

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

Student Hearing Office  
810 First Street NE, STE 2  
Washington, DC 20002

OSSE  
Student Hearing Office  
July 31, 2013

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[Parent], on behalf of  
[Student],<sup>1</sup>

Date Issued: July 31, 2013

Petitioner,

Hearing Officer: Jim Mortenson

v

[Local Education Agency],

Respondent.

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**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed by the Petitioner on June 7, 2013. The Petitioner and Respondent are both represented by counsel. Another Independent Hearing Officer (IHO) was appointed to hear the matter and was unable to complete the case and the Undersigned was appointed to hear this matter on July 19, 2013. A public charter school was also a respondent to the complaint and the issues with that respondent were resolved and withdrawn on or about July 8, 2013.

A response to the complaint was filed by the Respondent on June 18, 2013. A resolution meeting was held on June 25, 2013, and resulted in no agreements. A prehearing conference was convened on June 28, 2013, and a prehearing order was issued on July 2, 2013.

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<sup>1</sup> All proper names have been removed in accordance with Student Hearing Office policy and are referenced in Appendix C which is to be removed prior to public dissemination.

The complaint initially included issues concerning manifestation determinations, and so this case was on an expedited track. All expedited issues were resolved prior to hearing and so the case was moved to a non-expedited track and the hearing was scheduled for July 23, 2013.

The Respondent shared and filed initial disclosures July 1, 2013, and supplemental disclosures on July 16, 2013. The Petitioner shared and filed disclosures on July 1, 2013.

The hearing was convened at 9:30 a.m. on Tuesday, July 23, 2013, in room 2004 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The hearing ended at 1:45 p.m.

The due date for this Hearing Officer's Determination (HOD) is August 21, 2013. This HOD is issued on July 31, 2013.

## **II. JURISDICTION**

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

## **III. ISSUE, RELIEF SOUGHT, and DETERMINATION**

The issue to be determined by the IHO is:

Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP and provide an appropriate educational placement (*i.e.*, which were reasonably calculated to confer meaningful educational benefit), on or about March 12, 2013, and/or May 9, 2013, because they failed to require a *full-time, outside general education* program to meet Student's needs?

The Petitioner is seeking revisions to the IEP including an increase in specialized instruction outside of the general education setting to a specific full-time special education day school. She is also seeking compensatory education consisting of 80 hours of one to one tutoring.

The Respondent did not deny the Student a FAPE when the IEP, revised March 12, 2013, and again on May 9, 2013, did not include specialized instruction and related services in a full-time out of general education setting.

#### **IV. EVIDENCE**

Two witnesses testified at the hearing, both for the Petitioner. The Petitioner's witnesses were the Petitioner herself (P) and a representative from a non-public special education day school (D.D.) Both witnesses testified credibly.

10 of the Petitioner's 11 disclosures were entered into evidence. The Petitioner's exhibits are listed in Appendix A. All of the Respondent's 15 disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B.

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

## V. FINDINGS OF FACT

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

1. Student is a     year old learner with a disability enrolled at the Attending School.<sup>2</sup> The Student suffers from Oppositional Defiant Disorder and he was determined by the Respondent to be eligible for special education and related services under the definition of emotional disturbance because of inappropriate types of behaviors under normal circumstances.<sup>3</sup>
2. The Student is inattentive, does not follow directions from staff, is physically aggressive toward peers, and verbally aggressive toward his teachers.<sup>4</sup> His general intellectual functioning is estimated to be in the low average range.<sup>5</sup> His negative behaviors have been demonstrated in several different educational settings and impact his academic achievement.<sup>6</sup> The Student has significant trouble establishing appropriate interpersonal relationships within a school setting.<sup>7</sup> His academic skills are within the high average range of others at his grade level and his fluency with academic tasks is average.<sup>8</sup>
3. The Student began attending the Respondent's school after being expelled from a public charter school in February 2013.<sup>9</sup> He completed the seventh grade in June 2013 and will progress to the eighth grade.<sup>10</sup>

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<sup>2</sup> Testimony (T) of P.

