

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

Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Office of Dispute Resolution  
November 10, 2014

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STUDENT, <sup>1</sup>	)	
through the Parent,	)	Date Issued: November 8, 2014
	)	
Petitioner,	)	Hearing Officer: John Straus
	)	
v.	)	
	)	
District of Columbia Public Schools (“DCPS”)	)	
	)	
Respondent.	)	
	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

The Petitioner, the Student’s mother, filed a due process complaint notice on August 25, 2014, alleging that Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”).

The Petitioner alleged that the District of Columbia Public Schools (“DCPS”) failed to provide the student a FAPE by failing to provide an appropriate Individualized Education Program (“IEP”) because the IEP does not have sufficient present level of performance (“PLOP”) information regarding speech and language (“SL”) and occupational therapy (“OT”) services, compensatory services, the correct disability category, an appropriate Behavior Intervention Plan (“BIP”), sufficient hours of special education services outside of general education setting and placement in a separate special education day school. The Petitioner also alleged that DCPS denied the Student a FAPE by failing to include the Petitioner in the placement determination at the March 13, 2014 IEP meeting. Finally, the Petitioner alleged DCPS denied the student a FAPE by failing to evaluate the student in all areas of suspected disability by failing to complete a Vineland Adaptive Behavior Scale (“Vineland”) assessment.

The Petitioner requested that the Hearing Officer determine the student is a student with Intellectual Disability under the IDEA. In the alternative, DCPS to fund an independent Vineland assessment and within 10 days of the receipt of independent assessment, DCPS to convene a IEP

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<sup>1</sup> Personal identification information is provided in Appendix A.

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meeting to review the assessment, determine the student's disability category, and review and revise Student's IEP. In the alternative, the Hearing Officer to order DCPS to convene an IEP meeting to review and revise Student's IEP and discuss and determine placement or alternatively, fund placement and transportation to Nonpublic School B. Finally, the Petitioner sought to have the Hearing Officer order a compensatory education to redress the lack of special education services as a result of the reduction in services and inappropriate placement from March 2014 to the present.

DCPS asserted it crafted an IEP which provided an educational benefit to the student and was based on ample student data. Additionally, the student was provided the appropriate placement and location of services at the time of the development of the March 13, 2104 IEP that was amended in June 12, 2014. DCPS further argued that DCPS attempted to include the parents in every meeting and has considered the parent's input in every IEP and placement decision. Finally, DCPS states it is well within the statutory timeline for conducting the assessment.

### **Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R."); and 38 D.C. Code 2561.02.

### **Procedural History**

The due process complaint was filed on August 25, 2014. This Hearing Officer was assigned to the case on August 27, 2014.

Neither Petitioner nor Respondent waived the resolution meeting. A resolution meeting took place on September 16, 2014, at which time parties agreed to keep the resolution period open. The 30-day resolution period ended on September 24, 2014, the 45-day timeline to issue a final decision began on September 25, 2014 and the final decision was initially due by November 8, 2014. *See* 34 C.F.R. §§ 300.510 and .515.

The due process hearing took place on October 22, 2014 and October 24, 2014. The due process hearing was a closed hearing.

Neither party objected to the testimony of witnesses by telephone. The Petitioner participated in person on October 22, 2014 but did not participate in person on October 24, 2014.

The Petitioner presented four witnesses: the Petitioner, an Educational Advocate ("EA"), Educational Consultant ("EC"), and Clinical Psychologist. DCPS presented three witnesses: Special Education Coordinator, Elementary School ("SEC"), Special Education Teacher, Elementary School ("SET") and School Psychologist, Middle School SP.

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The Petitioner's Disclosure Statement, filed and served on October 15, 2014, consisted of a witness list of nine (9) witnesses and documents P-01 through P-42. The Petitioner's document, P-27, was admitted over objection. Petitioner's document P-37 was not admitted into evidence. The remaining documents were admitted into evidence without objection.

