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OSSE  
Student Hearing Office  
April 26, 2013

**Confidential**

Parent on Behalf of Student <sup>1</sup> ,  Petitioner,  v.  District of Columbia Public Schools (“DCPS”)  Respondent.  Case # 2013-0052	HEARING OFFICER’S DETERMINATION  Hearing Date: April 18, 2013  <u>Representatives:</u>  Counsel for Petitioner: Domiento C.R. Hill, Esq. 37 Florida Avenue, N.E. #100 Washington, D.C. 20002  Counsel for Respondent: Lynette Collins, Esq. Assistant Attorney General 1200 First Street, N.W. Washington, D.C. 20002  <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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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 April 18, 2013, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student is age thirteen and resides in the District of Columbia with her parent. She has been determined to be a child with a disability under IDEA with a classification of other health impairment (“OHI”).

The student is in seventh grade at (“School A”) a DCPS middle school, where she attended during the 2011-2012 school year (“SY”). Because of a temporary housing relocation the student’s parent transferred the student from School A to another DCPS school, (“School B”) sometime during SY 2011-2012.

The student started SY 2012-2013 at School B. Once the parent’s original housing arrangements were resolved the parent and student returned to their home near School A in October 2012 and the parent re-enrolled the student in School A during the first semester of SY 2012-2013.

Soon after the student began attending School A she began to display behavioral difficulties for which the parent was regularly contacted by the student’s teachers. As a result, the parent, through her advocate, requested a multidisciplinary team (“MDT”) meeting to address among other issues the student’s behavioral and academic progress.

Based upon information the parent obtained that student may have missed related services after returning to School A Petitioner filed the current complaint alleging a number of claims including the alleged missed related services. Petitioner seeks an award of compensatory education in the form of tutoring to compensate the student for missed behavioral support, speech-language and occupational therapy from October 2012 through January 31, 2013.

DCPS filed a response to the complaint on February 6, 2013, and denied any alleged denial of a free and appropriate public education (“FAPE”) to the student. DCPS asserted the student received all of the specialized instruction and related services prescribed by her IEP at both School B and up her return to School A.

The resolution meeting was held February 20, 2013, and was unsuccessful in resolving the issues. The parties expressed no desire to proceed directly to hearing. Rather, the parties agreed to allow the full 30-day resolution period expire before the 45-day timeline began. Thus, the 45-day period began on March 2, 2013, and ended (and the Hearing Officer Determination (“HOD”)

was originally due) on April 15, 2012. The parties filed a joint motion to continue the hearing and extend the HOD due date for ten (10) calendar days, thus the HOD is due April 25, 2013.

This case was initially assigned to Hearing Officer Virginia Dietrich. Hearing Officer Dietrich conducted a prehearing conference on March 7, 2013. The Hearing Officer issued a pre-hearing order on March 7, 2013, outlining the issues to be adjudicated and setting the hearing date. The case was subsequently reassigned to the current Hearing Officer to conduct the hearing.

The parties appeared for the hearing on April 18, 2013. During the pre-hearing conference with Hearing Officer Dietrich and then at the start of the hearing Petitioner withdrew the other claims and issues asserted in the complaint and only proceeded on the alleged missed related services at School A from October 2012 through January 31, 2013.

#### **THE ISSUE ADJUDICATED:**

Whether DCPS denied the student a FAPE by failing to fully implement the student's IEP from October 2012, to January 31, 2013, when the student re-enrolled at School A.

#### **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 23 and Respondent's Exhibits 1 through 11) that were admitted into the record and are listed in Appendix A.

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

1. The student is age thirteen and resides in the District of Columbia with her parent. She has been determined to be a child with a disability under IDEA with a classification of OHI. (Petitioner's Exhibit 14-1)
2. The student is in seventh grade at School A, a DCPS middle school, where she attended during SY 2011-2012. Because of a temporary housing relocation the student's parent transferred the student from School A to another DCPS school, School B sometime during SY 2011-2012. The student started SY 2012-2013 at School B. (Parent's testimony, Petitioner's Exhibit 12, Respondent's Exhibit 4-1)
3. While the student was attending School B her individualized educational program ("IEP") developed at School A on May 14, 2012, was being implemented. The IEP

