District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
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Confidential

OSSE
STUDENT HEARING OFFICE
2012 NOV 27 AM 9:13

Adult Student[1], Petitioner, v. District of Columbia Public Schools ("DCPS") Respondent.	REVISED HEARING OFFICER'S DETERMINATION Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

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 for one day on November 16, 2012, at the Office of the State Superintendent ("OSSE") Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student (alternatively "Petitioner") is a resident of the District of Columbia who has been determined eligible as a student with a disability under IDEA with a classification of multiple disabilities ("MD") including emotional disturbance ("ED") and other hearing impairment. ('OHI") for Attention Deficit Hyperactivity Disorder ("ADHD"). The student currently attends a District of Columbia public charter school hereinafter referred to as ("School A") in tenth grade. The District of Columbia Public Schools ("DCPS") is the local educational agency ("LEA") for School A. Prior to attending School A the student another District of Columbia public charter school, hereinafter referred to as "School B."

The student began attending School A in ninth grade during school year ("SY") 2009-2010. The student was retained in ninth grade at the end of SY 2009-2010 and was promoted to tenth grade at the end of SY 2010-2011 with a grade point average ("GPA") of 1.5. The student was retained in tenth grade at the end of SY 2011-2012 and is repeating tenth grade in SY 2012-2013.

The student's current individualized educational program ("IEP") developed on May 22, 2012, at School A prescribes twenty (20) hours per week of specialized instruction inside general education (inclusion services) and one hour per week of behavioral support services outside general education. The student attended his May 22, 2012, IEP meeting. This was the first IEP meeting held for the student since he became age eighteen. His parent did not attend the meeting.

On September 12, 2012, Petitioner, though counsel, filed the current due process complaint. Petitioner alleges he was retained in ninth grade at the end of SY 2009-2010 and failed several subjects during SY 2010-2011 even though he was promoted from ninth grade to tenth grade at the end of that school year and retained again in tenth grade at the end of SY 2011-2012. Petitioner asserts that after his academic failures and retentions DCPS did not make warranted changes to his IEP to increase services and his retentions and academic failure are evidence that DCPS should be providing him full-time special education services (specialized instruction throughout the school day delivered outside general education). Thus, Petitioner alleges the May 22, 2012, IEP[2] is inappropriate and results in a denial of a free and appropriate public education

[2] The Hearing Officer ruled during the pre-hearing conference ("PHC") that the complaint alleges that the May 22, 2012, IEP is inappropriate and any challenge of the student's previous IEPs was not expressly alleged in the complaint and would require the complaint be amended. Petitioner's counsel stated during the pre-hearing

("FAPE"). Petitioner alleges that his IEP is inappropriate because it does not prescribe full-time special education services outside general education. Petitioner is not challenging the goals in the IEP only the number of services hours of both specialized instruction and behavior support. Petitioner seeks as relief that the Hearing Officer order place the student at High Road School with DCPS funding.[3]

Petitioner also alleged DCPS failed to conduct triennial reevaluations and failed to provide him prior notice of the May 22, 2012, IEP meeting, but simply pulled him from class to participate in the meeting and did not inform his parent of the meeting or reschedule the meeting so she could attend. Petitioner also alleges DCPS did not provide him and/or his parent the notice of transfer of rights during the development of the student's June 9, 2011, IEP or thereafter.

DCPS filed a response to the complaint on September 17, 2012, and asserted that proper notice of the May 22, 1012, IEP meeting was provided to the parent and/or the student. DCPS asserted the transfer of the student's educational rights to the student occurred automatically and even if no notice was provided there was no denial of a FAPE as a result. DCPS maintained that the student's IEP developed at the May 22, 2012, meeting is appropriate as well as his continued placement at Chavez.

A resolution meeting was held September 28, 2012. The parties were able to resolve the issue related to the triennial re-evaluation. DCPS agreed to provide the student twenty (20) hours of independent tutoring and agreed to fund an independent comprehensive psychological evaluation. As to the unresolved issues the parties agreed to proceed to hearing and to allow the full 30-day resolution period to expire before the 45-day timeline began. Thus, the 45-day period began on October 13, 2012, and ends (and the HOD is due) on November 26, 2012.

