

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 March 21, 2012, at the OSSE Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____ in _____ grade and has been determined eligible as a child with a disability under IDEA with a classification of emotional disturbance ("ED"). The student currently attends a District of Columbia Public Schools ("DCPS") senior high school, hereinafter referred to as "School A."

The student has attended several high schools in the past few years including three DCPS schools and one District of Columbia public charter school. The student has had a recent history of juvenile court involvement and a history of truancy. The student currently has an upcoming juvenile court sentencing for a matter in which his probation was suspended principally because he was not attending school, which was a condition of probation.

The student's September 2011 independent comprehensive psychological evaluation and August 2011 independent vocational evaluation were reviewed at an individualized educational program ("IEP") meeting held at School A on December 9, 2011. At that meeting the student's primary disability classification was changed from specific learning disability ("SLD") to ED. The IEP was amended to increase the student's hours of specialized instruction and they were adjusted to include hours delivered both inside and outside the general education setting. The student's previous IEP prescribed specialized instruction hours only in the general education setting. DCPS also authorized the student to obtain an independent functional behavioral assessment ("FBA"), which has not yet been conducted.

The student has continued a pattern of truancy since the change in the IEP and asserts that he does not attend school because he is so far behind academically and gets frustrated by his inability to understand the work and because of disruptions caused by other students in his classes. The student asserts that his current IEP is inappropriate because he requires full time special education services in a therapeutic setting.

On December 23, 2011, this due process complaint was filed on behalf of the student alleging that the student's IEP and placement is inappropriate because the IEP does not prescribe a full time special education therapeutic placement. Petitioner² seeks as relief DCPS funding of a full time therapeutic school, specifically the Foundations School.

² When the due process complaint was filed the student was not yet 18 years of age and the student's mother was named as Petitioner. The student has since reached age 18 and has assumed the role of Petitioner asserting the claims in the complaint in his own behalf. The student was present at the hearing.

DCPS filed a written response to the complaint on December 29, 2011. DCPS asserts that on December 9, 2011, the student's annual IEP meeting was held and based upon the evaluations reviewed, the team developed an appropriate IEP designed to meet the student's needs. DCPS denies the student's IEP and current placement are inappropriate and denies that the student has been denied a Free and Appropriate Public Education ("FAPE") FAPE.

The resolution meeting was held January 26, 2012. No agreement between the parties was reached. The parties agreed that the 30-day resolution period would continue for the full thirty days. Thus, the 45-day period began on January 24, 2012, and originally ended March 7, 2012.

A pre-hearing conference was conducted on February 6, 2012, at which the issues to be adjudicated were discussed and determined. On February 9, 2012, the Hearing Officer issued a pre-hearing order.

The hearing was originally scheduled for February 27, 2012. On February 27, 2012, Petitioner's counsel contacted the Hearing Officer and DCPS counsel to request that the hearing be continued and that the HOD due date be extended because of the unavailability of the student. DCPS did not oppose the continuance. On March 6, 2012, an interim order of continuance was issued granting the motion for continuance, setting a new hearing date of March 21, 2012, and extending the HOD due date to March 30, 2012.

ISSUES: ³

The issue adjudicated is:

Whether DCPS denied the student a FAPE by failing to provide the student an appropriate IEP and placement in therapeutic setting. ⁴

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-19 and DCPS Exhibit 8) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

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

⁴ Petitioner alleges the student's current IEP that prescribes a combination general education and special education setting is inappropriate because it does not prescribe full time special education services in a therapeutic setting. At the hearing Petitioner's counsel made clear that he was not pursuing a claim of compensatory education although it was originally asserted in the complaint.

