

District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
Student Hearing Office
1150 5th Street, SE
Washington, DC 20003
Tel: 202-698-3819
Fax: 202-698-3825

Confidential

<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>“DCPS”</p> <p>Respondent.</p> <p>Case</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: July 28, 2010</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Pamela Halpern, Esq. 1220 L Street NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Kendra Berner, Esq. Assistant Attorney General District of Columbia DC Public Schools 1200 First Street, NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
---	---

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* ("IDEIA"), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

BACKGROUND:

A Due Process Hearing was convened July 27, 2010, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003, in Hearing Room 6B. The hearing was held pursuant to a due process complaint submitted by counsel for the parent and student filed June 4, 2010, alleging the issue(s) outlined below. A pre-hearing conference in this matter was conducted July 12, 2010, and a pre-hearing order was issued on July 15, 2010.

ISSUE(S):²

The issues adjudicated are: (1) Whether DCPS denied the student a FAPE by breaching the February 23, 2010, settlement agreement? Petitioner alleges DCPS did not timely convene (within 20 business days) the agreed upon MDT meeting in which the student's evaluations were to be reviewed, his IEP updated, and placement and compensatory education determined; (2) Whether DCPS denied the student a FAPE by failing to implement the student's IEP from February 5, 2010, through June 3, 2010? (3) Whether DCPS denied the student a FAPE by failing to provide the student an appropriate placement from February 5, 2010, through June 3, 2010? (4) What compensatory education is the student due for missed services from February 5, 2010, to June 3, 2010 and for not being in a residential placement from March 23, 2010? and (5) What is the most appropriate residential placement for the student?

Petitioner seeks as relief for the alleged denial(s) of FAPE that the Hearing Officer order DCPS to fund and provide the student an appropriate location of services at _____ residential treatment center in _____ Maryland. DCPS does not dispute the student is in need of a residential placement but has proposed the student be placed at _____ a residential treatment center in _____ Virginia. Petitioner also seeks compensatory education for the time the student was not attending School A.³

² The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

³ Petitioner wants the compensatory education to be saved in case the student does not stay long in the residential placement but Petitioner was willing to put a time limit of a year to 18 months on the use of the award.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations of each counsel that resulted in stipulations of fact as noted, the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 34 and DCPS Exhibits 1 through 10) which were admitted into the record.⁴

FINDINGS OF FACT ⁵:

1. The student (*hereafter "the student" or "Student"*) is a .-year old resident of the District of Columbia and resides with his parent(s), (*hereinafter "Petitioner" or "Parent"*). DCPS has determined the student to be eligible for specialized instruction and related services under IDEA with a disability classification of emotional disturbance. (Petitioner's Exhibit 17)
2. On September 9, 2009, a multidisciplinary team ("MDT") developed an individualized educational program ("IEP") that prescribed the student receive the following weekly services: 28 hours of specialized instruction and 2 hours of behavior support services. The IEP team agreed the student should be in full time special education placement. (Petitioner's Exhibit 17)
3. During the 2009-10 school year ("SY") the student attended School A, a private full time special education day school. The student's attendance at School A was funded by DCPS. (Petitioner's Exhibit 17).
4. On February 5, 2010, the student had an altercation with a teacher at School A and the police were called. The student was removed from the school but not arrested. The following day the parent spoke with School A's principal about the incident. The student was to return to school the following Monday, February 8, 2010. When the student returned he made a threat to the same teacher. The principal agreed with the parent that the student should not return to the school. The parent did not receive any paperwork regarding the student's suspension from school. Thereafter, the parent expected there would be some meeting or action taken by School A and/or DCPS to identify another school for the student. However, no such meeting was held. Consequently, the student did not attend school from February 5, 2010, until he returned to School A on June 3, 2010. (Parent's testimony, testimony)
5. On February 23, 2010, Petitioner and DCPS entered into a settlement agreement settling a prior due process complaint. Pursuant to the settlement agreement DCPS was to convene an IEP meeting within 20 business days to revise the student's IEP and discuss the location of

⁴ The disclosed and admitted documents are listed in Appendix A.