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<sup>2</sup> The evidence that is the source of the Finding of Fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

prescribed the following services: 15 hours of specialized instruction per week outside general education and the following related services: 4 hours of occupational therapy (“OT”) per month, 2 hours of speech-language pathology per month and 2 hours of behavioral support services per month. (Petitioners’ Exhibit 31-1, 13-9)

4. Once the parent’s original housing arrangements were resolved the parent and student returned to their home near School A in October 2012 and the parent re-enrolled the student in School A on October 12, 2012. (Parent’s testimony)
5. For a short while after the student returned to School A the student’s parent was receiving calls indicating the student was missing school at School B, even though the parent had transferred the student to School A. (Parent’s testimony)
6. Soon after the student began attending School A she began to display behavioral difficulties for which the parent was regularly contacted by the student’s teachers. As a result, the parent, through her advocate requested a MDT meeting to address among other issues the student’s behavioral and academic progress. (Parent’s testimony, Mr. Carter’s testimony)
7. In March 2013, DCPS convened a meeting at School to review the student’s IEP. The student’s IEP was amended to reduce her OT services and make them consultative rather than direct services. The student’s behavioral support services were increased. (Petitioner’s Exhibits 13, 14)
8. The amended IEP prescribed the following services: 15 hours of specialized instruction per week outside general education and the following related services: 30 minutes of occupational therapy (“OT”) consultation per month, 2 hours of speech-language pathology per month and 4 hours of behavioral support services per month. (Petitioner’s Exhibit 14-1, 14-11)
9. DCPS acknowledged the student missed some services after she returned to School A. (Petitioner’s Exhibit 22)
10. The DCPS service tracking logs for behavior support services provided to the student indicate that of the eight (8) hours of behavioral support services the student should have received pursuant to her IEP from October 2012, through January 31, 2013, the student missed 2 hours and 10 minutes. The student was provided 1 hour in October 2012, 1 hour in November 2012, 1 hour & 50 minutes in December 2012 and 2 hours in January 2013. (Petitioner’s Exhibit 15, Respondent’s Exhibits 6, 7)
11. The DCPS service tracking logs for speech/language services provided to the student indicate that of the eight (8) hours of speech-language pathology the student should have received from October 2012, through January 31, 2013, the student missed 5 hours – 45 minutes. The student received 30 minutes in October 2012, 30 minutes in November

2012, 30 minutes in December 2012 and 45 minutes in January 2013. (Petitioner's Exhibit 16, Respondent's Exhibits 4, 5)

12. The DCPS service tracking logs for occupational therapy provided to the student indicate the student should have been provided sixteen (16) hours of behavioral support services from October 2012, through January 31, 2013. The forms indicate the student was provided one hour of occupational therapy of the 16 hours she was due during that period and thus missed 15 hours. (Petitioner's Exhibit 17, Respondent's Exhibit 8)
13. At School A the student is a part of the self-contained special education program for English, Math and Science. (Ms. Faulkner-Jones' testimony)
14. The student's report card for the first and second quarters of SY 2012-2013 at School A: the student was receiving passing grades and a grade of D in English 7 and the teacher noted the student's poor behavior in the classroom. (Petitioner's Exhibit 12)
15. The Social worker at School A provides the student behavioral support services and began seeing the student at the end of November 2012. The student has difficulty with peers and is non-compliant and disrespectful and her behaviors have affected her academically. When the student returned to School A the social worker attempted engage the student in group counseling but that was not successful and she began to provide individual therapy. The student was provided no related services in October at School A because School A staff believed she was not at School A in October and did not get there until November and the social worker did not begin providing her services until the student's name appeared in the DCPS data base (Easy IEP) in mid November 2012. (Ms. Jones' testimony, Respondent's Exhibit 7)
16. The student is impulsive and has significant behavioral difficulties that interfere with her ability to access the academic curriculum. The student is functioning at the second grade level. (Mr. Carter's testimony, Petitioner's Exhibit 14-2)
17. The parent's educational advocate, Mr. Kevin Carter, proposed a compensatory education plan for the related services the student did not receive. Mr. Carter proposed that a firm conduct a four hour (\$65.00 per hour) assessment to determine the effect of the missed related services to the student for a total cost of \$260.00 Mr. Carter also proposed that student be provided 26.5 hours of independent tutorial services to compensate the student for the missed related services. Mr. Carter reasoned that because the student's academic functioning is very low and because the student's related services are designed to assist the student in accessing the academic curriculum, academic tutoring would be the most beneficial means of compensating the student for the missed services. (Mr. Carter's testimony, Petitioner's Exhibit 23)
18. The parent believes the student is acting out in school because she is struggling academically. She fights and constantly gets put out of class. The parent wants the student to have a tutor to help bring her grades up and to help improve her reading and

believes her behavior will improve as her academic abilities improve. (Parent's testimony)

### **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. <sup>3</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:** Whether DCPS denied the student a FAPE by failing to fully implement the student's IEP from October 2012, to January 31, 2013, when the student re-enrolled at School A.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS' failure to provide the student all related services prescribed in her IEP upon her return to

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<sup>3</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.

