

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on August 1, 2014, and continued on August 6, 2014, and concluded on August 14, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student is an adult who is eligible for special education with a disability classification of multiple disabilities (“MD”) including emotional disability (“ED”) and other health impairment (“OHI”). During the first semester of school year (“SY”) 2012-2013 the student attended a District of Columbia (“D.C.”) charter school (“School A”) for which DCPS is the local education agency (“LEA”).

Prior to attending School A the student attended another D.C. charter school (“School B”) that is its own LEA. The student was enrolled for ninth, tenth and eleventh grades at School B. While at School B the student’s disability classification was OHI for Attention Deficit Hyperactivity Disorder (“ADHD”). The student successfully completed ninth and tenth grade at School B, but was retained in eleventh grade at end of SY 2010-2011. The student repeated eleventh grade at School B for SY 2011-2012, during which time he had an individualized educational program (“IEP”) dated August 23, 2011, that prescribed 26 hours per week of specialized instruction inside general education, 1 hour per week of specialized instruction outside general education and 1 hour per week of behavioral support services.

Unfortunately, the student failed eleventh grade a second time. Rather than have the student repeat eleventh grade a third time at School B the student’s parents enrolled him at School A for SY 2012-2013. When the student arrived at School A after sometime after the start of SY 2012-2013 School A began implementing the IEP he brought with him from School B. On September 13, 2013, School A convened an annual IEP review meeting and updated the student’s IEP and maintained the special education services in the his prior IEP but made all his specialized instruction inside general education.

During the time the student attended School A he was living in an independent living facility (group home) and not with his parents. As a result, the student had no at home supervision to help ensure he attended school or arrived to school timely. The student started off attending School A regularly but soon began to be absent at least two days per week and was tardy to school on the days he did attend. School A communicated with the group home staff and the student’s parents regarding his absences and tardiness. On the days the student attended school he met with the School A social worker. The social worker was available to the student whenever needed to discuss the difficulties he was experiencing in and out of school including factors that were preventing him from attending school and arriving timely.

On September 28, 2012, School A issued a progress report card for the student that indicated he was failing most of his classes. On October 12, 2012, School A convened another IEP meeting and discussed the student's attendance and tardiness. The student and his parents attended the meeting. By the time of this meeting the student was age 18. The student absences and tardiness continued and by November 2012 he was at risk of failing eleventh grade a third time.

On December 3, 2012, the student's parents notified School A that they planned to place the student, effective December 4, 2012, at an out-of-state wilderness program for ten weeks. In their December 3, 2012, letter the parents stated that the student's School A IEP and placement were not adequate to meet his needs. Based upon this notification School A later withdrew the student from its school roster.

After completing the wilderness program in February 2013, at the recommendation of the wilderness program staff, the student's parents enrolled him in a residential treatment facility ("School C") where he has remained up to and including the date of this due process hearing.

In January 2013 the DCPS LEA liaison for School A became aware of the student's removal from School A and had the student reinstated to the School A roster. After DCPS' intervention an IEP meeting was held on February 7, 2013. At that meeting, the student's parents requested DCPS place and fund the student's attendance at School C. DCPS requested updated evaluations be completed to consider the student's need for a residential placement.

Over the next year while the student continued to attend School C DCPS funded part of the cost of an independent neuropsychological evaluation conducted in August 2013 and DCPS convened multiple IEP meetings to review evaluation(s) and developed a DCPS IEP for the student. The student's disability classification was changed to include ED. The IEP meetings included DCPS personnel, the student, his parents, the parent's educational consultant and School A and School C staff.

The student's current DCPS IEP was developed on February 4, 2014. Petitioners are in agreement with the content of the current DCPS IEP.² In February 2014 DCPS proposed that the student's February 2014 IEP be implemented at a full time out of general education program for ED students that is housed in the same DCPS high school building as School A. The student's parents and their educational consultant visited the DCPS proposed program and were not in agreement that it was appropriate for the student. They renewed their request that DCPS place and fund the student's continued attendance at School C.

While the student has attended School C he has been provided services pursuant to an IEP that School C staff developed and believes has been appropriate to meet the student's educational, social/emotional and transition needs. The student is due to graduate from School C with a high school diploma near the end of August 2014 and has been accepted to, and plans to attend, college starting at the end of August 2014.

² Petitioner does not dispute the student requires all services outside general education as the IEP prescribes but also asserts the student is in need of a residential placement.

