District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
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OSSE
STUDENT HEARING OFFICE
2011 DEC 15 AM 8: 58

Confidential

STUDENT[1], by and through his Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent.	HEARING OFFICER'S DETERMINATION Hearing Officer: Coles B. Ruff, Esq.

[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 November 23, 2011, at the OSSE Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2004.

BACKGROUND AND PROCEDURAL HISTORY:

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 including emotional disability ("ED") and specific learning disability ("SLD").

During the 2010-2011 school year ("SY") the student was enrolled in a private full time special education program hereinafter referred to as "School A". The student's attendance at School A was funded by the District of Columbia Public Schools ("DCPS") and was ordered by a Hearing Officer's Determination ("HOD"). During the summer of 2011 School A was closed. Near the start of SY 2011-2012 DCPS assigned the student to attend a special education program, hereinafter referred to as "School B" located within a DCPS high school. The student attended School B for seven days at the start of SY 2011-2012. The parent then unilaterally placed the student in a private full time special education program, hereinafter referred to as "School C" and notified DCPS of the unilateral placement.

On September 30, 2011, Petitioner filed the due process complaint alleging, *inter alia,* that the student's placement at School B was made inappropriately and that School B was an inappropriate placement for the student.

Petitioner seeks as relief: (1) DCPS be ordered to reimburse the parent for the full cost of tuition, related services, and transportation to School C from September 8, 2011, through the date of the HOD; (2) DCPS be ordered to fund placement and transportation for student to School C for, at a minimum, the remainder of SY 2011-2012; (3) DCPS be ordered to fund 60 hours of compensatory education in the form of academic tutoring for the time the student was suspended at the start of SY 2010-2011 for which a manifestation determination review ("MDR") was ordered by the May 18, 2011, HOD.

DCPS counsel filed a response to the complaint on October 12, 2011. DCPS asserted that it convened a multidisciplinary team ("MDT") meeting at School A at a mutually agreeable date and time on June 6, 2011,but Petitioner's educational advocate arrived late. School A staff refused to participate in meetings scheduled thereafter. DCPS discussed the MDR issue at the August 19, 2011, meeting at complied with the HOD. DCPS maintains the placement to which the student was assigned, School B, is an appropriate placement, and there had been no denial of a Free and Appropriate Public Education ("FAPE").

A resolution meeting was held on October 28, 2011, and the matter was not resolved. The parties did not agree to immediately proceed to hearing and the forty-five (45) day timeline ended (and the HOD is due) on December 14, 2011.

A pre-hearing conference in this matter was held on November 8, 2011, at which the issues to be adjudicated were clarified. A pre-hearing order was issued on November 14, 2011.

ISSUES: [2]

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by refusing to hold the student's LRE meeting at a mutually agreeable time and place.

2. Whether DCPS denied the student a FAPE by holding a placement meeting without an appropriately constituted team.

3. Whether DCPS denied the student a FAPE by providing an inappropriate placement when it changed the student's placement from School A to School B.

4. Whether DCPS failed to comply with the HOD of May 18, 2011, when it failed to convene a MDR meeting within the time prescribed.

5. Whether DCPS failed to offer an appropriate amount of compensatory education for the missed days of school while the student was suspended at School D.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-37 and DCPS Exhibit 1-23) that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: [3]

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 including emotional disability ("ED") and specific learning disability ("SLD"). (Petitioner's Exhibit 6-1)

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[2] 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.

[3] 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.

2. During SY 2010-2011 the student was enrolled in a private full time special education program, School A. DCPS funded the student's placement at School A. At the end of school year SY 2010-2011 School A closed and just before the start of SY 20110- 2012 the student was assigned by DCPS to attend a special education program, School B, located within a DCPS high school. (DCPS Exhibits 6, 10)