School A from October 2012, through January 31, 2013, resulted in harm to the student behaviorally and academically and denied her a FAPE.

34 C.F.R. §300.323(c) provides: Each public agency must ensure that--

(1) A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and

(2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

The evidence indicates that the DCPS failed to provide the student all her related services during the period from October 2012, through January 31, 2013.<sup>4</sup> The evidence reveals that the student missed the following related services: from October through January 31, 2013: 15 hours of occupational therapy, 6 hours – 45 minutes of speech-language pathology and 2 hours – 10 minutes of behavioral support services. The evidence also demonstrates through the parent's testimony, as well as the DCPS social worker's that the student had significant behavioral difficulties after she returned to School A and her academic performance was significantly impacted as a result. The Hearing Officer concludes based on this evidence that the student was harmed educationally because of the missed related services and as a result she should be provided compensatory services.

### **Appropriate Relief:**

IDEA authorized District Courts and Hearing Officers to fashion "appropriate" relief, e.g., 20 U.S.C. § 1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations." *Florence County Sch. Dist. For v. Carter*, 5

A compensatory award fashioned by the Hearing Officer must be the result of a "fact-specific" inquiry that is "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 at 524. This means that the plaintiff has the burden of "propos[ing] a well-articulated plan that reflects [the student's] current education abilities and needs and is supported by the record." *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt ("Nesbitt II")*, 583 F. Supp. 2d 169, 172 (D.D.C. 2008) (Facciola, Mag. J.).

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<sup>4</sup> Respondent's counsel asserted that at an October 3, 2012, IEP meeting at School B the student's OT services were changed from direct services to consultative services. However, the October 3, 2012, IEP was not disclosed by either party. The Hearing Officer did not find DCPS testimony that the OT services were consultative credible and concluded that the parent's testimony as to the date the student began attending School A was more credible because of her apparent certainty and her testimony of the absentee calls she continued to receive from School B.

Furthermore, the Court must be wary of "mechanical" calculations because a "reasonable calculation" of a compensatory award "must be qualitative, fact-intensive, and above all tailored to the unique needs of the disabled student." Branham, 427 F.3d at 9 (citing Reid, 401 F.3d at 524) (internal quotation marks omitted); but see *Stanton ex rel. K.T. v. Dist. of Columbia*, 680 F. Supp. 2d 201, 206-207 (D.D.C. 2010) (Huvelle, J.) (holding that formulaic calculations are not per se invalid, so long as the evidence provides a sufficient basis for an "individually-tailored assessment") (citing *Brown ex rel. E.M. v. Dist. of Columbia*, 568 F. Supp. 2d 44, 53-54 (D.D.C. 2008) (Bates, J.) (internal quotation marks omitted)).

However, "*Reid* certainly does not require [a] plaintiff to have a perfect case to be entitled to a compensatory education award"; on the contrary, "[o]nce a plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with Reid." *Stanton*, 680 F. Supp. 2d at 207.

The evidence demonstrates that student's related services are designed to allow her to access the academic curriculum, thus the Hearing Officer credits Mr. Carter's testimony and opinion that the student would benefit from academic tutoring to compensate her for the missed services. The Hearing Officer also notes the parent's testimony that the student's behavioral difficulties are related to her academic struggles and that she desires that the student be provided tutoring to help compensate for her missed services.

Consequently, the Hearing Officer concludes that the proposed services of 26.5 hours of independent tutoring is a reasonable and appropriate means of compensating the student for her missed services and placing her in a position she would have been had the services been provided.

**ORDER:**

DCPS shall, within thirty (30) calendar days of the issuance of this Order, provide the student 26.5 hours of independent tutoring at the OSSE/DCPS approved rate.

**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: April 25, 2013**