



## **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 May 5, 2014, and concluded on May 7, 2014, 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 \_\_\_\_\_ resides in the District of Columbia with his parent. The student is a child with a disability classification of autism. He has attended non-public schools with DCPS funding from 2003 through the summer of 2013 when it was determined that he is in need of residential placement. Prior to that determination the student was attended a full-time out of general education day school (“School A”) with DCPS funding.

On or about September 3, 2013, when DCPS had not designated a specific residential facility for the student for school year (“SY”) 2013-2104, his parent unilaterally enrolled him at residential facility located outside the District of Columbia (“School B”). School B is a therapeutic residential school that will enable the student to earn a high school diploma.

DCPS convened a meeting on September 9, 2014, and issued a prior notice on September 19, 2013, indicating that the student requires residential placement. Petitioner asserts, however, this determination should have been made prior to the start of SY 2013-2014 as she requested a placement in June 2013.

After Petitioner informed DCPS that she had unilaterally enrolled student at School B DCPS explored whether it could authorize funding for student at that location. DCPS determined that location did not have OSSE certificate of approval (“COA”). DCPS, thereafter, informed Petitioner it would be offering the student a different residential facility. However, DCPS never issued a prior notice placing the student at any residential facility for SY 2013-2014 and the student remains at School B.

On February 28, 2014, Petitioner, the student’s parent, filed this due process complaint alleging, inter alia, that DCPS failed to provide the student a school placement for SY 2013-2014, and now seeks reimbursement of the student’s tuition and expenses at School B for SY 2013-2014 and prospective placement and funding for the student to remain at School B. Petitioner asserts School B is a proper placement for the student that provides him with a college preparatory diploma track high school program, career exploration and vocational instruction.

DCPS filed a timely response to the complaint on March 24, 2014, and asserted there has been no denial of a free and appropriate public education (“FAPE”) to the student as DCPS revised student’s individualized educational program (“IEP”) on September 9, 2013, to require a “24 hour therapeutic setting,” only eight days after the student was to return following summer break

from School A and by the time DCPS revised the IEP the student had already been unilaterally enrolled at School B; thus the student has suffered no educational harm. DCPS, however, maintained that unless and until School B has a COA it could not prospectively place the student there and would provide an alternative residential placement.

As of the date Petitioner filed the due process complaint up until the due process hearing DCPS has not issued a prior notice placing the student at any specific residential school. DCPS has agreed to reimburse the student's parent the full cost of the student's tuition, room and board and costs of attending School B through the end of School B's academic year for SY 2013-2014.

A resolution meeting was held on March 14, 2014. The complaint was unresolved and the parties did not mutually agree to proceed directly to hearing. The 45-day period began on March 28, 2014, and ended (and the Hearing Officer's Determination ("HOD") was due) on May 14, 2014. Petitioner's counsel requested a ten day extension of the HOD due date to allow for the requested hearing dates as counsel or witnesses were not available on the previous hearing date(s) offered. Respondent's counsel did not object. The motion was granted and the HOD due date is May 24, 2014.

The Hearing Officer convened pre-hearing conferences on March 27, 2014, and March 31, 2014, and issued a pre-hearing conference order outlining, inter alia, the issues to be adjudicated at hearing.<sup>2</sup>

The parties appeared for hearing on May 5, 2014, and May 7, 2014. At the start of the hearing DCPS did not present or seek to have the student placed at any facility and agreed to reimburse the parent for the full tuition and costs of the student's attendance at School B for SY 2013-2014.<sup>3</sup> The parties stipulated that DCPS had provided partial reimbursement to the parent prior to the hearing. Post hearing the parties agreed to the amount of the remaining reimbursement for the student's tuition and costs of attending School B through the end of School B's SY 2013-2014 session.

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<sup>2</sup> At the pre-hearing conference the Hearing Officer informed DCPS that if it was going to propose a residential placement location for the student other than School B it needed to identify that facility prior to the hearing. DCPS counsel provided an acceptance letter to another residential program to Petitioner prior to the hearing. However, on the date of the hearing DCPS did not request that the Hearing Officer place the student at the facility for which the acceptance letter was obtained. Thus, the Hearing Officer concluded that the appropriateness of that residential facility was not at issue.

