

*District of Columbia*  
*Office of the State Superintendent of Education*

OSSE  
Student Hearing Office  
February 28, 2013

Office of Review and Compliance  
Student Hearing Office  
810 First Street, NE – Second Floor  
Washington, DC 20002  
Tel: 202-698-3819  
Fax: 202-478-2956

**Confidential**

<p>Parent on behalf of the Student<sup>1</sup>,</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Case # 2012-0823</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: February 20, 2013</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Roberta Gambale, Esq. James Brown &amp; Associates 1220 L Street, N.W. Washington, D. C. 20001</p> <p>Counsel for DCPS: Justin Douds, Esq. Assistant Attorney General 1200 First Street, N.W. Washington, D.C. 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 on February 20, 2013, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student is [REDACTED], resides with his parent in the District of Columbia and has been determined to be a child with a disability with a classification of emotional disability (“ED”). The student attends (“School A”) a DCPS senior high school.

During school year (“SY”) 2010-2011 the student attended (“School B”) a full-time special education private school. DCPS funded the student’s attendance at School B. The student’s parent and School B staff believed the student was ready to return to a DCPS public high school for SY 2011-2012. The parent and staff thought the student’s neighborhood school was Dunbar SHS (“Dunbar”) and made preparations for the student to attend Dunbar. However once the parent contacted Dunbar she was told that his neighborhood school was (“School C”) and he could not attend Dunbar. Thus, the parent enrolled the student at School C for SY 2011-2012.

Petitioner alleged that before the start of SY 2011-2012 she provided the School C special educator coordinator (“SEC”) the student’s School B individualized educational program (“IEP”) that prescribed all services outside general education. Petitioner alleged she had conversations with the School C SEC who assured her the student would be provided appropriate special education services. Yet Petitioner alleges that in the weeks the student attended School C he was provided no special education services and no transportation. As a result, Petitioner withdrew the student from School C and early in the first advisory of SY 2011-2012 and enrolled him in (“School D”) a District of Columbia public charter school that is its own local education agency (“LEA”).

School D implemented the student’s School B IEP and in January 2012 updated the IEP. His most recent IEP developed in January 2012 at School D prescribes 26 hours of specialized instruction and 1.5 hours of behavioral support weekly outside general education. Petitioner alleged that the student performed well at School D at the end of SY 2011-2012 she was still hopeful the student could attend a DCPS public high school and applied to DCPS for a school placement and the student was accepted to attend School A.

Petitioner alleged she met with the School A SEC during the summer prior to SY 2012-2013 and provided the student’s IEP in an effort to ensure the student’s needs would be met at School A. At the start of SY 2012-2013 the student began attending School A. However, Petitioner alleged the student is has been placed in general education classes at School A, has not been provided services prescribed by his current IEP and is failing all his courses. Petitioner also alleged the

student has had two significant suspensions at School A and Petitioner asserted the student needs a change of placement to a full time out of general education placement. In addition, Petitioner alleged the student's current IEP does not include an appropriate transition plan based on age appropriate assessments.

Petitioner seeks as relief the following: (1) the Hearing Officer order DCPS to fund the student's placement at the Frost School, a private full time special education program; (2) order DCPS to conduct or fund an age appropriate transition assessment/evaluation; (3) order DCPS to convene an IEP team to review the transition assessment/evaluation and review and revise the student's IEP as appropriate; (4) order DCPS to reimburse the parent for her out of pocket travel expenses in sending the student to and from School C during SY 2011-2012 (\$8 per day for approximately 30 school days = \$240), and (5) provide the student appropriate compensatory education.

DCPS filed a response to the complaint on December 23, 2012. DCPS denied any and all alleged denial(s) of a FAPE and specifically, asserted that the IEP team when the student aged out of School B agreed the student would be reintegrated into general education and Petitioner stated a desire for the student to attend Dunbar, but it was later determined that Dunbar was not the student's neighborhood school. Rather School C was his neighborhood school. DCPS asserted the student enrolled in School D very early in SY 2011-2012, and DCPS is not responsible for any alleged violation(s) occurring during SY 2011-2012, and if so they are de minimis. DCPS asserted the student's current IEP was developed at School D on January 27, 2012, and contains an adequate transition plan based on an age appropriate assessment.

DCPS asserted there was an IEP meeting scheduled at School A for December 2012 and the student has been offered an appropriate full time out of general education setting at School A that can implement his IEP.

