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**Confidential**

<p>Parents on Behalf of Student<sup>1</sup>,</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS") ["LEA"]</p> <p>Respondent.</p> <p>Case # 2015-0336</p>  <p>Date Issued: December 29, 2015</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Hearing Date: December 3, 2015</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Kiran Hassan, Esq. James E. Brown &amp; Associates, PLLC 1220 L Street, N.W. Suite 700 Washington, D.C. 20005</p> <p>Counsel for Respondent: Steven Rubenstein, Esq. District of Columbia Office of the General Counsel 1200 First Street, NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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<sup>1</sup> Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

## **JURISDICTION:**

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on December 3, 2015, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student is age \_\_ and in grade \_\_<sup>2</sup> and at the time the complaint was filed was attending a District of Columbia public high school: “School A”<sup>3</sup>. The student is a child with disability pursuant to IDEA and has an individualized education program (“IEP”). The District of Columbia Public Schools (“DCPS”) is the local education agency (“LEA”) responsible for ensuring the student is provided special education.

The student’s IEP was amended on March 25, 2015, when the student attended a different DCPS high school: (“School B”). During the multi-disciplinary team (“MDT”) meeting on March 25, 2015, the team classified the student with multiple disabilities (“MD”) including specific learning disability (“SLD”) and other health impairment (“OHI”) for Attention Deficit Hyperactivity Disorder (“ADHD”) and developed an IEP that required the student receive, inter alia, 27.5 hours per week of specialized instruction per week outside general education.

DCPS issued a letter that stated the student was to attend School A and that School A could implement his IEP. The student began attending School A on April 13, 2015, and he was placed in a Behavior and Education Support (“BES”) self-contained classroom taught by a special education teacher.

On June 3, 2015, School A convened an MDT meeting to, inter alia, conduct a 30-day review of the student’s attendance at School A. The student’s parents (“Petitioners”) claim that during this meeting team members reported that the student was likely to fail the grade and they requested that the student be placed in a separate special education day school. Petitioners assert that the team did not comply with their request but wanted to move forward with referring the student to the DCPS least restrictive environment (“LRE”) team.

On June 19, 2015, Petitioners filed a due process complaint that alleged DCPS had denied the student a free appropriate public education (“FAPE”) by: (1) failing to develop an appropriate IEP on June 3, 2015, due to a reduction in IEP service hours; (2) failing to develop an appropriate IEP on June 3, 2015, because the IEP did not provide the student a placement in a separate special education therapeutic day school; (3) failing to provide an appropriate a placement/location of services because School A lacks the programming to implement the

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<sup>2</sup> See Appendix B for student’s age and current grade.

<sup>3</sup> The student’s school(s) listed as School A and/or B, etc. are identified in Appendix B.

student's IEP, (4) failing to include the parent as a meaningful participant in the student's placement at School A, and (5) failing to implement the student's January 2015 IEP.

That complaint resulted in a hearing and an August 28, 2015, Hearing Officer's Determination ("HOD") that concluded Petitioner failed to meet the burden of proof on four of the five issues adjudicated. The Hearing Officer concluded the student was denied a FAPE on a single issue: DCPS failing to fully implement the student's IEP at School A. The Hearing Officer in his order stated, *inter alia*, that Petitioner's request for the student's placement at the private special education separate school ("School C") was dismissed without prejudice. The Hearing Officer also ordered DCPS to conduct an assessment of the student's need for a more restrictive environment and to hold a meeting to review the findings and revise the IEP and placement as necessary.

Although the Hearing Officer found that DCPS denied the student a FAPE with respect to the implementation of the student's IEP, the Hearing did not order additional compensatory education because the student had only completed 4 hours of the 100 hours of tutoring that were part of a March 2, 2015, settlement agreement.

DCPS completed its LRE review on September 13, 2015. On October 7, 2015, DCPS convened a meeting to review the LRE observation report, review and revise the student's IEP as necessary and discuss placement. DCPS decided that the student would remain at School A and that School A would first conduct a functional behavior assessment ("FBA") and update the student's behavioral intervention plan ("BIP") then reconsider his placement after interventions had been attempted. Petitioners disagreed with that decision and again advised that they wanted the student placed at School C.