3. Prior to attending School A the student attended a DCPS middle school, hereinafter referred to as "School D." While the student was attending School D, in September 2010 Petitioner filed a due process complaint that resulted in a HOD issued November 4, 2010. The HOD placed the student at School A on an interim basis where he began attending in November 2010. The student remained at School A until the end of SY 2010-2011. The HOD also ordered DCPS to convene an IEP meeting to, *inter alia*, determine an award of compensatory education services for DCPS' failure to determine at a January 21, 2010, MDR meeting that the student's behavior was a manifestation of his disability, and to conduct an additional MDR meeting concerning the student's suspensions during the second half of SY 2009-2010. (Petitioner's Exhibit 30-15)

4. In December 2010 a comprehensive psychological evaluation and an adaptive behavior assessment were conducted of the student to assess his cognitive abilities, academic abilities and to rule out intellectual deficiency (formerly known as mental retardation). The evaluator found the student's general intellectual ability falls within the extremely low range with a full scale IQ of 62. He had strength in working memory. The student's academic abilities were determined to be very under-developed considering his chronological age and grade. The evaluator determined the student would have difficulty keeping up with in his same-aged peers in all academic subjects and required a full time placement in a special education classroom with a low student to teacher ratio. The evaluator noted the student might have motivation issues but he can work independently if the work is tied to incentives. The evaluator also determined the student had a mood disorder and probably often walked out of class at School D as a defense mechanism to mask his academic deficits. The evaluator determined the student did not meet the criteria for intellectual deficiency. (Dr. Nelson's testimony [4], Petitioner's Exhibit 34-1, 35-3)

5. On January 21, 2011, an educational evaluation was conducted of the student while he was attending School A. The evaluation determined the student was operating on a 2.1 grade level in broad reading and a 3.3 grade level in broad math and a 1.6 grade level in written expression. (Petitioner's Exhibit 32-10)

6. On March 1, 2011, DCPS convened an IEP meeting for the student at School A. The parent and her educational advocate attended the meeting. A DCPS representative participated along with School A staff members. The team reviewed the student's evaluations and his performance since attending School A. DCPS offered another placement location for the student but the parent rejected the offer and the team determined the student would continue attending School A. The student's IEP was amended to reflect his full time special education and related services: 25.5 hours per

[4] The witness was designated as an expert in clinical and school psychology.

week of specialized instruction, 1 hour per week of speech/language services and 1 hour per week of behavioral support services. (Petitioner's Exhibit 15)

7. On March 4, 2011, Petitioner filed another complaint alleging, *inter alia*, DCPS failed to comply with provisions of the November 4, 2010, HOD, and failed to hold MDR meetings for suspensions of the student during SY 2010-2011 at School D, prior to him attending School A. The Hearing Officer found that DCPS failed to conduct a MDR meeting for suspending the student for more than 10 days during the initial portion of SY 2010-2011 at School D and, therefore, ordered that DCPS, within 10 school days of the issuance of the Order (May 18, 2011) convene a MDR meeting to determine whether the student's suspensions during the initial portion of SY 2010-2010 were caused by or had a direct and substantial relationship to his disability. (Petitioner's Exhibit 29-4, 29-7, 29-8)

8. On May 23, 2011, A DCPS representative emailed the parent's counsel regarding the MDR meeting to be held pursuant to the May 18, 2011, HOD. The representative stated a meeting was already scheduled for June 6, 2011, to discuss the student's location of services and he requested that the timeline for the MDR meeting be extended to coincide with the June 6, 2011, meeting. (Petitioner's Exhibit 25-1)

9. On June 6, 2011, a multidisciplinary team ("MDT") meeting was convened at School A. The DCPS representative was present along with School A staff. The parent did not attend and her educational advocate attended but arrived late for the meeting. DCPS convened the meeting to comply with the May 18, 2011, HOD. However, it was quickly determined that the MDR involved the student's suspension at School D, before the student began attending School A. Therefore, the meeting was adjourned with no action on the MDR. (Petitioner's Exhibit 28-1)

10. On June 28, 2011, the parent's educational advocate sent an email to DCPS requesting dates when the student's MDT meeting, that was not held June 6, 2011, could be reconvened. (Petitioner's Exhibit 25-6)