FINDINGS OF FACT: ⁵

1. The student is age eighteen in _____ grade and has been determined eligible as a child with a disability under IDEA with a classification of ED. The student currently attends School A, a DCPS senior high school. (Petitioner's Exhibit 2-1)
2. The student was first found eligible and his first IEP was developed while he was in elementary school. The student has attended several schools over the years. While attending four different high schools in the past few years he has not progressed and has remained in ninth grade. The student attended a DCPS middle school during SY 2006-2007 and 2007-2008. He began attending his first DCPS high school during SY 2008-2009, his first year in ninth grade. The student has remained in ninth grade for SY 2009-2010, SY 2010-2011 and SY 2011-2012. During these years he has earned a total of 2 credits toward high school graduation. The student admits he did not attend school consistently for at least the past two years. (Parent's testimony, Student's testimony, Petitioner's Exhibits 7-3,14-1)
3. The student also has a history of psychiatric hospitalizations. On November 27, 2011, the student was admitted to the _____ for violent and destructive behavior in the home. He was discharged November 30, 2011, and prescribed medication. The student was admitted to _____ at least twice prior during August 2010, and December 2010 for anger and depression. The student was also hospitalized in April 2009 for suicidal ideations. (Petitioner's 15-1, 16-1, 17-1, 18-1)
4. The student has been diagnosed with Mood Disorder, Conduct Disorder, Oppositional Defiant Disorder, Depressive Disorder and Cannabis Abuse. The student is currently on medication used to treat depression and Bipolar and Schizophrenia in adults. He often does not take his medication as prescribed and indicates that he forgets to take it. The student is reported to be aggressive in the home when he does not get his way and has difficulty in controlling his mood and anger. A contributing factor to the student's emotional difficulties is his reaction to his father's death in 2008 and the recent death of his grandmother. (Petitioner's Exhibit 7-3, 7-13, 7-14)
5. The student has had a recent history of juvenile court involvement and a history of truancy. The student currently has an upcoming juvenile court sentencing for a matter in which his probation was suspended principally because the student was not attending school, which was a condition of probation. At the time of the hearing the student was living in a group home as ordered by the Court until his sentencing occurs. Prior to being placed in the group home the student was detained at the _____

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.

where he attended the school. The student found that educational services he received while at were engaging and he felt he was making some educational progress in the short time he was detained. (Student's testimony, testimony, DCPS Exhibit 4-2)

6. Natasha Nelson, Psy.D. conducted a comprehension psychological evaluation and educational assessment of the student in September 2011. The student's cognitive abilities were found to be in the very low range with a full scale IQ score of 62. His academic achievement was also very low, at the fourth grade level for broad reading, broad math and broad written language. Dr. Nelson concluded that he met the criteria for learning disorder and stated that the student requires specialized instruction in all academic areas. (Dr. Nelson's testimony⁶, Petitioner's Exhibits 7-13, 7-16)
7. The student's September 2011 independent comprehensive psychological evaluation and an August 2011 independent vocational evaluation were reviewed at an IEP meeting held at School A on December 9, 2011. At that meeting the student's primary disability classification was changed from SLD to ED; his hours of specialized instruction were increased and adjusted to include hours delivered both inside and outside the general education setting. The student's previous IEP prescribed specialized instruction hours only in the general education setting. DCPS also authorized the student to obtain an independent FBA that has not yet been conducted principally because the student has not consistently attended school. (Dr. Nelson's testimony, DCPS Exhibit 4-2, Petitioner's Exhibits 2-1, 2-6, 5-1, 5-5, 6)
8. The student enrolled in School A on September 30, 2011. Between the time of his enrollment and the date of his IEP meeting on November 29, 2011, the student was absent a total of 34 days. The student has continued a pattern of chronic truancy since the change in the IEP and asserts that he does not attend school because he is so far behind academically and gets frustrated by his inability to understand the work and because of disruptions caused by other students in his classes. The student also felt that his teachers would not break material down sufficiently enough for him to grasp it despite his requests for them to do so. Because of his truancy School A has now dropped the student from its rolls. Consequently, the group home in which he resides under Court order does not allow him to attend school because School A has indicated to the group home staff the student is not enrolled. (Student's testimony, DPCS Exhibit 5-2)
9. The student and his parent attended the December 9, 2011, IEP meeting. The team reviewed the comprehensive psychological evaluation and the vocational evaluation. A DCPS psychologist, Marquita Elmore, Ph.D also participated in the meeting and stated the student would need academic support in all his classes and in-school counseling. The team revised the IEP but the notes state "there are not many changes due to the [the student's] being absent from school approximately 34 days." The psychologist stated she believed her recommendations could be implemented at School A. The DCPS team

