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Office of Review and Compliance  
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OSSE  
Student Hearing Office  
April 29, 2013

**Confidential**

<p>Parent on Behalf of Student<sup>1</sup>,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Case # 2013-0070</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: April 15, 2013</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Miguel Hull, Esq. Brown &amp; Associates 1220 L Street, N.W. Suite 700 Washington, D.C. 20005</p> <p>Counsel for DCPS: District of Columbia Assistant Attorney General Yair Inspektor, Esq. 1200 First Street, NW Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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<sup>1</sup> 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 April 15, 2013, at the Office of the State Superintendent (“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 resides in the District of Columbia with his parent. The student has been determined to be a child with a disability with a classification of emotional disability (“ED”). The student is currently attending (“School A”), a DCPS senior high school, where he began attending in September 2012.

During school year (“SY”) 2011-2012 the student attended (“School B”), a private full time special education school where his tuition was funded by DCPS. The student began attending School B in January 2009 pursuant to a Hearing Officer’s Determination (“HOD”) issued in December 2008.

On May 10, 2012, DCPS held a multi-disciplinary team (“MDT”) meeting for the student at School B to discuss his progress and a possible change in location of services. The DCPS representative at the meeting recommended that the student attend his neighborhood DCPS high school for SY 2012-2013. The parent objected to the change in schools.

At the start of SY 2012-2013, the student attended School B for the first few days because the DCPS school bus took him to School B. Then the school bus began taking him to School A. The student attended School A thereafter.

On October 12, 2013, DCPS convened a meeting at School A at which the student’s individualized educational program (“IEP”) was amended. The student’s services were reduced from the previous IEP that had prescribed that all the student’s services be provided outside general education throughout the school day.

The October 12, 2012, IEP prescribes the following weekly services: fifteen (15) hours of specialized instruction in general education and five (5) hours of specialized instruction outside general education and one (1) hour of behavior support services outside general education.

Petitioner alleges the student, since he began attending School A and since his IEP was amended, has experienced severe academic and attendance difficulties at School A, which Petitioner alleges the student did not exhibit prior his removal by DCPS from School B.

Petitioner alleges the student's current IEP that reduced his hours of specialized instruction and services from "full-time"<sup>2</sup> is inappropriate and the student requires reinstatement to a full-time program and placement. Petitioner is seeking the student's placement at School B with DCPS funding and compensatory education.

DCPS filed a response to the complaint on February 19, 2013. DCPS denied any alleged denials of a free and appropriate public education ("FAPE") and specifically asserted that the student's IEP is appropriate and reasonably calculated to provide the student educational benefit. DCPS asserted the student's poor academic performance is due to his truancy and DCPS has referred the student for truancy action.

The resolution meeting was held March 4, 2013, and was unsuccessful in resolving the issues. The parties expressed no desire to proceed directly to hearing; rather, the parties chose to allow the full 30-day resolution period to expire before the 45-day timeline began. Thus, the 45-day period began on March 9, 2013, and originally ended (and the HOD would have been due) on April 24, 2013.

The Hearing Officer conducted pre-hearing conferences on March 21, 2013, and March 28, 2013,<sup>3</sup> at which the issues to be adjudicated were discussed and determined. On April 2, 2013, the Hearing Officer issued a pre-hearing order outlining, inter alia, the issues to be adjudicated.

Because of the unavailability of a key witness Petitioner's counsel filed a motion to continue the hearing date and extend the final decision due date by three (3) calendar days. The motion was unopposed and the Hearing Officer granted the motion. Thus, the HOD is due April 27, 2013.

#### **ISSUE: <sup>4</sup>**

The issue adjudicated is:

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<sup>2</sup> "Full time" services is defined in this instance and all special education instruction and related services provided outside general education throughout the school day in a setting where there are no non-disabled peers.

<sup>3</sup> The pre-hearing conference was convened on the first date that both counsel were available following the resolution meeting.

<sup>4</sup> 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. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated. At the outset of the hearing the parties agreed to stipulate that DCPS would provide the student transportation services as a component of his IEP prospectively and a directive to that effect is contained in this hearing decision and order. Based upon the stipulation Petitioner agreed to withdraw the claim/issue related to transportation services.

Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP and provide an appropriate placement for the student during SY 2012-2013 by failing to prescribe that all services be provided outside general education.