The Hearing Officer conducted a pre-hearing conference on October 15, 2012, at which the issues to be adjudicated were discussed and determined. The parties acknowledged that DCPS has agreed to fund an independent comprehensive psychological evaluation and provided the parent written authorization to obtain the evaluation. On October 18, 2012, the Hearing Officer issued a pre-hearing order outlining, inter alia, the issues to be adjudicated.

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conference ("PHC") that based on this ruling he desired to proceed with the current complaint without amendment.

[3] The complaint noted that he was seeking compensatory education for the student having an inappropriate IEP and being in an inappropriate placement since the May 22, 2012, IEP meeting. During the PHC and in the pre-hearing conference order the Hearing Officer directed Petitioner's counsel to file a written compensatory education proposal by November 5, 2012. Petitioner's counsel did not file a proposal by that date and at the hearing stated that Petitioner was not seeking compensatory education at this hearing.

ISSUES: [4]

The issues to be adjudicated are:

1. Whether DCPS denied the student a FAPE violating 34 C.F.R §300.520 and/or 34 C.F.R. §320 (c) by failing to provide Petitioner notice of transfer of rights.

2. Whether DCPS denied the student a FAPE violating 34 C.F.R § 300.503 by failing to provide the student and/or his parent prior notice of the May 22, 2012, IEP meeting.

3. Whether DCPS denied the student a FAPE violating 34 C.F.R §300.114 and/or §300.116 and/or §300.320 (a) by failing to develop and provide an appropriate IEP and educational placement as of the May 22, 2012, IEP meeting that prescribes full-time special education services (specialized instruction throughout the school day delivered outside general education) and by continuing his educational placement at School A rather than in a full-time special education program.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-17 and DCPS Exhibit 1-32) that were admitted into the record and are listed in Appendix A. Any documents not admitted into the record are so noted in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: [5]

1. The student is a resident of the District of Columbia who has been determined eligible as a student with a disability under IDEA with a classification of MD including ED and OHI for ADHD. (Petitioner's Exhibit 1-1, Respondent's Exhibit 31-1)

2. The student currently attends School A, a District of Columbia public charter school in tenth grade. DCPS is the LEA for School A. (Petitioner's Exhibit 1-1)

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[4] The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order do not directly correspond to the issues outlined here. Hearing Officer restated the issue(s) in the pre-hearing conference order and at the outset of the hearing and the parties agreed that these are the issue(s) to be adjudicated. During the 10/15/12 PHC Petitioner's counsel acknowledged that the issue regarding triennial reevaluation(s) had been resolved and was no longer an issue to be adjudicated.

[5] The evidence that is the source of the finding of fact 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 both parties separately the Hearing Officer may only cite one party's exhibit.

3. The student began attending School A in ninth grade during school year SY 2009-2010. The student was retained in ninth grade at the end of SY 2009-2010 and was promoted to tenth grade at the end of SY 2010-2011 with a GPA of 1.5. Prior to attending School A the student, School B, another District of Columbia public charter school. (Student's testimony, Petitioner's Exhibits 11 & 12)

4. On June 9, 2011, DCPS convened an IEP meeting at which the student's IEP was reviewed. The IEP continued the number of service hours the student had been provided in the IEP that had been in effect during SY 2009-2010 when he failed ninth grade and was retained. (Petitioner's Exhibit 2-1, 2-6)

5. The student was retained in tenth grade at the end of SY 2011-2012 and is repeating tenth grade in SY 2012-2013. (Petitioner's Exhibits 10 &13)

6. The student's current IEP developed on May 22, 2012, at School A prescribes twenty (20) hours per week of specialized instruction inside general education (inclusion services) and one hour per week of behavioral support services outside general education. The student is on a high school diploma track. The IEP includes goals in the areas of math, reading and written expression, emotional/social and behavioral development. The least restrictive environment ("LRE") section of the IEP states that only the behavioral supports services are to be provided outside general education. The number service hours in the student's IEP and the location of the services were not changed from the previous IEP. (Petitioner's Exhibits 1-1, 1-7, 1-8, 1-17, 2-6)

7. Prior to the May 22, 2012, IEP meeting several of the student's teachers filled out surveys commenting on the student's academic performance in their respective courses. Although all the teachers noted the student had solid academic skills, the student's then current grade performance was below average and in some classes he was failing. The teachers noted the following interventions had been initiated: tutoring, detention, behavior management techniques and modification of academic materials. The teachers noted in the surveys that the student had difficulty completing written work assignments, lacked self-control, and was easily frustrated and distracted in class. (Petitioner's Exhibits 3, 4, 5, 6)