The Respondent's Disclosure Statement, filed and served on August 29, 2014, consisted of a witness list of seven (7) witnesses and documents R-1 through R-26. The Respondent's documents were admitted in to evidence without objection.

The issues to be determined in this Hearing Officer Determination is as follows:

1. Whether Respondent denied Student a FAPE by failing to propose or provide an IEP or placement that was reasonably calculated to enable the student to make progress in the general education curriculum because the March 13, 2014 IEP and the June 12, 2014 amendment to the IEP do not have sufficient PLOP information regarding speech and language and occupational therapy services, compensatory services, the correct disability category, an appropriate BIP, sufficient hours of special education services outside of general education setting and placement in a separate special education day school.
2. Whether Respondent denied the Student a FAPE by failing to include the Petitioner in the placement determination at the March 13, 2014 IEP meeting.
3. Whether Respondent denied the Student a FAPE by failing to evaluate the student in all areas of suspected disability by failing to complete a Vineland Adaptive behavior Scale assessment.

For relief, the Petitioner requested that the Hearing Officer determine the student is a student with Intellectual Disability under the IDEA. In the alternative, DCPS to fund an independent Vineland and within 10 days of the receipt of independent assessment, DCPS to convene a IEP meeting to review the assessment, determine the student's disability category, and review and revise Student's IEP. In the alternative, the Hearing Officer to order DCPS to convene an IEP meeting to review and revise Student's IEP and discuss and determine placement or alternatively, fund placement and transportation to Nonpublic School B. Finally, the Petitioner sought to have the Hearing Officer order a compensatory education to redress the lack of special education services as a result of the reduction in services and inappropriate placement from March 13, 2014 to the present.

### **Findings of Fact**<sup>2</sup>

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<sup>2</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

## Hearing Officer Determination

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

1. The Student is a resident of the District of Columbia who attends Middle School. The Petitioner is the Student's mother.<sup>3</sup>
2. The student began his academic career at a DCPS Education Campus for Kindergarten for the 2007-2008 school year. In first grade the student was in Maryland for a month before attending Elementary A in the District of Columbia for the 2008-2009 school year. The student was identified with a disability under the IDEA in first grade. The student was in Nonpublic School A for second grade for part of the 2009-2010 school year. The student attended a DCPS separate special school for the part of the second grade through fourth grade for the 2009-2010 school year through 2012-2013 school year.<sup>4</sup>
3. On May 15, 2013, the IEP team at the separate special school convened. The team determined that the student requires 28 hours per week of specialized instruction outside the general education classroom, four hours per month of speech-language pathology outside the general education classroom, two hours of behavior support services per month outside the general education classroom and 240 minutes of occupational therapy per month outside the general education classroom.<sup>5</sup>
4. The separate special school closed by DCPS at the end of the 2012-2013 school year. No IEP team meeting was convened with the Petitioner during the summer of 2013. The student enrolled in a self-contained class at Elementary School B for fifth grade for the 2013-2014 school year.<sup>6</sup>
5. On September 19, 2013, the student was accepted in to the Nonpublic School B for the 2013-2014 school year contingent on a part-time dedicated aide be added to the student's IEP before enrollment.<sup>7</sup>
6. On December 16 and 18, 2013, DCPS contacted the Petitioner to request consent to amend the IEP by decreasing the hours of specialized instruction outside of general education from 28 hours per week to 25 hours per week. The Petitioner emphatically refused to give consent to amend the IEP.<sup>8</sup>
7. On March 13, 2014, the IEP team at Elementary School B convened without the Petitioner present. The SEC and SET were the only individuals present. DCPS states that they attempted to contact the parent via certified mail, telephone message and placing an invitation in the Student's book bag. However, DCPS did not attempt to contact the Petitioner's counsel, whom the Petitioner wanted present at the meeting.<sup>9</sup>