#### Current Due Process Complaint and Prayer for Relief:

On October 15, 2015, Petitioners filed the current due process complaint that alleged DCPS denied the student a FAPE by failing to develop an appropriate IEP at the June 3, 2015, and/or the October 7, 2015, meeting(s) when it did not provide the student with specialized instruction in a separate special education therapeutic day school. Petitioner sought as relief that the Hearing Officer order DCPS to develop an IEP to include the student's LRE as a therapeutic, separate, special education day school. Petitioners sought the student's placement at School C and reasonable compensatory education.<sup>4</sup>

#### Respondent's Response to the Complaint:

On October 23, 2015, DCPS filed a timely response to Petitioners' complaint in which it denied that it failed to provide the student with a FAPE. DCPS contended, *inter alia*, Petitioners executed a settlement agreement resolving a prior complaint that required DCPS to convene a

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<sup>4</sup> Prior to the hearing DCPS granted the educational placement Petitioners were seeking, thus the Hearing Officer, concluded after ruling on Respondent's motion, discussed below, that if Petitioner met the burden proof on the issue to be adjudicated, compensatory education would be measured from the October 7, 2015, meeting until the student was placed at School C by DCPS and he began attending.

30-day review meeting at the new school location (School A) and to review and revise the student's IEP, FBA and BIP if necessary and fund 100 hours of independent tutoring and 100 hours of independent behavioral support services. DCPS also contended the previous Hearing Officer found Petitioner failed to prove that the student requires special education with no interaction with non-disabled students and ordered DCPS to complete an assessment of the student's need for a more restrictive environment. DCPS contended the LRE report was completed and reviewed and contains recommendations, strategies and interventions for the student that include development of an attendance plan, revision of his BIP, amending the IEP to include transportation and outside intervention for the student's possible drug abuse. DCPS asserted that Petitioners' due process complaint was premature because it was filed before any of these interventions could be put in place and before the team could reconvene to determine the effectiveness of the interventions as the team had agreed.

#### Resolution Meeting and Pre-Hearing Conference:

On October 29, 2015, a resolution meeting was held. The case was not resolved and the parties did not mutually agree to proceed to hearing. The 45-day period began on November 15, 2015, and ends [and the Hearing Officer's Determination ("HOD") is due] on December 29, 2015.

The Hearing Officer convened a pre-hearing conference ("PHC") on November 9, 2015, and issued a pre-hearing order ("PHO") on November 12, 2015, outlining, inter alia, the issue to be adjudicated, which was as follows:

"Whether DCPS denied the student a free appropriate public education ("FAPE") by failing to develop an appropriate IEP at the June 3, 2015, meeting and/or the October 7, 2015, meeting, when it did not provide the student with specialized instruction in a separate special education therapeutic day school in light of the student's lack of educational progress, on-going behavioral issues and current evaluations."

#### **Respondent's Partial Dismissal Motion**

Prior to the hearing, on November 25, 2015, Respondent's counsel filed a timely Partial Dismissal Motion. On November 30, 2015, Petitioner filed an opposition to the motion. Respondent in its motion asserted that the August 28, 2015, HOD disposed of the issue of whether DCPS denied the student a FAPE by failing to provide the student a placement in a separate special education day school on June 3, 2015. Respondent asserted that in the August 28, 2015, HOD the Hearing Officer concluded that Petitioner failed to sustain the burden of proof on the placement decision at the June 3, 2015, meeting and thus, the issue is barred by res judicata and/or collateral estoppel. Petitioner, on the other hand, asserted the prior Hearing Officer had dismissed the issue without prejudice.

The current Hearing Officer ruled on the record granting Respondent's partial motion concluding that the issue as to the appropriateness of the student's placement as of June 3, 2015, had been decided in the previous HOD and Petitioner was thus barred from adjudicating that issue in the current hearing. Consequently, the issue to be adjudicated was amended at the outset of the hearing to exclude reference to the June 3, 2015, meeting.