On May 23, 2014, Petitioner filed the current due process complaint alleging DCPS did not provide a free appropriate public education ("FAPE") from the beginning of school year ("SY") 2012-2013 when he began attending School A and seeks reimbursement from DCPS for the student's tuition and costs for attending both the wilderness program and School C up to and until his anticipated graduation from high school at the end of August 2014. In addition, Petitioner seeks compensatory education in the form of prospective payment for a college education support program for four years at the college that the student is anticipated to attend once he graduates high school.

DCPS filed a timely response to the complaint on June 3, 2014, and asserted there has been no denial of a FAPE to the student. In its response DCPS asserted that as of April 1, 2014, DCPS agreed to reimburse the educational portion of the student's attendance at School C.

A resolution meeting was held June 2, 2014. Nothing was resolved. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on June 21, 2014, and originally ended (and the Hearing Officer's Determination ("HOD") was due) on August 3, 2014.

The Hearing Officer convened a pre-hearing conference on July 3, 2014, and issued a pre-conference order outlining, inter alia, the issues to be adjudicated. The parties filed a joint motion of continuance and extension of the HOD due date to allow for availability of all witnesses. The HOD is now due in this matter on August 25, 2014. The parties concluded the hearing on August 14, 2014, and on August 18, 2014, submitted written legal citations.

ISSUES:³

The issues to be adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to provide the student an appropriate IEP and services within a reasonable time after he entered School A at the beginning of SY 2012-2013 until December 4, 2012, when his parents removed him from School A and unilaterally placed him the out of state wilderness program.⁴
2. Whether DCPS denied the student a FAPE by failing to convene an IEP meeting (upon its receipt of the student's parents' December 3, 2012, notice stating the

³ The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

⁴ Petitioner asserts (1) upon the student's entry to School A his IEP was inappropriate because it was the same IEP that he had failed under for two years prior and School A was made aware of that when he enrolled and (2) the student should have had 100% out of general education placement and been immediately moved to such a program when he enrolled at School A.

student's IEP was inappropriate) to review and revise the student's IEP rather than simply withdrawing the student from School A's attendance rolls.⁵

3. Whether DCPS denied the student a FAPE by failing to complete the revision of the student's IEP and determine an appropriate placement and school location following a year-long reevaluation and IEP development process initiated by DCPS in January 2013.⁶

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 88 and Respondent's Exhibits 1 through 15) that were all admitted into the record and are listed in Appendix A.⁷ Witnesses a listed in Appendix B.

FINDINGS OF FACT:⁸

1. The student is an adult who is eligible for special education with a disability classification of MD for ED and OHI. (Petitioner's Exhibit 77-1)
2. At age four the student was removed from the custody of his biological mother and placed in foster care. He came to reside with his current adoptive parents in November 2003. The student was first identified for special education during elementary school. (Parent's 1's testimony, Petitioner's Exhibit 6-2)
3. During the first semester SY 2012-2013 the student attended School A, a D.C. charter school for which DCPS is the LEA. (Petitioner's Exhibit 19-1)
4. Prior to attending School A the student attended School B, a D.C. charter school that is its own LEA, where he was enrolled for ninth, tenth and eleventh grades. While at School B the student's disability classification was OHI for ADHD. The student successfully completed ninth and tenth grade at School B, but was retained in eleventh

⁵ Petitioner asserts a reasonable time to initiate a meeting would have been a week or two following School A's receipt of the letter with attempts to schedule a meeting no later than early January 2013.

⁶ Petitioner asserts the student's February 4, 2014, IEP still does not prescribe the residential program the student requires but instead only prescribes the service hours for a full time out of general education placement.

⁷ Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

⁸ The evidence that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

grade at end of SY 2010-2011. (Parent's 1's testimony, Petitioner's Exhibits 12-1, 17)