11. On June 30, 2011, DCPS sent the parent's counsel an email offering dates to convene the MDT meeting to discuss the student's location of services and compensatory education. The dates offered were in July 2011, and the meeting was to be held at DCPS central office and the participants were to be the parent, the student, and a DCPS representative. The meeting was not held on the dates proposed. (DCPS Exhibit 16)

12. On June 30, 2011, the parent's counsel sent a response to the email objecting to the proposed participants in the meeting asserting that it did not constitute a proper MDT team. (Petitioner's Exhibit 25-12)

13. On July 19, 2011, DCPS sent School A an email requesting School A staff participation in a meeting to discuss the compensatory education and the student's educational placement. The proposed meeting dates were in August 2011. (DCPS Exhibit 17)

14. On July 29, 2011, DCPS sent the parent's counsel an email alerting her that DCPS had not heard from School A regarding its participation in the proposed meeting to discuss the student's educational placement and the MDR, albeit the MDR was to address

suspensions prior to the student attending School A. The email inquired whether the counsel wanted to proceed with the meeting without School A's participation and indicated that the meeting would be held at DCPS central office. The parent's counsel responded that she wished for the meeting to be held at School A and for School A staff to participate. DCPS sent another email to School A to ask about new dates when a meeting could be convened at School A. During the summer of 2011 it was determined that School A was closing. No meeting was ever held at School A. (DCPS Exhibits 18, 19).

15. School A's closing necessitated a change in placement location for the student. On August 19, 2011, DCPS convened a meeting at DCPS central office to discuss the student's location of services as a result of School A closing and to discuss the MDR that was ordered by the May 18, 2011, HOD. None of the School A staff were available for the meeting. The parent and her educational advocate participated in the meeting. DCPS personnel included the compliance case manager, a DCPS special education teacher and three other LEA representatives. The MDR (directed to be held by the May 18, 2011, HOD) was discussed. There were no attendance records for the student from School D. The parent alleged the student was due compensatory education for 14 days of suspension at School D. DCPS proposed to provide the student 12 hours of independent tutoring as compensatory education services for the 14 days of suspension and issued an authorization letter for the services. The parent stated that she would consider the offer and discuss it with her attorney. testimony, DCPS Exhibit 9-1, 20, Petitioner's Exhibit 19-2)

16. At the August 19, 2011, meeting the team agreed the student's IEP would remain the same and discussed the student's least restrictive environment ("LRE") and agreed the student should remain in an out of general education setting. DCPS proposed that in light of School A closing the student's location of services would be School B and that School B could implement the student's IEP. The student's IEP was not amended at this meeting and no discussion was had as to changing the student's disability classification to make ED his primary disability. A staff member of School B participated in the meeting by telephone and provided information about the program. The parent agreed with the LRE determination but disagreed with the placement location at School B, but stated that she would visit the program. The parent requested DCPS place the student at School C and stated that he had been accepted there but the parent did not have the an acceptance letter to present at the meeting. Thereafter, DCPS issued a prior written notice for the student to attend School B. However, the student's IEP that was produced by DCPS following the August 19, 2011, meeting has the student's primary disability as ED.
testimony, Petitioner's Exhibit 19-2, DCPS Exhibit 9-1, 11, 10, 20)

17. DCPS monitor for School A, Ms. Nicole Garcia, participated in the August 19, 2011, meeting. School A closed August 8, 2011, and thus the meeting was held at DCPS central office and no School A staff was available by that time. Ms. Jade Bryant, another DCPS monitor participated in the meeting and was familiar with the student and his needs. The team did not change the student's IEP. Ms. Garcia did not recall a discussion of the change of the student's primary disability to ED during the August 19, 2011, meeting. (Ms. Garcia's testimony)

