

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
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OSSE
Student Hearing Office
May 16, 2013

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Case #</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: May 1, 2013</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Miguel Hull, Esq. Brown & Associates 1220 L Street, N.W. Suite 700 Washington, D.C. 20005</p> <p>Counsel for DCPS: Lynette Collins District of Columbia Assistant Attorney General Lynette Collins, 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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¹ 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 for one day on May 1, 2013, at the Office of the State Superintendent (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____ resides with his grandmother in the District of Columbia, and has been determined eligible for special education with a disability classification of emotional disability (“ED”).

When the initial due process complaint in this matter was filed (December 28, 2012) the student attended the DCPS middle school (“School A”) where he had also attended during the 2011-2012 school year (“SY”). When the complaint was filed the student’s disability classification was specific learning disability (“SLD”) and his individualized educational program (“IEP”) dated March 14, 2012, prescribed 5 hours per week of specialized instruction inside general education and 2 hours per month of behavioral support outside general education.

In the December 28, 2012, complaint, Petitioner alleged, inter alia, that the student’s IEP and placement was inappropriate and that the student had been suspended at least 15 school days during SY 2012-2013 without DCPS convening a manifestation determination review (“MDR”) and that the student remained out of school.

On January 7, 2013, DCPS filed a timely response to the complaint and a supplemental response on January 9, 2013. DCPS asserted that the student’s IEP was appropriate and was being implemented. DCPS stated that attempts were made to convene both an IEP meeting and a MDR and the parent failed to and/or refused to attend. DCPS agreed to convene a MDR prior to the February 1, 2013, expedited hearing and offer the student what it believed to be an appropriate educational placement and agreed consider whether compensatory services would be provided to the student.

On January 8, 2013, this Hearing Officer conducted a pre-hearing conference at which a hearing date² was set and the issues to be adjudicated were determined. The Hearing Officer issued a pre-hearing conference order on January 12, 2013. A second pre-hearing conference was conducted on January 16, 2013, following a resolution meeting. The resolution meeting was held January 11, 2013. The parties agreed that the resolution period would remain open for the

² A hearing date of February 1, 2013, was set for the expedited hearing on the issue(s) related to the MDR meeting. A hearing date of February 26, 2013, was set for the other issues alleged in the complaint that were not subject to an expedited hearing.

full 30-day period and the parties would continue to explore settlement. Petitioner agreed to participate in the MDR meeting and the parties were directed to inform the Hearing Officer promptly as to when the MDR was held and its outcome. The hearing date was affirmed and the Hearing Officer issued a pre-hearing conference order on January 16, 2013.

On January 29, 2013, the parties participated in a multidisciplinary team (“MDT”) meeting at School A, at which the student’s in school behaviors and suspension were discussed. At the time of the meeting the student had been out of school for fourteen days and had not been sent to an alternative placement. The parties agreed the student would attend another DCPS middle school (“School B”) and DCPS agreed to conduct an evaluation to which the student’s parent consented. The MDT determined that the student’s behavior that had been the basis for the suspension was a manifestation of his disability or suspected disability. DCPS agreed to provide compensatory services for the days the student missed school.

On January 29, 2013, a DCPS psychologist conducted a “data evaluation review” and prepared a report dated February 11, 2013. On February 22, 2013, DCPS convened an IEP meeting for the student at which the team reviewed the student’s evaluation data and determined the student’s disability classification would be changed from SLD to ED. The student’s IEP was changed to prescribe the following services: 27.5 hours of specialized instruction outside general education and 240 minutes per month of behavioral support outside general education. The student, thereafter, began attending School B, a full-time special education program for students with ED classification located in School A. (Petitioner’s Exhibit 13-1, 12-1)

On February 7, 2013, Petitioner submitted a withdrawal notice withdrawing the issues that were subject to the expedited hearing.³ On February 7, 2013, based on a settlement reached by the parties, the Hearing Officer issued an order dismissing with prejudice the issues that were subject to the expedited hearing.⁴

The parties appeared for hearing on February 26, 2013, to adjudicate the remaining issues alleged in the complaint. Petitioner sought to amend the complaint to include a challenge to the appropriateness of the student’s current placement at School B. DCPS consented to amendment and the parties filed a consent motion to amend. Petitioner filed the amended complaint on March 1, 2013. DCPS counsel promptly filed a response to the amended complaint asserting that the student’s current location of services is appropriate.

On March 13, 2013, the Hearing Officer issued an order granting amendment to the complaint and stating that the timeline for the complaint began on March 1, 2013, the date the amendment was filed. The parties did not mutually agree to waive the resolution meeting or end the resolution period early. The matter was not resolved at resolution. Thus, the 45-day timeline began in this matter on April 1, 2013, and ends and the HOD is due on May 15, 2013.

³ The case was bifurcated and the issues subject to the expedited hearing were given the case # 2012-0847-B.

⁴ DCPS thereafter, moved to dismiss the remaining issues in the complaint to which Petitioner objected. Petitioner and Respondent appeared for hearing on February 26, 2013, and the motion was disposed of at the outset of the hearing on February 26, 2013.