In making that ruling the current Hearing Officer considered the following:

A motion to dismiss generally tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242, 352 U.S. App. D.C. 4 (D.C. Cir. 2002). The complaint need only set forth a short and plain statement of the claim, giving the defendant fair notice of the claim and the grounds upon which it rests. *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040, 358 U.S. App. D.C. 295 (D.C. Cir. 2003) (citing FED. R. CIV. P. 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

"[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (internal quotation marks omitted); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)

In resolving a motion to dismiss the Hearing Officer must treat the complaint's factual allegations -- including mixed questions of law and fact -- as true and draw all reasonable inferences there from in Petitioner's favor. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165, 357 U.S. App. D.C. 35 (D.C. Cir. 2003); *Browning*, 292 F.3d at 242. While many well-pleaded complaints are conclusory, a court need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *Warren v. District of Columbia*, 353 F.3d 36, 39, 359 U.S. App. D.C. 179 (D.C. Cir. 2004); *Browning*, 292 F.3d at 242. "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent judgments." *Montana v. United States*, 440 U.S. 147, 153-54, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979).

"The collateral estoppel doctrine provides that 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' ") *U.S. v. Wells*, 347 F.3d 280, 285 (8th Cir. 2003). The requirements that must be satisfied before the doctrine of collateral estoppel is applied are similar to those for *res judicata*, but there are differences. First, the issues in the first and second litigation must be identical and must have been before a court. Second, the issue must have been actually litigated. Third, a final judgment must have been rendered ultimately deciding the issue in question.

In the current case Petitioners were attempting to litigate whether the student was denied a FAPE by DCPS failing to develop an appropriate IEP at the June 3, 2015, and/or October 7, 2015, meeting(s) when it did not provide the student with specialized instruction in a separate special education therapeutic day school.

The four issues that were adjudicated and decided against Petitioners in the August 28, 2015, HOD included the issue of whether DCPS denied the student a FAPE by failing to develop an appropriate IEP on June 3, 2015, because the IEP did not provide the student placement in a

separate special education therapeutic day school.<sup>5</sup>

In the August 28, 2015, HOD the Hearing Officer concluded and stated the following: “I find that Petitioners have not met their burden of proof to show that education in a special education school, with no interaction with nondisabled peers, is required in Student’s case...”<sup>6</sup>

The Hearing Officer also stated in the HOD the following: “In this decision, I have found that Petitioners have not met their burden of proving that Student’s education cannot be achieved satisfactorily in the BES program at City High School 3. Therefore, I decline to order DCPS to fund Student’s placement at Nonpublic School.”<sup>7</sup>

Petitioner asserts, however, that the Hearing Officer dismissed this issue without prejudice.<sup>8</sup> The plain language of the HOD contradicts this assertion. The Hearing Officer concluded that despite Petitioner having not met the burden of proof on the issue, it was appropriate for DCPS to proceed with the LRE assessment and the Hearing Officer ordered DCPS to do so.<sup>9</sup> The August 28, 2015, HOD ordered DCPS to conduct the LRE assessment after which a team was meet to review those findings and recommendations and revise as appropriate the student’s IEP and educational placement.<sup>10</sup>

The issue adjudicated in the August 28, 2015, HOD regarding the June 3, 2015, IEP placement decision and the issue Petitioner was attempting to litigate in the current proceeding about the June 3, 2015, IEP placement are identical. Although the language of the issue is phrased slightly differently it is nonetheless the same issue. The issue was before the previous Hearing Officer and was litigated and a final judgment was rendered deciding the issue. Therefore, the issue is no longer available to Petitioners for adjudication.

The Hearing Officer ordered in the August 28, 2015, HOD that Petitioners’ request that DCPS fund the student’s placement at the specific nonpublic school Petitioners were seeking, School C, was dismissed without prejudice. The student’s ultimate placement at School C was relief that remained available to Petitioners if they sought that relief in a subsequent proceeding. This was originally relief Petitioner sought from the current Hearing Officer as it was not granted nor precluded by the August 28, 2015, HOD. What was dismissed without prejudice was the relief sought but not the issue as to the June 3, 2015, IEP placement. Despite Petitioners’ counsel’s

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<sup>5</sup> August 28, 2015, HOD: Respondent’s Exhibit 9-3, 9-9, 9-12, 9-13, 9-14

<sup>6</sup> Respondent’s Exhibit 9-13

<sup>7</sup> Respondent’s Exhibit 9-16

<sup>8</sup> Petitioners’ counsel asserted during oral argument on the motion that the issue and relief cannot be separated and because the requested relief was dismissed without prejudice the underlying issue was dismissed without prejudice. In addition, Petitioners’ counsel asserted that the “order” portion of the HOD was binding, not the conclusions of law.

