educational advocate or other observer. The Hearing Officer concludes that Petitioner has failed to meet her burden of proof on this issue.

As OSEP has explained, "neither the statute nor the regulations implementing the IDEA provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement." *Letter to Mamas*, 42 IDELR 10 (OSEP 2004). OSEP and the courts have recognized that there may be limited circumstances in which access may need to be provided – "[f]or example, if parents invoke their right to an independent educational evaluation of their child, and the evaluation requires observing the child in the educational placement." *School Board of Manatee County, Florida v. L.H.*, 666 F. Supp. 2d 1285 (M. D. Fla. 2009); *Letter to Mamas, supra*. Otherwise, state and local policy may control who has access to classrooms. *Id.* Such limited circumstances are not present here.

In this case, High School adhered to its general policy of not allowing outside educational advocates to observe students during classes (*see P-11*), and Petitioner was not seeking access for purposes of completing an independent evaluation. There also is no evidence to support a finding that Petitioner's right to participate in the IEP process on the issues complained of (evaluations, transition plan, and BIP focused on attendance issues) were significantly affected by the advocate's inability to observe the Student in the classroom environment. *Cf. L.M. v. Capistrano Unified School District*, 556 F.3d 900, 905 (9th Cir. 2009). Accordingly, the Hearing Officer concludes that he lacks authority to order DCPS to admit the Student's advocate to the classroom, and that DCPS' refusal to do so does not constitute a denial of FAPE. However, the evaluators to be retained to conduct the Student's independent assessments pursuant to this HOD will be entitled to observe if needed for completion of their evaluations.

3. Inappropriate IEP Claim

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)). An IEP is a comprehensive written plan that must include, among other things: (1) "a statement of the child's present levels of academic achievement and functional performance, including ... how the child's disability affects the child's improvement and progress in the general education curriculum"; (2) "a statement of measurable annual goals, including academic and functional goals, designed to ... meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum...and meet each of the child's other education needs that result from the child's disability"; (3) "a description of how the child's progress toward meeting the annual goals...will be measured"; (4) "a statement of the special education and related services and supplementary aids and services ...and a statement of the program modifications or supports for school personnel that will be provided for the child"; and (5) an explanation of the extent, if any, to which the child will not participate with non-disabled children in any regular classes. 20 U.S.C. 1414(d)(1)(A)(i) (emphasis added). *See also* 34 C.F.R. 300.320; DCMR 5-E3009.1.

To be sufficient to provide FAPE under the IDEA, 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 also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). Judicial and hearing officer review of IEPs is “meant to be largely prospective and to focus on a child’s needs looking forward; courts thus ask whether, at the time an IEP was created, it was ‘reasonably calculated to enable the child to receive educational benefits.’” *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207). An LEA also must periodically update and revise an IEP “in response to new information regarding the child’s performance, behavior, and disabilities.” *Maynard v. District of Columbia*, 54 IDELR 158 (D.D.C. 2010), slip op. at p. 6; see 34 C.F.R. 300.324. And the issue of whether an IEP is appropriate is a question of fact for hearing. See, e.g., *S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003).

In this case, Petitioner claims that the Student’s IEP fails to provide (a) an appropriate post-secondary transition plan; and (b) an appropriate behavior intervention plan (“BIP”). (Petitioner does not challenge any other IEP goals or the amounts or types of services provided in the IEP.)

(a) Inappropriate Post-Secondary Transition Plan

Petitioner alleges that DCPS has failed to develop a post-secondary transition plan for the Student that is reasonably calculated to enable him to move from school to post-school activities, in that the plan lacks appropriate baselines and includes vague and non-measurable goals. See *Administrative Due Process Complaint*, filed Sept. 30, 2011, pp. 6-7 (setting forth specific allegations in more detail). The Hearing Officer agrees with Petitioner on this issue.

Under the IDEA, “[b]eginning not later than the first IEP to be in effect when the child turns 16... the IEP “**must include – (1) appropriate measurable postsecondary goals** based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and (2) the **transition services** (including courses of study) needed to assist the child in reaching those goals.” 34 CFR 300.320(b) (emphasis added). See 20 U.S.C. § 1414 (d)(1)(A)(i)(VII). “**Transition services**,” in turn, are defined under IDEA as a “**coordinated set of activities** for a child with a disability that –

(A) is designed to be within a results-oriented process that is focused on improving the academic and functional achievement of

the child with a disability to facilitate the child's movement from school to post-school activities...;

(B) is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of living skills and functional vocational evaluation."

20 U.S.C. §1401(34) (emphasis added); *see also* 34 C.F.R. §300.43; *Virginia S. v. Department of Education*, 47 IDELR 42 (D. Haw. Jan. 8, 2007) (statute requires more than a "generic and somewhat vague formula of post-high school goals and services, equally applicable to almost any high school student").

IDEA thus requires that a written plan be included in the IEP, containing "appropriate measureable postsecondary goals" that are geared *specifically* to the "individual child's needs." That plan (commonly called a "Post-Secondary Transition Plan") then serves as the guide for a "coordinated set" of transition activities. The primary intent underlying these IDEA provisions is to afford individual students the opportunity to reach measureable post-secondary goals of self-sufficiency as adults. Based on the Student's age, both his January and June 2011 IEPs were required to incorporate such a plan.