A resolution meeting was held January 3, 2013, and was unsuccessful in resolving the issues. The parties expressed no desire to proceed directly to hearing but to allow the full 30-day resolution period expire before the 45-day timeline began. Thus, the 45-day period began on January 14, 2013, and ends (and the HOD is due) on February 27, 2013.

A pre-hearing conference was conducted on January 22, 2013. The Hearing Officer issued a pre-hearing order on January 29, 2013, outlining the issue to be adjudicated and setting the hearing date.

#### **THE ISSUES ADJUDICATED:**

1. Whether DCPS violated 34 C.F.R. § 300.320 (b) and/or 34 C.F.R. § 300.43 by failing to conduct age appropriate transition assessment(s) and develop appropriate transition goals and services prior to the student turning age 16 and in development of his most recent IEP; and whether DCPS' failure to do so denied the student a free and appropriate public education ("FAPE").

2. Whether DCPS violated 34 C.F.R. § 300.101 and 34 C.F.R. § 300.17 by failing to implement the student's IEP at School C during SY 2011-2012, and whether DCPS' failure to do so denied the student a FAPE.
3. Whether DCPS violated 34 C.F.R. § 300.101 and 34 C.F.R. § 300.17 by failing to implement the student's IEP at School A during SY 2012-2013, and whether DCPS' failure to do so denied the student a FAPE.
4. Whether DCPS violated 34 C.F.R. § 300.116 by failing to provide the student an appropriate placement and/or location of services for SY 2012-2013, and whether DCPS' failure to do so resulted in a denial of a FAPE.

**RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-23 and Respondent (DCPS) Exhibit 1-11) that were admitted into the record and are listed in Appendix A. The witnesses are listed in Appendix B.

**FINDINGS OF FACT:<sup>2</sup>**

1. The student is age [REDACTED], resides with his parent in the District of Columbia and has been determined to be a child with a disability with a classification of ED. The student attends School A, a DCPS senior high school and is currently in 11<sup>th</sup> grade. (Parent's testimony, Petitioner's Exhibit 1-1)
2. During SY 2010-2011 the student was in ninth grade and attended School B, a full-time special education private school. DCPS funded the student's attendance at School B. The student's parent and the School B staff believed the student was ready to return to a DCPS public high school for SY 2011-2012 with appropriate transition supports. (Parent's testimony, Petitioner's Exhibit 3-1, Respondent's Exhibit 1)
3. The parent and staff expected the student to attend [REDACTED] and believed it to be his neighborhood school. However, once the parent contacted [REDACTED] she was told that it was not his neighborhood school and that he would have to attend School C his neighborhood DCPS high school. (Parent's testimony, Respondent Exhibit 1-2)
4. Thereafter the parent enrolled the student in School C for SY 2011-2012. The parent provided School C with the student's IEP from School B before the start of SY 2011-2012 and had conversations with the special education coordinator ("SEC") at School C who assured her the student would be provided appropriate special education services

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<sup>2</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 more than one party separately the Hearing Officer may only cite one party's exhibit.

from the first day of school. The student's School B IEP prescribed all services outside general education and stated that the student would be provided transportation services via Metro. (Parent's testimony, Petitioner's Exhibit 3-1, 3-6, 3-7, 3-8)

5. The parent asked the School C SEC whether transportation would be provided for the student per his IEP. She was assured it would. However, the student was never provided transportation. The parent provided the student his daily fare (\$8 per day) for Metro to get to and from School C for the time the student attended School C, which was approximately four weeks (20 school days) for a total cost to the parent of \$160. (Parent's testimony)
6. During the time the student attended School C he was placed in regular education classes. Soon after the student began attending School C some of the student's teachers began telephoning the parent to inform her the student was performing poorly or either not attending. The parent informed the teachers who called that the student was to receive special education services and expressed to the parent their surprise the student was a special education student. Upon finding this out one of the teachers who called informed the parent the student needed to be placed in a different classes than he was currently assigned. (Parent's testimony)
7. The parent soon began to receive calls from the School C staff stating the student was waling the halls and not attending class. The parent asked the School C SEC for a meeting with the student's special education team and was able to obtain a meeting. After the student was not allowed to enter School C one day because of a security issue and then she contacted the parent became convinced she should find another school for the student to attend. (Parent's testimony)
8. As a result, the parent withdrew the student from School C after he had attended four weeks and enrolled him in School D, a District of Columbia public charter school that is its own LEA. (Parent's testimony)
9. When the student first arrived at School D, because classes had already started it took him couple of months to transition but he eventually stabilized. The student earned sufficient credits and passed to the next grade. School D provided the student needed structure and behavioral supports and his IEP was implemented. School D eventually updated the student's IEP in January 2012. The IEP continued to prescribe that the student's services be provided outside general education and the provision for transportation services was removed. (Parent's testimony, Petitioner's Exhibits 1-9, 1-10, 1-11, 11-1, Respondent's Exhibit 4)
10. The student's most recent IEP was developed on January 27, 2012, when he was age fifteen and attending School D. The student's IEP prescribes 26 hours of specialized instruction and 1.5 hours of behavioral support weekly outside general education. The IEP includes a post secondary transition plan based upon and interview conducted of the student on January 18, 2012. The plan includes the goal of the student attending college and majoring in music. (Petitioner's Exhibit 1-9, 1-10, 1-13)