18. On August 22, 2011, the parent's educational advocate visited School B for a tour. The program was described as a program for students with ED classification. There are two classrooms for School B but the high school staff of the high school in which School B is housed handles all administrative matters for School B. The IEP is being serviced through the Spectrum program but otherwise the students are students of the high school in which Spectrum is housed. Following her visit the advocate sent on September 8, 2011, a letter expressing her dissatisfaction with the program at School B and asked that DCPS reconsider the parent's request that DCPS place the student at School C. The advocate noted that the student was not benefitting at School B and had the personnel at School A participated in the August 19, 2011, meeting the parties would have known the program at School B was not appropriate. She also asked that the offer of 12 hours of compensatory education be reconsidered and she asked for 36 hours of tutoring. She was trying to negotiate and find a number that was a compromise. To extend the tutoring longer to assist with the student's needs Petitioner is now asking for 60 hours of tutoring. At the thirty-day review DCPS participated in the meeting by telephone and stated its objection and what its responsibilities would and would not be. The DCPS staff then hung up from the meeting when the student's progress at School C was discussed. testimony, Petitioner's Exhibit 4-1, 14, 16-6, 17-1)

19. The student attended School B for seven days at the start of SY 2011-2012. The parent then unilaterally placed the student in a private full time special education program, School C, and on September 8, 2011, notified DCPS of her intention to do so. (DCPS Exhibit 21, 22, Petitioner's Exhibit 18, 20, 24)

20. The student attended School B for approximately 7 days. The staff was able to take some assessment of the student's skill level but then he stopped attending. While the student was attending School B he seemed to get along with peers and interacted appropriately. He did not appear to isolate himself. The School B staff observed that the student's academic skills clearly showed deficits. His reading was at the 2nd to 3rd grade level and he had deficits in multiplication and division. His expressive writing was on the lower level demonstrated by the short length of his sentences and his grammatical and punctuation errors. testimony)

21. The student acknowledged during the hearing that at School D he kept getting suspended for wearing a coat that did not match the school colors and for walking the halls. He did not like School D and he thought the program was boring. By contrast the student enjoyed attending School A and there the student felt he did well. He received As and Bs which he had not received at School D. There were rewards and as a result he did well. Once the student left School A and began attending School B he found School B boring because there were no privileges and he found it difficult to sit in one room all day. During his time there the students had not yet started to use of the computers for instruction. Since attending School C the student has made academic progress because he is in classes with fewer students and he has more hands-on instruction such as barbering and small engine mechanics. He is attending a special reading class and he meets regularly with his counselor. There is a point sheet he carries around from class to class during the day and if he does well he gets to go to lunch at the end of the week with

his counselor. The student likes animals and hopes to eventually work in a pet shop. (Student's testimony)

22. There are eight students with two teachers in the student's current classroom at School C. He is getting a lot of help and feels he is learning. If he does not understand something at school he will ask for help. The student wants to stay at School C because the staff provide him more help and more services than he received at School B. The student does better in math than reading. He thinks that most students are on the same level as him. It makes him feel he is reading better. He knows that he is not reading on the 9th grade level but wants to be reading at that level and knows that he has to believe he can do it. (Student's testimony)

23. DCPS responded in writing to the parent's notice of unilateral placement stating that DCPS believed student's placement at School B was appropriate and that DCPS would not agree to fund the student's placement at School C. (Petitioner's Exhibit 23)

24. After the student began attending School A, a Woodcock Johnson III was administered. The evaluation revealed the student is still operating on a 2.1grade level in broad reading, a 2.8 grade level in broad math and a 1.8 grade level in written expression. (Petitioner's Exhibit 31)

25. The parent believes based upon her experience with the student that he sometimes gets frustrated and emotional when doing his schoolwork. He wants to do it himself and gets embarrassed when he doesn't understand and will not ask for help. The student's reading ability is very basic and he is able to spell and write only basic words. The student needs one-to-one attention to make academic progress. Once the student began attending School A his academic abilities seemed to improve and the student enjoyed attending School A because of the small class size. The parent did not find out for sure that School A was closing until late summer 2011 and participated in the August 19, 2011, meeting by telephone. At this meeting the School B program was explained. The parent was informed that much of the student's instruction would be delivered via the computer. (Parent's testimony)

