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STUDENT HEARING OFFICE  
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**Confidential**

<p>STUDENT<sup>1</sup>, by and through her Parent Petitioners, v. District of Columbia Public Schools (“DCPS”) Respondent. Case</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: February 14, 2011</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Roberta Gambale, Esq. Brown and Associates 1220 L Street, NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Assistant Attorney General Tanya Chor, Esq. 1200 First Street, NW Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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<sup>1</sup> Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

## **JURISDICTION:**

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened February 14, 2010, at the OSSE Student Hearing Office 810 First Street, NE, Washington, DC 20003, in Hearing Room 2004.

## **BACKGROUND:**

Student or "the student" is age \_\_\_\_\_ and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of specific learning disability ("SLD"). The student is attending a private full time special education school, hereinafter referred to as "School A." The student's tuition at School A is funded by the District of Columbia.

Petitioner alleges that at an individualized educational program ("IEP") meeting in March 2010 the student's IEP team determined that School A was no longer an appropriate location of services for the student and that another school should be identified for the student that was appropriate and could implement her IEP. Petitioner alleges there were two subsequent IEP meetings in the summer of 2010 and in November 2010 at which the IEP team reiterated the student's need for a different school. Petitioner alleges DCPS as the responsible local educational agency ("LEA") has failed to provide the student an appropriate location of services since the IEP team determined School A was inappropriate. Petitioner has proposed the student be placed at School B, another private full time special education school, with DCPS funding.

DCPS asserted in defense that the student's IEP could be implemented at School C, a DCPS public high school and that School C was proposed by DCPS at the November 12, 2010, IEP meeting.

The resolution session was convened January 7, 2011. The matter was not resolved. A pre-hearing conference was convened January 11, 2011. The Hearing Officer issued a prehearing order ("PHO") January 11, 2011, certifying the issue to be adjudicated, the relief Petitioner is seeking.<sup>2</sup>

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<sup>2</sup> This case was originally assigned to Hearing Officer Jim Mortenson who conducted the pre-hearing conference and issued the PHO. The case was reassigned to the current Hearing Officer due to Mr. Mortenson's unavailability to conduct the hearing. The parties did not object to the reassignment.

**ISSUE(S):** <sup>3</sup>

The issue to be adjudicated is:

Did DCPS fail to provide the student an appropriate secondary school education when the individualized education program ("IEP") team determined in March 2010 that an appropriate education could no longer be provided at the student's present school?

Petitioner seeks as relief: (1) compensatory education consisting of independent tutoring and counseling to make up for missed services and aid with the student's transition to a new school and (2) DCPS funding of the student's placement at School B.

**RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-12 and DCPS Exhibit 1-11) that were all admitted into the record and are listed in Appendix A.<sup>4</sup> Witnesses are listed in Appendix B.

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

1. Student or "the student" is age \_\_\_\_\_ in the \_\_\_\_\_ grade and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of specific learning disability ("SLD"). The student is attending a private full time special education school, hereinafter referred to as "School A." The student's tuition at School is funded by the District of Columbia. (Student's testimony, DCPS Exhibit 5)
2. The student has had difficulty with her peers at School A. Because of these difficulties the student's schoolwork has suffered. The student is also concerned about her safety at School A. (Student's testimony)

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<sup>3</sup> The alleged violation(s) and/or issue(s) listed in the complaint may not directly correspond to the issue(s) outlined here. However, the parties agreed at the hearing that the issue listed here and as stated in the pre-hearing order dated January 11, 2011, is the issue to be adjudicated. Hearing Officer Mortenson noted in his PHO that if DCPS was asserting the student required a less restrictive environment than the student's IEP currently requires DCPS would need to assert that defense as a counterclaim, perhaps assume the burden of persuasion on that issue and request a subsequent pre-hearing conference. This Hearing Officer is not aware that DPCS made any such request. Thus, the issue to be adjudicated is as presented the PHO.

<sup>4</sup> DCPS objected to admission of Petitioner's Exhibits #1 and #4. This Hearing Officer overruled the objections and admitted the exhibits as noted in Appendix A.

<sup>5</sup> The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may perhaps only cite one party's exhibit.