8. The student attended his May 22, 2012, IEP meeting. This was the first IEP meeting held for the student since he became age eighteen. His parent did not attend. One of the student's teachers came and got the student out of class and told him he had a meeting. He was not aware of the meeting beforehand. He went into the meeting and listened as the participants talked about his IEP. He asked no questions and felt that everyone else was doing the talking. He understood some of what was going on but did not understand all that was discussed. The student asked whether his mother was coming to the meeting and was told that the school staff had tried to contact her. The student concluded that their attempts were unsuccessful because his parent did not show up. No one told the student beforehand that his parent did not have to participate in his IEP meetings anymore after he turned eighteen. (Student's testimony)

9. On September 12, 2012, Petitioner, through counsel, filed the current due process complaint. At the resolution meeting held September 28, 2012, the parties were able to resolve some of the issues raised in the due process complaint. DCPS agreed to provide the student twenty (20) hours of independent tutoring and agreed to fund an independent comprehensive psychological evaluation. As to the unresolved issues the parties agreed to proceed to hearing. (Respondent's Exhibit 2)

10. On October 11, 2012, Joy D. Nagorniak, Psy.D., conducted the independent comprehensive psychological evaluation of the student. The student was age 18 years 7 months at the time of the evaluation. The evaluation assessed the student's cognitive abilities, academic achievement and social/emotional functioning. The student's overall intellectual abilities were assessed to generally be in the average range with strengths in non-verbal reasoning and a weakness in processing speed. The student's academic abilities were assessed in the low average range. His academic skills appear to be fairly well developed with a good foundation of academic skills. His academic scores in the evaluation assessments are commensurate with his intellectual functioning. (Dr. Nagorniak's testimony[6], Petitioner's Exhibit 7-1, 7-6, 7-13, 17-14, 7-17)

11. Dr. Nagorniak's talked with some of the student's teachers and they all indicated the student was bright and participated in class discussions but fell short in turning in assignments and thus was not passing his courses. Dr. Nagorniak found the student to be likeable and well spoken in the school environment but displaying a level of emotional disturbance – with frequent flare-ups in school that interfere with his ability to get through his school day and finish his assignments. (Dr. Nagorniak's testimony)

12. The social/emotional assessments Dr. Nagorniak administered consisted of several rating scales and a projective measure. The student earned elevated scores for depression and anxiety on the assessments. The student demonstrated feelings and thoughts that are atypical indicating school problems and attention problems and low levels of self-reliance. To the evaluator the student appeared to be struggling academically and the student also viewed himself as struggling. Dr. Nagorniak diagnosed the student with ADHD, mood disorder and anxiety disorder and recommended changes to his current IEP to include a therapeutic setting with smaller class sizes, more staff, more individualized attention, trained mental health clinicians and more structure with fewer distractions than the student's current school has so that he can succeed consistent with his abilities. (Dr. Nagorniak's testimony, Petitioner's Exhibit 17-13, 17-14)

13. On the October 11, 2012, Woodcock Johnson-III Dr. Nagorniak administered the student had the following scores:

    (Petitioner's Exhibit 7-17)

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[6] This witness was qualified as an expert in the area of clinical psychology and conducting psychological evaluations. Dr. Nagorniak was qualified as an expert in psychological evaluations and the Hearing Officer considered her opinion as to the student's educational placement.

	Standard Score	RPI[7]	Age Eq.	Percentile Rank
Broad Reading	86	59/90	12-11	17
Broad Math	91	78/90	14-4	27
Broad Written Language	94	84/90	14-11	35
Math Calculation Skills	87	76/90	13-4	19
Written Expression	94	84/90	14-5	35
Academic Skills	90	74/90	14-3	26
Academic Fluency	79	62/90	12-1	8
Academic Applications	96	86/90	16-2	39

14. The student received the following grades during the first advisory of SY 2012-2013 at School A:

Petitioner's Exhibit 10)

Subject:	Adv 1	Adv 2	Adv 3	Adv 4	Exam	Final
Language/Composition	C-					
English II	F					
Biology	F					
Algebra II	C-					
World History II	F					
Collegiate Prep	C					
Spanish I	F					
Geometry	F					

[7] RPI: The relative proficiency index - proficiency with similar tasks that average individuals in the comparison group (grade) would perform with 90% proficiency.