26. For the brief period the student was attending School B he was not allowed to attend classes on some days because the parent bought the incorrect school uniform. On at least one day of attending School the student did not return home in the evening due to his frustration of having to attend School B. The student now enjoys School C and the vocational training that is provided. The student has been doing well there. The parent wants the student to remain at School C because he enjoys it and is more willing to attend. At School A the student got to move from class to class and he does so at School C. At School B the student would have stayed in one class. The student's writing has improved since he has been attending School C. He brings homework every day and the tutor or the parent will assist. The student has received tutoring in the past for approximately two hours per week. The parent wants the student to increase his current tutoring beyond the two hours per week he is currently receiving. (Parent's testimony)

27. School B is a full time special education program for students who have behavior difficulties. The program began at the start of SY 2011-2012. The program is housed within a DCPS high school. The program was open the first day of school for SY 2011-2012 and conducted an open house greeting prior to the first day of school. The school was not available for tours until August 17, 2011. The staff comes from different parts of the country. The disability classifications of the students at School B vary, but all students have some behavioral issues. The program is designed to house two classrooms with approximately 10 to 12 students each. The students' skills range from 2nd grade to high school grade level. At the start of SY 2011-2012 there were approximately 4 students in one class and 6 in the other, so the classrooms were eventually merged with one special education teacher. There were three staff members for the classroom, an instructional assistant who conducts attendance and makes phone calls home and assists students. The behavior specialist is responsible for implementing the students' behavior programs and the level system used at School B. The behavioral specialist also conducts a daily social skills activity or class. In the school's level program all students begin at entry level, and then are able to move from level 1 through level 4. Once a student reaches level 4 the student is integrated back to a general education setting. There are a certain number of points required by each student each day in order to be successful. After 30 days of earning points a student at School B could move up to the next level. It would take several months – by the beginning of January 2012 to meet the required level. At that point a team is convened to determine what level of integration the student is ready for. Some may be ready for full inclusion and some integrated into a single class. The behavior and academic goals are measured to determine this. Students who have not made sufficient academic progress to return to general education would be in a resource setting. Generally, the students at School B have little if any interaction with the general education students in the school building where School B is housed. However, School B students were allowed to participate in the school team sports programs. testimony)

28. School B uses a computer based credit recovery learning system known as "A Plus" to provide the students instruction. A student's academic level determines what portion of the program is used. Each student is on the computer with this program 1½ hours to 2 hours per day. Two students could be sitting next to each other on the computer and taking different classes. Direct teaching is also provided. The direct instruction Reading program is provided on 4 levels. Depending on where the student is assessed, the teacher breaks the students in groups to deliver the program. All teachers are special education certified. The computer serves as the content area specialist for the areas in which the teacher is not certified. The students can obtain credits toward a high school diploma. Math, Reading, Science and Social Studies comprise the core curriculum and students take these in the classroom. Any other courses are offered to the students on the computer. There are textbooks along with the computer program. Elective classes are not to start until January 2012. During an elective a special education setting would not be needed. The high school in which School B is located has an inclusion model and has some pull-out services. If the student in School B is ready to transition to general education services in the high school he or she might have to change location or he or she could be mainstreamed into the high school in which School B is housed. School B students enter and leave the building with general education students; otherwise there is

no interaction unless a student plays on the school's sport team(s). (Ms. Glen's testimony)

29. School B has a transition specialist who works with students and conducts vocational assessments. The program is designed for any students who have behavior difficulties attached to his or her IEP. The other staff members have degrees and have training in delivering intervention procedures. testimony)

30. After the student had attended School C for thirty days an IEP meeting was convened at School C. A DCPS representative attended but took the position that because the student was unilaterally placed by the parent DCPS was not responsible for the student's program at School C or for providing a FAPE. The representative did not stay through the entire meeting. The School C staff discussed the student's performance since attending School C and completed a transition worksheet. The IEP was updated but no changes were made to the services that were being provided to the student. The student is getting 27.5 hours of specialized instruction and receives one hour of individual therapy and is on the diploma tract. The student's speech/language services were increased to 2 hours per week. (Petitioner's Exhibit 10, 13-9)