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<sup>3</sup> Petitioner

<sup>4</sup> Petitioner

<sup>5</sup> P-5, P-6, R-11

<sup>6</sup> Petitioner

<sup>7</sup> P-31

<sup>8</sup> R-12, Petitioner, SEC

<sup>9</sup> P-3, R-14, R-15, Petitioner, SEC

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8. The March 13, 2014 IEP team reduced the student's services from 28 hour per week of specialized instruction outside the general education setting to 25 hours per week of specialized instruction outside the general education classroom. The hours of specialized instruction were reduced because the hours reflected the amount of hours provided to the student at the Nonpublic School and the hours of specialized instruction did not reflect the hours provided at Elementary School. The team also determine the student continues to require four hours per month of speech-language pathology outside the general education classroom, two hours of behavior support services per month outside the general education classroom and 240 minutes of occupational therapy per month outside the general education classroom.<sup>10</sup>
9. On April 15 and 18, 2014, the Student received a Comprehensive Psychological assessment. The assessment included a Wechsler Intelligence Scale for Children-Forth Edition ("WISC-IV"). The assessment yielded the following standard scores:

Full Scale	46	Extremely Low Range
Verbal Comprehension	57	Extremely Low Range
Perceptual Reasoning	57	Extremely Low Range
Working Memory	50	Extremely Low Range
Processing Speed	56	Extremely Low Range

The assessment included a Wechsler Individual Achievement Test-Third Edition ("WIAT-III"). The assessment yielded the following selected standard scores:

Reading Composite	65	Extremely Low Range
Reading Comprehension	56	Extremely Low Range
Mathematics Composite	67	Extremely Low Range
Oral Language Composite	70	Borderline Range
Written Expression Composite	64	Extremely Low Range

His achievement on the WIAT-III was commensurate with what was expected given his general cognitive abilities. The student was also provided several projective tests and the Petitioner was given parent rating scales. The evaluator noted the Student suffers from feelings of inadequacy, insecurity, constriction, withdrawal tendencies, depressive tendencies, difficulty with expressing emotions and difficulties interpreting social cues. The evaluator further noted the Student struggles with attentional problems, hyperactivity and impulsivity. The evaluator stated the student is a student with Attention Deficit Hyperactivity Disorder ("ADHD"), Dysthymic Disorder and Mild Mental Retardation. The evaluator recommended the student be placed in a therapeutically structured classroom setting.<sup>11</sup>

10. On April 16, 2014, the Student received an OT assessment. The assessment included a Bruininks-Oseretsky Test of Motor Proficiency 2<sup>nd</sup> (BOT-2) which yielded well below

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<sup>10</sup> P-3, R-13, R-14, Petitioner, SEC

<sup>11</sup> P-25, R-4, Clinical Psychologist

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average scores. The assessment also included a Beery-Buktinica Developmental Test of Visual-Motor Integration 6<sup>th</sup> Edition (“Beery VMI”) which yielded very low scores.<sup>12</sup>

11. On May 20, 2014, the Student received a SL assessment. The assessment included a Comprehensive Assessment of Spoken Language (“CASL”) which yielded a standardized core language score of 59. The assessment also included a Comprehensive Receptive and Expressive Vocabulary Test (“CREVT-2”) which yielded a composite standard score of 50.<sup>13</sup>
12. On June 12, 2014, the IEP team convened to review the OT assessment, Speech and Language assessment and Comprehensive Psychological assessment report. However, the team did not add the standardized scores from the OT assessment or the SL assessment to the PLOP. The team determined the student is a student with a learning disability under the IDEA. The team amended the IEP to include Extended School Year (“ESY”) services. The Petitioner disagreed with the reduction in hours of specialized instruction by the March 13, 2014 IEP team from 28 hours to 25 hours of specialized instruction outside the general education setting. The Petitioner presented a letter of acceptance from Nonpublic school B and requested DCPS to place the Student at the Nonpublic School B. DCPS refused; however, the Petitioner did not state that the student was harmed by either reducing the student’s hours of service or continued placement in a separate classroom in a general education school. DCPS provided the Respondent a Vineland parent survey form to be filled out by the parent as part of the Vineland assessment.<sup>14</sup>
13. The Petitioner completed the form and dropped the form off at the front office at the school where the Student attended summer school for ESY services on the last day of the ESY period. At some point, DCPS cancelled the administration of the Vineland. The parent’s input can be provided by either completing the form or through an interview that may be done in person or over the telephone.<sup>15</sup>
14. The Student is currently enrolled in Middle School for sixth grade for the 2014-2015 school year. He is exhibiting good participation and excellent behavior.<sup>16</sup>
15. The EC recommends the student receive 100 hours of tutoring to redress the lack of special education as a result of DCPS’ reducing the hours of specialized instruction outside the general education classroom from 28 hour per week to 25 hours per week.<sup>17</sup>