<sup>3</sup> Respondent's counsel represented at the outset of the hearing that it is not DCPS' intention to move the student from School B at all, even for SY 2014-2015, presuming School B will obtain an OSSE COA. However, DCPS asserted that if the COA is not obtained DCPS reserves its right to determine an appropriate location for the student for SY 2014-2015. However, there was no information at this juncture as to what DCPS' course of action will be in the future with regard the student's SY 2014-2015 placement.

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

### **The issues adjudicated are:**

1. Whether DCPS denied the student a FAPE by failing to promptly endorse the conclusions of the School A team, the parent, the child's treating psychiatrist from July 15, 2013, that the student required a residential treatment program for SY 2013-2014 until approximately October 23, 2013, when DCPS informed the parent the DCPS would not place the student at School B but another residential program.
2. Whether DCPS denied the student a FAPE for SY 2013-14 because it has failed to provide him with any specific school and location for implementation of his IEP during SY 2013-2014 thereby preventing implementation of his IEP.
3. Whether School B is a program at which the student's educational and social emotional needs are being addressed so that he has been receiving educational benefit there since his enrollment on September 3, 2013, and whether the student's availability for learning will be impaired if he is required to change from one residential school to another at this time instead of remaining at School B.
4. Whether DCPS denied the parent the right to be a member of the group that made decisions on the school placement for the student for SY 2013-2014 in violation of 34 CFR 300.501(c). Petitioner asserts the decision about which school the student would attend was made without her participation but by persons who have not been identified to her for reasons that have not been stated.
5. Whether DCPS has refused to provide the student's parent access to the educational records she has requested and failed to respond with specifics to her detailed request in violation of 34 CFR 300.501(a)(1) and (2).

### **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 39), Joint Exhibits and Respondent's Exhibits 1 through 5 ) that were all admitted into the record and are listed in Appendix A.<sup>5</sup> Witnesses a listed in Appendix B.

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<sup>4</sup> The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may 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.

<sup>5</sup> DCPS counsel objected to two of Petitioner's disclosed documents. The objections were noted on the record and all Petitioner's documents were ultimately admitted. The joint exhibits were admitted without objection; all of Respondent's exhibits were admitted without objection.

## FINDINGS OF FACT:<sup>6</sup>

1. The student \_\_\_\_\_ resides in the District of Columbia with his parent. The student is a child with a disability classification of autism. He has attended non-public schools with DCPS funding from 2003 through the summer of 2013 when it was determined that the student is in need of residential placement. Prior to that determination the student was attended a full-time out of general education day school, School A, with DCPS funding. (Parent's testimony, Joint Exhibit 2)
2. As the student's behaviors became increasing aggressive and his parent's concern grew regarding the student eloping from home and his developing obsession with taking public transportation on his own, the parent, based on conversations with and recommendations of the student's treating professionals, began to explore residential placement facilities for the student. In June 2013 the student's parent expressed to the DCPS progress monitor for School A the need for a change in the student's placement to residential and the DCPS placement monitor began to arrange a meeting at which the student's need for residential placement could be addressed. (Petitioner's Exhibits 19a, 19c, 21)
3. In June 2013 the student's parent and the student visited a residential school located outside the District of Columbia, School B, and applied for admission. School B is a therapeutic residential school that will enable the student to earn a high school diploma. On July 1, 2013, School B provided an acceptance letter for the student to attend. (Parent's testimony, Petitioner's Exhibits 6-1, 7)
4. On July 15, 2013, the meeting was convened at School A to discuss the student's need for residential school placement. The student's parent as well as school staff related the student's increasingly aggressive behaviors and the danger of the student eloping. The team recommended a temporary 24 hour therapeutic residential setting in order to appropriately maintain the student's access to an educational curriculum. (Joint Exhibit 1)
5. On August 14, 2014, the student's parent sent a letter to the DCPS School A progress monitor inquiring as to the status of DCPS' approval for the student to be placed in a residential facility. The parent informed DCPS in this letter of her intention to continue the placement process with DCPS but she intended to enroll the student at School B for the fall term SY 2013-2014 and expected DCPS to provide funding. On August 30, 2013, the student's parent sent another letter to the DCPS progress monitor stating that because DCPS had yet to provide a residential program for the student she would be placing him at School B starting September 3, 2013. (Petitioner's Exhibits 19b-2, 22)

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<sup>6</sup> The evidence that is the source of the Finding of Fact ("FOF") 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.