31. The student was provided independent tutoring in Reading, Math and Writing from June to September for two hours per week. The student is low functioning and needs a lot of help building the foundations. The student has difficulty reading instructions. The student is a hard worker and he has difficulty building relationships but once he forms them he is able to work hard. He is very quiet. The first few weeks the student refused to work with his tutor and took off and left the house. Once the student warmed up and the relationship was built he opened up. He is not comfortable with changes and he will shut down and run away. Once the relationship is built he will do the work. The student will not communicate when he doesn't understand but will complete the work to best of his ability. testimony)

32. School C is a private full time special education school located in Northern Virginia. The school serves students with a variety of disability classifications. There are approximately 70 students. And no classroom has more than 10 students with a special education teacher. A teaching assistant is also in the class. The assistants are not certified teachers. There is usually a special education teacher in the room for teachers who are content certified without special education certification. The majority of the students are from D.C. The program is considered therapeutic because there are psychologists and a psychiatrist on staff and six behavior counselors and there is a school wide behavior modification program. With a level system the students earn points throughout the day and as they move up they receive more privileges. The school can and is implementing the student's IEP. The school can provide the student a DC high school diploma. The student had a difficult time at the beginning but has now become acclimated and his attendance has improved. The student first avoided issues and wanted to leave the classroom. Once he became aware that other students had difficulties as well he has done better. There is English Language Arts ("ELA") class that is an extra class. The teachers in that class observed this behavior in the student right away. The students are escorted around the building and transition from class to class. The student is now

acclimated and doing well. The tuition at School C is per day and the per hour for individual therapy and no charge for group counseling. Speech language services cost per hour. testimony)

33. The student is provided individual and group therapy at School C. The student's major deficits are his learning disability in Reading and Math. The student had a difficult time at the beginning of the school year. He has now gotten acclimated and provides peers with feedback and he has come out of his shell. He has little if any disruptive behaviors but he will shut down and not want to do any work. He was shutting down initially because he was used to the reward system at School A. He was hesitant to discuss his difficulties in reading but the staff has been working with him to share more about this. The student does not like the computer work and the staff has been working with him closely to assist him with the work. He missed the beginning of school when all the students shared and opened up about their weaknesses. There is a behavioral model at the school that awards the student points in areas measured and for the percentage of work completed. The student has been much more productive in the ELA class. The student transitions from class to class well. The student is now more relaxed and trusting and is using his support services. He is more engaged and invested in the program. (Dr. Elkin's testimony, Petitioner's Exhibit 7)

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.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [5] *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.

[5] 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.

Issue 1: Whether DCPS denied the student a FAPE by refusing to hold the student's LRE meeting at a mutually agreeable time and place.

Conclusion: DCPS convened the student LRE meeting at a mutually agreeable time and place. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

34 C.F.R. § 300.116 provides:
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 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.

In the case at hand the evidence demonstrates that DCPS attempted to convene a meeting to discuss the student's LRE and location of services on June 6, 2011, but the parent did not attend and her representative arrived late. There were several attempts by DCPS thereafter during the summer of 2011 to convene the meeting and to do so at School A. However, the evidence demonstrates that School A staff became unavailable because of the school's closing. Under the circumstances of School A closing DCPS convening the student's MDT meeting determine his location of services at DCPS central office on August 19, 2011, was reasonable. The Hearing Officer does not conclude that there was any denial of FAPE in this regard.

Issue 2: Whether DCPS denied the student a FAPE by holding a placement meeting without an appropriately constituted team.

Conclusion: The August 19, 2011, meeting was held with appropriate personnel. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

34 C.F.R. § 300.116 provides:

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...

Generally, in the District of Columbia the IEP Team[6] also functions as the placement team but IDEA does not mandate it. *See* D.C. Mun. Reg. tit. 5-E § 3001.1 (definition of "IEP team"). Placement decisions need not be made by an IEP team. Note that 34 C.F.R. §300.116(a)(1) does not require the IEP team to make the placement decision. Because IDEA does not assign any particular name to the placement team, MDT is generally used.