### **Conclusions of Law**

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<sup>12</sup> P-24, R-3, EA

<sup>13</sup> P-23, R-5, EA

<sup>14</sup> P-4, R-6, R-7, R-16, R-17, Petitioner

<sup>15</sup> R-10, Petitioner, School Psychologist

<sup>16</sup> P-26, Petitioner

<sup>17</sup> P-35, EC

## Hearing Officer Determination

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:

### **Whether DCPS denied the Student a FAPE by failing to propose or provide an IEP or placement that was reasonably calculated to enable the student to make progress in the general education curriculum**

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). The Hearing Officer shall consider each concern raised by the Petitioner in the issue regarding the Student's IEP and make a determination by a preponderance of the evidence.

### **DCPS did not fail to provide a FAPE by failing to develop IEPs with sufficient PLOP information regarding speech and language and occupational therapy services**

Pursuant to 34 C.F.R. § 300.320(a)(1), an IEP must include a statement of the child's present levels of academic achievement and functional performance (i.e. PLOP), including how the child's disability affects the child's involvement and progress in the general education curriculum.<sup>18</sup>

In this case, the Petitioner alleges that the PLOP is not sufficient regarding the student's related services because the related services do not have test data from the recent assessments. The EA stated that test data is necessary because it could be understood by other service providers. The PLOP information has information from therapy sessions such as the Student's ability to produce diphthongs, ability to answer “sh” questions, behaviors during therapy sessions, using scissors, copying skills and writing skills.

Pursuant to 34 C.F.R. § 300.324(a), “in developing each child's IEP, the IEP Team must consider the strengths of the child; the concerns of the parents for enhancing the education of their child; *the results of the initial or most recent evaluation of the child*; and the academic, developmental, and functional needs of the child.” [emphasis added] The IEP should express the PLOP in specific, objectively measurable terms. While the use of test scores is not always appropriate, test scores accompanied by some individual analysis is common. *See O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 28 IDELR 177 (10th Cir. 1998); and *Chase v. Mesa County Valley Sch. Dist. No. 51*, 53 IDELR 72 (D. Colo. 2009). The statement of PLOP should be individualized and reflect the student's unique abilities. *See Letter to New*, 211 IDELR 464 (OSEP 1987).

The standard for determining if a student has received FAPE is whether the IEP was reasonably calculated to provide educational benefit to the student. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982). While the IEP does

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<sup>18</sup> This statement is the foundation upon which the IEP team builds the remainder of the IEP. See 71 Fed. Reg. 46,662 (2006).

## Hearing Officer Determination

not have baseline data regarding SL and OT services, the goals are reasonably calculated to provide educational benefit to the student. The hearing officer finds that although the PLOP failed to establish a baseline for establishing goals and monitoring progress; the statement considers the Student's unique needs and allowed informed parental participation in the IEP process. *See, e.g., Friedman v. Vance*, 24 IDELR 654 (D. Md. 1996). Thus, the hearing officer finds the student was provided a FAPE.