3. The parent communicates with the School A social worker approximately twice per week and visits the school often. The student often tells the parent about her difficulties with peers at School A. In March 2010 the DCPS representative assigned to School A suggested that the parent research other schools that would be suitable for the student. (Parent's testimony)
4. The student's IEP was reviewed on March 23, 2010, at School A. The team discussed the student's need to attend another school location due to difficulty she was experiencing with peers at School A. The team agreed to reconvene by the end of the 2009-2010 school year to decide on an alternative location and any other adjustments to the student's IEP. (DCPS Exhibit 6-3)
5. There was another meeting convened in June 2010 at which the issue of change of location for the student was discussed. However, no alternative school location was agreed upon. The DCPS representative suggested additional private and public schools the parent could visit and consider. (Parent's testimony)
6. The student's IEP prescribes that the student be provided 26 hours of specialized instruction per week in an out of general education setting, 1.5 hours of behavior support services per week and speech and language services on a consultative basis for one hour per month. (DCPS Exhibit 8-7)
7. The least restrictive environment ("LRE") section of the student's IEP prescribes the student receive 26 hours per week of specialized instruction and 1.5 hours of behavioral support services. The LRE section also states: "[the student] received special education services within the general education setting but it was not enough for the student to be successful. Along with direct and specially designed instruction in that areas of reading, math, and written expression, [the student] needs additional response and processing time as well as breaks during in-class assignments and exams. [The student] needs a small student to teacher ratio of 8:1 including clearly defined expectations, predictable routines and minimal distractions. [The student] also needs assignments shortened/abbreviated and presented in verbal/auditory modalities. [The student] needs to be provided exposure to textbooks, source material, and lectures in various sensory modalities that can provide repeated exposure to new material. [The student] will need consistent reinforcement and encouragement from teachers and needs support in organizing herself which is suggested by a daily planner." (Petitioner's Exhibit 5-8)
8. On November 12, 2010, another IEP team meeting was convened at School A to review the student's IEP and discuss placement options. School A's social worker mentioned at the meeting that the student would be best served with a change of location of services because she was not getting the full benefit of services at School A. The parent expressed her desire that student's school be changed from School A to School B, another full time special education school the parent and student had visited and to which the student been offered admission. At the meeting the student expressed her excitement about attending School B particularly because of the vocational and transition options that were available to her at School B. The student believes that School B will better

prepare her for her career pursuits than School A. (Student's testimony, Parent's testimony, testimony, Petitioner's Exhibit 7-2).

9. There were two DCPS representatives at the November 12, 2010, meeting. These representatives suggested the student attend School C, a DCPS public high school. There was no one from School C available during the meeting to describe the services that would be available to the student at School C. The parent and student objected to the student being placed at School C principally because they believed School C only offered specialized instruction in an inclusion setting. DCPS was not prepared to change the student's educational placement and/or location of services at the conclusion of the meeting. The team did not amend the LRE provisions of the student's IEP. The DCPS representatives agreed to provide additional information to the parent about School C. The meeting concluded without a change of educational placement and/or location services being made. (testimony, Petitioner's Exhibit 7-2)
10. In December 2010, there was email correspondence between the DCPS representatives and the parent and her educational advocate in attempts to reconvene a meeting to discuss and determine a change in the student's location of services. However, the parties did not agree on a date. On December 17, 2010, Petitioner filed the current complaint alleging DCPS had not provided the student an appropriate location of educational services as an alternative to School A. DCPS has never issued a prior notice for the student to attend School C. (Petitioner's Exhibits 8, 9, 10)
11. In January 2011 an IEP progress report was issued for the student. The progress report indicates the student is making progress in most of her IEP goals, has mastered one of her math goals and mastered one of her speech and language goals. Two of her math goals have not been introduced. (DCPS Exhibit 11)
12. The student has visited School B and been interviewed by the staff and offered acceptance. School B is a private full time special education school for students age five through twenty-one with array of disability classifications. The DC Office of State Superintendent of Education has approved School B to provide services to DC students. School B has certified special education teachers and certified related service providers. School B can implement the student's IEP and can provide the student a low student to teacher ratio as the student's IEP prescribes. School B also offers a full array of career transition services. (testimony, Petitioner's Exhibit 12)
13. There was no official proposal by DCPS of a location of services for the student at the November 12, 2010, IEP meeting. DCPS sent a letter of invitation on December 13, 2010, to convene an IEP meeting to discuss the student's post-secondary transition and her placement. The current DCPS representative assigned to School A believes the student is making sufficient progress relative to her IEP goals that DCPS would like to consider whether the student is able to be successful in an educational setting that is less restrictive than School A and School B. This would be a topic of discussion if the IEP meeting had been convened by DCPS prior to the due process hearing. At School C the specialized instruction would be offered in a combination setting, thus some of the