15. On October 29, 2012, a DCPS psychologist reviewed Dr. Nagorniak independent comprehensive psychological evaluation and agreed with the findings. On November 1, 2012, DCPS convened an IEP team meeting to review the evaluation. The student and his parent attended the meeting. The team members discussed the evaluation results and the recommendations and what actions could be taken by the student and School A to address the concerns raised in the evaluation report. (Petitioner's Exhibits 8 & 17)

16. The student believes he performed better academically at his previous school, School B. There he had classes with about 11 or 12 students and two teachers in the classroom to assist students in getting work done. The student had a bad transition his first year at School A. He was used to the teachers applying pressure to get him to complete classroom assignments and he did not get that kind of prodding at School A. The teachers simply said that he had to make up the class work without, what he considered to be, sufficient structure for him to do so. The student believes the curriculum and grading system at School A doesn't work in his interest because in his opinion 75% of the work needs to be presented in outcomes and in writing which he has difficulty doing. The student believes he cannot format writing in paragraphs like most students and this is a problem he has repeatedly told School A staff about but feels the school did little to assist. (Student's testimony)

17. The student wants to get his high school diploma and to make a better life for himself. He has visited High Road School ("High Road") and thinks High Road will work better for him because of its smaller class with fewer students and because High Road appears to better accommodate students' different learning and performance styles. The student feels he needs to be allowed to work in a way he is best able to show his knowledge and ability and with these accommodations he can earn high school diploma. (Student's testimony)

18. The parent consistently met with special education coordinators at School A over the years the student has attended School A. She made attempts to get the school to allow the student accommodations to assist him in completing his academic assignments including using a lap computer to take notes and taking oral exams. The parent claims that School A staff told her the requested accommodations could not be made. (Parent's testimony)

19. The parent participated in all the student's IEP meetings at School A except the May 22, 2012, meeting. The parent was not aware that once the student turned age eighteen he would be in the IEP meetings on his own without her assistance. She did not know about the May 22, 2012, meeting until the student came home from school and told her the meeting had been held. The parent later saw the special education coordinator who stated that the school tried to inform her about the meeting but still had the meeting solely with the student. The parent would have preferred to be at the meeting because the student does not always know what is going on in the IEP meetings. (Parent's testimony)

20. The student is currently assigned a case manager at School A, Mr. Bolds, who is also his special education teacher and was also his teacher last school year. Mr. Bolds co-teaches the student's English and language composition classes along with a content certified teacher in an inclusive classroom with general education students. The student to teacher ratio in the student's classes with Mr. Bolds is 11 to 1. (Mr. Bolds' testimony)

21. School A staff has provided the student assistance in attempts to address his academic difficulties. In Mr. Bolds' class the student has been provided several opportunities to demonstrate what he knows, working directly with Mr. Bolds after school and during Saturday school. With this additional help the student demonstrated understanding of core concepts that he did not demonstrate in class. The student was on occasion referred to school detention when his behavior in the classroom was disruptive. He was given preferential seating and was allowed to complete work in a separate classroom to reduce detractions particularly for writing assignments. The teachers used "chucking" to present material in portions so the student and other special education students in his class could better grasp concepts. The student was also provided graphic organizers, concept maps and checklists to make sure he understood essential details of the text presented. (Mr. Bolds' testimony, Respondent's Exhibit 19)

22. Mr. Bolds described the student as phenomenal because of the strength of his insights of materials presented in his English and language composition class. Mr. Bolds marveled at the student's "text to world connections." Mr. Bolds believes the discrepancy between the student's academic talent and his poor grades has been his inconsistent performance and his performance improvements often came too late in a course in order for him to turn his grade around. Although the student was offered the opportunity to revise assignments he did not have enough time or did not use the opportunities to use alternative methods to prove his mastery of concepts. Mr. Bolds believes the student's ADHD affects his organizational skills and he inability to keep up with his work. He also has a phobia of writing because he is afraid of being incorrect. Mr. had begun to assist the student with his organizational difficulties by making copies of all his writing assignments just in case he looses them, conducting notebook checks and offering verbal support to encourage him to write more and to type his responses on computer. (Mr. Bolds' testimony, Respondent's Exhibit 19)