6. After DCPS did not designate a specific residential facility for the student the student's parent enrolled him School B on or about September 3, 2013. The student began attending School B at the start of School B's SY 2013-2014. The parent contracted with and made scheduled payment arrangements with School B for the student to attend School B with anticipation that DCPS would provide funding for the student to attend. (Parent's testimony)
7. DCPS convened a meeting on September 9, 2014, and determined the student required a residential placement and on September 19, 2014, DCPS issued a prior written notice of a change of placement to a 24 hour therapeutic setting. However, DCPS did not designate the specific residential school the student would attend and DCPS would fund. (Joint Exhibits 2, 3-1, Petitioner's Exhibit 29)
8. On September 24, 2013, DCPS referred the student's case file to OSSE for placement and funding and recommended the student's placement at School B. (Petitioner's Exhibit 19-e-1)
9. In early October 2013 the DCPS residential specialist sent residential packages to obtain a residential facility for the student and identified a residential program for the student located in Pennsylvania. Normally, the individual requesting identification of a residential placement, who with regard to the student was the School A progress monitor, would issue the location of services letter ("LOS"). However, no LOS was issued for the student after the residential program was identified. School B was considered as a residential facility for the student but the single factor preventing DCPS from placing the student at School B is its lack of a COA. (Witness 1's testimony)
10. On October 23, 2013, the DCPS School A progress monitor informed the student's parent that she had been notified that the student had been approved by OSSE for residential funding but the student would not be placed at School B but another residential facility in a different state than School B but operated by the same organization as School B and that the parent would be provided an letter of agreement for reimbursement of the student's tuition at School B and a location of services letter to the residential placement that had been selected. (Petitioner's Exhibit 19-h-1)
11. On October 23, 2013, the student's parent responded in writing to the DCPS progress monitor stating her opposition to the student being moved from School B to the other facility that had not been specifically identified. In her letter the parent alluded to the reason the progress monitor mentioned as to why School B was not selected by OSSE as it's lack of a COA. (Petitioner's Exhibit 19-i)
12. In an effort to understand the decision-making process regarding the student's school placement the student's parent sent a letter dated October 25, 2013, to DCPS requesting all relevant documents of the student's educational records related to his referral and placement in the residential program. (Petitioner's Exhibit 19j)

13. School B is a residential educational placement for the student that provides him with a college preparatory diploma track high school program along with career exploration and vocational instruction. The student has made social, emotional and educational progress since he has been attending School B. School B is a co-ed school located in an un-gated rural setting. There is no public transportation near the campus. School B has total of 96 students and covers grades 5 through 12. There are 20 students through 8<sup>th</sup> grade and 68 students in high school. The rest of the students are in a post-secondary transitional program. All School B students have special needs and are all on diploma track. Local public school districts fund approximately forty students and School B is approved by a number of state educational agencies including California, Massachusetts and New York. Not all students at School B are residential students - 5 to 10 % of the students are day students only. School B provides related services and has vocational explorations and sports programs. School B had an OSSE COA in the past and in the process of reapplying. (Witness 2's testimony, Witness 3's testimony)
14. In October 2013 School B conducted an initial review of the student's progress and developed an IEP that guides his instruction and programming. The parent participated in the meeting to create the IEP. The student is currently in 11<sup>th</sup> grade and will be in 12<sup>th</sup> grade next year. The student's parent originally requested the student's junior and senior year be spread out over four years. However, the student could graduate sooner perhaps in 2015. (Witness 3's testimony, Petitioner's Exhibits 11, 12, 13, 14, 15)
15. At School B the student lives in a cottage with nine other students. School B uses a social skills curriculum and a token economy behavioral system. The student has bought into and been successful with the token economy system. There is also a parent point sheet used when the student leaves the school for a home stay. The student works with a social worker once per week on social and coping skills; coaching is on going. The student is benefitting from the program at School B. He has begun to become more flexible and better manage his anxiety by being methodically exposed to his triggers and receiving coaching on his behaviors. He experiences anxiety with novel tasks and transitions. He is growing and thriving and invested in the program and feels safe at School B. The School B staff believe the student would experience extreme anxiety and regression if he were to change schools next year. (Witness 2's testimony, Witness 3's testimony, Petitioner's Exhibits 9, 10, 11, 12)
16. The student's former psychiatrist asserts that the student has made surprising progress since attending School B and she would not recommend a change of school at this time and particularly does not recommend the student live in one place and travel to school in another location. She predicts that if the student were required to change schools he would have increased behavioral problems and might lose trust in his parent and that has been the main impetus for him to adjust to the change of being in a residential program. His behavioral regression and severe anxiety would negatively impact his education. (Witness 4's testimony)