⁵ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer may cite only one party's exhibit.

services and compensatory education. (Petitioner's Exhibit 8)

6. In April 2010 a court ordered psychosexual evaluation was conducted of the student after he was found involved in a third degree sex offense in Montgomery County, Maryland. The evaluator notes the student has been diagnosed with, inter alia, with Bipolar Disorder and Attention Deficit Hyperactivity Disorder ("ADHD") and Oppositional Defiant Disorder. The evaluator recommended the student have a placement in a residential treatment center ("RTC") that has a sex offender treatment component. The evaluator noted that the RTC where the student is placed should closely monitor the student's psychiatric status and take precautions to ensure his safety in light of a previous sexual assault of the student when he was in a prior residential placement. (Petitioner's Exhibit 25)
7. On April 26, 2010, a Montgomery County, Maryland Court adjudged the student a "Delinquent Child" and committed him to the Department of Juvenile Services and placed him in the custody of his parent "pending placement in _____ Rockville residential treatment..." (DCPS Exhibit 7)
8. The student's IEP meeting that was to be convened pursuant to the February 2010 settlement agreement did not occur within the prescribed time frame. The meeting was not convened until April 28, 2010. The parent and her counsel attended the meeting. Counsel informed DCPS that the student was charged with a sexual offense in Montgomery County, the judge in that matter had agreed to the student attending _____ residential treatment center _____ and that the student's IEP could be implement there. The parties agreed to reconvene the meeting to further discuss the student's placement and compensatory education. The team agreed School A was not the appropriate placement for the student. _____ testimony, DCPS Exhibit 6)
9. DCPS later issued a prior written notice for the student to return to School A. The student returned to School A on June 3, 2010, and continued to attend until June 14, 2010. On June 14, 2010, the student had an altercation with another student. In the process of a staff members attempt to break up the fight some property damage was caused to the school. The parent expressed to the School A principal that the student should not return to the School A. The principal did not disagree. _____ testimony, DCPS Exhibit 4)
10. The student is in need of placement in a residential treatment center and DCPS has proposed to place and fund the student at _____ (formerly) _____ in _____ Virginia. (Stipulation)
11. The student has been accepted to _____ which can provide the student 24-hour psychiatric services and educational programming. _____ can provide the student specialized instruction and related services in the student's IEP. _____ also has a drug abuse treatment program and sexual offender treatment. _____ has a certificate of approval from the DC government and high school students can earn credits toward a DC high school diploma. Parents can visit students and the visits can be a part of the student's treatment plan. A student who is a part of a sexual offense program would probably not be

permitted to use the computer for online courses while in that program. Extra educational tutoring would not be a part of the educational program provided by the school. (Dr. Williams' testimony)

12. At the time of the due process hearing the student was in psychiatric hospitalization due to a major drug overdose and suicidal ideations. The parent prefers that the student be placed at _____ because its proximity to the student's home in light of the severity and complexity of his mental health. The parent and student visited and were interviewed at _____. Because _____ is close to the parent's home it would allow the parent to participate in the family therapy sessions that the parent has been told are an important part of the therapy and treatment in a residential program. The parent believes the student's placement in a residential facility that is outside the Washington, DC area might further harm the student's fragile mental state and the parent would have a tremendous hardship traveling to the placement proposed by DCPS in _____ Virginia. (Parent's testimony)
13. The student has a probation officer assigned to him based on his court involvement in Montgomery County, Maryland. The probation officer believes that the continued work and monitoring of the student that is expected by her with the court are more readily facilitated at _____ because of its proximity to the Washington, DC area than the location proposed by DCPS. _____ testimony)
14. _____ has a DC certificate of approval for a special education day school but does not have a certificate for its residential treatment program. Because there is not yet a certification for the residential treatment program there is no guarantee that the services provided in the program meet all DC and federal services requirements for a residential treatment center. DCPS was willing to fund the education portion of the placement when it was thought that the Montgomery County court order required placement at _____. _____ testimony)
15. _____ has certified special education teachers and licensed psychologists and Psychiatrists and social workers and can implement the student's IEP. _____ has a drug treatment program and a sexual offenders program. The student was been accepted into our sex offenders program on May 12, 2010. (Stipulation)⁶
16. DCPS acknowledges that at some point DCPS should have "stepped up to the plate" and taken some action for the student to return to the school when he no longer was attending school at School A; thus DCPS has offered to provide the student compensatory education for missed services from February 5 2010, to June 3, 2010 in the amount of 9 hours of independent counseling and 60 hours of independent tutoring. (DCPS Exhibit 2)

⁶ At the conclusion of the hearing Petitioner was directed because of the unavailability of its witness to submit to DCPS counsel for stipulation the information sought on _____. Following the hearing that information was provided by email to DCPS counsel who agreed for the information to be shared with the Hearing Officer and admitted into the record.