11. At the end of SY 2011-2012, the parent was still hopeful the student could attend a DCPS public high school and applied to DCPS for a school placement and the student was accepted to attend School A. (Parent's testimony)
12. At the start of SY 2012-2013 the student enrolled at and began attending School A. The parent met with SEC at School A special education coordinator during the summer prior to SY 2012-2013, brought the student's IEP and School A staff stated they could implement the student's IEP. The student began attending School A on the first day of SY 2012-2013. (Parent's testimony)
13. School A placed the student in the ninth grade although he had completed tenth grade at School D. After a couple of weeks the staff changed the student to tenth grade classes. Later after the parent met with the School A transcript official the student's credits were verified and he was placed in eleventh grade classes in late November 2012. Most of the classes the student in which student has been placed since he began at School A are general education classes. The student's specialized instruction as prescribed by his IEP has not been implemented at School A. (Parent's testimony)
14. School A convened an multidisciplinary team ("MDT") meeting during Fall 2012; the parent and the student attended. The student's special education and general education teacher attended along with the school social worker and an assistant principal. The team discussed the student frequently missing class and being unfocused in his general education class. The parent expressed to the team that the student came from a smaller and more structured environment at School D and believed the student's needs were not being met at School A. (Parent's testimony, Respondent's Exhibit 7-2, 7-3, 7-4)
15. During the MDT meeting the student expressed that he felt lost in every class and felt no one was providing him sufficient help to be successful. He stated that he often doesn't go to class because he often doesn't understand what is being taught. The School A SEC stated that she would refer the student to the DCPS least restrictive environment ("LRE") team about whether a different placement was appropriate for the student. However, the student has remained at School A and remained in general education classes. (Parent's testimony, Respondent's Exhibit 7-2, 7-3, 7-4, Petitioner's Exhibit 11-1)
16. The student has had two significant suspensions at School A. School A conducted a manifestation determination review ("MDR") and concluded the student's behaviors of missing classes and wandering the halls was a manifestation of his disability. The suspensions have made the student further behind academically. After the MDR meeting the School A staff assured the parent they were on track with the appropriate classes for the student. The parent stated a willingness to meet and revise the IEP to ensure the student had sufficient in-school supports to be successful. (Parent's testimony)
17. On December 6, 2012, a new behavior intervention plan ("BIP") was developed for the student. However, the plan has not helped and the student's behavioral problems have persisted. (Student's testimony, Parent's testimony, Respondent's Exhibits 9, 10)