### **DCPS did not fail to provide a FAPE by failing to provide compensatory services for the Student**

*Harris v. District of Columbia*, 19 IDELR 105(D. D.C. 1992), states that students with disabilities are entitled to compensatory services where they have been "deprived of special education in violation of the IDEA." Pursuant to *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005), "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."

The EC testified the student should have received compensatory education services because the number of hours of specialized instruction outside the general education setting was reduce from 28 hours per week to 25 hour per week. However, the EC did not explain how the Student was denied a FAPE by the reduction of hours (i.e. lower academic achievement). The hearing officer finds the Petitioner did not prevail on this matter because the Student was not denied a FAPE by reducing the hours of specialized instruction in the IEP.

### **DCPS did not fail to provide a FAPE by failing to determine the Student's correct disability category**

Pursuant to 34 C.F.R. § 300.8(a), a child with a disability means a child evaluated as having ID, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. Pursuant to 34 C.F.R. § 300.8(c)(1), ID means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance. Intelligence quotient ("IQ") is a measure of intellectual capacity.

In this case, the IEP team has not reviewed an adaptive measure, such as the Vineland, to determine whether the student's subaverage general intellectual functioning exists concurrently with deficits in adaptive behavior. Therefore, the student's correct disability category remains Specific Learning Disability.<sup>19</sup> Therefore, the Hearing Officer finds that DCPS did not deny the Student a FAPE by failing to change the Student's disability category.

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<sup>19</sup> The 7th U.S. Circuit Court of Appeals observed in *Heather S. v. State of Wisconsin*, 26 IDELR 870 (7th Cir. 1997), that the label affixed to a child's disability is not as important as the education and services the child receives under the IDEA. Thus, a district offers FAPE if it provides education and services that meet a student's unique needs, regardless of the student's specific category of eligibility. An IEP should not be "automatically set aside ...

**DCPS did not fail to provide a FAPE by failing to develop a BIP for the Student**

The IDEA requires that the IEP team, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324 (a)(2)(i). However, the IDEA generally gives IEP teams discretion to determine when a BIP is necessary in order for a student to receive FAPE. The failure to develop a BIP when a child needs one can result in a denial of FAPE. *See R.K. v. New York City Dep't of Educ.*, 56 IDELR 212 (E.D.N.Y. 2011).

The IDEA explicitly mandates the development of a BIP in one circumstance. If a student is subjected to a disciplinary change of placement, and the conduct is found to be a manifestation of a disability, the district must either: 1) conduct an FBA, unless the LEA had conducted an FBA before the behavior that resulted in the change of placement occurred, and implement a BIP for the child; or 2) if a BIP already has been developed, review the BIP, and modify it, as necessary, to address the behavior. 34 C.F.R. § 300.530(f).

In this case, the Student is exhibiting excellent participation and good behavior. The student has not presented any behavior that has resulted in a suspension or a change in placement. Therefore, the Hearing Officer finds the Student was not denied a FAPE by DCPS' failure to develop a BIP.

**The IEP teams should not have decreased hours of special education services outside of general education setting**

Only after the IEP has been developed does a district have a basis for determining placement.<sup>20</sup> If that process is reversed, then there is a danger of denying the student FAPE by developing an IEP to meet a predetermined setting. *Spielberg v. Henrico County Pub. Sch.*, 441 IDELR 178 (4th Cir. 1988). The IDEA requires that "a group of persons, including the parents, and other persons knowledgeable about the child, the evaluation data, and the placement options" make placement decisions. 34 C.F.R. § 300.116 (a)(1). In contrast to the detail provided about the composition of the IEP team, the IDEA does not provide any significant direction about who should make placement decisions. However, parents are essential members of the group. *See Hollenbeck v. Board of Educ.*, 441 IDELR 281 (N.D. Ill. 1988).