### **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-21 and DCPS Exhibit 1-13) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

### **FINDINGS OF FACT:<sup>5</sup>**

1. The student is age            in            grade and resides in the District of Columbia with his parent. The student has been determined to be a child with a disability with a classification of ED. (Petitioner's Exhibit 9-1)
2. The student's cognitive functioning was assessed with a WISC-IV in May 2008 when he was in fifth grade. His cognitive scores demonstrated that he was functioning solidly in the average range with a full scale IQ of 96. (Petitioner's Exhibit 17-2)
3. The student is currently attending School A, a DCPS senior high school, where he began attending in September 2012. (Petitioner's Exhibit 9-1)
4. During SY 2011-2012 the student was in ninth grade and attended School B, a private full time special education school, where his tuition was funded by DCPS. The student began attending School B in January 2009 pursuant to a HOD issued in December 2008. (Petitioner's Exhibits 12, 19-8)
5. Prior to attending School B, when the student attended a DCPS middle school, his grades were poor. When the student first began attending School B he struggled but after his first year there he became more comfortable with the faculty and students and he began to perform well academically. However, the student did not like attending school during the summer months, which was required at School B. (Student's testimony)
6. During the student's eighth grade year at School B (SY 2010-2011) the student demonstrated solid academic progress. He had some attendance problems that were addressed by the IEP team and the student's attendance began to show improvement. At an IEP meeting in April 2011 the student expressed a desire to attend a public school the following school year where there would be a greater number of students and he would have the summer months off. The DCPS representative at the meeting acknowledged the

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<sup>5</sup> 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.

student's comments but pointed out that most of the IEP team agreed that at that time the student should remain at School B. The student remained at School B for the rest of SY 2010-2011 and for 2011-2012. The team instituted an attendance contract with the student. (Petitioner's Exhibits 11-1, 11-3, 13-1)

7. During SY 2011-2012 the student's attendance improved, however, in the second semester from February 2012 through July 2012 the student had 25 absences, the majority of which were during May, June and July. (Respondent's Exhibit 1)
8. On May 10, 2012, DCPS held a MDT meeting for the student at School B to discuss his progress and a possible change in location of services. The teachers' comments made at the meeting indicate the student was making academic progress and he had above average grades in most subjects. However, his grade in English had recently dropped. One teacher noted at the meeting the student was operating on sixth to seventh grade instructional level with accommodations. The DCPS representative at the meeting, Mr. Montgomery, stated that School B had done "well to transition [the student] to his LRE [least restrictive environment]." Mr. Montgomery recommended the student attend his neighborhood school for SY 2012-2013. The student's parent participated in the meeting and objected to the change in schools. Nonetheless, DCPS issued a prior written notice placing the student at School A for SY 2012-2013. (Parent's testimony, Petitioner's Exhibits 3-2, 3-3, 7-1, 8-1, 8-2, 8-3, 8-5)
9. During the student's last year at School B he had the following grades in the following subjects:

(Respondent's Exhibits 12, 13)

Subject:	Adv 1	Adv 3	Final Grade	Teacher Comments
Art	A		A	
Career Exploration		C	B	
English 9	C	B	B	Completes Assignments in a Timely Manner
Health/Phys Ed.	A	A	A	Contributes to Classroom Activities
Algebra	B	B	B	Needs More Study/Good Participation
Science	A	C	B	Disruptive Behavior/Develop better habits
Social Studies	C	C	C	Asks for Assistance /Contributes in Class

10. At the start of SY 2012-2013, the student attended School B for the first few days because the DCPS school bus took him to School B. There was then an abrupt change and the school bus one morning delivered the student to School A. When the student

arrived that morning at School A, School A staff were not aware he would be coming and telephoned the parent to inquire as to why he was there. The parent then had a conversation with the School A special education coordinator and within a few days registered the student at School A. He began attending School A thereafter. (Parent's testimony)