23. Mr. Bolds worked in a therapeutic full time special education school prior to coming to School A. Mr. Bolds does not believe that type of educational setting would benefit the student because the student may not be sufficiently challenged in such a program if the program relies heavily on independent self-motivated computer work and if the student is not held accountable to work on grade-level. In addition, Mr. Bolds believes the student benefits from the relationships he has built with School A staff over the years and without those relationships he may struggle more. Mr. Bolds is also concerned that if the student is required to travel outside his neighborhood to school he may be more likely to display school avoidance. (Mr. Bolds' testimony, Respondent's Exhibit 19)

The school's admission director met the student and his parent on October 5, 2012, reviewed the student's May 2012 IEP and reviewed the student's transcript and the independent comprehensive psychological evaluation report. The admission director concluded that the student did not meet the standards of the typical ED program in which students display more aggressive behaviors, but would benefit from the therapeutic supports available The student toured the school and observed some of the classrooms and students. (Ms. Stith-Twine's testimony)

25. High Road currently has 65 students. There are 12 teachers on staff. All teachers are either certified in special education or their content area. In most classes the capacity is eight students to a classroom – there are two adults in each classroom – a teacher and a teacher assistant. Subjects are co-taught by special educators and content certified teachers. High Road has three social workers, a reading specialist and speech pathologist and two program directors on staff. The social workers hold clinical social work licenses. The current tuition for High Road is $39,733.00, which includes tuition and related services. (Ms. Stith-Twine's)

26. If the student enrolls at High Road he will be provided courses to satisfy his DCPS high school diploma requirements. The student will be assisted in his writing skills with smart boards and I-pads and computers in the classroom for writing assignments. High Road's reading specialist will assist the student in learning to take notes and could work with him individually to develop his writing skills. (Ms. Stith-Twine's testimony)

27. High Road has a behavior modification system in which student receive daily scores from each of their teachers. The student will be assigned a social worker that will provide him both individual and group therapy consistent with his IEP. Therapeutic supports available at the High Road to address the student's emotional concerns including male group counseling to focus on frustration and anger and provide the student male role models. High Road will conduct a thirty-day review after he begins attending to review or revise his IEP as appropriate. (Ms. Stith-Twine's testimony)

28. High Road has an OSSE certificate of approval. However, High Road was recently informed by OSSE that renewal of its certificate of approval was incomplete and that High Road would need to submit additional information before the certificate would be renewed. OSSE has stated that until the final renewal is granted High Road cannot accept new students unless placed there by a Hearing Officer. High Road has submitted all required documentation to OSSE for teacher certifications and expects that OSSE will soon grant the renewal of the certificate of approval. (Ms. Stith-Twine's testimony, Respondent's Exhibit 32)

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.

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. [8] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

ISSUE 1: Whether DCPS denied the student a FAPE violating of 34 C.F.R §300.520 and/or 34 C.F.R. §320 (c) by failing to provide Petitioner notice of transfer of rights.

Conclusion: The evidence demonstrates that neither the student nor the parent was provided the notice of transfer of rights and DCPS failure to provide the notice significantly impeded the student's opportunity to participate in the decision making process regarding provision of FAPE and caused the student a deprivation of educational benefits.

34 C.F.R. §300.520 and DCMR Title 5 Chapter E30 §3023 require that when a student with a disability under IDEA reaches the age of eighteen (except a student determined to be incompetent) an LEA must provide any notice required by Part B of IDEA to both the student and his parents; and all other rights accorded to parents under Part B of IDEA transfer to the child… and whenever the LEA transfers rights the LEA shall notify the child and his or her parents of the transfer of rights.

C.F.R. §300.320 (c) provides that beginning not later than one year before a student reaches the age of majority the IEP must include a statement that the child has been informed of the child's rights under Part B of the Act, if any, that will transfer to the child on reaching the age of majority under Sec. 300.520.

The student and his parent credibly testified that neither of them was provided notice that the student's education rights had been transferred.[9] Both the student and the parent were credible in their testimony; they were forthright and consistent in their statements that they were unaware

[8] 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.

[9] FOF #s 8, 19

that the student's rights transferred at age eighteen and had not been informed of that fact and that the parent would no longer be responsible for the student's educational decisions. Although the transfer of rights is automatic and occurs when the student becomes age eighteen, IDEA and the DCMR both require that the notice be provided.