⁶ This witness was designated as an expert in school psychology testing without objection from DCPS counsel.

members discussed the location of services and agreed School A was appropriate. The parent and the educational advocate disagreed. (DCPS Exhibit 4-2, 4-3)

10. The student's current IEP developed December 9, 2011, prescribes the following services: 6 hours per week of specialized instruction outside the general education setting and 12 hours per week in general education. The IEP has academic and emotional/social/behavioral goals. The IEP also prescribes the following related services: 240 minutes per week of behavioral support services per month. The least restrictive environment section of the IEP lists the services provided outside general education and simply states: "Based on WJIII scores [the student] needs supports to assist him in completing assignments appropriately. Based on previous test scores and in school behaviors [the student] will meet with the school counselor once a week." There are no comments describing the supplemental supports and services that were previously attempted in a general education setting. (DCPS Exhibit 5-6, 5-7)
11. As to social emotional goals the student's current IEP reflects the following: Present level of Performance: "[The student does not attend classes. He comes to the building and runs the halls. This behavior impacts his learning]" and Needs: "[the student] must become responsible for his actions/behavior as it relates to attending school and being present for learning" and Annual Goals: "[the student] will attend school every day." "[the student] will attend all of his classes on time in 8 out of 10 opportunities." The identified behavior and the goals in this area are virtually the same as they were in the student's previous IEP. (DCPS Exhibit 5-4)
12. During SY 2010-2011 the student had an IEP that listed his disability classification of SLD. That IEP included academic goals in Math, Reading, Written Expression, and Emotional/Social/Behavioral Development. The prescribed weekly services were 10 hours of specialized instruction in a general education setting and 1 hour of behavioral support services. (Petitioner's Exhibit 5-1, 5-2, 5-3, 5-4, 5-5)
13. On November 25, 2011, Dr. Elmore prepared a written review of the independent comprehensive psychological evaluation. The review summarized information from the evaluation and the results of teacher interviews. The interviews provided limited information due to the student's excessive absences from class. The school staff noted the student has not received any suspensions during the current year and noted that the school submitted a truancy report following several attempts to contact the family regarding the student's poor attendance. Dr. Elmore noted Dr. Nelson's recommendations that the student be classified as a student with ED and SLD and should continue to live in a court determined therapeutic setting and receive individual therapy and substance abuse treatment and receive an OT evaluation to determine whether OT series are required in the school setting. Dr. Elmore recommended that the student appeared to need significant support in all academic classes. His severe emotional and reported behavioral problems suggest that he may require significant therapeutic supports at school as well. (DCPS 6-1, 6-4, 6-7)
14. Dr. Nelson noted in her evaluation report that the student had not been in school consistently for the previous two years and "externalized all the blame regarding his

educational difficulties to his teachers.” The student stated to the evaluator that the work at school did not “catch his attention” and thus he was not interested and that teachers were not making school “fun” hence his lack of attendance. Dr. Nelson noted that the student’s history of truancy and school avoidance is an expression of his disability. (Dr. Nelson’s testimony, Petitioner’s Exhibit 7-3)