5. In 2011 the student had begun to display aggressively violent behavior with his parents and was hospitalized in 2011 as a result. The student was diagnosed with depression and anxiety and noted substance abuse. (Petitioner's Exhibit 9-1, 9-2, 9-3)
6. The student repeated _____ grade at School B for SY 2011-2012, during which time he had an IEP dated August 23, 2011, that prescribed 26 hours per week of specialized instruction inside general education, 1 hour per week of specialized instruction outside general education and 1 hour per week of behavioral support services. (Parent's 1's testimony, Petitioner's Exhibits 12-6, 17)
7. The student's IEP at School B included Emotional/Social and Behavior Development goals to address his inattention, organization skills, frustrations and difficulty completing school-work. (Petitioner's Exhibit 12-4, 12-5)
8. The student failed eleventh grade a second time because he wasn't completing his work. Rather than have the student repeat eleventh grade a third time at School B the student's parents transferred him to School A for SY 2012-2013. The student and his parent chose School A based on recommendations from friends and others from whom they sought advice regarding schools the student could attend. (Student's testimony, Parent's 1's testimony, Petitioner's Exhibit 16-1)
9. Prior to the start of SY 2012-2013 the student displayed physically aggressive behavior towards his family members. As result his parents sought out and found an independent living program where the student began residing. Thus, when the student started at School A he was residing in an independent living/group group setting. (Parent 1' testimony)
10. The student arrived at School A sometime after the start of SY 2012-2013. School A was provided the student's IEP from School B and School A began providing the student special education services. At the time of his enrollment School A was informed the student was repeating eleventh grade. The student and his parent were aware School A was special education inclusion program and no request was made by the student or his parents for any additional special education services than he had been provided at School B. (Parent's 1's testimony, Witness 5's testimony)
11. On September 13, 2013, School A convened an annual IEP review meeting and updated the student's IEP with more recent assessment data, modified some of his goals, and maintained the special education services in his prior IEP, save the 1 hour of specialized instruction per week outside general education. The student and his parent participated in the meeting and the team discussed that the student would be in an inclusion setting and the accommodations he would be provided to address his inattention, difficulty completing work and his emotional and family issues. (Parent's 1's testimony, Witness 5's testimony, Petitioner's Exhibit 19-1, 19-2, Respondent's Exhibits 4-1, 4-2, 4-3, 9-3)

12. As a result of the student living independently he had no at home supervision to help ensure he attended school or arrived to school timely. The student started off attending School A regularly but soon began to be absent at least two days per week and was tardy to school on the days he did attend. School A communicated with the group home staff and the student's parents regarding his absences and tardiness. On the days the student attended school he met with the School A social worker. The social worker was available to the student whenever needed to discuss the difficulties he was experiencing in and out of school. The social worker and the student discussed the factors that were preventing him from attending school and arriving timely. (Student's testimony, Witness 5's testimony)
13. On September 28, 2012, School A issued a progress report card for the student that indicated he was failing most of his classes. (Petitioner's Exhibit 20)
14. On October 12, 2012, School A convened another IEP meeting and discussed the student's attendance, tardiness and school performance. The student and his parents attended the meeting. By the time of this meeting the student had reached age 18.⁹ The student noted that his hour-long travel time to school contributed in his tardiness. The student's teachers discussed the student's strengths of class participation and his challenges in completing work. The student agreed to participate in after school tutoring to help improve his grades. (Petitioner's Exhibits 1, Respondent's Exhibit 5)
15. The student's special education teacher and the School A staff thereafter increased communication with the student's parents and the student's group home and would check in with the student's first period teacher at the start of the day to see if the student was present in class. (Witness 5's testimony, Respondent's Exhibit 9-10, 9-11, 9-12, 9-13)
16. During his time at School A the student's teachers found the student to be respectful. He was never a behavior problem. He always participated in class discussions and was a good reader. However, he rarely if ever did homework. The student had a serious problem getting started with his class assignments and needed to be prompted in order to complete written work. To assist the student one of the two teachers in his classes would stay with him to help him finish assignments and he was moved to a location in the classroom with fewer distractions. (Witness 5's testimony)
17. The student's attendance and tardiness continued following the October 12, 2012, IEP meeting. The student had difficulty getting school because of a lack of motivation and he felt depressed about his life and his family dynamics. He did not take advantage of the after school tutoring that School A offered him. School A's attempts to address the student's attendance issues with disciplinary measures were also unsuccessful. He did not attend afterschool detention as directed and there was one instance in which he was given a one-day school suspension. (Student's testimony)

⁹ At this point the student was responsible for his educational decision-making. However, there was no evidence as to whether a transfer of rights notice was issued to the student and his parents. The student's parent have pursued this complaint on the student's behalf pursuant to a power of attorney dated May 23, 2014. (Petitioner's Exhibit 2-8, 2-9, 2-10, 2-11)