student's hours would be provided in a general education setting.  
testimony, DCPS Exhibit 4)

### CONCLUSIONS OF LAW:

Pursuant to IDEIA §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 IDEIA §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.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief. <sup>6</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). 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.

34 C.F.R. § 300.17 provides that 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.

**Issue:** Did DCPS fail to provide the student an appropriate secondary school education when the individualized education program ("IEP") team determined in March 2010 that an appropriate education could no longer be provided at the student's present school?

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

Pursuant to 34 C.F.R. §300.116:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that-- (a) The placement decision-- (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (2) Is made in conformity with the LRE provisions of this subpart, including Sec. Sec. 300.114 through 300.118; (b) The child's placement-- (1) Is determined at least

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<sup>6</sup> 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 that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

annually; (2) Is based on the child's IEP; and (3) Is as close as possible to the child's home; (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled; (d) 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; and (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

Pursuant to 34 C.F. R. §300.327:

Each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

Pursuant to 34 C.F.R. §300.114:

(1) Except as provided in Sec. 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and Sec. Sec. 300.115 through 300.120. (2) Each public agency must ensure that-- (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Pursuant to DC Code § 38-2561.02 (b) and (c):

DCPS shall place a student with a disability in an appropriate special education school or program in accordance with this chapter and the IDEA. (c) Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;(2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

In the present case Petitioner presented sufficient evidence through the documents and testimony offered by the student, the parent and \_\_\_\_\_ that the student's IEP team on March 23, 2010, in June 2010 and on November 12, 2010, concluded the student was in need of a change in location of services from School A.

The student's IEP clearly states that the student is to be provided 26 hours of specialized instruction in a out of general education setting. In addition, the LRE in the student's IEP clearly states the student has been unsuccessful in a general education setting and the student is need a small student to teacher ratio of 8 to 1. As of the November 12, 2010, meeting after two prior meetings when the student's IEP team had determined the student was in need of a change of location because of difficulties at School A no other appropriate school was offered by DCPS.

Although DCPS representative suggested at the November 12, 2010, meeting that the parent consider School C, there was no information presented at that meeting and insufficient evidence presented at the hearing that School C can provide the student the out of general education services and the low student to teacher ratio the student's IEP and LRE requires.

This Hearing Officer did not credit the DCPS witness's testimony that School C could implement the student's IEP. The witness did not state she had personal knowledge of the School C's student to teacher ratio and stated that some of the specialized instruction would be in an out of general education setting. Although the student's progress reports indicate she is making some progress toward her IEP goals the progress reports do not indicate the student has mastered all of her goals and the student's IEP has not been changed such that a less restrictive environment than offered in a full time special education school is appropriate. Thus, this Hearing Officer concludes School C is not an appropriate placement and/or location of services for the student.

There was sufficient evidence based on the credible testimony offered by [redacted] that School B can implement the student's IEP, provide the LRE that the student's current IEP prescribes and can provide the student educational benefit. Thus, this Hearing Officer concludes that the student should be placed at School B with District of Columbia funding.

Although the pre-hearing order stated that Petitioner sought compensatory education, there was no evidence of regarding compensatory education presented during the hearing and this Hearing Officer finds no basis in fact or law that compensatory education is warranted.

**ORDER:**

DCPS shall, effective the date of this order, place and fund the student's attendance at School B (Accotink Academy) for the remainder of the 2010-2011 school year.

**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).



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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: February 21, 2011**