17. The week prior to the due process hearing the student's parent received a check from the District of Columbia Government in the amount of \$ 93,362.09 as partial reimbursement for the student attendance at School B. (Stipulation)
18. The remaining amount that the student's parent is obligated to pay for the student's tuition and costs at School B for the full 2013-2014 school year is \$31,440.00. (Petitioner's Exhibit 8-2).
19. With regard to transportation the parties have agreed to use the amount of \$1,645.44 as the maximum amount for which the parent can be reimbursed for the remainder of SY 2013-2014 for the transportation expenses (a) already incurred for spring break (\$547.04) along with the anticipated estimate of the transportation costs for (b) the trip home June 27, 2014, and the trip back to School B for the summer program and (c) the trip home with the parent at the end of the summer program (\$1098.40). (Stipulation)
20. DCPS has issued a revised Independent Services Authorization for the student that addresses the remaining \$31,440 for tuition and the \$1,646.44 sum for transportation expenses for SY 2013-2014. (Stipulation)<sup>7</sup>

## 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;

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<sup>7</sup> The revised Independent Services Authorization indicates that the authorization in Respondent's Exhibit 1 has been satisfied, and that the authorization in Respondent's Exhibit 5 is being rescinded, since the amount of \$15,228 in Respondent's Exhibit 5 is included in the \$31,440. A copy of the parent's statement of tuition and transportation expenses dated May 8, 2014, and the new Independent Services Authorization are both a part of the official hearing record. The parties have agreed that they accurately reflect the total of the sums outstanding and to be reimbursed to Petitioner.

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>8</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 denied the student a FAPE by failing to promptly endorse the conclusions of the School A team, the parent, the child's treating psychiatrist from July 15, 2013, that the student required a residential treatment program for SY 2013-14 until approximately October 23, 2013, when DCPS informed the parent the DCPS would not place the student at School B but another residential program.

**Conclusion:** Petitioner did not sustain the burden of proof that DCPS' failure to promptly adopt the findings of the July 15, 2013, meeting at School A was a denial of a FAPE to the student.

The evidence demonstrates that on September 9, 2013, DCPS convened a meeting at which the student's IEP was updated to provide for a residential placement. The evidence also demonstrates that as of September 19, 2013, DCPS issued a prior notice of placement for the student's least restrictive environment change to a residential placement. Although the dates upon which the IEP was amended and the prior notice was issued were beyond the date the parent desired and prodded DCPS to confirm the student's residential placement, there was insufficient evidence that the lapse of time between the July 15, 2013, meeting and the IEP change and prior notice of placement was inordinate and amounted to a denial of FAPE to the student.

**ISSUE 2:** Whether DCPS denied the student a FAPE for SY 2013-2014 because it has failed to provide him with any specific school and location for implementation of his IEP during SY 2013-2014 thereby preventing implementation of his IEP.

**Conclusion:** Petitioner sustained the burden of proof by preponderance of the evidence that DCPS denied the student a FAPE by failing to identify and provide a residential facility for the student's IEP to implemented during SY 2013-2014.

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<sup>8</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.

The evidence clearly demonstrates that although there was communication between DCPS and the student's parent regarding the specific residential facility that would be selected and funded by DCPS there was never an official notification provided the parent in the form of a prior notice of other means that specifically identified a residential facility at which the student's IEP would be implemented for SY 2013-2014 and thus student was denied a FAPE as a result. Consequently, the parent was justified in unilaterally placing the student at School B absent any such location designation by DCPS and the parent is entitled to the reimbursement of the tuition and costs of the student's attendance at School B for SY 2013-2014.