18. In November School A issued the student a warning that he would likely not pass Spanish no matter what he did from that point. (Witness 5's testimony, Respondent's Exhibit 9-5, 9-23)
19. As result of the student's continued difficulties in and out of school the student's parents began to explore residential programs for the student. Near the end of November 2012, after consulting with professionals and having discussions with the student, his parents concluded they would immediately place the student in an out of state residential wildness program that could offer the student structure, therapy, and help with substance abuse. (Parent 1's testimony, Petitioner's Exhibits 27-1, 44-2)
20. On December 3, 2012, the student's parents sent School A a letter notifying the school that because of the student's continued absences, tardiness and resulting failing grades, despite School A's efforts, they planned to place the student in an out-of-state wilderness program. The letter stated the student would be absent for an extended period up to ten weeks starting December 4, 2012. The student's parents in the letter stated that they believed the student potentially required placement in a residential treatment facility and that his current IEP and placement were not adequate to meet his needs. The parents also stated that they welcomed School A's assistance in determining the next steps for the student's education. (Parent 1's testimony, Petitioner's Exhibit 25, Respondent's Exhibit 9-24)
21. In response to the parent's December 3, 2012, letter the student's special education teacher suggested to the student's parents that the student be withdrawn from the school's roster to prevent him from failing his classes due to excessive absences and that when he completed his program he could re-enroll. (Respondent's Exhibit 9-24)
22. In January 2013 the DCPS LEA liaison for School A became aware of the student's removal from School A and had the student reinstated in the School A roster. The student's parent later wrote School A and requested an IEP meeting and put School A on notice that he was rejecting the student's IEP and intended to place the student in a residential program. After DCPS' intervention a meeting was held on February 7, 2013. The student's parents requested DCPS place and fund the student's attendance at School C. DCPS requested updated evaluations be completed to consider the student's need for a residential placement. (Parent 1's testimony, Petitioner's Exhibits 30, 31, 32-1)
23. At the wilderness program the student was provided therapy and life skill training and some academics. As a result of his time in the wilderness program the student learned to take greater responsibility for his life and make better choices. The student expected to return home following his completion of the program in early February 2012. However, the professional therapeutic staff at the wilderness program recommended that the student not return to home but needed to continue in a therapeutic program for at least another year. These recommendations were made to the DCPS liaison for School A in a February 8, 2013, letter, at the request of the student's parents. (Student's testimony, Petitioner's Exhibit 32-2, 32-3, 32-4)

24. After completing the wilderness program in February 2013, at the recommendation of the wilderness program staff, the student's parents enrolled him in School C where he has remained up to and including the date of this due process hearing. (Parent 1's testimony, Student's testimony)
25. Over the next year while the student continued to attend School C DCPS funded part of the cost of an independent neuropsychological evaluation conducted on the student in August 2013 and DCPS convened multiple IEP meetings to review evaluation(s) and develop a DCPS IEP for the student. The student's disability classification was changed from OHI to ED. The IEP meetings included DCPS personnel, the student, his parents, the parents' educational consultant and School A staff. DCPS convened IEP meetings on March 22, 2013, May 23, 2013, September 17, 2013, October 29, 2013, January 17, 2014, and February 4, 2014. (Parent's 1's testimony, Petitioner's Exhibits 41, 42, 43, 44, Respondent's Exhibit 3)
26. The neuropsychological evaluation conducted of the student in August 2013 concluded the student has average cognitive abilities and his language based academic skills were "fairly intact." The student's math skills reflected a Mathematics Disorder. The evaluation confirmed the student's attention issues, difficulty managing anger and mild to moderate depression. The evaluator recommended the student's continued placement at School C given that he had made a positive adjustment to the program and had been succeeding in a school setting for the first time in last few years and that a placement in a less restrictive setting at that time would likely result in the student's return to at risk behaviors he displayed while attending his previous schools. (Petitioner's Exhibit 44-3, 44-9, 44-10, 44-11, 44-12)
27. A DCPS school psychologist reviewed the student's neuropsychological evaluation and participated in at least one of the student's IEP team meetings. The DCPS psychologist noted that as to the student's disability classification the IEP team's opinion was divided. The student's family and School C believed the student qualified for the ED classification because of his anxiety. In the end the team agreed on the ED classification. The DCPS psychologist would not have recommended the student for a residential placement as she believed the student's issues could have been addressed in a public program with sufficient supports and staff trained to address students concerns. However, it was apparent from the neuropsychological evaluation the student had made improvements since attending School C. (Witness 4's testimony)
28. The student's current DCPS IEP was developed on January 17, 2014, and was amended February 4, 2014. Petitioners are in agreement with the content of the current DCPS IEP. However, they believe the student's appropriate placement is a residential setting and desire the student remain at School C. In February 2014 DCPS proposed that the student's IEP be implemented at a full time out of general education program for ED students that is housed in a DCPS high school. The student's parents and their educational consultant visited the DCPS proposed program and were not in agreement

that it was appropriate for the student. They renewed their request that DCPS place and fund the student's continued attendance and School C. (Parent's 1's testimony, Witness 2's testimony, Petitioner's Exhibits 57, 59)