11. When the student began attending School A he felt extremely uncomfortable because of the unfamiliarity of the setting and because of the large number of the students in most his classes. As a result, the student soon began skipping classes and sometimes not attending school at all. However, there were two classes that he seemed to gravitate toward more readily: Math and English, because he found the teachers in those classes to be engaging and helpful. However, the student found some of his other teachers less helpful. (Student's testimony)
12. The student special education case manager at School A established a good rapport with the student. The case manager helped to ensure that the student's teachers knew how to modify the instruction for the student so that he was able to access the general education curriculum. When the student attended he was quiet and focused on his work and most of teachers at School A believed, based on his performance, that he was capable of performing well academically. (Mr. Njenga's testimony)
13. In the beginning of the school year the student was coming to his English class regularly then he began to display spotty attendance. When the teacher addressed the attendance issues with the student, the student stated he was not coming regularly because he believed he wasn't doing well in school. However, when the student was in school his English teacher found that he did perform well. The English class originally was too large but was eventually broken up with co-teachers in the classroom to assist in accommodating the special education students. When the student was pulled to worked with in a smaller group he performed significantly better. The student displayed no behavioral issues when he attended he attended class. (Mr. Dotson's testimony)
14. The student sometimes skipped classes because he did understand the work and during those periods he would sometimes go to an office in the school where school staff would allow him to stay during the class periods he skipped. (Student's testimony)
15. On October 12, 2013, DCPS convened a meeting at School A at which the student's IEP was amended. The student's services were reduced from the previous IEP for School B that had prescribed that all services the student's services would be provided outside general education throughout the school day. (Petitioner's Exhibits 4-7, 2-12)
16. The October 12, 2012, IEP as amended IEP prescribes the following weekly services: fifteen (15) hours of specialized instruction in general education and five (5) hours of specialized instruction outside general education and one (1) hour of behavior support services outside general education. The IEP noted the student was performing below grade level at approximately 6<sup>th</sup> grade equivalency in math and approximately 5<sup>th</sup> grade equivalency in reading based upon a July 2011 assessment. (Petitioner's Exhibit 2-2, 2-3, 2-4, 2-12)

17. The student's parent objected to the change in hours and stated that the student wasn't ready for such change to the large class sizes. Because the student had already begun to have attendance issues by the time of the meeting the DCPS team members discussed with the student incentives and accommodations that might assist him in being motivated to come to school and attend his all his classes. They offered to put him on an attendance contract and warned him that if his attendance problems persisted he might be eventually reported to the court for truancy. (Parent's testimony)
18. The student would often be late to school because the time it took to travel by public transportation to School A. The student missed school on some days because DCPS was not providing him Metro fare cards and he sometimes did not have money to come to school. (Student's testimony)
19. When the student's began to have attendance problems the case manager telephoned the student's parent. There was some improvement for a while after the parent was contacted but the student attendance then began to slip again. The School A attendance staff took the appropriate action to address the student's absences and telephone and sent letter to the student home to help address his attendance problems. (Mr. Njenga's testimony)
20. Based upon DCPS' calculation of the student's attendance using a formula to convert class absences to days absent from school, the student is considered to have missed at total of 52 days of school from the time he began attending September 2012 until March 18, 2013. (Respondent's Exhibits 3 & 4)
21. On January 10, 2013, School A sent a letter to the student's parent stating that the student was failing World History due to absences, and missing assignments. (Petitioner's Exhibit 9-1)
22. The student has earned the following grades during the second advisory of SY 2012-2013 at School A:

Petitioner's Exhibit 5-1, Respondent's Exhibit 5)

Subject:	Adv 1	Adv 2	Final Grade	Teacher Comments
College Summit 12	F	F		Excessive Tardiness
World/History/Geo 2	D	F	F	Good Participation/Excessive Absences
Geometry	C	C	D	Needs More Study/Good Participation
Spanish 1	D+	F	F	Does not do homework
Extended Literacy 10	F	D	D	Does not complete Assignments
Career Exploration		F		Does Not Bring Materials

23. The parent educational advocate prepared a proposal for compensatory education for the alleged denial of a FAPE to the student for him allegedly having an inappropriate IEP and being in an inappropriate placement since the start of SY 2012-2013. The proposal requested the following items: inclusion of transition goals in the student's IEP, 5 hours of instruction in the areas added to the IEP as result of the added transition goals, a credit recovery program for all courses the student failed this current school year that are needed in order for him to graduate high school and 15 hours of behavioral support, and truancy avoidance program via Seeds of Tomorrow. (Ms. Long's testimony, Petitioner's Exhibit 20-3)
24. The student has been reaccepted to School B. The student desires to return to School B where he knows that he has been and believes he can again be academically successful. (Student's testimony, Petitioner's Exhibit 15)

### CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. <sup>6</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

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<sup>6</sup> 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.

**ISSUE:** Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP and provide an appropriate placement for the student during SY 2012-2013 by failing to prescribe that all services be provided outside general education.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence.