<sup>9</sup> Respondent’s Exhibit 9-14

<sup>10</sup> Respondent’s Exhibit 9-18

assertions that the issue and relief cannot be separated and that the “order” section of the August 28, 2015, HOD rather than the “conclusions of law” were binding, she presented no legal authority to support these assertions.

Consequently, the current Hearing Officer concluded that there had been a previous and final determination by the Hearing Officer in the August 28, 2015, HOD that the Petitioner failed to sustain the burden of proof that as of the June 3, 2015, meeting the student was in need of instruction in a separate special education therapeutic day school. Thus, at the outset of the current hearing, after oral argument, the Hearing Officer granted Respondent’s motion over Petitioner’s objection and eliminated from the issue to be adjudicated the reference to the student’s June 3, 2015, meeting.

**ISSUE:** <sup>11</sup>

The issue adjudicated is:

Whether DCPS denied the student a free appropriate public education (“FAPE”) by failing to develop an appropriate IEP at the October 7, 2015, meeting, when it did not provide the student with specialized instruction in a separate special education therapeutic day school in light of the student’s lack of educational progress, on-going behavioral issues and current evaluations.

**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 34 and Respondent’s Exhibits 1 through 15) that were admitted into the record and are listed in Appendix A).<sup>12</sup> Witnesses are listed in Appendix B.

**FINDINGS OF FACT:** <sup>13</sup>

1. At the time the current complaint was filed the student was attending School A, a DCPS high school. The student is a child with disability pursuant to IDEA and has an IEP. (Parent’s testimony, Petitioner’s Exhibit 10-1)

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<sup>11</sup> The alleged violation(s) and/or issue(s) listed in the complaint or in the PHO do not directly correspond to the issues outlined here. The Hearing Officer restated the issue at the outset of the hearing. Petitioner objected to the issue being changed to exclude the June 3, 2015, meeting date determined by the Hearing Officer’s ruling on the Respondent’s Partial Dismissal Motion.

<sup>12</sup> Any documents that were objected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

<sup>13</sup> The evidence that is the source of the Finding of Fact (“FOF”) 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.

2. On March 2, 2015, the Petitioners executed a settlement agreement with DCPS for DCPS to convene a 30-day review meeting at School A to revise the student's FBA and BIP, review and revise student's IEP if needed and fund 100 hours of independent tutoring and 100 hours of independent behavioral support services. (Respondent's Exhibit 5-2)
3. The student's IEP was amended on March 25, 2015<sup>14</sup>, when the student attended a different DCPS high school, School B. On March 25, 2015, the MDT classified the student as MD including SLD and OHI and developed an IEP that required the student receive 27.5 hours per week of specialized instruction per week outside general education setting and 240 minutes per month of behavior support services outside general education. (Petitioner's Exhibit 10-1, 10-16)
4. The student began attending School C on April 13, 2015, in a BES self-contained classroom taught by a special education teacher. (Respondent's Exhibit 9-6, 9-20)
5. The student had failing grades during SY 2014-2015 and was not promoted. The student's father saw no improvement in the student's behavior or his academics over the past couple of years, nor any since the student began attending School A. The student's father believes the student needs an intense educational and behavioral program. The student's father has concerns about the student's performance while at School A and has seen regression in the student's behavior and academics. (Parent's testimony)
6. At School A the student would often arrive late to school and leave school early and the student was suspended usually because of some behavior related to his disability such as leaving the class, being disruptive, running the halls and being combative and non-compliant. The student has recently begun independent counseling and it seems to be helping. (Parent's testimony)
7. On June 3, 2015, School A convened an MDT meeting to, inter alia, conduct a 30-day review of the student's attendance at School A. During this meeting team members reported that the student performed work in class for a short while before getting up and distracting other students, failed to comply with directions and was constantly on his cell phone. The team further commented that the student regularly arrived to school around 10:00 a.m., read on a 4<sup>th</sup> or 5<sup>th</sup> grade level, did not participate in math class, had incomplete assignments, and was likely to fail the school year. (Petitioner's Exhibit 12-1, 12-2)
8. During the June 3, 2015, meeting Petitioners requested that the team provide the student with a full-time outside of general education IEP and that he be placed in a separate special education day school. The DCPS members of the team declined the request and instead moved forward with referring the student to the DCPS LRE team. (Petitioner's Exhibit 12-3)
9. On June 19, 2015, Petitioners filed a due process complaint in which they alleged DCPS had denied the student a FAPE by: (1) failing to develop an appropriate IEP on June 3,