29. While the student has attended School C he has been provided services pursuant to an IEP that School C staff developed and believes has been appropriate to meet the student's educational, social/emotional and transition needs. The student is due to graduate from School C with a high school diploma near the end of August 2014 and has been accepted to, and plans to attend, college starting at the end of August 2014. (Witness 1's testimony, Witness 2's testimony)
30. At School C the student has progressed academically and earned passing grades in every course he has attempted. At School C he has engaged in extracurricular activities. He has taken and passed a college level course at an area community college. He has also engaged in individual and group therapy and has performed well based upon School C's behavioral management system. The student is pleased with his progress since being in wilderness program and since attending School C and he is excited about attending college starting at the end of August 2014. (Student's testimony, Petitioner's Exhibits 47-4, 63-2)
31. School C has 105 students: 83 residential students and 22-day students. All students at School C have IEPs. The school is separated into three separate programs: (1) a self-contained transitional program, (2) a general studies program and (3) a college preparatory program in which the student is now enrolled. The college preparatory program is School C's smallest program with 30 to 45 students in grades 10, 11 and 12. (Witness 1's testimony)
32. School C has a therapeutic behavior management system under which students' behaviors are measured on a point scale. At the most restrictive level (Level 1) students are not permitted any alone time due to safety concerns. At the least restrictive level (Level 5) a student is allowed significant privileges including being allowed to engage in activities off-campus without supervision. A student must be at Level 4 for 100 days before being allowed to apply for Level 5 privileges. During the student's time at School C he has earned Level 5 but is currently on Level 4 due to some recent academic issues. (Witness 1's testimony, Petitioner's Exhibit 54)
33. When the student first entered School C he was in the general studies program where there are generally eight to twelve students per classroom. All classrooms have a teacher and assistant. In the general studies program the student transitioned to different teachers for each class. Some teachers at School C are special education certified and some are general education teachers. While in the general studies classroom the student had some verbal aggression and minor physical aggression. However, the student can now focus on his academic and has fewer problems with frustration tolerance. (Witness 1's testimony)
34. The student will continue to need some level of academic supports in math and writing

and will need time management, organization support and some level of therapeutic intervention including group or individual therapy. The student has now moved from general studies to college preparatory program. The student asked for the change and he was told his behavior would be monitored and he was successful and was placed in college preparatory program in the second term of this school year. (Witness 1's testimony)

35. The student's progress since he began at School C has been dramatic. He takes greater responsibility for his actions rather than externalizing responsibility on others. He is now pleasant to be around. His level of depression has moderated and there has been a significant decrease in impulsivity related to his ADHD. He engages with peers and is respectful of adults and has progressed through School C's behavior management system. The student's being in a residence program has been helpful. Outpatient therapy would not have been effective for him. At School C there is no artificial division of school and home and there is around the clock support. This clinical approach has had a positive and necessary impact on the student's educational progress. His attention issues and his need for medication for depression will probably be an ongoing concern. After high school the student will need some academic support and continued accommodations. (Witness 3's testimony)
36. The student's parents incurred the costs of the student's attendance at the wilderness program in the amount of \$34,347.60 for the ten-week program and incurred the cost of the student's travel and the parents' travel to and from that program in the amount of \$2,001.69. (Parent 2's testimony, Petitioner's Exhibit P84)
37. The student's parents have incurred the costs of the student attendance at School C. Since the student began attending School C his tuition and fees have been approximately \$11,000 per month. Since January the student's parents have been paying only \$2,000 per month and have been allowed by School C to carry debt until it can be satisfied. To date the student's parents have paid in tuition and fees for the student to attend School C \$139,233.99 and still owe the school \$70,239.76 through the end the student's current school year due to conclude by the end of August 2014. The total amount that the student's parents have paid and/or are obligated to pay School C for the student's attendance there is approximately \$209,500. (Parent 2's testimony, Petitioner's Exhibit 85)
38. In order to pay the costs of the student's attendance at the wilderness program and then at School C the student's parents have used an equity line of credit on their home and have incurred interest in doing so. In addition to the costs of the student's tuition and fees of attending School C the student's parents have incurred the costs of the student's travel to and from his parent's home and School C in the amount of \$7,773.72. For the first half year at School C the student did not have home visits but since then the student has had six separate school vacation breaks. (Parent 2's testimony, Petitioner's Exhibit 85)
39. DCPS has expressed a willingness to reimburse the student's parents for the educational tuition and fees for the student's attendance at School C from August 2013 through

August 2014. (Respondent's Exhibit 1)