Petitioner seeks the following relief: (1) Compensatory education for the approximate four weeks the student remained at School A after the complaint was filed until the student began attending School B in February 2013 and (2) DCPS funding at a private special education school, Accotink Academy.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-18 and DCPS Exhibit 1) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

ISSUE: ⁵

The issues adjudicated are:

1. Whether the student's March 14, 2012, IEP was inappropriate because it did not prescribe full-time⁶ special education services outside general education and thus deprived the student of a FAPE from the date the complaint was filed (December 28, 2012) to the date the student moved from School A to School B.
2. Whether the student's placement at School B is an inappropriate program/school for the student because it does not meet his needs and his placement there denies the student a FAPE.

FINDINGS OF FACT: ⁷

1. The student is age _____ in _____ grade, resides with his grandmother in the District of Columbia, and has been determined eligible for special education with a disability classification of ED. (Student's testimony, Petitioner's Exhibit 12-1)

⁵ The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order do 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.

⁶ "Full time" is defined in this instance and all instruction and related services provided outside general education throughout the school day.

⁷ 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 only cite one party's exhibit.

2. The student's most recent psychological evaluation was conducted in October 2010 when the student was age eleven in fifth grade. The student was determined to have average cognitive functioning with a full scale IQ score of 99. The student had been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") His academic functioning was determined to be below grade level. (Petitioner's Exhibit 3-9, 3-10, 13-2)
3. When the initial due process complaint in this matter was filed on December 28, 2012, the student attended School A, a DCPS middle school he had also attended during SY 2011-2012. The student's disability classification at the time the complaint was filed was SLD and his IEP dated March 14, 2012, prescribed 5 hours per week of specialized instruction inside general education and 2 hours per month of behavioral support outside general education. (Petitioner's Exhibit 2-1, 2-4)
4. During SY 2012-2013 at School A the student often had problems with bullies and was suspended numerous times for fighting. He believed he was often suspended without a full investigation by school staff of the circumstances. The student's last suspension at school A in December 2012 was the basis of the current due process complaint. In resolving the complaint DCPS agreed to conduct an evaluation of the student, and on January 29, 2013, convened a MDR and reviewed and revised the student's IEP to prescribe full time special education services and placement and to change the student's school from School A to School B. The student was provided compensatory services for the time he was suspended from school. The student began attending School B on or about February 1, 2013. (Student's testimony, Petitioner's Exhibit 11)
5. At School B the student is in a special education classroom with seven other students and three adults. One of the adults is a dedicated aide for one of the other students. His academic schedule consists of Reading the morning with his homeroom teacher, then Math. The student then goes to lunch and after lunch has recess and physical education. However, the student's official class schedule indicates that in addition to the three courses the student believes he takes, he also has a World History course. The student is not sure of who is assigned to provide him behavioral support services, but he talks with a number of staff members at the school when he needs to talk with an adult. (Student's testimony, Respondent's Exhibit 1)
6. In class at School B the student feels he is not learning much and is simply provided work packets that he finds simple to complete and thus he gets good grades. However, he has to leave the classroom and go to an empty classroom in order to concentrate because of the disruptions caused by the other students. One of the other students regularly curses in the classroom and creates disruptions and the adults in the classroom seem unable to control him. The student has been in fights with other students in that class and suspended twice since arriving at School B. The student's difficulties with other students often arise when he is in the gym class in the afternoons where he is with general education students. (Student's testimony)
7. The student's believes School B is not an appropriate school for him or a place where he can learn effectively because he feels the work is not challenging, the teachers don't

teach and he was suspended without a full investigation of the facts. The student has visited ██████ Academy (“█████”) and likes the small classes and the teacher assistance that he observed during his visit. The behavior of the other students was far better than at School B; the student’s were respectful and seem to follow rules. In addition, the student believes he would benefit greatly from the special programs such as music that ██████ offers. (Student’s testimony)

8. The student has been interviewed by and accepted to ██████ ██████ serves students ages six through twenty-two with the various disability classifications including ED. There are currently a total of 112 students with total staff of approximately 150. ██████ has an OSSE certificate of approval (“COA”) and OSSE approved tuition and follows the DCPS curriculum. There is a maximum of nine students in the ██████ grade. The classroom to which the student would be assigned has four students currently and two adults – a lead instructor who is special education certified and an assistant. The school has licensed social workers who can provide the student behavioral support. The student would move to different classes in the seven periods of the school day and will have different teachers all of whom have special education certification and the student will have several choices of extracurricular activities. Accotink can implement the student’s current IEP. (James Corley’s testimony, Petitioner’s Exhibit 14)
9. At School B the student is being provided weekly behavioral support from a DCPS contractor. The student has two classes in the morning and one class after lunch, which is social studies. The student has made some progress as reflected on his report card. However, behaviorally the student has had problems. The student seems to be more comfortable compared to when he first arrived at School B and is now participating in some of the extracurricular programs in the school. (Ms. Thompson’s testimony)
10. The student is the highest performing student academically in his class at School B. His reading level is higher than the other students and he completes his work when he is not distracted or dealing with emotional issues. Sometimes the student needs to be calmed and sometimes directed to leave to the classroom because of his behaviors. He enjoys reading and is operating at a 5th grade level. When he first arrived he experienced a lot of rivalry with other students. He has made some progress with his adjustment but his behavior continues to interfere with his work. However, there is support staff available to assist the student. (Ms. Lee’s testimony)
11. During the student’s time at School B he had the following grades in the following subjects:
(Respondent’s Exhibit 1)