<sup>3</sup> T of P, P 2, P 4, R 5, R 7, R 9.

<sup>4</sup> P 7.

<sup>5</sup> P 7.

<sup>6</sup> P 7.

<sup>7</sup> P 7.

<sup>8</sup> P 8.

<sup>9</sup> T of P, R 4.

<sup>10</sup> T of P.

4. The Student's IEP at the public charter school, written August, 2011, included the following: four math goals; four reading goals; four functional goals (emotional, social, and behavioral development); 20 hours per week of specialized instruction within the general education setting; and one hour per week of behavioral support services outside of the general education setting.<sup>11</sup>
5. The IEP was revised by the IEP team at the public charter school in August 2012 and included: two math goals, both the same as two of the previous year's math goals; three reading goals, two of which were the same as the previous year's reading goals; three functional goals, all of which were the same as three of the four functional goals for the prior year; and the same special education and related services as the previous year.<sup>12</sup>
6. Approximately a month following the Student's enrollment at the Respondent's school, the IEP team met and revised the IEP on March 12, 2013.<sup>13</sup> The Student's teachers had not seen behavior, other than inappropriate language and profanity, that they felt was a major concern, and so the IEP team, including the Petitioner, agreed to reduce the Student's level of specialized instruction from 20 hours per week to 6 hours per week, still within the general education setting.<sup>14</sup> The IEP included: the same four math goals as the August 2011 IEP; three reading goals, all the same as three of the four reading goals in the August 2011 IEP, but not including the writing goal from the August 2012 IEP, under reading; the same three functional goals from the August 2012 IEP; and a reduction to behavioral support services to two hours per month.<sup>15</sup>

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<sup>11</sup> R 14.

<sup>12</sup> P 3, R 14.

<sup>13</sup> R 4, R 5.

<sup>14</sup> P 3, R 5.

<sup>15</sup> P 3, R 6, R 14.

7. The IEP team met again on May 9, 2013, to review the IEP.<sup>16</sup> The Student's Math teacher noted he was able to stay on task and remain focused as long as he was in close proximity to the teacher.<sup>17</sup> He responded well to verbal re-direction.<sup>18</sup> The only significant revisions to the IEP were the addition of requiring a location with minimal distractions, and testing to be done in small groups.<sup>19</sup>
8. The Petitioner consented to a reevaluation which was completed in May, 2013.<sup>20</sup>
9. The Student was suspended for three days on March, 2013, for throwing food, and two days in May, 2013, for cursing at teachers and running from them.<sup>21</sup> He has been sent home from the Attending School five or six other times as well.<sup>22</sup>
10. The Student passed all of his classes at the end of the 2012-2013 school year but for Music.<sup>23</sup> His report card notes, for Music, that the Student lacks initiative and does not participate.<sup>24</sup>
11. The Petitioner is concerned that the Student continues to exhibit the same behaviors he has long exhibited.<sup>25</sup>

## **VI. CONCLUSIONS OF LAW**

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based

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<sup>16</sup> R 6, R 7

<sup>17</sup> R 6.

<sup>18</sup> R 6.

<sup>19</sup> R 5, R 7.

<sup>20</sup> R 8, R 9.

<sup>21</sup> T of P, R 11.

<sup>22</sup> T of P.

<sup>23</sup> R 10.

<sup>24</sup> R 10.

<sup>25</sup> T of P.

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.” D.C. Mun. Regs. 5-E3030.14. The recognized standard is a preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

2. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

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 §§300.320 through 300.324.