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<sup>14</sup> The parties stipulated at the hearing that the March 25, 2015, IEP is the student's most recent IEP.

2015, due to a reduction in IEP service hours; (2) failing to develop an appropriate IEP because the student was not placed in a separate special education day school; (3) failing to provide an appropriate placement/location of services because School A lacks the programming to implement the student's IEP and meet his needs, (4) failing to include the parent as a meaningful participant in the student's placement at School A, and (5) failing to implement the student's January 2015 IEP. (Respondent's Exhibit 9-1, 9-3)

10. That complaint resulted in a hearing and an August 28, 2015, Hearing Officer's Determination ("HOD") that concluded Petitioner failed to meet the burden of proof on four of the five issues adjudicated. The Hearing Officer concluded the student was denied a FAPE on the remaining issue by DCPS failing to fully implement the student's IEP at School A. The Hearing Officer ordered DCPS to conduct an assessment of the student's need for a more restrictive environment and to hold a meeting to review the findings and revise the IEP and placement as necessary. (Respondent's Exhibit 9-18)
11. Although the Hearing Officer found that DCPS denied the student a FAPE with respect to the implementation of the student's IEP, the Hearing did not order additional compensatory education because the student had only completed 4.5 hours of the hours that were part of the March 2, 2015, settlement that were to be completed by December 31, 2015. However, the Hearing Officer extended the period that the hours could be used to the start of SY 2016-2017. (Respondent's Exhibits 7-1, 9-3, 9-9, 9-12, 9-13, 9-14, 9-18, 15-1)
12. DCPS performed two 1-hour observations of the student on September 4, 2015. During the first observation there were 7 students in class with a special education teacher and a paraprofessional aide and the student failed to remain inside the classroom. The second observation was performed in a science class with 6 students and a special education teacher. During this observation the student arrived 20 minutes late, sat down, and looked at his cell phone. When the teacher came to him to explain the activity he put on his earphones and appeared to get started on the assignment. The student later took part in an assessment but later got up from his seat to check out items around the classroom. The observer noted the student frequently demonstrated self-control but needed continuous support, sometimes disrupted the lesson but responded positively to prompting. (Petitioner's Exhibit 21, Respondent's Exhibit 10-1, 10-2, 10-3, 10-4)
13. The LRE report indicated that the observer believed based upon her observations of the student that his current school environment was appropriate and a more restrictive environment was not recommended. She concluded that the student did not require restraint, crisis management or therapeutic intervention during the classroom observations. The observer recommended strategies and interventions for the student that included development of an attendance plan, revision of the student's BIP, and outside intervention for the student's possible drug abuse. (Respondent's Exhibits 10-5, 10-6, 11)
14. On October 7, 2015, DCPS convened a meeting to review the LRE observation report, review and revise the student's IEP as necessary and discuss placement. The discussion

related to the student's absences, tardiness, possible drug abuse and other behavioral issues. The team decided to conduct a FBA and develop a BIP rather than place the student in a separate special education school as the parent requested. The student's parents objected. Petitioners advised DCPS that they wanted the student placed at School C. The team agreed to reconvene in 30 days. Petitioners' due process complaint was filed before any of the new interventions could be put in place for the student. DCPS revised the student's BIP on October 30, 2015. (Witness 2's testimony, Petitioners' Exhibit 13-1, 13-2, Respondent's Exhibits 10-7, 11)