40. In April 2013 the student parents hired an educational consultant to assist them in determining an appropriate school placement for the student and to assist them in the IEP meetings with DCPS and any anticipated due process hearing. The consultant reviewed the student's educational records and assessments and spoke with the student over the phone and with staff at School C and the student's most recent evaluator. The consultant participated in the IEP meetings with the parents after April 2013. (Witness 2's testimony)
41. After the multiple IEP meetings with DCPS the parent's consultant has concluded that the student's DCPS IEP as of February 2014 is satisfactory and fully addresses the student's special education needs except for the identified location of services. The parent's consultant opined that the student continues to need a residential placement and that the DCPS proposed placement that he and the student's parents visited in the DCPS high school is inappropriate because the student would be exposed to the same environmental conditions and issues that resulted in his academic and social and emotional decline when he attended School A. (Witness 2's testimony, Exhibit 32-3)
42. The parents' consultant has developed opinions as to the student's educational functioning and needs based upon his review of the student's evaluations, educational data and his communication with the student and the teachers and staff of School C. The consultant opined that the student's IEPs in his last two years at School B and his semester at School A, that focused on his challenges with math, written language and attention, were virtually identical and did not adequately address the student's emotional difficulties. The consultant advocated for the student's disability classification to include ED during the IEP meetings with DCPS and the consultant believes that student's current IEP goals adequately address the student's emotional concerns. (Witness 2's testimony)
43. The parents' consultant opined that School A should have conducted a review of the student's educational experiences when he first enrolled at School A and realized the student was attempting eleventh grade for the third time. In his opinion School A missed an opportunity at the September 13, 2012, IEP meeting to seek additional evaluations and consider the possibility of a different disability classification. In his opinion at the October 12, 2012, meeting the IEP team should have explored the causes for the student's absences and tardiness and ordered additional evaluations. At that point the student's academically failure was apparent and School A was on notice that the student was in need of a more restrictive placement to address both his academic and social/emotional concerns. (Witness 2's testimony, Petitioner's Exhibit 82)
44. The student's parents' intervention in December 2012 of placing him at the wilderness program, where his acute social/emotional concerns could be addressed, was an appropriate action in light of the student's apparent trajectory of failing the eleventh grade for the third time and School A's ineffectiveness in addressing his academic decline. The consultant opined that that School A did not provide the student appropriate special education services and the student's educational needs could have been addressed

with additional IEP goals and services in a more restrictive academic setting. (Witness 2's testimony)

45. The parent's consultant opined that the student's transition goals have not been fully met during his time at School C and had the student been provided appropriate special education services while he attended School A he would have been more available for learning and would not have suffered the degree of emotional and academic decline he experienced. The consultant opined that the harm to the student from his time at School A is still present and the harm as well as the student's current gap in transition skills can be compensated for by additional services when he attends college. The consultant identified a program at the college the student anticipates attending that can assist the student in academic coaching, appropriate school behavior, study skills and assistive technology and is taught by staff familiar with students with special needs. The consultant opined that the student needs four years of this support at a cost of \$11,750 for the first year and \$8450 for subsequent years. (Witness 2's testimony, Petitioner's Exhibit 83)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. ¹⁰ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the

¹⁰ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied the student a FAPE by failing to provide the student an appropriate IEP and services within a reasonable time after he entered School A at the beginning of SY 2012-2013 until December 4, 2012, when his parents removed him from School A and unilaterally placed him the out of state wilderness program.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student’s IEP at School A at least as of the October 12, 2012, IEP meeting was inappropriate and the student as of that point was in need of more intense special education services.

“The IEP is the “centerpiece” of the IDEA’s system for delivering education to disabled children,” *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (*quoting Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch .Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act. " *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.” *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009).

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34C.F.R. § 300.550; see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision (1) is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; (2) is made in conformity with the Least Restrictive Environment (“LRE”)

provisions of the IDEA that mandate that to the maximum extent possible, disabled children are to be educated with their nondisabled peers and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; (3) is determined annually; (4) is based on the child's IEP; and (5) is as close as possible to the child's home. 34 C.F.R. 300.114, 34 C.F.R. 300.116.

“Educational placement” means educational program, not the particular institution where that program is implemented.” *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003), 39 IDELR 182. A placement is not a physical location, but a program of educational services offered to the student. *Sherri A.D. v. Kirby*, 19 IDELR 339 (5th Cir. 1992).

The “educational placement” consists of: (1) the education program set out in the student's IEP, (2) the option on the continuum in which the student's IEP is to be implemented, and (3) the school or facility selected to implement the student's IEP. *Letter to Fisher*, 21 IDELR 992 (1994).