In the case at hand when the student has repeatedly earned failing grades and repeatedly been retained it is even more critical that the student and the parent be provided all notices that are required to help ensure the student's educational performance deficits were adequately addressed. DCPS did not offer evidence to demonstrate that the notice had been provided. Rather, the evidence presented offered by the DCPS witness supported Petitioner's position that the student had been struggling continually at School despite the assistance offered him by the school staff.

DCPS' failure to ensure that the notice of transfer of rights was provided and provided timely so that the student and his mother could participate in his May 22, 2012, IEP meeting which occurred two months after the student turned eighteen significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE and caused the child a deprivation of educational benefits.

ISSUE 2: Whether DCPS denied the student a FAPE violating of 34 C.F.R § 300.503 by failing to provide the student and/or his parent prior notice of the May 22, 2012, IEP meeting.

Conclusion: DCPS' failure to provide the student and the parent notice of the May 22, 2012, IEP meeting significantly impeded the student's opportunity to participate in the decision making process regarding provision of FAPE and caused the student a deprivation of educational benefits.

34 C.F.R.§ 300.503 provides:

> (a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency--
> (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
> (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.
>
> The notice required under paragraph (a) of this section must include--
> (1) A description of the action proposed or refused by the agency;
> (2) An explanation of why the agency proposes or refuses to take the action;
> (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
> (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can

be obtained;...

Again the evidence demonstrates through the credible testimony of the student that he was provided no prior notice of the IEP meeting and the parent credibly testified that she was not aware of the meeting until after it occurred.[10] The student wound up failing the school year following the IEP meeting and repeating tenth grade. It appears even more critical that School A and DCPS should have ensured the student and in this instance his parent, pursuant to DCMR Title 5 Chapter E30 §3023, received prior notice of the IEP meeting. The failure to provide the student prior notice deprived him of preparation for the meeting and time to discuss with his parent and/or other possible sources of assistance the issues regarding his education that would be discussed at the meeting.[11] DCPS did not offer evidence to demonstrate that notice had been provided. As stated previously, DCPS' failure to provide the student and the parent notice of the May 22, 2012, IEP meeting significantly impeded the student's opportunity to participate in the decision making process regarding provision of FAPE and caused the student a deprivation of educational benefits.

ISSUE 3: Whether DCPS denied the student a FAPE violating of 34 C.F.R §300.114 and/or §300.116 and/or §300.320 (a) by failing to develop and provide an appropriate IEP and educational placement as of the May 22, 2012, IEP meeting that prescribes full-time special education services and by continuing his educational placement at School A rather than in a full-time special education program.

Conclusion: The evidence clearly demonstrates the student has been unsuccessful while attending School A demonstrating academic failure despite his and the school's repeated effort for him to succeed. The student's two retentions and apparent failures in the first advisory of the current school year are sufficient evidence[12] the student's current education placement in an inclusion program is inappropriate and the student will be placed at the school Petitioner has requested for the remainder of the current school year.

34 C.F.R. § 300.114 provides:

(a) General.

(1) Except as provided in Sec. 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and Sec. Sec. 300.115 through 300.120.

(2) Each public agency must ensure that--

(i) 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

[10] FOF #s 8, 19

[11] FOF #s 8, 19

[12] FOF #s 5, 6, 7, 14

nondisabled; and

(ii) 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. § 300.116 provides:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that--

(a) 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; and

(2) Is made in conformity with the LRE provisions of this subpart, including Sec. Sec. 300.114 through 300.118;

(b) 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;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also *Scott v. District of Columbia*, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

20 U.S.C. 1414(a)(i) and 34 C.F.R. §300.320 (a) define IEP as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes a statement of the child's present levels of academic achievement and functional performance." It includes measurable goals, statements of related services, assistive technology and other appropriate accommodations. It is developed by the IEP team that consists of the child's parent, general education teachers, LEA special education teachers and anyone

deemed a necessary participant by reason of the services provided to the student. The IEP is the centerpiece or main ingredient of special education services.

The IDEA ensures that "all children with disabilities have available to them a free appropriate pubic education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. §1400(d)(1)(A). The IDEA guarantees children with disabilities the right to a FAPE. Id. In seeking an appropriate education for students with disabilities, the child's parents, teachers, school officials, and other professionals collaborate to develop an IEP to meet the child's unique needs. See 20 U.S.C. §1414(d)(1)(B). "The IEP must, at a minimum,' provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir.2005) (quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458U.S. 176, 203 (1982)). Local school officials utilize the IEP to assess the student's needs and assign a commensurate environment. See 20 U.S.C. § 1414(d)(1)(A).