15. The student's father attended the October 7, 2015, meeting. He expressed his concern that the student's behavior was affecting his education and discussed ways to resolve the behavior. The student was failing all his classes at the time of the meeting. The student's father later talked to the student about his need to improve and provided him constructive criticism. (Parent's testimony)
16. Although the team at the October 7, 2015, meeting mentioned the student being provided bus transportation to assist him in getting to school and getting there on time the student's parent believed the student would be resistant to catching a yellow school bus. In any case, School A did not follow up with the parent regarding the transportation services. (Parent's testimony, Petitioner's 28-2)
17. The parent's educational advocate also attended the October 7, 2015, meeting. During the meeting the team members reported that the student was nasty to his teacher, made threats to a classroom aide, looked disheveled and high on drugs and he when he did so was sent home. The team agreed to assist the family to find a substance abuse counselor. Because of the student's defiance and non-compliance with school rules the majority of the team members including the student's parents were of the opinion that the student was not being successful at School A and needed a change of placement to a separate special education school. (Witness 2's testimony)
18. The DCPS LRE representative who observed the student at School A was the only member of the October 7, 2015, team who did not agree that the student needed to move from School A. Because the School A team had not yet done its own FBA or BIP School A proposed reconvening the meeting on a later date to see if the changes in the student's BIP and transportation would make a difference in his behavior and academic performance. (Witness 2's testimony)
19. On October 15, 2015, Petitioners filed the current due process complaint. (Petitioner's Exhibit 1)
20. DCPS developed a new BIP for the student at School A the student; however, he continued to have problems behaviors in the School A BES program, arriving late, refusing to do work, being out of place and leaving school early. (Witness 2's testimony, Petitioner's Exhibit 20, Respondent's Exhibit 11)

21. The student' has recently engaged in independent counseling starting in November 2015 using some of the independent counseling that had been awarded to him and extended by the August 28, 2015, HOD. At the time of the current hearing the student had had about 18 to 20 face-to-face hours with the independent therapist and the therapist had used 10 to 12 hours in research of the student's educational records and interviews. (Witness 1's testimony)
22. Petitioners engaged an independent psychologist to review the student's evaluations and to provide him the independent behavioral support services that the student was previously awarded as compensatory education. The psychologist testified in the hearing as an expert witness. She reviewed the student's March 2010, July 2011 and June 2014 educational and comprehensive psychological evaluations. The June 2014 comprehensive psychological evaluation indicated the student's academic achievement rose slightly but remained significantly below his grade level in reading, math and written expression. The student's full-scale IQ score in the June 2014 evaluation was 81, low average. (Witness 1's testimony, Petitioner's Exhibits 17-6, 18-8, 18-9, 18-10)
23. Based upon her review of the student's records and having worked with the student the expert witness is of the opinion that he student has difficulties following through, escapes from academic tasks and is resistant to more traditional methods of schooling. The witness opined that the student had inconsistent and attendance that was interfering with his academic performance and his absenteeism was likely emotionally based. The student typically does not respond as well to traditional verbal direct counseling but needs more one to one hands on counseling that is not primarily based in conversation and language. (Witness 1's testimony, Petitioner's Exhibit 18-10)
24. The expert witness believes School A is too conventional a school setting for the student and does not break the academics down to basic level he requires. She is of the opinion that if the student remained at School A he would likely continue to be truant. She opined that the student is in need of a therapeutic environment in a non-traditional setting where he can be provided life-skills training coupled with academics to help compensate for his low writing and verbal expression. (Witness 1's testimony, Petitioner's Exhibits 10-10, 17-11, 17-12, Petitioner's Exhibit 10-10).
25. On November 20, 2015, DCPS issued a letter to Petitioner informing Petitioner's that the non-public placement Petitioners were seeking, School C, had been identified by DCPS at the location at which DCPS would be placing the student for his IEP to be implemented. (Respondent's Exhibit 12)
26. The student had been attending School C for a few days prior to the hearing. School C is implementing the student's IEP. Since attending School C the student has exhibited some task avoidance and resistance to giving his phone to staff. Teachers are assessing him formally and informally prior to a 30-day review to determine if any adjustments to the IEP are necessary. School C follows OSSE attendance truancy procedures. Students move from class to class and there are 29 total students attending the school. All students have emotional disabilities. (Witness 3's testimony)

