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**Confidential**

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OSSE  
STUDENT HEARING OFFICE

<p>STUDENT<sup>1</sup>, by and through his Parent  Petitioners,  v.  District of Columbia Public Schools (“DCPS”)  Respondent.</p>	<p>HEARING OFFICER’S DETERMINATION</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 August 10, 2011, at the OSSE Student Hearing Office 810 First Street, NE, Washington, DC 20003, in Hearing Room 2006.

## **BACKGROUND:**

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 multiple disabilities (MD). During the 2010-2011 school year the student was enrolled in a private full time special education program hereinafter referred to as "School A." DCPS provided the funding for the student's attendance at School A. Prior to attending School A the student was in a private residential treatment center.

An individualized education program ("IEP") meeting was convened at School A on March 21, 2011, which the parent did not attend. The IEP developed prescribed the student receive 26.5 hours of specialized instruction and 1 hour of behavioral support services weekly. The student's March 21, 2011, IEP prescribed that he be out of general education 100% of time. The IEP indicated the student was operating on the 4<sup>th</sup> grade level in Math and approximately the 3<sup>rd</sup> grade level in Reading and Written Expression. The IEP also included a behavior intervention plan ("BIP"). During the first and second advisory of the 2010-2011 school year the student had excessive absences and earned failing grades in all subjects.

On May 31, 2011, another IEP meeting was convened for the student at School A. Again the parent was not in attendance. The student's specialized instruction was reduced from 26.5 hours per week to 19 hours per week and the IEP was amended to state that the student should be out of a general education setting 60% of the time. The 1-hour of week behavioral supports were continued in the IEP.

On May 12, 2011, DPCS sent a letter of invitation ("LOI") to the parent to attend the student's May 31, 2011, IEP meeting. The notes from the May 31, 2011, meeting indicate that the parent was informed of the meeting that day by telephone and was unable participate by telephone because she was at work at the time.

DCPS and the School A staff proceeded with the meeting without the parent's participation. The School A staff was of the opinion that the student was not invested in the educational program as evidenced by his poor attendance. The members of the team in attendance agreed that the student would be placed at his neighborhood school, hereinafter referred to as ("School B").

Petitioner filed a due process complaint on June 17, 2011, alleging DPCS had failed to allow the parent participation in the student's IEP meetings and failed to provide the student an appropriate placement. Petitioner asserted "Stay Put" for the student to remain at School A during the pendency of this proceeding. However, at the end of SY 2010-2011 School A closed and will

not reopen. Petitioner is seeking, the student's placement and DPCS funding at a private full time special education school and an IEP meeting within 30 days of his placement.

A resolution meeting was held on June 30 2011.<sup>2</sup> The parties did not resolve the complaint and a pre-hearing conference was conducted on July 18, 2011.<sup>3</sup> This Hearing Officer issued a pre-hearing order on July 21, 2011, stating the issues to be adjudicated, the relief Petitioner is seeking and Respondent's position with regard to the complaint and/or defenses.

DCPS maintains it made repeated attempts to encourage the parent to attend both the March 21, 2011, and May 31, 2011, IEP meetings and the student's placement and IEP as amended at the May 31, 2011, IEP meeting are appropriate, School B can provide the student the services prescribed by his IEP and is an appropriate educational placement. DCPS maintains the student has not been denied a FAPE.

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

The issues adjudicated are:

- 1. Whether DCPS denied the student a FAPE by failing to ensure the parent participated in the decision making process in the development of the student's IEP and determining his educational placement at the March 21, 2011, and May 31, 2011, IEP meetings? <sup>5</sup>**
  
- 2. Whether DCPS denied the student at FAPE by failing to provide the student an appropriate placement? <sup>6</sup>**

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<sup>2</sup> At the conclusion of the resolution meeting the parties agreed that the case would proceed to hearing at the end of the 30-day resolution period and thus the 45-day timeline would begin after the last day of the resolution period and end August 31, 2011.