17. The student's cognitive abilities are clearly in the average range but his academic performance has not been commensurate with his abilities in his recent school placement due to his emotional and behavioral difficulties. Petitioner is requesting the student be provided compensatory education for the services the student missed from February 5, 2010, through the date of the due process hearing in the amount of 18 hours of behavioral support services and 100 - 200 hours of tutoring to assist the student in accessing two online courses⁷ that will allow the student to obtain academic credits toward high school graduation. Petitioner also alleges the student should have been placed in a residential placement by March 23, 2010, and as a result Petitioner believes this proposed level of compensatory education is warranted. (Dr. Holman's testimony, Petitioner's Exhibit 35)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §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 34 C.F.R. 300.17 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. Sec. 300.320 through 300.324. (Authority: 20 U.S.C. 1401(9))

Pursuant to IDEIA §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.

Pursuant to 5 DCMR 3030.3 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). 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: (1) Whether DCPS denied the student a FAPE by breaching the February 23, 2010, settlement agreement? Petitioner alleges DCPS did not timely convene (within 20 business days) the agreed upon MDT meeting in which the student's evaluations were to be reviewed, his

⁷ The witness stated the course cost approximately \$150 and can be provided by an entity such as Brigham Young.

⁸ 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 that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

IEP updated, and placement and compensatory education determined? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

Pursuant to the Blackman Jones Consent decree there is a rebuttable presumption of harm when the settlement agreement is violated. In this instance there is no dispute that the IEP meeting prescribed by the settlement agreement was not held timely and as a result the student's IEP was not amended and placement and compensatory education were not determined timely. There was no evidence presented by DCPS to rebut the presumption of harm to the student.

(2) Whether DCPS denied the student a FAPE by failing to implement the student's IEP from February 5, 2010, through June 3, 2010? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

There is no dispute the student was not in attendance at School A from February 5, 2010, to June 3, 2010. Although DCPS disputed that the parent was told by School A the student could not return, DCPS acknowledged that at some point after the student stopped attending school it had a duty to take action to ensure the student was attending school. There was during this period an April 28, 2010, IEP meeting for the student and it was at least clear at that point to all parties the student was not attending school. The Hearing Officer concludes based on the evidence presented and DCPS' acknowledged duty to ensure the student was being provided services at some point after he stopped attending School A following the February 5, 2010, incident, that DCPS' failure to ensure the special education services were provided to the student pursuant to 34 C.F.R. 300.17 resulted in an educational loss to the student and was a denial of a FAPE.

(3) Whether DCPS denied the student a FAPE by failing to provide the student an appropriate placement from January 25, 2010, through June 3, 2010? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

There is no dispute the student was not in attendance at School A from February 5, 2010, to June 3, 2010. Although DCPS disputed that the parent was told by School A the student could not return, DCPS acknowledged that at some point after the student stop attending school it had a duty to take action to ensure the student was attending school. There was during this period an April 28, 2010, IEP meeting for the student and it was at least clear at that point to all parties the student was not attending school. The Hearing Officer concludes based on the evidence presented and DCPS' acknowledged duty to ensure the student was being provided services at some point after he stopped attending School A following the February 5, 2010, incident, that DCPS' failure to ensure the special education services were provided to the student resulted in an educational loss to the student and was a denial of a FAPE.

Petitioner is seeking compensatory education for the missed services. There is no additional compensatory education due the student as a result of the additional finding of denial of FAPE as the services missed by the student are the same as those missed as a result of the denial of FAPE found in issue # 2 above.

(4) Issue 4: What if any compensatory education is the student due for missed services from

February 5, 2010, to June 3, 2010, and for not being in a residential placement from March 23, 2010? Conclusion: The Hearing Officer is not convinced by the evidence presented by Petitioner that the proposed compensatory education is appropriate. Rather, the Hearing Officer grants a compensatory education award that seems reasonable to compensate the student for the services missed and to remediate his loss.

Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005) the Court stated that “courts and hearing officers may award ‘educational services . . . to be provided prospectively to compensate for a past deficient program.’” *Id.* citing *G. ex. Rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003). Compensatory education is an equitable remedy crafted to remedy educational deficit created by “an educational agency’s failure over a given period of time to provide FAPE to a student” *Id.* “Appropriate compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place.” *Id.* The student’s right to receive compensatory education is reasonable in light of DCPS’ continued failure to provide FAPE to this student.