27. School C does not allow students to walk the hall. If a student leaves the classroom a behavior staff member immediately walks with the student to de-escalate the student. The school's behavior staff members all have bachelor's degrees and experience with working with students with emotional disabilities. School C is a therapeutic program and uses a behavior intervention system and its staff is trained in intervention. (Witness 3's testimony)
28. In the previous settlement agreement DCPS provided the student 100 hours of tutoring and 100 of counseling. The student had only used 4.5 hours prior to the August 2015 hearing. The student is very resistant to tutoring and the providers that have attempted to tutor him in the past have not been able to engage in the tutoring. The tutors have had difficulty finding him and developing rapport to get him to engage in the tutoring. The parents' education advocate begged and pleaded with the student to engage in the tutoring and he was not receptive. (Witness 2's testimony, Petitioner's Exhibits 13, 21, Petitioner's Exhibit 34-7, Respondent's Exhibit 15)
29. The parent's educational advocate developed a compensatory education proposal for the student for this case and in doing so conferred with the student's current compensatory education provider. Since the engagement of the recent provider the student has been more receptive to the individual counseling. The advocate was of the opinion that the student would not be receptive to 200 hours of tutoring. However, the advocate proposed 128 hours of tutoring and 16 hours of counseling or mentoring as compensatory education for the period from the October 7, 2015, meeting until the student began attending School C. (Witness 2's testimony, Petitioner's Exhibit 34-7)

### **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. 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. 7 *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 1:** Whether DCPS denied the student a free appropriate public education (“FAPE”) by failing to develop an appropriate IEP at the October 7, 2015, meeting, when it did not provide the student with specialized instruction in a separate special education therapeutic day school in light of the student’s lack of educational progress, on-going behavioral issues and current evaluations.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that at the October 3, 2015, meeting there was sufficient evidence that the student was in need of placement in a separate school as of the date based upon the information available to the team at the October 7, 2015, meeting.

Because the IEP is the mechanism through which a free appropriate public education (“FAPE”) is delivered to disabled students, failure to provide the student with an appropriate IEP is a denial of FAPE. See *Scott v. District of Columbia*, (D.C. Cir) 03-1672 DAR (March 31, 2006). A parent dissatisfied with the IEP developed for his or her child has a right to a due process hearing conducted by the state or local education agency before an impartial hearing officer 20 U.S.C. § 1415(f)(1), (3), 4, 2010)

In the District of Columbia all available information must be considered when making a determination about whether an IEP is reasonably calculated to provide these education benefits. *Suggs v. District of Columbia*, 679 F. Supp. 2d 43, 51 (D.D.C. 2010). “ An IEP may not be reasonable calculated to provide benefits if, for example, a child’s social behavior or academic performance has deteriorated under his current educational program, see *Reid v. District of Columbia*, 401 F.3d [516,] 519-20 [(D.C. Cir. 2005)]; the nature and effects of the child’s disability have not been adequately monitored, see *Harris v. District of Columbia*, 561 F. Supp.2d [63,] 68 [D.D.C. 2008]; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties. See *Gellert v. District of Columbia Public Schools* 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006)” *Suggs*, 679 F. Supp. 2d at 51-52. This line of reasoning is supported by the statute and regulations themselves. The IEP is a living document that, once initially created and consented to, is reviewed “periodically but not less than annually, to determine whether the annual goals for the child are being achieved[.]” 34 C.F. R. § 300.324(b).

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.

The IDEA contemplates a continuum of educational placements to meet the needs of students with disabilities. Depending on the nature and severity of his disability, a student may be instructed in regular classes, special classes, special schools, at the home, or in hospitals and institutions. See 5E DCMR § 3012, 20 U.S.C. § 1412(a)(5), 34 CFR § 300.115. The IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate. See, e.g., *Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012).

“In determining the least restrictive environment, consideration is given to the types of services that the child requires.” *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (citing 34 CFR § 300.552(d)). Separate schooling, or other removal of children with disabilities from the regular educational environment may occur only if the nature or severity of the disability is such that education in a regular public school cannot be achieved satisfactorily. See 34 CFR § 300.118(a)(2)(ii).

