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**Confidential**

<p>Parent on Behalf of Student<sup>1</sup>,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS") ["LEA"]</p> <p>Respondent.</p> <p>Case # 2015-0408</p> <p>Date Issued: March 7, 2016</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Hearing Date: February 18, 2016</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Roberta Gambale, Esq. James E. Brown &amp; Associates 1220 L Street, N.W. Suite 700 Washington, D.C. 20005</p> <p>Counsel for Respondent: William Jaffe, Esq. District of Columbia Office of the General Counsel 1200 First Street, NE 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 on February 18, 2016, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

## **BACKGROUND AND PROCEDURAL HISTORY:**

Petitioner filed this due process complaint on December 23, 2015, alleging that in October 2015 the student’s disability classification changed from Other Health Impairment (“OHI”) to Autism and his individualized educational program (“IEP”) was amended and the team determined the student’s current school placement was inappropriate in light of the changes. Petitioner asserted in the complaint that DCPS did not timely propose an appropriate school placement for the student and now alleges that the school placement DCPS finally proposed after the complaint was filed is inappropriate.

Petitioner alleges DCPS denied the student a free appropriate public education (“FAPE”) by failing to provide the student with an appropriate alternative placement and/or location of services capable of implementing the student’s IEP and addressing the student’s behavioral and educational needs and/or failing to identify such a placement and/or location of service in a timely manner.

Petitioners seek as relief that the Hearing Officer find DCPS denied the student a FAPE, order DCPS to fund a private placement selected by the parent and include transportation and award of compensatory education.

On December 29, 2015, DCPS filed a timely response to Petitioners’ complaint in which it denied that it failed to provide the student with a FAPE. DCPS indicated that a meeting with Petitioner had been scheduled to propose a school placement for the student.

The parties participated in a resolution meeting occurred on January 6, 2016. The parties did not resolve the issues and did not mutually agree to proceed directly to hearing. The 45-day period began on January 23, 2016, and ends [and the Hearing Officer’s Determination (“HOD”) is due] on March 7, 2016.

The Hearing Officer convened a pre-hearing conference (“PHC”) on the complaint on January 28, 2016, and issued a pre-hearing order (“PHO”) on February 1, 2016, outlining, inter alia, the issue to be adjudicated.

## **ISSUE:**

**The issue to be adjudicated is:**

Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate alternative placement and/or location of service capable of implementing the student's IEP and addressing the student's behavioral and educational needs<sup>2</sup> and/or failing to identify such a placement and/or location of service in a timely manner following the October 26, 2015, meeting.

**RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 33 and Respondent's Exhibits 1 through 7) that were admitted into the record and are listed in Appendix A).<sup>3</sup> Witnesses are listed in Appendix B.

**FINDINGS OF FACT: 5**

1. The student is age \_\_\_\_\_ and in grade \_\_\_\_\_<sup>4</sup> currently attends a District of Columbia Public Schools ("DCPS") school ("School A").
2. The student is currently eligible to receive special education and related services with a disability classification of Autism. (Petitioner's Exhibit 3-1)
3. The student's previous IEP dated November 3, 2014, classified the student as other health impaired ("OHI") for Attention Deficit Hyperactivity Disorder ("ADHD"). That the IEP required that the student receive 26 hours per week of specialized instruction outside the general education setting, 240 minutes per month of behavioral support services, and 120 minutes per month of occupational therapy ("OT"). (Petitioner's Exhibits 5-1, 5-8, 7-1)
4. As a result of a previous HOD, DCPS completed a psychological evaluation on October 5, 2015, that recommended changing the student's disability classification from OHI to Autism. The evaluator recommended the student be provided applied behavior analysis therapy ("ABA"). (Petitioner's Exhibit 7-1, 7-17)
5. On October 16, 2015, a meeting was held to discuss the student's evaluations and during the meeting the student was determined to be eligible with a classification of Autism and convened a subsequent meeting on October 26, 2015, to revise the student's IEP. The entire team agreed the student's IEP as amended could not be properly implemented at School A and the student needed to be placed in a different school. The team determined

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<sup>2</sup> Petitioner is not asserting that the student's placement was inappropriate prior to the October 26, 2015, meeting. Petitioner is asserting that the placement/location of services proposed by DCPS on February 9, 2016, (School B) is inappropriate.