In the case at hand DCPS convened a meeting at DCPS central office on August 19, 2011. The meeting included the parent and personnel from DCPS, one of whom was familiar with the student. This meeting was not an IEP meeting nor did it purport to be based on the testimony provided. It is clear under IDEA that a full IEP team is required when the IEP is developed and the services, goals and LRE are determined. However, an IEP team is not necessarily required when a location of services is determined. Although typically the placement and location of service decisions are made in an IEP meeting, there is no requirement under IDEA that these decisions include all individuals required by an IEP team. The language of 34 C.F.R. § 300.116 and §300.321 are distinct. The personnel required in an IEP team are not the same individuals

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[6] 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 then 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.

required for a placement decision. In addition, when it comes to a location of services verses the student's LRE and placement there is precedent for the determination of a location of services being made by the school district.

In *White v. Ascension Parish Sch. Bd.* 343 F. 3d 373 the appeals court held the IDEA did not prohibit the district from making the administrative decision about where to provide services. While the Act requires parental participation in "educational placement" decisions, such "placement" refers to educational programming, not physical location. "'Educational placement', as used in the IDEA, means educational program not the particular institution where that program is implemented," the court explained. While the IDEA requires parental participation in educational placement decisions, it does not mandate that parents be involved with site selection, the court emphasized, finding support in *Sherri A.D. v. Kirby*, 19 IDELR 339 (5th Cir. 1992).

In the case at hand there has been no change in the IEP, no change in the services and no change in the student's LRE. Consequently, DCPS was justified in convening the MDT meeting at DCPS central office and involving the personnel it did and issuing a notice of placement for a location that it thought could implement the student's IEP and it did this with the notice issued for the student to attend School B.

Issue 3: Whether DCPS denied the student a FAPE by providing an inappropriate placement when it changed the student's placement from School A to School B.

Conclusion: Based on the evidence School B proves to be an inappropriate placement to meet the student's individual needs. Petitioner sustained the burden of proof by a preponderance of the evidence.

34 C.F.R. § 300.114 provides:

> (a) General.
>
> (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.

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.

Placement decisions can only be made after the development of the IEP. Only after the IEP has been developed does the multidisciplinary team ("MDT") have a basis for determining where the student's needs can be served. Should the process be reversed, the child's IEP would be written to conform with a predetermined setting, possibly denying the child a free and appropriate public education ("FAPE"). *Spielberg v. Henrico County Public School*, 853 F.2d 256, 441 IDELR 178 (4th Cir. 1988).

Although there is evidence the student's primary disability classification appears to be different in a copy of the IEP in the case at hand the evidence demonstrates the student's IEP was not changed at the August 19, 2011, meeting.

In this case there has been no change in the IEP, no change in the services and no change in the student's LRE. Consequently, DCPS was justified in issuing a notice of placement for a location that it thought could implement the student's IEP and it did this with the notice issued for the student to attend School B.

However, the evidence demonstrates that School B is not an appropriate placement and location of services for the student. Based on the cumulative evidence of the student's psycho-educational evaluation, the testimony of student and the individuals that have worked with the student at School C and his tutor, the student is in need of intensive one-to-one specialized instruction to meet his unique educational needs. The tutor as well as School A staff clearly demonstrated that the student is reluctant to admit is educational deficits and actually needs to be coaxed over time to open up and reveal his weaknesses so that they can be effectively addressed. The evidence demonstrates that he does not have behavioral difficulties such as outbursts and disruptions that seem to be the target of the School B program. In addition, the evidence that School B is primarily a computer based educational program where the student is working independently is further indication that the student's unique educational needs will not be met there and the program is an inappropriate program for the student. The student's own credible testimony[7] of the progress he made at School A and is now making at School C and did not think he would make at School B also demonstrates that his needs were not being met at School B.

[7] The Hearing Officer found the student credible based on his demeanor.

Consequently, the Hearing Officer concludes the student's needs would not be met at School B and the student's placement there is inappropriate.