18. The student is frustrated and demoralized from experience attending School A. He wants academic assistance and requests it but feels it is not forthcoming from the School A staff. Consequently, the student avoids most of his classes because he does not understand most of what is being taught. However, he regularly seeks out his special education and the school social worker who provide him assistance when they are available but at other times he feels that he is left to fend for himself. The student is unsure of what he wants to do or can do when he graduates high school. He is interested in college but has done nothing to prepare and is unsure what to do. (Student's testimony)
19. The student has a special education teacher/case manager at School A. The student has one class with this special education teacher and she collaborates with the student's general education teachers. The MDT team at School A agreed the student needs more structure than he has had during the first semester at School A. School A has a self-contained special education program in which the student can be provided all instruction in a special education setting and the student would be in a class size of approximately six students. (██████████ testimony)
20. The School SEC staff in December 2012, told the parent that School A was creating a new program that would be appropriate for the student where he would be in a self-contained program. The student participated in the program briefly but the student schedule and locations of the program were not clear to the student and as a result he did not remain in the program and the School A staff continued to adjust the student's schedule in an attempt to have the student attend class regularly and be successful academically. The parent believes School A is chaotic and unstructured and has failed to promptly implement the special education services and transition supports the student needs to be successful in a general education school such as School A. As a result the parent has concluded the student should return to a full time out general education school that has a lower student to teacher ratio and more structure and behavioral supports so the student can be successful. (Parent's testimony)
21. The student has been interviewed by and accepted to attend the ██████████ (██████████). During the student's interview he was forthcoming and is seeking more support than he is getting at his current school. ██████████ provides all the academic classes for the student to earn a DCPS high school diploma and can meet the services stated in the IEP. ██████████ is a full time special education school and holds a certificate of approval ("COA") from OSSE. The total number of students at ██████████ is 130. There are only 15 students in the group therapy program to which the student has been accepted. The number of 9th to 12th grade students in the entire school is approximately 65. The tuition for Frost is approximately \$50,000 annually including the costs of counseling services. (██████████ testimony)
22. The average student-to-teacher ratio at ██████████ is six students per teacher with a maximum of eight. ██████████ has related service providers on staff including in the areas of speech-language, occupational therapy and clinicians who provide psychological and behavioral support services. Psychological therapy is integrated into the classroom curriculum. A psychiatrist is at the school twice per week for medication management and family

therapy. In the schools high school program there are 15 student and three counselors. [REDACTED] All teachers are at least provisionally certified with OSSE in special education and/or their content area(s). [REDACTED] has two transition coordinators who work with students with course work and other services the student would need to transition out of high school. ([REDACTED] testimony)

23. Petitioner engaged the services of an educational consultant to develop a compensatory education plan. The consultant reviewed the student's academic records and evaluations, spoke with the student and his parent, and the staff at School D and proposed a plan designed to compensate the student for DCPS' failure to implement the student's IEP at School C and School A. The plan made the following recommendations: (1) 120 hours of tutoring for the time the student was in general education classes at School C and School A, (2) 12 hours of counseling or mentoring to compensate for the lack of therapeutic support at School C and School A, and transition programming consisting of a comprehensive transition assessment and vocational services because of the student's "continued severe emotional and behavioral disorders." ([REDACTED] testimony, Petitioner's Exhibit 19-3, 19-4, 19-5)
24. Petitioner engaged the services of an educational consultant to the review the transition plan contained in the student's current IEP and offer an opinion on its appropriateness compared with the 2010 OSSE Memorandum on Secondary Transition. The consultant concluded that the interview provided to the student at School D and the transition plan in his current IEP were lacking in detail and content to effectively assess the student's abilities and interests to plan an appropriate post-secondary transition plan for the student. The interview gleaned scant information from the student about his interests and abilities and the resulting goals in the plan are meager. ([REDACTED] testimony <sup>3</sup>, Petitioner's Exhibit 21)

## 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:

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<sup>3</sup> This witness was designated as an expert in transition assessments.



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>4</sup> *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.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. 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).

**ISSUE 1:** Whether DCPS violated 34 C.F.R. § 300.320 (b) and/or 34 C.F.R. § 300.43 by failing to conduct age appropriate transition assessment(s) and develop appropriate transition goals and services prior to the student turning age 16 and in development of his most recent IEP; and whether DCPS' failure to do so denied the student a free and appropriate public education ("FAPE").

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that the student student's IEP does not contain appropriate transition goals based upon age appropriate assessments and the student was thus denied a FAPE.

34 C.F.R. § 300.320 (b) provides:

Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include--

- (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
- (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

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<sup>4</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.

34 C.F.R. § 300.43 provides:

- (a) Transition services means a coordinated set of activities for a child with a disability that--
  - (1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
  - (2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes--
    - (i) Instruction;
    - (ii) Related services;
    - (iii) Community experiences;
    - (iv) The development of employment and other post-school adult living objectives; and
    - (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

The student's current IEP contains a post-secondary transition plan and goals. However the expert witness testified that the interview that was apparently conducted at School D gleaned scant information from the student about his interests and abilities and the resulting goals in the plan are meager. The student himself credibly testified that he is unsure of his future after high school but is eager to gain some direction. The Hearing Officer concludes based on the expert testimony and that of the student that the interview that was the basis for the student's transition plan is insufficient and the student has harmed thereby and denied a FAPE.<sup>5</sup>

Consequently, the Hearing Officer order below that DCPS conduct a age appropriate transition assessment consistent with the 2010 OSSE Memorandum on Secondary Transition and revise the student's transition plan. Although the interview and transition plan were developed while the student was attending School D, DCPS has the ongoing responsibility to ensure the student's IEP and all its components are appropriate and meet the standards under IDEA.