34 C.F.R. § 300.17. A “determination of whether a child received FAPE must be based on substantive grounds.” 34 C.F.R. § 300.513(a)(1). Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA’s purpose. *See*: 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. “[A]n IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State’s content standards.” 71 Fed. Reg. 46662 (2006). In the District of Columbia all available information must be considered when making a determination about whether an IEP is reasonably calculated to provide these education benefits. *Suggs v. District of Columbia*, 679 F. Supp. 2d 43, 51 (D.D.C.2010). “An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his current educational program, *see Reid v. District of Columbia*, 401 F.3d [516,] 519-20

[(D.C.Cir. 2005)]; the nature and effects of the child's disability have not been adequately monitored, *see Harris v. District of Columbia*, 561 F. Supp. 2d [63,] 68 [(D.D.C. 2008)]; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties. *See Gellert v. District of Columbia Public Schools*, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006).” *Suggs*, 679 F. Supp. 2d at 51-52. This line of reasoning is supported by the statute and regulations themselves. The IEP is a living document that, once initially created and consented to, is reviewed “periodically, but not less than annually, to determine whether the annual goals for the child are being achieved[.]” 34 C.F.R. § 300.324(b). The IEP must then be revised to address:

- (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;
- (B) The results of any reevaluation conducted under § 300.303;
- (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
- (D) The child’s anticipated needs; or
- (E) Other matters.

34 C.F.R. § 300.324(b)(2)(ii). The IEP team must, for a “child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior[.]” 34 C.F.R. § 300.324(a)(2)(i).

3. The Student is progressing in the general curriculum, and his academic achievement is not currently the primary concern, but rather his functional performance which impacts his academic achievement, such as failing music class. Failing one class does not, itself, mean a student requires a full-time special education environment. The Student’s behavior continues to impact his academic achievement, and it has not appreciably improved over the years, as evidenced, in part, by the annual goals in the IEP which do not change, reflecting a lack of meaningful progress in functional performance. The Respondent addressed this when the Student came to its school, and it will take time to see an impact. More specifically, the

Petitioner has not shown a more restrictive setting is necessary and the IEP team may need to revise the IEP to ensure more and better behavioral support services are included in the IEP to see positive change rather than no change in behavior. The nature and effects of the Student's disability have been adequately monitored by the Respondent. The IEP team reviewed the Student's performance within a month of his arrival at the attending school, and again in May 2013, and made changes to the IEP accordingly, including requiring him to be in a location with minimal distractions. Finally, the Petitioner has not shown by a preponderance of the evidence that the type of restrictive setting the IEP lacks and she claims is necessary to provide FAPE for the Student is likely to resolve or at least ameliorate the Student's educational difficulties. The law favors education of students with disabilities in the least restrictive environment with necessary supports and services to enable them to function effectively in that environment. *See*, 34 C.F.R. § 300.114. While the Student has behavioral challenges, the evidence does not show these challenges can only be addressed in a full-time special education day school. Rather, and as noted *supra*, the IEP may need review and revision for, if anything, more or different behavioral support services and consistently applied positive behavior interventions, as the law intends.

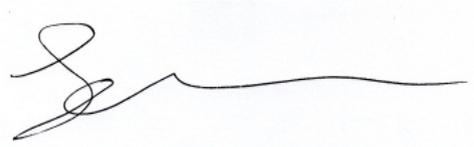
## **VII. DECISION**

The Respondent did not deny the Student a FAPE when the IEP, revised March 12, 2013, and again on May 9, 2013, did not include specialized instruction and related services in a full-time out of general education setting.

**VIII. ORDER**

The issue of whether the Student was denied a FAPE because the IEP did not include full-time specialized instruction outside of the general education setting, when the IEP was revised in March and again in May, 2013, is dismissed with prejudice.<sup>26</sup>

**IT IS SO ORDERED.**



Date: July 31, 2013

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Independent Hearing Officer

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<sup>26</sup> It is recommended that the Respondent reconvene the IEP team prior to the start of the 2013-2014 school year to revise the IEP, including the behavior intervention plan, to devise some different supports and services to effectively meet the Student's behavioral needs so that progress toward his behavioral goals can be achieved.

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).