**ISSUE 3:** Whether School B is a program at which the student's educational and social emotional needs are being addressed so that he has been receiving educational benefit there since his enrollment on September 3, 2013, and whether the student's availability for learning be impaired if he is required to change from one residential school to another at this time instead of remaining at School B.

**Conclusion:** Petitioner presented sufficient evidence that the student has and is obtaining educational benefit at School B and the school is meeting is educational and social and emotional needs and that removing the student from School B at this time would be detrimental.

Although when Petitioner filed the due process complaint it was uncertain that DCPS would agree to fund and/or reimburse for the student's attendance at School B for remainder of SY 2013-2014 or whether it would propose an alternative residential facility, at the hearing DCPS agreed that the student would remain at School B through the end of SY 2013-2014.

Although the student is considered to be in the eleventh grade and he is projected to be able to graduate high school in the next school year a final determination of the student's graduation status has not yet be made nor has there been any review of the student's progress and IEP implementation at School B by any DCPS personnel who, now based upon the order below, are responsible for the student's education provided to him at School B.

Although Petitioner sought as relief for denial of a FAPE that DCPS be ordered place fund the student at School B through SY 2014-2015, the Hearing Officer does not conclude that such a conclusion can be made at this juncture or that DCPS actions in not promptly providing a residential location for the student for SY 2013-2014 warrants such relief.

The evidence demonstrates that School A has begun the process of applying for a OSSE COA and that the only reason DCPS did not place the student at School B on its own accord was because School B lacked a COA. Given that School B is applying for the COA and that OSSE has the obligation to ensure that the health and safety of students funded by the District of Columbia is protected through the COA process the Hearing Officer considers it premature to make a determination on the appropriateness of the student's placement for SY 2014-2015 and specifically declines to grant that portion of Petitioner's requested relief regarding prospective placement at School B.

**ISSUE 4:** Whether DCPS denied the parent the right to be a member of the group that made decisions on the school placement for the student for SY 2013-14 in violation of 34

CFR 300.501(c). Petitioner asserts the decision about which school the student would attend was made without her participation but by persons who have not been identified to her for reasons that have not been stated.

**Conclusion:** Petitioner did not sustain the burden of proof that the parent was not involved in the decision making of the placement for the student.

The evidence clearly demonstrates that the parent fully participated in the July 15, 2013, meeting at which the initial determination regarding the student's need for residential placement was made and fully participated in the September 9, 2013, meeting at which the student's IEP was changed to prescribe a residential placement. Although the evidence does not indicate the parent was involved in the decision making process of which residential facility the student would attend, the evidence demonstrates that DCPS never proposed a facility for SY 2013-2014 for her to visit or consider as location for the student's IEP to implemented. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of proof on this issue.

**ISSUE 5:** Whether DCPS has refused to provide the student's parent access to the educational records she has requested and failed to respond with specifics to her detailed request in violation of 34 CFR 300.501(a)(1) and (2).

**Conclusion:** Petitioner did not sustain the burden of proof that DCPS failed to provide the parent the student's educational records.

The evidence demonstrates that after the parent was informed by the DCPS progress monitor for School A that School B had not been chosen as the student's residential facility the parent requested numerous documents including internal communications regarding the process and decision making by DCPS and OSSE regarding the student's residential placement location. The Hearing Officer concludes that there was insufficient evidence or authority provided that the parent was denied any educational records to which the parent was entitled. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of proof on this issue.

**ORDER:<sup>9</sup>**

1. DCPS shall, as it has already partially done and agreed to do fully, reimburse Petitioner for the tuition and transportation costs for the student attending School B for SY 2013-2014<sup>10</sup> and School B is the student's current school location and DCPS is hereby responsible for the student's placement at School B for SY 2013-2014.
2. All other requested relief is denied.

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<sup>9</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.

<sup>10</sup> The parties have stipulated to the total amount that have been and is to be reimbursed to Petitioner by DCPS.

**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: May 24, 2014**