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for failing to include a specific disability diagnosis or containing an incorrect diagnosis." *Fort Osage R-1 School District v. Sims*, 641 F.3d 996, 1004 (8th Cir. 2011). Classification of the precise impairment listed within 20 U.S.C. § 1401(3)(A)(i) is "not critical in evaluating FAPE" and IDEA charges schools to develop an "appropriate education, not with coming up with the proper label." *Pohorecki v. Anthony Wayne Local School District*, 637 F. Supp. 2d 547, 557 (N.D. Ohio 2009) (quoting *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997)).

<sup>20</sup> Each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child. 34 C.F.R. § 300.327. In determining the educational placement of a child with a disability each public agency must ensure that the child's placement: 1) is determined at least annually; 2) is based on the child's IEP; and 3) is as close as possible to the child's home. 34 C.F.R. § 300.116(b).

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In the instant case, DCPS predetermined the student's placement.<sup>21</sup> Upon learning of the separate day school closure at the end of the 2012-2013 school year, DCPS did not convene a meeting to determine the student's placement. DCPS did not convene the IEP team until March 13, 2014. The Student had attended the self-contained class at the Elementary School for over six months before the team reconvened. At the meeting, DCPS reduced the hours of specialized instruction in order to fit the program provided at Elementary School. The Petitioner was not present at the March 13, 2014 meeting. When the IEP team reconvened with the Petitioner present, DCPS did not revisit either the placement decision or the reduction of hours of specialized instruction.

DCPS argues that *Aikens v. District of Columbia*, 950 F. Supp. 2d 186 (D.D.C. 2013) supports its argument that the move from the separate special school to the elementary school was not a change in placement. In *Aikens*, the District Court found that the student's relocation did not amount to a change in placement. The court held the district had no obligation to involve the parent in the decision or provide her with prior written notice. U.S. District Judge Rosemary M. Collyer explained that a change in setting does not constitute a change in educational placement unless the substantive differences between the two sites are substantial or material. As such, the district could move its emotional disturbance program from one school to another without parental involvement so long as the program settings were substantially similar.<sup>22</sup> However, the fact that the DCPS convened a meeting of the IEP team to change the IEP in order to conform with the program at Elementary School evinces that the programs are significantly different. However, just because the programs are different does not mean the Student was denied a FAPE. The Hearing Officer finds that the reduction in hours did not result in a denial of FAPE because the Petitioner did not present evidence that the Student did not receive benefit from the self-contained classroom program.

### **DCPS did not deny the Student a FAPE by placing the Student in a separate special education day school**

The Least Restrictive Environment ("LRE") requirement is one of the central concepts of appropriate placement under the IDEA. Compliance with the IDEA's LRE provision essentially requires that students with disabilities receive their education in the regular classroom environment to the maximum extent appropriate or, to the extent such placement is not appropriate, in an environment with the least possible amount of segregation from the students' nondisabled peers and community.

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<sup>21</sup> In *Deal v. Hamilton County Board of Education*, 42 IDELR 109 (6th Cir. 2004), when parents requested that the district fund an ABA program, the IEP team refused and indicated its policy prevented it from considering a program other than the one in which it had invested. During IEP meetings, the district allowed the parents to voice their opinion and present evidence regarding an appropriate program for their son, but it already had decided on his placement and educational methodology. The district's predetermination violation caused the student substantive harm and therefore denied him FAPE.

<sup>22</sup> The court noted that while the program was now housed within a public high school instead of being in a separate building, students enrolled in the program would not have contact with typically developing peers unless required by their IEPs. Furthermore, the court agreed with the IHO that any differences in the classroom spaces set aside for behavior management were not material or substantial. To the contrary, the court observed that the student would be receiving essentially the same program she received in the previous school. "In the absence of a 'fundamental change in' or 'elimination of' a basic element of [the student's] educational program at [the separate school] when it moved to [the high school], there has been no change in educational placement," Judge Collyer wrote.

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School districts must offer a continuum of alternative placements for students who require special education and related services. The continuum should provide the range of potential placements in which a district can implement a student's IEP. It begins with the regular classroom and continues to get more restrictive at each placement on the continuum. 34 C.F.R. § 300.115(a). The IDEA requires each public agency to ensure that:

1. 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. 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 C.F.R. § 300.114(b).