The Hearing Officer concludes based on the evidence that the student missed services and because no affirmative action was taken by DCPS to make certain the student was attending school or had an alternative placement between February 5, 2010, and June 3, 2010, the student is entitled to some form of compensation for the missed services.

The Hearing Officer is not convinced by Dr. Holman’s testimony that the amount of compensatory education proposed in Petitioner’s plan has a nexus to the services the student missed and the amount of services needed to place the student in the position he would have been had he not missed services. At the time it became clear to DCPS that the student was not attending school Petitioner was seeking residential placement for the student. When it was clarified the student could return to School A he did so on June 3, 2010. Although, Petitioner alleges that student is due some form of compensatory education for not being in a residential placement from March 2010, and was without services after June 14, 2010, the Hearing Officer is unconvinced by the evidence presented that the student suffered any additional harm by not being in a residential placement during that period.

The student’s evaluation and court order did not recommend and direct residential placement until late April 2010, and there was insufficient evidence presented what additional services the student might be due for not being in a residential placement rather than a special education day placement. In addition, by June 14, 2010, the end of the school year was nearing. There was insufficient evidence the student missed significant enough services after that date to warrant any additional compensatory education. In addition, the student is not likely to be able to avail himself of any compensatory education services while he is in a full time residential treatment center. Consequently, the Hearing Officer concludes the most appropriate compensatory education for the services the student missed are the 9 hours of independent counseling and 60 hours of independent tutoring offered by DCPS. In addition, the Hearing Officer concludes it is reasonable in light of the student’s need to gain academic credits toward graduation that he be awarded two on-line courses that DCPS accepts toward graduation credits.

(5) What is the most appropriate residential placement for the student? Conclusion: The Hearing Officer concludes based on the compelling evidence regarding the unique needs of the student that he should be placed at _____ residential treatment center.

34 C.F.R. 300.104 provides: If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child. (Authority: 20 U.S.C. 1412(a)(1), 1412(a)(10)(B))

DC Code 38-2561.03, which prohibits DCPS from placing students at schools that have not been approved by the SEA and permits a hearing officer to place a student at a non-approved school if an appropriate approved school is not available. The DC Code provides that a hearing officer may place a student at a nonpublic special education school that does not have a Certificate of Approval ("COA") only if there is not program with a COA that can implement the student's IEP and represents the least restrictive environment for the student.

Least restrictive environment ("LRE"), as defined in the DC Code (38-2561.01), includes a *consideration* of proximity to the student's residence. The Code does not require that the student attend the school closest to his home, only that proximity be considered, as well as whether the school can meet the student's special education needs and allow the student to be included with nondisabled peers to the maximum extent appropriate. Likewise, the IDEA regulations on least restrictive environment (34 CFR 300.116) provide that the student be placed as close *as possible* to the student's home.

The DC certification of approval based on DCPS counsel assertions presumably ensures that the school complies with the regulations in Title 5 of the Municipal Code, Chapters 22 (grades, promotion, graduation) and 30 (special education policy) as well as applicable fire safety, building code, health, and sanitation requirements (DC Code 38-2561.07).

Although there was no evidence presented that _____ residential treatment center complies with these regulations, there was significant evidence that the student is in a fragile psychiatric state as he was recently hospitalized for drug overdose and suicidal ideations.

In addition, the student is under the continued jurisdiction of the Montgomery County Court and has been released to the parent's custody pending the student's placement at _____. The student's probation officer credibly stated that her monitoring and involvement with the student can be more readily accomplished at _____. In addition, the parent stated credibly how critical to the student's success in a residential treatment her involvement in the family counseling component of the student's treatment will be and that it would be an extreme hardship for her to travel the distance to the placement proposed by DCPS.

Consequently, the Hearing Officer concludes based on these unique factors that the most appropriate placement for this student in light of his unique needs and the placement considerations that are prescribed under IDEA that the student should be placed at _____ despite the fact that its day school has DC approval but its residential center does not yet have such a certificate. There is compelling evidence that the student's placement at _____

is the most appropriate in providing the student FAPE under IDEA.

ORDER:

1. DCPS shall immediately place and fund the student's attendance at residential treatment center in Rockville, Maryland.
2. DCPS shall provide the student compensatory education to be used when the student is exited from the residential placement in the amount of 60 hours of tutoring, 9 hours of individualized counseling and shall provide the payment for two on-line educational courses that can be used toward the student's high school diploma.

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. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: August 7, 2010