If DCPS has not provided the student a FAPE as the Hearing Officer concluded then private placement and reimbursement might be an appropriate remedy. See, e.g. *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

A parental placement need not be the least restrictive environment. See *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 83-84 (3rd Cir. 1999); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 775, 770 (6th Cir. 2001), the Hearing Officer can determine whether was the proposed school is the least restrictive environment in evaluating whether private placement is the proper remedy. See, e.g., *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005); *Kerkham v. Superintendent, D.C. Public Schools*, 931 F.2d 84, 87 (D.C. Cir.)

The evidence demonstrates that the student has had an IEP that has provided him 20 hours per week of specialized instruction in a general education inclusion setting. Despite the student having access to a special education teacher in his classes he has repeatedly failed his classes and been retained twice at School A. Despite the student's failures at School A the School has continued the student's IEP and the student's hours of specialized instruction have remained unchanged[13] despite the student's continued failures and despite the student's demonstrated academic talent and efforts. The student has clearly been harmed academically and perhaps even emotionally[14] by his continued failure at school A and the continuation of an inappropriate educational program.

The Hearing Officer concludes based upon this evidence that the student's IEP and placement in an inclusion setting and at School A is inappropriate and the student should be in an educational placement that is more restrictive and can provide him full-time special education services consistent with the recommendations made by his recent evaluator, Dr. Nagorniak. Dr.

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[13] FOF # 6

[14] FOF # 12

Nagorniak credibly testified,[15] was qualified as an expert witness and stated that the student's disabilities squarely affect his educational performance and that he is need of a therapeutic setting with smaller class sizes, more staff and more individualized attention, trained mental health clinicians and more structure to offer fewer distractions.

In the case at hand the student is obviously bright, has at least average intellectual abilities and his assessments indicate that his academic abilities are on par with his intellectual abilities.[16] Despite his abilities he has performed well below average since he has been attending School A. He failed ninth grade and after being promoted to tenth he failed tenth and now has pretty much failed the first advisory of the current school year. Although the Hearing Officer was impressed with Mr. Bolds' recognition of the student's talent and capabilities and impressed with Mr. Bolds' sincerity in wanting to see the student achieve, and even though the grading system has recently be adjusted to include methods that will perhaps better accommodate the student's individual needs, it seems to be too little too late. There is no need to put the student at risk of failing another school year.

This isn't a situation where the student isn't trying, is not putting forth the effort or not coming to school or doesn't enjoy school. The student seems to be committed to his education and committed to obtaining a high school diploma and going on to college. But now the student is eighteen and should be graduating high school this school year but he is barely into his second year of high school. School A has clearly been an inappropriate program for the student.

Thus, the Hearing Officer concludes that the student's current IEP and placement is inappropriate and DCPS' failure to provide and more restrictive IEP and placement that can more effectively address the student unique learning needs is a denial of a free and appropriate public education.

DCPS has proposed no other educational placement or location of services for the student other than School A. The Hearing Officer is left with the choice proposed by Petitioner. And although High Road seems to lack the current certificate of approval, the evidence indicates that it is likely that certification will soon be reinstated.[17] And although the student might fair better in what might be a more academically challenging school, he definitely will have supports at High Road that don't seem to be present at School A.[18] Although High Road may not be the ideal setting for the student it seems to be a more appropriate school setting for this student than School A has been. High Road can implement the student's IEP and can do so at a cost that seems to be within reason. The Hearing Officer concludes there is sufficient evidence High Road can provide the student educational benefit and it meets the standards set forth in

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[15] The witness was forthright and direct in her testimony and demonstrated and clear knowledge of the student and his evaluation results.

[16] FOF #10

[17] FOF # 28

[18] FOF #s. 25, 26, 27

Branham.[19] Therefore, the Hearing Officer will place the student at High Road for the remainder of SY 2012-2013.

ORDER:

DCPS shall place and fund the student at the High Road School for the remainder of SY 2012-2013.

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: November 26, 2012

[19] *Branham ex rel. Branham v. District of Columbia 44 IDELR 149 427 F.3d 7*