In this case, the Clinical Psychologist recommended the student be placed in a therapeutically structured classroom setting. There is nothing in the record that suggests the program a Middle School does not provide a therapeutically structured classroom setting. The student is exhibiting good participation and excellent behavior. Although, DCPS should have determined the contents of the student's IEP prior to determining placement, the current placement seems to meet the student's needs. The LRE for a child with a disability must be determined on an individual basis, based on the child's IEP.

The Petitioner requests the hearing officer to fund placement and transportation to Nonpublic School B. Although hearing officers may consider the restrictiveness of a nonpublic when determining whether that placement is appropriate, the 2d U.S. Circuit Court of Appeals explained that courts must also look at the services the private program offers. The Petitioner requests the student be placed at the Nonpublic School B. However, the Petitioner presented no evidence at hearing regarding the program at the Nonpublic School B. The only evidence provided was that the Student was accepted for the 2013-2014 school year contingent on a part-time dedicated aide be added to the IEP before enrollment. Not only does the evidence not support a need for a dedicated aide, the student has not been accepted for the current school year. Therefore, the Hearing Officer declines the relief sought by the Petitioner.

### **DCPS denied the Student a FAPE by failing to include the Petitioner in the placement determination at the March 13, 2014 IEP meeting**

The purpose of the IDEA is to provide a "cooperative process" between parents and schools, and a central component of this collaboration is the IEP process. *Schaffer v. West*, 546 U.S. 49 (U.S. 2005). The IEP is the cornerstone of the IDEA that sets forth the FAPE that is offered to a child with a disability eligible to receive special education and related services under the IDEA. *See* 34 C.F.R. § 300.17. The failure of an IEP team<sup>23</sup> to address a child's educational

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<sup>23</sup> Pursuant to 34 C.F.R. § 300.321(a), the IEP team includes the parents of the child; not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child; a representative of the public agency who is qualified to provide, or supervise the provision of, specially

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needs will likely result in a denial of FAPE. *Forest Grove Sch. Dist. v. T. A.*, 52 IDELR 151 (U.S. 2009). Therefore, the hearing officer must determine whether the IEP team's failure to make changes to the IEP resulted in a denial of FAPE.<sup>24</sup>

In this case, DCPS attempted to change the IEP to have the IEP conform to the separate classroom provided at the Elementary School. The Petitioner emphatically refused to give consent to amend the IEP outside the IEP team. DCPS then convened an IEP team meeting without the Petitioner present and reduced the hours of specialized instruction.

Generally, notice must be provided early enough so that parents have adequate time to make whatever arrangements may be required to attend. Ten school days is a customary period, given no emergent circumstances. Consistent with other requirements of the IDEA that are not regulated by specific timelines, a standard of reasonableness is applied in determining whether a notice is timely. *Letter to Constantian*, 17 IDELR 118 (OSEP 1990). DCPS states that a note was placed in the Student's book bag, a message was left on the Petitioner's voice mail and a certified letter was sent to the Petitioner. However, the Petitioner stated she did not receive the message. It does not matter whether or not the Petitioner received the message because DCPS acknowledged that the Petitioner wanted her attorney present at the IEP meeting and DCPS knew how to contact her attorney.

Pursuant to 34 C.F.R. § 300.513(a)(2), 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 regarding the provision of a FAPE to the parent's child; or caused a deprivation of educational benefit. In this case, although the failure to include the Petitioner in the IEP team meeting, the hearing officer finds that significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child. Therefore, the Petitioner prevails on this issue.