Subject:	Adv 3
English	B
Math 7	B
World History/Geography	B

12. The parent educational advocate prepared a proposal for compensatory education for the alleged denial of a FAPE to the student for him allegedly having an inappropriate IEP and being in an inappropriate placement since the start of SY 2012-2013. The proposal requested the following items: 72 hours of independent tutoring and 20 hours of independent counseling. (Ms. Long's testimony, Petitioner's Exhibit 16-4)

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. ⁸ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). 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 the student's March 14, 2012, IEP was inappropriate because it did not prescribe full-time special education services outside general education and thus deprived the student of a FAPE from the date the complaint was filed (December 28, 2012) to the date the student moved from School A to School B.

⁸ 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.

Conclusion: Petitioner failed to sustain the burden of proof.

Petitioner presented insufficient evidence that the student suffered harm as a result of remaining at School A from the time the complaint was filed until he moved to School B. The evidence⁹ demonstrates that during that period the student was either suspended or if attending school at all the student was being evaluated and the parties were in discussions regarding changes to the student's IEP and placement. The student was compensated by DCPS for the time he missed school. Therefore, the Hearing Officer concludes Petitioner did not demonstrate that relief for this period was warranted.

ISSUE 2: Whether the student's placement at School B is an inappropriate program/school for the student because it does not meet his needs and his placement there denies the student a FAPE.

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

IDEA ensures that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. §1400(d)(1)(A). The IDEA guarantees children with disabilities the right to a FAPE. *Id.* In seeking an appropriate education for students with disabilities, the child's parents, teachers, school officials, and other professionals collaborate to develop an IEP to meet the child's unique needs. See 20 U.S.C. §1414(d)(1)(B). "The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir.2005) (quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458U.S. 176, 203 (1982)). Local school officials utilize the IEP to assess the student's needs and assign a commensurate environment. See 20 U.S.C. § 1414(d)(1)(A).

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision 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 is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34C.F.R. § 300.550; see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

⁹ FOF # 4

The evidence in this case clearly demonstrates that an IEP team on January 29, 2013, determined that the student's least restrictive environment ("LRE") was outside general education and DCPS therefore assigned the student to attend a special education program located at School B.¹⁰ However, the evidence based on the student's credible testimony¹¹ reveals that the student is not being provided an appropriate education at School B.¹² Instead, the student spends much of his classroom instruction time having to contend with disruptions from other students such that he is forced to leave the classroom to complete the work he is provided by teacher, work that he does not find challenging.

The evidence indicates that instead of placing the student in a school environment that meets his unique needs at which his suspensions for having to fight with other students would be minimized, the student has been subjected to an environment where he is around general education students much of his afternoon and during which many of the instances that have led to his disciplinary actions since attending School B have occurred. Although there was testimony by the DCPS witnesses that the student has participated in some school programs and the student has earned above average grades on his report card, this evidence was outweighed by the student's testimony that he is not challenged academically, has to endure a disruptive classroom and is regularly in class with general education students.

The Hearing Officer concludes that based upon this evidence the student's placement at School B is inappropriate and at this location the student is not being provided a FAPE. The evidence demonstrates that the student has been accepted to ██████ k and ██████ can implement the student's IEP, provides an environment free the disruptions that student encounters at School B and the school has a COA, and otherwise meets the criteria that the Hearing Officer is to consider in placing a student.¹³ *Branham*, 427 F3d 7 (U.S. App. 2005) Consequently, the Hearing Officer directs in the Order below that the student be placed and funded by DCPS at ██████

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

¹⁰ FOF # 4

¹¹ The Hearing Officer found the student credible based on his forthrightness and lack of hesitation in providing his testimony.

¹² FOF #s 5, 6

¹³ FOF # 8

resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

Although Petitioner has requested compensatory education for the student allegedly having been in an inappropriate setting the full school year, the Hearing Officer does not conclude that the requested compensatory education is appropriate. The prospective placement in a full time private special education setting adequately compensates the student for the denial of a FAPE that has been determined herein. Consequently, the Hearing Officer in the Order below directs that DCPS immediately place and fund the student at his previous placement, [REDACTED] Academy for the remainder of SY 2012-2013.

ORDER:

1. DCPS shall, within ten (10) school days of the issuance of the Order, place and fund the student at the Accotink Academy for the remainder of SY 2012-2013 and provide transportation services.
2. All other requested relief is hereby denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/s/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: May 15, 2013