The evidence demonstrates that when the student entered School A he brought with him an IEP that prescribed virtually all services in an inclusion setting. The evidence demonstrates that the student and his parents were aware that inclusion was the special education model School A used and they willingly chose the school. At the September 13, 2012, IEP meeting School A staff had a full discussion with the student and his a parent of the student's educational strengths and challenges and put accommodations in place to assist the student. The testimony of the special education teacher supports a conclusion that School A's efforts resulted in an IEP that was reasonably calculated at the time of this IEP meeting to provide the student educational benefit.¹¹

However, as of the October 12, 2012, IEP meeting it had become apparent that the student was consistently missing school and when he did come he was arriving late. At this point School A stepped up its communications with the student's parent and his group home regarding the student's attendance and tardiness. However, there was no action at that point to determine if the student's behaviors were related to his disability and whether he was in need of additional services. Although the student testified he had regular access to the school social worker and talked with her about his concerns regularly there is no indication that the student's time with the school social worker made any difference in the student's behaviors.

There is no indication that School A conducted, for instance, a behavior assessment or attempted to implement a behavior intervention plan. The Hearing Officer concludes that as of this second IEP meeting School A was remiss in not taking more effective and affirmative measures to address the student's behaviors through his special education programming or at least initiate assessments to determine the cause and potential solution to the student's behaviors and resulting academic failure. In this case the Hearing Officer concludes that School A's sense of urgency

¹¹ The Hearing Officer was not convinced by Petitioners' expert witness' testimony that School A should have been on notice to conduct evaluations of the student or explore at this point another disability classification. The student's failure at his previous school was not in the Hearing Officer's opinion a significant enough basis at this point to evaluate the student or change his special education services or placement.

with regard to the student's academic decline was lacking. The evidence demonstrates that the student's school absences and tardiness continued and eventually School A notified him he was perhaps in danger of failing eleventh grade for a third time. As result, the Hearing Officer concludes that the student's School A IEP at the point of this second IEP meeting was no longer reasonably calculated to provide the student educational benefit and additional action and services by School A were warranted. School A and the LEA should have taken action beyond what was done to address the student's school attendance, tardiness, and lack of work completion. School A's failure to act more proactively resulted in a denial of a FAPE to the student.

The evidence also demonstrates that as of December 3, 2014, the student was not capable of living at home with his parents or independently or in a group home setting and remaining available for learning and demonstrates that a residential placement at that point was appropriate. The Hearing Officer concludes that student's parents were justified in taking the action they took on December 4, 2012, to remove student and place him in a more appropriate setting.

The Hearing Officer concludes based upon the evidence that the that student's ten weeks at the wilderness program provided him the intense social and emotional services as well as academic instruction that the student was in need of when he left School A in December 2012. The Hearing Officer concludes that equity warrants that the costs to the student's parents placing him in the 10 week wilderness program be reimbursed given School A's and thus the LEA's lack of appropriate measures to stem the tide of the student's academic and social and emotional decline while he was attending School A.

In addition, the evidence demonstrates that the student has continued to be in need of a residential placement following his completion of the wilderness program and the student has been provided educational benefit during his attendance at School C.¹² The evidence demonstrates that School C satisfies the factors a Hearing Officer must consider in determining an education school placement.¹³

ISSUE 2: Whether DCPS denied the student a FAPE by failing to convene an IEP meeting (upon its receipt of the student's parents' December 3, 2012, notice stating the student's IEP was inappropriate) to review and revise the student's IEP rather than simply withdrawing the student from School A's attendance rolls.

Conclusion: Petitioner did not sustain the burden of proof that School A's failure to convene an IEP meeting following the parent's December 3, 2012, letter was a denial of a FAPE to the

¹² FOF #s 29 through 37

¹³ A hearing officer or court may award a prospective private placement as relief to ensure that a child receives the education required by the IDEA in the future where a balance of the relevant factors justifies such a placement. In addition to the conduct of the parties, which is always relevant in fashioning equitable relief, the following factors must be balanced before awarding such relief: the nature and severity of a student's disability; the student's specialized individual educational needs; the link between those needs and the services offered by the private school; the private school placement's costs; and the extent to which the placement represents the least restrictive environment. *Branham ex rel. Branham v. District of Columbia*, 427 F. 3d 7; 44 IDELR 149 (D.C. Cir. 10/25/05).

student by the LEA.

The evidence demonstrates that the parents' letter to the School A clearly indicated that the student would be absent from School A for an extended time as they were placing him in an out of state wilderness program. School A responded to the letter by indicating that to prevent the student's failing courses it would withdraw the student and allow him to reenroll upon his return. Although the parent in that letter was open to suggestions from the school the letter did not specifically request an IEP meeting.