### **DCPS denied the Student a FAPE by failing to evaluate the student in all areas of suspected disability by failing to complete a Vineland Adaptive behavior Scale assessment**

Under IDEA, DCPS must ensure that a variety of assessment tools and strategies are used to gather relevant functional, developmental, and academic information about the child, including information provided by the parent. *See* 34 C.F.R. § 300.304(b)(1). DCPS must also ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic

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designed instruction to meet the unique needs of children with disabilities; is knowledgeable about the general education curriculum; and is knowledgeable about the availability of resources of the public agency; an individual who can interpret the instructional implications of evaluation results; at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and whenever appropriate, the child with a disability.

<sup>24</sup> A district's obligation to provide FAPE to a student with a disability is satisfied when the district provides the student with the personalized educational program necessary to allow the child to derive an educational benefit from that instruction. In other words, the FAPE requirement of the IDEA demands access to educational opportunity only, not the specific achievement of educational results. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982).

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performance, communicative status, and motor abilities. 34 C.F.R. § 300.304(c)(4). It is critically important to evaluate a student in all areas of suspected disability and the duty to obtain an evaluation of a child cannot be handed off to the parent. *N.B. and C.B. ex rel. C.B. v. Hellgate Elementary Sch. Dist.*, 50 IDELR 241 (9th Cir. 2008).

In the instant case, June 12, 2014 IEP team reviewed the Comprehensive Psychological assessment that states the Student had low IQ scores and recommended the student be identified as a student with ID under the IDEA. However, the IEP team correctly determined that such a diagnosis cannot be made absent an adaptive behavior measure, such as the Vineland. *See supra*. A parent form for input in to the Vineland was provided to the Petitioner at the June 12, 2014 meeting. Such information from the Petitioner is crucial because she has developmental information regarding the Student prior to the Student's school enrollment. The Petitioner provided the completed form to the DCPS school where the Student attended ESY over the summer of 2014. Unfortunately, neither party can locate the form. The Petitioner is willing to complete the form again. The information may be obtained via interview instead. In the meantime, DCPS unilaterally "cancelled" the Vineland assessment despite the IEP team requiring information from the Petitioner in order to determine the correct disability category under the IDEA.

Pursuant to 34 C.F.R. § 300.513(a)(2), 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 regarding the provision of a FAPE to the parent's child; or caused a deprivation of educational benefit. Here, the hearing officer finds that DCPS' failure to obtain the Petitioner's input in the Vineland and its failure to complete the Vineland assessment resulted in a denial of FAPE. Therefore, the Petitioner prevails on this issue.

### **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. 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." *Reid v. District of Columbia*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

The Petitioner requested 100 hours of tutoring services to redress the loss of services as a result of reducing the Student's IEP from 28 hours of specialized instruction per week to 25 hours of specialized instruction per week. However, the Petitioner did not prove how the student was harmed by the lack of specialized instruction. Despite the conclusion that the IEP was inappropriate the Hearing Officer concludes that no award for compensation for the inappropriate IEP is equitable.

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**ORDER**

- (1) Within 15 school days from the issuance of the order, DCPS shall either interview the Petitioner or obtain a completed form from the Petitioner to complete the parent portion of the adaptive behavior scale. DCPS shall also either interview the Student's teacher or obtain a completed form from the Student's teacher to complete the teacher portion of the adaptive behavior scale;
- (2) For everyday of delay by the Petitioner, DCPS shall have one day to complete the adaptive behavior scale;
- (3) Within 15 school days from completion of the Petitioner's portion of the adaptive behavior scale as described above, DCPS shall provide the Petitioner, through counsel, a copy of the adaptive behavior assessment report;
- (4) DCPS shall convene an IEP team meeting within 10 school days of delivery of the adaptive behavior assessment report, to review the assessment, discuss and determine the student's disability category, review and revise the Student's IEP, as necessary, in light of the student's most recent assessments and discuss and determine placement;
- (5) For everyday of delay by the Petitioner, DCPS shall have one day to convene the meeting; and
- (6) No further relief is granted.

**IT IS SO ORDERED.**

**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).

Date: November 8, 2014

*/s/ John Straus*  
Hearing Officer