34 C.F.R. § 300.148 provides:

> (a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with Sec. Sec. 300.131 through 300.144.
> (b) Disagreements about FAPE. Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in Sec. Sec. 300.504 through 300.520.
> (c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.
> (d) Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied--
> (1) If--
> (i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
> (ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;
> (2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in Sec. 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the

evaluation; or
(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.
(e) Exception. Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement--
(1) Must not be reduced or denied for failure to provide the notice if--
(i) The school prevented the parents from providing the notice;
(ii) The parents had not received notice, pursuant to Sec. 300.504, of the notice requirement in paragraph (d)(1) of this section; or
(iii) Compliance with paragraph (d)(1) of this section would likely result in physical harm to the child; and
(2) May, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if--
(i) The parents are not literate or cannot write in English; or
(ii) Compliance with paragraph (d)(1) of this section would likely result in serious emotional harm to the child.

If the public school provides an appropriate educational program, parents are not entitled to reimbursement for a private placement. If the school district does not provide the child with an appropriate education, and the parent places the child into a private special education program where the child does receive an appropriate education the parent should be reimbursed.

Parents who disagree with the proposed placement are faced with a choice: go along with the placement to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school. *Burlington v. Massachusetts Department of Ed.* 471 U. S. 359

In this case there was sufficient evidence that School B is inappropriate for the student and there was sufficient evidence presented that School C can meet the student's needs and implement his IEP. Therefore, the Hearing Officer will order that DCPS reimburse the student's tuition and costs at School C and fund his placement there for the remainder of SY 2011-2012.

Issue 4: Whether DCPS failed to comply with the HOD of May 18, 2011, when it failed to convene an MDR meeting within the time prescribed.

Conclusion: DCPS met the requirements of the HOD as to the MDR meeting. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

The evidence demonstrates that DCPS requested of Petitioner and Petitioner agreed that the MDR meeting would be held beyond the time prescribed by the HOD. DCPS attempted to

conduct the MDR meeting on June 6, 2011, but the parent did not attend. When the meeting was finally held on August 19, 2011, the student's behavior was not addressed, as there were no team members available from School A. However, DCPS authorized the parent to obtain 12 hours of independent tutoring as compensation for the time the student was suspended from school D during SY 2010-2011. The Hearing Officer concludes therefore that this was a good faith effort by DCPS to comply with the requirements of the May 18, 2011, HOD and with this action the requirements of the HOD were satisfied.

Issue 5: Whether DCPS failed to offer an appropriate amount of compensatory education for the missed days of school while the student was suspended from School D.

Conclusion: Petitioner failed to demonstrate with sufficient specificity that the requested amount of compensatory education services would remediate the student for the services the student missed.

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.

Despite the evidence that the student missed 14 days of school during a suspension at the start of SY 2010-2011 while the student was still attending School D, it was not clear from the evidence that any more than 4 of those days were more than the 10 days allowed pursuant to 34 C.F. R § 300.530 et seq. In addition, Petitioner failed to present sufficient evidence of how any proposed award would be reasonably calculated to provide the educational benefits that likely would have accrued if there had been no interruption in services. The testimony and documents offered by Petitioner with regard to compensatory education did not specifically address the alleged lack of services and state with sufficient specificity how the requested service would remediate for the missed services. However, when a denial of FAPE has been proven it is inequitable for the student to be provided nothing.[8] Consequently, the Hearing Officer will order, based on equitable considerations, and as compensatory education, that DCPS provide the student a nominal amount of services mentioned in the order below.

ORDER:

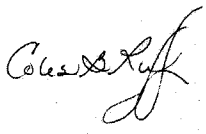
1. DCPS shall reimburse the student's attendance (tuition, related services and transportation) at Accotink Academy from the date he was unilaterally placed there by the parent until the date of this HOD and continue to fund his placement and transportation services through the end of SY 2011-2012.

[8] *Mary McLeod Bethune Day Acad. Public Charter School V. Bland* 534 F. Supp. 2d 109 (D.D.C. 2008)

2. DCPS shall fund twelve (12) hours of independent tutoring as compensatory education services for the time the student missed school during his suspension at the start of SY 2010-2011.

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).



Coles B. Ruff, Esq.
Hearing Officer
Date: December 14, 2011