On January 31, 2013, the parent specifically requested an IEP meeting. Once the LEA became aware of the student's situation the LEA acted within weeks to ensure the student was reenrolled and a meeting was held and thereafter IEP meetings were convened. The Hearing Officer does not conclude that the School A's actions or the length of time in LEA's response to the parent's specific request for an IEP meeting amounted to a denial of FAPE to the student or significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to complete the revision of the student's IEP and determine an appropriate placement and school location following a year-long reevaluation and IEP development process initiated by DCPS in January 2013.

Conclusion: Petitioner did not sustain the burden proof by a preponderance of the evidence that the student's lack of a DCPS IEP during the year that Petitioners and DCPS met to finalize the student's IEP resulted in a denial of a FAPE to the student.

Pursuant to 34 C.F.R. § 300.323 at the beginning of each school year, each public agency must have an IEP in effect for each child with a disability within its jurisdiction.

Although it took from February 2013 to February 2014 for DCPS to develop the student's current IEP, the evidence demonstrates that the student has during that time had an IEP at School C that effectively addresses his needs. In addition, the Petitioners' expert testified that he provided significant input into the student's current DCPS IEP and agrees that it sufficiently addresses the student's needs except for the location in which DCPS proposed to implement the IEP. There was testimony presented that DCPS had proposed a program located at a DCPS school and that Petitioners as well as their expert witness were not in agreement that the program was appropriate for the student. There was no evidence presented by DCPS as to a specific program and the evidence otherwise presented as to the student's current DCPS IEP is that it can and should be implemented in the residential program that the student currently attends. Therefore, the Hearing Officer does not conclude that the student current DCPS IEP developed in February 2014 is inappropriate.

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*, 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.

Based upon the evidence and conclusions herein the Hearing Officer has determined that from October 12, 2012, to December 4, 2012, when the student was placed by his parents in the wilderness program, the student was denied a FAPE and for this two month period the student had an inappropriate special education program. The evidence demonstrates that the student has since then made significant academic and social and emotional progress and as of the date of due process hearing had been accepted to college and was soon to graduate high school.

The Hearing Officer is incredulous at the portion of Petitioners' expert's testimony that the student requires four years of college supports after high school to compensate for two months in an inappropriate program. The expert witness along with the School C staff and his parents lauded the student's progress in the wilderness program and at School C and the student's anticipated completion of high school is evidence that any denial of a FAPE has been rectified and the student is certainly where he would have been, if not further, than had a denial of a FAPE not occurred. While there was testimony that the student still has unachieved transition goals there was insufficient evidence that any denial of a FAPE resulted in or caused this gap. Accordingly, the Hearing Officer does not grant the requested relief for compensatory education.

ORDER:¹⁴

1. DCPS is hereby ordered to reimburse the student's parents the total costs of the student's 10 week participation in the Legacy program that the student attended from approximately December 4, 2012, to February 7, 2013, within thirty (30) calendar days of its receipt from Petitioners of proof of payment for those services consistent with the amounts that have been determined in the decision above to have been expended by the student's parents for the student's participation in that program.
2. DCPS is hereby ordered to reimburse the student's parents the costs¹⁵ of the student's tuition and residency and fees at the Chamberlain School from the time

¹⁴ Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

¹⁵ Petitioners assert that they have incurred the interest costs for tapping an equity line of credit on their home in

he began attending the school from approximately February 23, 2013, through his completion of the 2013-2014 school year up to and including August 31, 2014, (or whenever the student completed his course of study at the school prior to that date) within thirty (30) calendar days of its receipt from Petitioners of proof of payment consistent with the amounts that have been determined in the decision above to have been expended by the student's parents for his attendance at the school.

3. DCPS is hereby ordered to reimburse the student's parents the costs of the student's transportation to and from the Legacy program and his reasonable transportation costs to and from the Chamberlain School as consistent with DCPS/OSSE policy for transportation costs for students and/or parents transportation to and from a residential treatment facility during the time the student attended the Chamberlain School from approximately February 23, 2013, through his completion of the 2013-2014 school year up to and including August 31, 2014, (or whenever the student completed his course of study at the school prior to that date) within thirty (30) calendar days of its receipt from Petitioners of proof of payment of the travel expenses consistent with the amounts that have been determined in the decision above to have been expended by the student's parents.
4. DCPS shall within ten (10) school days of the issuance of this order convene an IEP team meeting for the student to review the student's IEP and placement and determine the student's location of services for SY 2014-2015 or whether the student's special education services have concluded due to his graduation from high school.
5. All other requested relief is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: August 25, 2014

order to pay the costs of the student's tuition and fees. The reimbursement shall include the reasonable interests expense if the expense can be documented as having been applicable to the tuition and fees incurred for the student during the period of his attendance from February 2012 to August 2014.