<sup>3</sup> Any documents that were objected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

<sup>4</sup> See Appendix B for student's age and current grade.

the needed to be in an Autism program and needed both behavior support and the ABA therapy he could not receive at School A.

6. School A agreed to submit a referral to DCPS' least restrictive environment ("LRE") team so that an alternative placement and/or location of service could be identified and the student's parent would be given the opportunity to visit school location(s) proposed. (Witness 1's testimony, Parent's testimony, Petitioner's Exhibit 4-2)
7. At the October 26, 2015 meeting the student's IEP was amended to prescribe the following services: 26 hours of per week of specialized instruction in a self-contained classroom, 120 minutes per month of OT, 240 minutes per month of behavioral support services and 240 minutes per month of speech therapy. (Petitioner's Exhibit 3-15)
8. On February 9, 2016, DCPS convened a meeting with the parent and proposed that the student be placed in an Autism program ("School B") located in a DCPS school. The parent and her educational advocate attended the meeting. Representatives from School B participated and described the program available for the student at School B. (Parent's testimony, Witness 1's testimony)
9. The School B representatives explained that their program had a 6 to 1 student to teacher ratio and that students currently in the program are functioning significantly lower than the student is functioning academically, socially and in communication skills. The student would be in a self-contained classroom for academic subjects but he would have to transition to general education for his non-academic classes, lunch and any school assemblies. (Witness 1's testimony, Witness 2's testimony, Petitioner's Exhibit 30)
10. The representatives at School B stated that none of the students in their program had behavior problems such as those displayed by the student at School A and they were concerned about whether they were equipped to deal with the behaviors. School B has no behavioral technicians as are available in the student's current classroom at School A and which the student benefits from because of his occasional disruptive behaviors. (Witness 1's testimony, Petitioner's Exhibit 30)
11. The student has been accepted to a private special education school that can implement the student's IEP ("School C"). The parent's educational consultant talked to the principal of School C and reviewed information about the school. School C has programs designed for students on the autism spectrum and is twelve-month program. The student to teacher ratio is of 5 to 1. School C has clinical staff and behavior technicians and a separate sensory integration room and could meet the student's needs and provide the student ABA therapy. The student would be grouped with other students according to his ability. The cost for School C is \$326 per day and occupational therapy is billed at \$115 per hour. (Witness 1's testimony, Petitioner's Exhibits 31, 33)
12. The student's parent has visited both School B and School C. She does not believe School B is equipped to handle the student's behaviors and she is concerned that the student might regress at School B with students who are functioning below his abilities. (Parent's testimony)

13. As compensatory education for the time the student has remained in an inappropriate program from October 26, 2015, to February 9, 2016, when DCPS proposed School B, the consultant proposed the student be provided 50 hours of behavioral support through ABA therapy for 2 hours for 25 weeks. The consultant opined that these services would remediate the harm to the student for being without an appropriate placement for nearly three months.<sup>5</sup> (Petitioner's Exhibit 27)

## 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. 7 *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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:** Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate alternative placement and/or location of service capable of implementing the student's IEP and addressing the student's behavioral and educational needs and/or failing to

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<sup>5</sup> The Hearing Officer did not find that the recommendation for compensatory services to be based on a tangle measure of what the student missed and how what he missed would be remediated.

identify such a placement and/or location of service in a timely manner following the October 26, 2015, meeting.

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

Pursuant to 34 C.F.R. § 300.115(a), DCPS “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. This continuum of alternative placements must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. Additionally, when determining the Least Restrictive Environment of a student, “in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.” 34 C.F.R. § 300.116(d).