15. Mr. Juan Fernandez, the student’s educational advocate also attended the December 9, 2011, IEP meeting. The DCPS personnel at the meeting expressed the need for the student to attend school in order for him to make any academic progress. In response the student stated that he felt out of place and older than everyone else in his classes, which he said contributed to his reluctance to attend school. Although there was a lengthy discussion about the student’s attendance during the meeting, there were no different measures offered by DCPS to address the student’s non-attendance. The parent and the advocate requested that the student be provided a full-time IEP to be implemented in a therapeutic setting where he could, in their opinion, more effectively access the curriculum. DCPS did not agree to the request. (Mr. Fernandez’s testimony, Petitioner’s Exhibit 4-1, 4-2)
16. The student’s case manager who is also his English teacher at School A participated in the student’s December 9, 2012, IEP meeting and testified at the hearing. She observed that the student attended her class infrequently during the first semester of SY 2011-2012 and a few times following the December 9, 2012, meeting. She sent a non-attendance notice to the student’s home to address his truancy but the school received no response to the notice. On the occasions the student came to school and attended her class he was respectful and completed assignments. The student’s English class is a self-contained special education class with only a few students. 90% of students in the class are repeating 9th grade. Although the student’s most recent IEP calls for only 6 hours of specialized instruction in the general education setting School A was actually providing 15 hours outside general education to the student. (Ms. Jones’ testimony, Ms. Sheppard’s testimony)
17. DCPS school psychologist Irene Opuka recently reviewed the student’s independent evaluation and testified at the hearing as to several possible interventions School A can put in place to address the student’s truancy. Ms. Opuka offered that the FBA should be completed to provide insight into how the student’s truancy can be addressed and a behavior intervention plan (“BIP”) can be implemented once the Petitioner begins to attend school regularly. School A can place the student on a conduct contract to help him track his own attendance. (Ms. Opuka’s testimony, Ms. Sheppard’s testimony)
18. The student has been interviewed by and accepted to the _____ School _____ serves students with primary disability classification of ED from grades three to twelve. The school has no general education students. It is certified by the District of Columbia to implement IEPs and issues DCPS diplomas. High School students are on a separate floor in the school from lower school students. There are no more than 12 students in a class with one teacher and one program assistant. The teachers in the high school have certification in both special education and their content area. The school follows the District of Columbia curriculum. The student would be on a

diploma tract. All students received behavior support services in the way of individual and group therapy. The school offers occupational and vocational therapy as well. There is an opportunity for students to participate in a sports league with other alternative programs in softball and basketball and there is student government for high school students. All students are assigned to a licensed clinical social worker for therapy and to a caseworker. The school also has a part-time psychiatrist on staff. The school makes periodic home visits to help ensure students attendance and success in the program. The school does not have a full time vocational program but provides transition services and provides assistance in preparing students for the job market. The student would first be grouped based on the courses he needs and then grouped with students in his age range. The school has several older students who are age 17 and in ninth grade so that the student might not feel out of place or older than his classmates. testimony)

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.⁷ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the 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.

ISSUE: Whether DCPS denied the student a FAPE by failing to provide the student an appropriate IEP and placement in a therapeutic setting.

⁷ 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.

Conclusion: The evidence demonstrates the student's current IEP that prescribes 6 hours of specialized instruction outside the general education setting and 12 hours inside the general education setting is inappropriate and the student is in need of a full-time special education placement in a therapeutic setting. Petitioner sustained the burden of proof by a preponderance of the evidence.

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) defines 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 which consists of the child's parent, general education teachers, LEA special education teachers and anyone deemed as 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 evidence demonstrates that the student who is now age 18 and has been in high school for the last four school years and should presumably be in twelfth grade remains in ninth grade. Part of his failure to progress in the past four years is arguably due to his failure to attend school regularly. The student's recent comprehensive psychological evaluation reveals he has very low cognitive and academic levels. This assessment shows an IQ score of 62 and reveals the student has significant delays in academic functioning. The student's grade equivalents scores are at fourth grade level. The DCPS review of the independent evaluation, although not agreeing that a full-time out of general education setting is warranted, does state that the student appears to need support in all academic areas.

It is significant that the student's teacher and the school special education coordinator testified that DCPS was actually providing the student more specialized instruction outside of the general education setting than the IEP prescribes. The testimony establishes that instead of the 6 hours per week of specialized instruction outside the general education setting that the IEP prescribed they were providing 15 hours outside general education –more than twice of what the IEP prescribed.