In this case, the Student's Post-Secondary Transition Plan contains two annual goals, neither of which are reasonably measureable and specific to the Student's individual needs. The first goal, relating to post-secondary education and training, merely provides that, with teacher assistance, the Student "will develop a Transition Portfolio containing information about her [sic] learning style, latest diagnostic evaluations, exploration of a variety of colleges of choice and summary of accommodations/modifications." *P-2, p. 17*. The only baseline identified states that the Student "is currently exploring what he wants to do for his future." *Id.* The anticipated date of achievement is listed as 01/10/2012. The second goal, relating to employment, is even vaguer: "Upon graduation, [Student] plan[s] to find gainful full time employment while going to community college." *Id.* It provides no baseline at all, and does not relate the employment search to any particular strengths, preferences and interests of the Student. *See also EA Test.*

Nor do the goals appear to be based on any age appropriate transition assessments of the Student. The plan lists several assessment tools (*i.e.*, “Transition Planning Inventory,” “Interest Inventory,” and “Transition Skills Inventory”), but the evidence indicates that DCPS has not yet conducted or utilized any of these assessments to determine the Student’s long-range goals and interests. *See EA Test*. Indeed, the plan itself identifies the “date administered” as 01/10/2012 for the first two assessment tools and leaves such date blank for the third assessment. *P-2, p. 17*. The “Results” for each assessment is also left blank, reflecting that they have not taken place. *Id.*

Finally, the Plan also identifies no courses of study and no other transition services needed to assist the Student in achieving post-secondary goals, other than researching and applying for summer employment last summer and a category labeled “undecided.” *P-2, p. 18*. The Plan thus fails to provide a coordinated set of activities meeting IDEA requirements.

In sum, the Hearing Officer concludes that the Post-Secondary Transition Plan included in the Student’s current IEP is not reasonably calculated to provide meaningful educational benefit to the Student, consistent with the above statutory requirements. Accordingly, Petitioner has met her burden of demonstrating a denial of FAPE to the Student in this respect. An independent vocational evaluation will be included in the equitable relief being ordered herein to assist in developing a more specific and complete plan.

(b) Inappropriate Behavior Intervention Plan (BIP)

Petitioner claims that DCPS has failed to construct and incorporate into the IEP an appropriate BIP designed to address the Student’s problematic behaviors – primarily his truancy, which DCPS has recognized to have a negative impact on his ability to be on grade level. *P-5 (03/08/2011 Evaluation Summary Report), p. 1*. DCPS argues that the existing BIP (*R-1*) is reasonably calculated to achieve the desired result of improving the Student’s attendance.

On the basis of existing information, the Hearing Officer cannot conclude whether the content of the BIP is inadequate. However, the BIP was developed without the benefit of an FBA, and DCPS appears not to have reviewed the plan by February 28, 2011, as required by its own terms. *See R-1*. Thus, without necessarily finding a separate denial of FAPE in this regard, the Hearing Officer will order DCPS to review the BIP, and revise it as appropriate, in light of the completed FBA at the next IEP team meeting. To the extent the FBA indicates a need to

address any additional behaviors beyond attendance (e.g., “classroom habits,” P-2, p. 11), they should be incorporated into the revised BIP. See *EA Test*.

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). The Hearing Officer’s determination of appropriate equitable relief is set forth in the Order below.

The Hearing Officer notes that, at hearing, Petitioner chose not to pursue an award of compensatory education services for any denial of FAPE found in this proceeding because her counsel stated that there was no evidence of educational harm available for her to present. Petitioner shall retain the right to seek relief in the form of compensatory education services for denials of FAPE, if any, that Petitioner may be able to assert in any subsequent due process complaint based in whole or in part on the results of the above evaluations and/or revisions to the Student’s IEP. Cf. *Thomas v. District of Columbia*, 407 F. Supp. 2d 102, 115 (D.D.C. 2005).

VI. ORDER

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

1. Petitioner shall be authorized to obtain (a) an independent **psychological evaluation** (including cognitive, educational, and clinical components), (b) an independent **functional behavioral assessment**, and (c) an independent **vocational assessment**, at the expense of DCPS and consistent with DCPS’ publicly announced criteria for independent educational evaluations (“IEEs”). Upon completion of the evaluations, Petitioner shall cause copies of the reports to be sent to DCPS through its identified Compliance Case Manager.
2. Within **10 school days** of receiving the reports, DCPS shall convene a meeting of the Student’s MDT/IEP Team (with all necessary members, including Petitioner participating) to (a) review the results of the evaluations, and (b) review and revise, as appropriate, the Student’s IEP dated June 17, 2011, based on the evaluations and consistent with the Findings and Conclusions in this HOD.
3. The MDT/IEP Team’s review and revision of the IEP at the meeting held pursuant to paragraph 2 of this Order shall include at least the following sections: (a) the Post-Secondary Transition Plan; and (b) Behavior Intervention Plan. The

Team shall also discuss and determine whether changes to any other sections of the IEP, including but not limited to the other Annual Goals and the Special Education and Related Services, may be appropriate based on the evaluations and any other updated information.

4. Any delay in meeting any deadline 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 deadline by the number of days attributable to such delay.
5. Petitioner's other requests for relief in her Due Process Complaint filed September 30, 2011, are hereby **DENIED**.
6. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.



Dated: December 14, 2011

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).