**ISSUE 2:** Whether DCPS violated 34 C.F.R. § 300.101 and 34 C.F.R. § 300.17 by failing to implement the student's IEP at School C during SY 2011-2012, and whether DCPS' failure to do so denied the student a FAPE.

**Conclusion:** Petitioner sustained the burden of proof on this issue by a preponderance of the evidence. Petitioner demonstrated that School C failed to provide the student transportation services for the four week period that he attended School C and the parent should be compensated for the costs she incurred. However, Petitioner failed to demonstrate sufficient and enduring harm to the student for the brief time the student attended School C and was not in

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<sup>5</sup> FOF #s 18, 24

special education classes.

According to 5E DCMR 3002.1(f) the LEA must provide services to address all of a student's identified special education and related services needs. This provision is consistent with the federal regulations, which indicate that a FAPE includes the provision of related services defined as "transportation and such developmental, corrective and other supportive services" as are required to assist a child with a disability to benefit from special education 34 C.F.R. §300.34(a), (b) (16).

In the federal regulations, transportation is specifically listed as a related service. In the District of Columbia, the applicable regulations also specifically indicate that transportation is a related service that must be made available by the LEA. 5E DCMR 3001.1. It should be pointed out that a local federal court has held that the LEA in the District of Columbia continues to have legal responsibility to provide transportation to its students. *Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D. C. 2011).

The evidence indicates that the student's IEP at the time he attended School C required that he be provided transportation services. The parent credibly testified that she provided the student daily fare so he could travel to and from School C and that School C did not provide the transportation services as the IEP directed.<sup>6</sup> Consequently, the Hearing Officer concludes the parent should be compensated for the costs she incurred.

However, as to the other services in the student's IEP the evidence of harm to the student is not clear. The evidence demonstrates that the student attended School C for approximately four weeks and during that time the student was in at least some general education classes based upon the Parent's credible testimony that she received calls from at least two of the student's teachers expressing concern about the student's performance and at least in one instance was surprised that the student was a special education student.

The parent on her own accord after receiving this information and indication the student was not attending class regularly, transferred the student to School D. The evidence indicates that although the student started School D after the school year had begun and took a while to transition he was successful at School D and completed all courses and passed to the next grade.<sup>7</sup> The parent again after the end of that school year believed the student was capable of being successful in a public high where he would have contact with general education students. The Hearing Officer concludes that any academic loss the student might of endured for the brief period he attended School C was made up for during the time he attended School D. Petitioner presented insufficient evidence the student was academically harmed by the student's brief stent at School C. An IDEA claim is viable only if [DCPS'] procedural violations affected the

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<sup>6</sup> FOF #s 4, 5

<sup>7</sup> FOF #s 8, 9

student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

**ISSUE 3:** Whether DCPS violated 34 C.F.R. § 300.101 and 34 C.F.R. § 300.17 by failing to implement the student's IEP at School A during SY 2012-2013, and whether DCPS' failure to do so denied the student a FAPE.

**Conclusion:** Petitioner sustained the burden of proof on this issue by a preponderance of the evidence. The evidence clearly demonstrates the student was not provided appropriate special education services consistent with his IEP since he has attended School A.

34 C.F.R. § 300.101 provides:

(a) General. A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in Sec. 300.530(d).

(b) FAPE for children beginning at age 3.

(1) Each State must ensure that--

(i) The obligation to make FAPE available to each eligible child residing in the State begins no later than the child's third birthday; and

(ii) An IEP or an IFSP is in effect for the child by that date, in accordance with Sec. 300.323(b).

(2) If a child's third birthday occurs during the summer, the child's IEP Team shall determine the date when services under the IEP or IFSP will begin.

(c) Children advancing from grade to grade. (1) Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

(2) The determination that a child described in paragraph (a) of this section is eligible under this part, must be made on an individual basis by the group responsible within the child's LEA for making eligibility determinations.

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 §§ 300.320 through 300.324.