<sup>3</sup> Attempts were made by this Hearing Officer to schedule the pre-hearing conference within a week of the resolution session. This was the first date mutually available for both counsel.

<sup>4</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(s) listed here and as stated in the pre-hearing order are the issue(s) to be adjudicated.

<sup>5</sup> Petitioner alleges there were two IEP meetings at which the parent was not present; one on March 21, 2011 and the other on May 31, 2011. Petitioner alleges the parent received no formal letter of invitation to either meeting and received a phone call on the day of the May 31, 2011, meeting but was unable to attend due lack of sufficient notice and due to her work schedule. Petitioner alleges that at the May 31, 2011, meeting DCPS changed the student's IEP and placement, reducing his hours of specialized instruction and changing his placement and the parent was provided no or insufficient opportunity to participate in this decision making.

<sup>6</sup> Petitioner alleges the student remains in need of a full time special education IEP and a therapeutic placement and that the IEP/placement proposed by DCPS, as well as the location of services, School B, cannot implement the student's IEP as it existed prior to May 31, 2011, cannot meet the student's needs and is inappropriate.

## RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-11 and DCPS Exhibit 1-6) that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

## FINDINGS OF FACT:<sup>7</sup>

1. 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 multiple disabilities (MD). During the 2010-2011 school year the student was enrolled in a private full time special education program, School A. DCPS provided the funding for the student's attendance at School A. (Parent's testimony, Petitioner's Exhibit 4)
2. The student attended a residential behavior treatment center (School C) for 18 months and was placed at School A following his discharge from School C in 2009. The parent attended IEP meetings at School A during his first year at School A. The student did not fare well at School C because of behavioral difficulties and his failure to regularly attend class. The parent was aware that based upon the student's difficulties at School A the school was considering removing from the school. (Parent's testimony, Petitioner's Exhibits 1 & 2)
3. An IEP meeting was convened at School A on March 21, 2011, which the parent did not attend. The IEP prescribed the student receive 26.5 hours of specialized instruction and 1 hour of behavioral support services weekly. The student's March 21, 2011, IEP prescribed that he be out of general education 100% of time. The IEP indicated the student was operating on the 4<sup>th</sup> grade level in Math and approximately the 3<sup>rd</sup> grade level in Reading and Written Expression. The IEP also included a BIP. (Petitioner's Exhibit 4-1, 4-12)
4. During the first and second advisory of the 2010-2011 school year the student had excessive absences and earned failing grades in all subjects. (Petitioner's Exhibit 7)
5. On May 31, 2011, another IEP meeting was convened for the student at School A. Again the parent was not in attendance. The student's specialized instruction was reduced from 26.5 hours per week to 19 hours per week and the IEP was amended to state that the student should be out of a general education setting 60% of the time. The 1-hour of week behavioral supports were continued in the IEP. The IEP prescribed that the student

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<sup>7</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.

receive extended school year ("ESY") services for summer 2011. (Petitioner's Exhibit 5-1)