The evidence demonstrates that at the student’s October 26, 2015, IEP meeting once the student’s disability classification had been changed to Autism and his IEP had been amended the team determined that School A could not implement the student’s IEP. The evidence also demonstrates that School A referred the student’s school placement to the DCPS LRE team for a school to be assigned. Nearly two months passed and DCPS had not provided a proposed school placement and as result Petitioner filed her due process complaint. More than a month later DCPS finally proposed a school placement for the student at School B.

The evidence demonstrates that at a February 9, 2016, meeting representatives of School B participated along with the student’s parent and described the Autism program at School B. Those representatives acknowledged that the students currently in the program were functioning academically and socially below the student’s current functioning. In addition, when the student’s behavioral difficulties that he has displayed at School A were described the representatives indicated that they were unaccustomed to such behavioral difficulties and not equipped to address his behaviors. Also, the DCPS witness who testified also confirmed that the student functions above the level of the current students and at School B the student would take his non-academic classes inside general education, which is contrary to the dictates of his current IEP.

The student’s parent visited School B and confirmed the concerns that were raised about the difference in the student’s level of functioning compared to the other students. The parent also visited School C where she has requested the student be placed. By contrast School C groups students by ability level and has clinical staff equipped to address the student’s behaviors and School C can implement the student’s IEP that requires he be outside general education.

Based upon the evidence the Hearing Officer concludes that student was maintained in an inappropriate placement from October 26, 2015, and the delay in DCPS offering an alternative placement for the student of over three months was inordinate and a denial of a FAPE to the student.

In addition, the evidence demonstrates that the school placement DCPS finally proposed is inappropriate for the student based upon the fact that the students in the School B program are functioning below the student’s current academic and socialization level and School B cannot

fully implement the student's IEP by providing all instruction outside general education. Consequently, the Hearing Officer concludes that School B is an inappropriate school placement for the student.

### **Remedy:**

"[C]ourts have identified a set of considerations 'relevant' to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment." Branham, 427 F.3d at 12

Petitioner has requested as a remedy the student be placed at School C. The testimony by the parent and her educational advocate demonstrate that School C can provide the student specialized instruction and related services and address his unique needs. Based upon the evidence presented the Hearing Officer concludes that the school proposed by the parent meets the factors that the Hearing Officer is to consider in determining a prospective placement for the student and will grant her placement at School C, a non-public separate school, for the remainder of SY 2015-2016 as the remedy and as part of the compensatory education to the student.

### **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.

Petitioner proposed that the student be provided 50 hours of ABA therapy as compensatory education, however, there was insufficient evidence presented to support the amount of therapy suggested. Although the compensatory education request and plan Petitioner presented is problematic in that regard, to award no compensatory education when a denial of a FAPE has been established would be inequitable. Consequently the Hearing Officer also will grant Petitioner, in addition to the placement in a non-public separate school, a nominal amount of ABA therapy as compensatory education.<sup>6</sup>

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<sup>6</sup> The Hearing Officer concludes that despite Petitioner's inability to establish appropriate compensatory education, to award nothing would be inequitable. (A party need not have a perfect case to be entitled to compensatory education. *Stanton v. D.C.* 680 F Supp. 201 (D.D.C. 2011). If a student is denied a FAPE a hearing officer may not "simply refuse" to grant a compensatory education award. *Henry v. D.C.* 55 IDELR (D.D.C. 2010))

**ORDER:** <sup>7</sup>

1. DCPS shall, within ten (10) school days of issuance of this order place and fund the student at School C (the Frost School) for the remainder of SY 2015-2016. DCPS shall also provide the student transportation services.
2. DCPS shall within ten (10) school days of this issuance of this order provide the student as compensatory education 20 hours of ABA therapy at the DCPS/OSSE prescribed rates to be used by Petitioner by December 31, 2016.
3. All other requested relief 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: March 7, 2016**

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<sup>7</sup> Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.