The student's teacher testified that the student was respectful and applied himself when he attended her self-contained class. This testimony highlights the student's ability to engage in the self-contained class and lends support to his apparent need for more instruction out of general education.

Despite these significant academic delays, the student's prior IEP before the independent evaluation was conducted and reviewed by DCPS prescribed 6 hours of specialized instruction and none of it outside the general education classroom. It seems plausible that the lack of sufficient and appropriate instruction to effectively address the student's academic deficits over the years may have significantly contributed to the student's lack of progression.

In light of the revelations of the most recent evaluation DCPS on December 9, 2011, developed an IEP that increased the student's hours of specialized instruction to a total of 16 per week: 6 hours outside of the general education setting and 12 hours of inside the general education setting. However, based on the evidence presented through Dr. Nelson's expert testimony and the student's testimony the student is in need of more intensive services to address his academic deficits and a more structured setting to address his social/emotional issues and his propensity not to attend school.

In addition to the student's severe academic deficits the student presents with severe emotional issues. He has been hospitalized for psychiatric reasons at on at least three occasions, in April 2009 for suicidal ideation; in September 2010 for anger issues; and again more recently in November 2011 also for anger issues. Additionally, the comprehensive psychological evaluation diagnosed the student with several psychological conditions including Mood Disorder, Conduct Disorder; and Oppositional Defiance Disorder. The student's emotional outbursts have not only resulted in his hospitalization but resulted in juvenile court involvement. The student's low academic functioning, coupled with his emotional status and his chronic truancy, that has apparently been inadequately addressed over the last two years, clearly demonstrate the need for the student be provided significantly greater services and be in a more restrictive setting than is provided by his most recent IEP.

DCPS asserts that the student's failure to make academic progress is a result of his failure to attend school rather than any shortcoming in his IEP and/or educational placement. It has pointed to cases in support of its assertion including *Darlene Hinson v. Meritt Educational Center*, 579 F. Supp. 2d 89 (U.S. Dist. 2008). In that case the Court upheld the hearing officer's conclusion that the IEP was appropriate in a case where the student had extensive absences from school for substantial periods of time. The Hearing Officer reasoned that the student's absences for a substantial period of time tended to show that he was not "availing himself of educational benefit." The court concluded, "it is difficult to say how the Hearing Officer could have determined that the services in the IEP were not working when the student had not yet taken advantage of those services."

In *Nguyen v. District of Columbia*, 681 F. Supp. 2d 49 (D.DC 2010), where the court held that a 17-year old student was not eligible for special education as either learning disabled or emotionally disturbed because his poor educational performance was due in part to his truancy and drug use.

Unlike the student in *Nguyen*, who was not eligible for special education, there is a preponderance of evidence in this record linking the student's truancy to his ED disability. The current IEP already includes the truancy as part of the student's disability in that it classifies him as emotionally disturbed and the social-emotional goals therein overwhelmingly relate to

truancy.⁸ Even the student's previous IEP from December 2010, when he was not classified as ED includes social-emotional goals that overwhelmingly relate to his truancy.

In *Ranocas Valley Regional Board of Education*, 41 IDELR 46 (NJ SEA 2004), the State Review Officer recognized that it is well established that "[t]he failure of a student to cooperate with school staff in attaining goals and objectives in the student's IEP does not relieve school officials of the responsibility to provide FAPE to that child. . . [T]he student's failure to cooperate with school staff may be an indication of the need for reevaluation, a revision to the child's IEP, or change in the child's educational placement." quoting *Letter to Borucki*, 16 EHLR 884 (U.S. Dept of Educ. Off. of Sp. Ed. Programs 1990)).

The student testified that he engaged in truant behavior because when he would attend school he would get frustrated at not being able to understand the instruction and the teachers would not break the material down sufficiently for him to understand despite his requests for them to do so. His testimony also established that part of the reason that he is truant has to do with his being 18 years old but having to attend 9th grade classes with students who are much younger than he.