6. On May 12, 2011, DPCS sent a LOI to the parent to attend the student's May 31, 2011, IEP meeting. The LOI were also sent by certified mail to the last known address of the parent. DCPS also made phone call attempts to reach the parent and inform her of the IEP meetings. DCPS prepared letters of invitations for the parent to attend both the March 21, 2011, and the May 31, 2011, IEP meetings. testimony DCPS Exhibits 5, 6-1, 6-2, 6-3)
7. The parent did not receive letters of invitation to attend the March 21, 2011, or the May 31, 2011, IEP meetings. The letters were sent to an old address although the DCPS transportation regularly picked the student up at the new address. (Parent's testimony)
8. On the day of the May 31, 2011, IEP meeting DCPS reached the parent by telephone and informed her that the meeting was about to convene. The parent strongly requested that the meeting not be held without her attendance and requested that she be allowed to participate. The parent strongly objected to the student being placed at his neighborhood school based his continued need for a therapeutic special education school. (Parent's testimony, Petitioner's Exhibits 1 & 2)
9. The notes from the May 31, 2011, meeting indicate that the parent was informed of the meeting that day by telephone and was unable participate by telephone because she was at work at the time. DCPS and the School A staff proceeded with the meeting without the parent's participation. The School A staff was of the opinion that the student was not invested in the educational program as evidenced by his poor attendance. The members of the team in attendance agreed that the student would be placed at his neighborhood school, School B. (DCPS Exhibit 2)
10. A DCPS representative informed the parent by telephone after the May 31, 2011, meeting was concluded and informed her that the student should be enrolled at his neighborhood school, School B. (DCPS Exhibit 6-4)
11. At the end of SY 2010-2011 School A closed and will not reopen. (Stipulation)
12. The student currently receives community based therapy and mentoring services. The student did not receive ESY services during Summer 2011. (Parent's testimony)
13. The student has been admitted to a private full time special education program, is a therapeutic school that primarily serves students with emotional and behavioral difficulties. The school has a behavior modification model and behavioral specialists and social workers to closely address student's behavioral and emotional needs. has approximately 63 students and the student to teacher ratio is 1 to 8. The school provides specialized instruction and related services with certified special education teachers and certified related service providers. The school staff interviewed the student and he visited and toured the school. The student will be able to receive credits toward his DC high school diploma. The

school also provides transition services and vocational skills training available to the student. testimony, Petitioner's Exhibit 10)

14. School B is a DCPS public high school and can provide the student the specialized instruction and related services in the student's IEP as amended at the May 31, 2011, IEP meeting and can implement that IEP. testimony)

#### 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 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.

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 1:** Whether DCPS denied the student a FAPE by failing to ensure the parent participated in the decision making process in the development of the student's IEP and determining his educational placement at the March 21, 2011, and May 31, 2011, IEP meetings?

**Conclusion:** DCPS failed to ensure the parent participated in the student's IEP meetings. Petitioner sustained the burden of proof by a preponderance of the evidence.

34 C.F.R. § 300.322 provides:

- (a) Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including--

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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.

- (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
- (2) Scheduling the meeting at a mutually agreed on time and place...<sup>9</sup>
- (d) Conducting an IEP Team meeting without a parent in attendance. A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as--
  - (1) Detailed records of telephone calls made or attempted and the results of those calls;
  - (2) Copies of correspondence sent to the parents and any responses received; and
  - (3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

The evidence demonstrates that letters of invitation and phone calls to the parent were attempted for her to participate in the March 21, 2011, IEP meeting and the May 31, 2011, meeting. In addition, there was documentation that the at least one telephone call was made to the parent about the May 31, 2011, meeting. However, on the day of the May 31, 2011, IEP meeting DCPS reached the parent and informed her that the meeting was about to convene. The parent strongly requested that the meeting be rescheduled so she could participate. There was credible testimony from the mother, based on her demeanor during the hearing, that she was not provided sufficient opportunity to participate in a critical meeting at which the student's services were reduced from a full time special education therapeutic placement to a part-time special education program and the student's placement was change to his neighborhood school. The Hearing Officer concludes that such a critical change in the student's program and placement and the parent's strong request

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<sup>9</sup> (b) Information provided to parents.

- (1) The notice required under paragraph (a)(1) of this section must--
  - (i) Indicate the purpose, time, and location of the meeting and who will be in attendance; and
  - (ii) Inform the parents of the provisions in Sec. 300.321(a)(6) and (c) (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child), and Sec. 300.321(f) (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP Team meeting for a child previously served under Part C of the Act).
- (2) For a child with a disability 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, the notice also must--
  - (i) Indicate--
    - (A) That a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child, in accordance with Sec. 300.320(b); and
    - (B) That the agency will invite the student; and
  - (ii) Identify any other agency that will be invited to send a representative.
  - (c) Other methods to ensure parent participation. If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls, consistent with Sec. 300.328 (related to alternative means of meeting participation).

that she be allowed to participate in the IEP meeting sufficiently demonstrates that the parent was not provided sufficient opportunity to participate in the student's IEP meeting, IEP amendment, reduction in services and change of placement. This lack of participation significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE.