Although the evidence demonstrates that it was reasonable for DCPS to transition the student to a less restrictive setting at School A for SY 2012-2013 because of his solid academic performance at School B, clearly by the end of the first semester of SY 2012-2013, DCPS had a sufficient basis to realize that the student was not functioning effectively in the inclusion setting and the evidence demonstrates that now the student's October 12, 2013, IEP and the student's continued placement at School A is inappropriate.

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

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

The evidence demonstrates that the student had attended School B from December 2008. And although the student had a difficult start at School B and had some attendance problems, he was able to demonstrate solid academic progress and even advocated for his transition for less restrictive setting.<sup>7</sup> Although DCPS did not agree to such a change during SY 2011-2012 when the student requested it, the following year DCPS made the decision, based upon reasonable data, including teacher comments and the student's academic grades that it was appropriate for the student to transition to a less restrictive setting.<sup>8</sup> In any such transition there is no guarantee that a student will be successful, but in this instance the Hearing Officer concludes that based upon the evidence DCPS' actions in transitioning the student to School A and amending his IEP for SY 2012-2013 to allow for inclusion services was reasonable despite the parent's reservations and objection at the May 10, 2012, MDT meeting.

Although by the time the student's thirty-day review occurred at School A on October 12, 2012, the student had begun to have attendance issues, the evidence indicates that the student's special education case manager and some of his teachers were taking reasonable actions to address the student's difficulties and make accommodations that would help the student be successful. The Hearing Officer concludes that by the date of this meeting it was still reasonable based upon the student's academic abilities and performance that he would be able to succeed in the inclusion

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<sup>7</sup> FOF #s 5, 6

<sup>8</sup> FOF #s 8, 9

general education setting with the accommodations and modifications that were being provided.<sup>9</sup> The evidence demonstrates the student's IEP at the time was reasonably calculated to enable the student to receive educational benefits.

However, the evidence also demonstrates that at least by the end of the second advisory of SY 2012-2013, it should have been clear to School A staff that the student's transition to this less restrictive setting was not working. By that time he had received failing grades, and failing final grades in some courses, and his school attendance, despite the interventions that were discussed and put in place after the October 12, 2012, IEP meeting, were unsuccessful.<sup>10</sup> The Hearing Officer concludes, therefore, that by the end of the first semester of SY 2012-2013, DCPS continuing the student in the inclusion setting and simply attempting to address his non-attendance through threats of truancy action was insufficient and DCPS should have at that point taken action to change the student's IEP to place him in a more restrictive setting. At that point the student's continued placement in an inclusion setting at School A was a denial of a FAPE.

Although Petitioner asserts that the student should have never been removed from School B and should be returned to a full time special education setting and provided compensatory education for the "step down" occurring at all, the Hearing Officer having concluded that DCPS' actions in moving the student to a less restrictive setting was reasonable at the time, the Hearing Officer concludes that the appropriate remedy for the denial of FAPE is the student's return to School B as his prospective placement.<sup>11</sup>

### **Compensatory Education**

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid, 401 F.3d 522 & 524*. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

Although Petitioner has requested compensatory education for the student allegedly having been in an inappropriate setting the full school year<sup>12</sup>, the Hearing Officer does not conclude that the

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<sup>9</sup> FOF #s 12, 13

<sup>10</sup> FOF # 19, 20, 21, 22

<sup>11</sup> The Hearing Officer concludes that because the student was placed at School B by a previous HOD and DCPS funded the student's placement there since December 2008 up to and including SY 2011-2012, that School B is an appropriate placement, can provide the student educational benefit and meets the standards for the placement that are to be considered by the Hearing Officer.

<sup>12</sup> The Hearing Officer concluded the denial of FAPE arose as of the end of the first semester of SY 2012-2013 and approximately one month prior to the filing of the due process complaint. Thus, the Hearing Officer concluded the request for compensatory services Petitioner proposed did not correspond to the denial of FAPE that was found.

requested compensatory education is appropriate in this instance. The prospective placement in a full time private special education setting adequately compensates the student for the denial of a FAPE that has been determined herein. Consequently, the Hearing Officer in the Order below directs that DCPS immediately place and fund the student at his previous placement, for the remainder of SY 2012-2013.

**ORDER:**

1. DCPS shall, within ten (10) school days of the issuance of the Order, place and fund the student at the \_\_\_\_\_ for the remainder of SY 2012-2013.
2. Pursuant to the stipulation by the parties DCPS shall provide transportation service prospectively for the student to and from the \_\_\_\_\_.
3. All other requested relief is hereby denied.

**APPEAL PROCESS:**

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

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: April 27, 2013**