The DCPS witnesses stated that the student is truant and the school cannot assist him or determine his needs unless and until he comes to school. DCPS has to take some action other than simply sending letters to the home, and expecting the student to attend counseling to address his emotional issues when he is not even coming to school. Clearly DCPS should have and has to do more than simply list rote actions in the IEP that put the responsibility back on the student with no alteration of methods to address the truant behavior. It perpetuates a cycle of the same behaviors that that have persisted with the student for years.

Consequently, the Hearing Officer concludes the failure to provide the student an IEP with full time special education services in a therapeutic setting is a denial of FAPE. The student needs a full-time out of general education IEP and placement. Consequently, the Hearing Officer concludes the student is being harmed by his continued attendance at School A.

As relief Petitioner has requested that DCPS be required to place and fund the student at the School. The evidence demonstrates that the School can provide the student full time special education and related services in a therapeutic setting.

However, a school district is not required to implement a program that will maximize the handicapped child's potential. *Rowley*, 458 U.S. at 198-99. Rather, a handicapped child has a right to "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. Rowley explained that implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services

⁸ e.g. Present level of Performance: "[The student does not attend classes. He comes to the building and runs the halls. This behavior impacts his learning]" and Needs: "[the student] must become responsible for his actions/behavior as it relates to attending school and being present for learning" and Annual Goal 3: "[the student] will attend school every day.")

which are individually designed to provide educational benefit to the handicapped child.”
Rowley, 458 U.S. at 200-02.

A student’s placement is to be in the least restrictive environment and in a school that is capable of meeting the student’s special education needs. See Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1402 (9) (D) (“FREE APPROPRIATE PUBLIC EDUCATION- The term ‘free appropriate public education’ means special education and related services that include an appropriate preschool, elementary school, or secondary school education in the state involved” [and] “are provided in conformity with the individualized education program”); § 1401 (29) (D) (“The term ‘special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability [. . .].”); 34 C.F.R. § 300.17 & 39; 34 C.F.R. § 300.116 (placement is to be based on student’s IEP as determined by team including the parents); 34 C.F.R. § 300.327 & 300.501 (c); D.C. Mun. Regs. Tit. 5 § 3013.1-7 (LEA to ensure that child’s placement is based on the IEP); and D.C. Mun. Regs. Tit. 5 § 3000.

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.

34 C.F.R. § 300.114 provides:

LRE requirements.(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 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.

DCPS has an obligation to ensure that a student is educated with his non-disabled peers even if specialized instruction is delivered only in a special education setting. This Hearing Officer concludes that the IEP developed for the student including the educational placement and LRE is inappropriate for this student. Based on the student's apparent stagnant academic progress over the years the student is clearly in need of full time special education services and full time IEP and placement.

In addition, pursuant to D.C. Code § 38-2561.02 (c)

Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter:

- (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
- (2) Private or residential District of Columbia facilities; and
- (3) Facilities outside of the District of Columbia.

Petitioner has requested the Hearing Officer order that that student be placed and funding at the Foundations School. However, the Hearing Officer is not convinced by the evidence that the such a prescription requires that the student be totally removed from a setting that will allow him contact with any non-disabled peers. Although Petitioner has put forward a school that offers full time services in a therapeutic milieu, that school does not afford the student an opportunity to interact with non-disabled peers.

Consequently, the Hearing Officer chooses not to order that the student be placed at the Foundations School with DCPS funding. Rather, the Hearing Officer directs DCPS to promptly convene a IEP meeting to amend the student's IEP to reflect full time special education services in an out of general education setting with a therapeutic milieu and determine an appropriate location of services that can meet those requirements and do so consistent with the mandate of D.C. Code and 34 C.F.R. § 300.114

ORDER:

DCPS shall within ten (10) school days of the issuance of this Order convene an IEP placement meeting and amend the student's IEP consistent with this Order to prescribe full-time specialized instruction in a special education setting in all academic subjects in a therapeutic milieu consistent with the requirements of 34 C.F.R. 300.114 and shall determine an appropriate location of services for the student.

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: March 30, 2012