**Issue 2:** Whether DCPS denied the student at FAPE by failing to provide the student an appropriate placement?

**Conclusion:** The student's IEP prior to the May 31, 2011, meeting required a full time special education therapeutic placement. Because the student's May 31, 2011, IEP was not developed and his specialized instruction reduced with the valid participation from the parent the student's current placement at School B is premature and thus inappropriate. Petitioner sustained the burden of proof by a preponderance of the evidence.

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also Scott v. District of Columbia, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

34 CFR §300.321 provides: The public agency must ensure that the IEP Team for each child with a disability includes--

- (1) **The parents of the child;** (emphasis added)
- (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
- (4) A representative of the public agency who--
  - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
  - (ii) Is knowledgeable about the general education curriculum; and
  - (iii) Is knowledgeable about the availability of resources of the public agency.
- (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;
- (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and



(7) Whenever appropriate, the child with a disability.

34 CFR §300.321 provides: Consistent with Sec. 300.501(c), 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.

A student's placement is to be in the least restrictive environment and *in a school that is capable of meeting the student's special education needs*. See Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1402 (9) (D) ("FREE APPROPRIATE PUBLIC EDUCATION- The term 'free appropriate public education' means special education and related services that include an appropriate preschool, elementary school, or secondary school education in the state involved" [and] "are provided in conformity with the individualized education program"); § 1401 (29) (D) ("The term 'special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability [ . . . ]"); 34 C.F.R. § 300.17 & 39; 34 C.F.R. § 300.116 (placement is to be based on student's IEP as determined by team including the parents); 34 C.F.R. § 300.327 & 300.501 (c); D.C. Mun. Regs. Tit. 5E § 3013.1-7 (LEA to ensure that child's placement is based on the IEP); and D.C. Mun. Regs. Tit. 5E § 3000.

The evidence clearly demonstrates that the parent did not participate in the IEP develop and placement decision for the student. Pursuant to the provisions of IDEA cited above this is vital and necessary requirement. The student's IEP prior to the May 31, 2011, meeting required a full time special education therapeutic placement. Because the student's May 31, 2011, IEP was not developed and his specialized instruction reduced with the valid participation from the parent the student's current placement at School B is premature and thus inappropriate and the failure to include the parent in the placement decision impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE and caused the child a deprivation of educational benefits.

### **Compensatory Education**

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

Although there was testimony offered with regard to compensatory education the student might be due as result of him not receiving ESY services following his exit from School A there was no provision and claim for compensatory education discussed during the pre-hearing conference and mentioned in the pre-hearing order. The testimony presented by Dr. Holman during the hearing was not convincing as to what services would put the student in the place he would have been

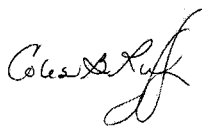
had he received ESY services. Consequently, the Hearing Officer will order, based on equitable considerations, and as compensatory education, that DCPS conduct and comprehensive psychological evaluation of the student that can be considered when the IEP team meets to assist in developing appropriate programming for the student during the 2011-2012 school year.

**ORDER:**

1. DCPS shall place and fund the student on an interim basis at \_\_\_\_\_ School and provide transportation services.
2. DCPS shall within thirty (30) calendar days of the date of this Order conduct a comprehensive psycho-educational evaluation with clinical components.
3. DCPS shall within thirty (30) calendar days of date of this Order convene an IEP meeting to (1) review the student's recent evaluation(s), (2) determine if the student remains in need of a full-time special education therapeutic placement, (2) review and revise the student's IEP as appropriate, and (3) consider and determine the student's placement and location of services for the 2011-2012 school year.
4. DCPS shall ensure that the all efforts are made pursuant to 34 C.F.R. § 300.322 to include the parent the IEP meeting directed to be convened.

**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: August 31, 2011**