The evidence demonstrates that despite the fact that the parent provided School A the student's IEP prior to the start of SY 2012-2013 and conferred with the School A SEC, the student's time at School A has been disastrous for him and he has not been provided the services that his IEP requires. The evidence demonstrates through the parent's credible testimony that the student was first placed in ninth grade classes although the student is in the eleventh grade. It took until near

end of the semester for the student to be placed in the correct grade. The evidence also demonstrates that the student has a single special education teacher who teaches him in one class and collaborates with the student's other teachers, but the evidence does not sufficient demonstrate that the student's other classes are being delivered outside general education. The student credibly testified that he requests support in these general education classes and that sufficient support is not provides. Consequently the student avoids class, roams the halls and is then suspended which further contributes to his academic failure at School A. The team at School A has made attempts to adjust the student's schedule, implement an BIP and even considered referring the student to the LRE team for another location of services. Belatedly, School A came up with a program that could perhaps implement the student's IEP outside of general education, but when the student attempted that program he apparently ran into obstacles as well. The Hearing Officer concludes based upon evidence presented, that School A, even though it may be capable of implementing a full time out of general education IEP, it has failed from the time the student began attending School A to implement his IEP. The student had clearly suffered harm as a result and has been denied a FAPE.

**ISSUE 4:** Whether DCPS violated 34 C.F.R. § 300.116 by failing to provide the student an appropriate placement and/or location of services for SY 2012-2013, and whether DCPS' failure to do resulted in a denial of a FAPE.

**Conclusion:** Petitioner failed to sustain the burden of proof on this issue by a preponderance of the evidence. The student's IEP has continued to prescribe a full time out of general education placement and the evidence demonstrates that School A may be a location in which such an IEP can be implemented despite that fact that it has not been for this student.

The evidence demonstrates that the entire time the student has attended School A his IEP has prescribed that all services are to be provided outside general education. The evidence seems to indicate that School A made an attempt at inclusion programming for the student by enrolling him in general education courses with general education students, but has failed to provide sufficient supports for the student to be successful. Yet, School A never changed the student's IEP to reflect the attempted change in his program. School A, thus failed to implement the student's IEP.

After what appears to be wasted and effort an time during first semester School A seems to be now attempting to provide a program to the student that is consistent with his IEP. The School A SEC testified that School A's new self-contained program may work for the student.<sup>8</sup> The problem is that the student is now failing academically and now has little hope and/or confidence he can be successful at School A. Consequently, the Hearing Officer does not conclude based on the evidence that School A is an inappropriate location of services. However, based upon the clear evidence of harm to the student because his IEP has not been implemented the Hearing Officer grants as prospective relief and as compensation to the student for the denials of FAPE the student placement and funding at the Frost School. The Hearing Officer concludes based on the evidence that the [REDACTED] is an appropriate placement for the student.<sup>9</sup>

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<sup>8</sup> FOF #19

<sup>9</sup> FOF#s 21, 22

IDEA authorized District Courts and Hearing Officers to fashion “appropriate” relief, e.g., 20 U.S.C. § 1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations.” *Florence County Sch. Dist. For v. Carter*, 510 U.S. 7, 15-16; *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005).

### **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.

As to compensatory education, Petitioner set forth a specific request for compensatory services. However, the Hearing Officer concludes that the tutoring and other services requested were not sufficiently linked through the evidence presented to the harm the student suffered from his IEP not being implemented at School A. The Hearing Officer believes equity warrants that the student's placement at the Frost School serve as appropriate compensation to the student for the denials of FAPE found herein.

Compensatory education is not a contractual remedy, but an equitable one. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497, 21 IDELR 723 (9th Cir. 1994).

### **ORDER:**

1. As compensation for the denials of FAPE to the student the Hearing Officer orders that DCPS shall, within ten (10) school days of the issuance of this Order, place and fund the student at the [REDACTED] for the remainder of SY 2012-2013.
2. DCPS, shall within thirty (30) calendar days of the issuance of this Order, conduct an age appropriate transition assessment of the student consistent with the 2010 OSSE Memorandum on Secondary Transition.
3. DCPS shall within forty-five (45) calendar days of the issuance of this Order conduct an IEP meeting for the student at [REDACTED] to determine whether additional evaluations are

warranted and review and revise the student's IEP as appropriate including a revision of the student's Post-Secondary Transition Plan.

4. DCPS shall, within thirty (30) calendar days of its receipt of a documented request from Petitioner for compensation for the transportation costs for the student during the time he attended School C during SY 2011-2012, pay to Petitioner the sum of \$160.
5. All other relief requested by Petitioner is 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: February 27, 2013**