The evidence in the case demonstrates that as of the October 7, 2015, the student was clearly displaying continuous behavior difficulties at School A that were significantly interfering with his academic progress. During the meeting the team members reported that the student was nasty to his teacher, made threats to a classroom aide, looked disheveled and high on drugs and when he did so was sent home. The team agreed to assist the family to find substance abuse counselor. Because of the student’s defiance and non-compliance with school rules the majority of the team members including the student’s parents were of the opinion that the student was not being successful at School A and needed a change of placement to a separate special education school. The DCPS LRE representative who observed the student at School A was the only member of the October 7, 2015, team who did not agree that the student needed to move from School A.<sup>15</sup>

At the October 7, 2015, meeting the information available to the team indicated that the student’s behavior had gotten worse and his academic performance had not improved and he was failing all his classes. Although the LRE observer was of the opinion that the student’s environment was appropriate, everyone else on the team was of the opinion that School A was not working for the student.

At the time of the August 28, 2015, HOD the student had only been attending School A for a couple of months. The prior Hearing Officer considered all the documents and data and he found that data was insufficient to support a full time special education school. In addition, the student had just begun attending School A on September 3, 2015, when the LRE observation was conducted. However, by the time of the October 7, 2015, it was clear that the student’s

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<sup>15</sup> FOF #s 17, 18

behaviors had not improved and his academics were continuing to suffer. Although the LRE observer made several recommendations that seemed reasonable and DCPS proposed to amend the IEP to add transportation and proposed another meeting, it is clear from the evidence presented the student was beyond that point and a new placement was in order in a separate special education school.

In addition, Petitioners' expert witness' uncontradicted testimony is further support for the student's need for separate therapeutic school rather than the full time special education program the student was being provided at School A.<sup>16</sup> Therefore, the Hearing Officer concludes that DCPS' failure to place the student in a separate school of as of October 7, 2015, meeting was a denial of a FAPE.

On November 20, 2015, DCPS issued a letter to Petitioners informing them that the non-public placement Petitioners were seeking ("School C") had been identified by DCPS as the location at which DCPS would be placing the student for his IEP to be implemented. The student began attending School C on November 30, 2015.

As stated previously, because DCPS granted the educational placement Petitioners were seeking, the Hearing Officer concluded at the start of the hearing that if Petitioner met the burden proof on the remaining issue to be adjudicated, compensatory education would be measured from the October 7, 2015, meeting until the student was placed at School C by DCPS and he began attending.

### **Compensatory Education**

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

The proper amount of compensatory education, if any, depends upon how much more progress a student might have shown if he had received the required special education services and the type and amount of services that would place the student in the same position he would have occupied but for the school district's violations of the IDEA. See *Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid v. District of Columbia*, supra, 401 F.3d at 518.)

In this decision, The Hearing Officer concluded that DCPS denied the student a FAPE by failing to provide the student placement in a separate school at the October 7, 2015, meeting.

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<sup>16</sup> FOF #s 23, 24

Petitioners proposed a compensatory education award based upon a plan drafted by their educational advocate who recommends, inter alia, that student be provided 128 hours of academic tutoring and 16 hours of counseling or mentoring.

Pursuant to the prior settlement agreement the student was awarded compensatory education of 100 hours of independent tutoring and 100 hours of independent behavior support. However, as of the due process hearing date in this case the student had used only 4.5 of the authorized 100 hours of tutoring and only 18 hours of the counseling hours awarded. Under the original DCPS authorization the compensatory education hours awarded was to be used by December 31, 2015, and this was extended by August 28, 2015, HOD to the start of SY 2016-2017.

Compensatory education is an “equitable remedy” designed to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA. See *Walker, supra; Reid v. District of Columbia*, 401 F.3d 516, 522-523 (D.C.Cir. 2005). Petitioners have made no showing that providing the student additional hours of compensatory education tutoring on top of the unused hours that the student has would restore him to the position he would have occupied but for DCPS’ not placing him in a separate school immediately following the October 7, 2015, meeting and for the 30 school days or six weeks before he began attending School C. Rather, the evidence indicates that the student is extremely resistant to tutoring.<sup>17</sup>

Therefore, instead of ordering DCPS to fund more tutoring hours for the student, the Hearing Officer finds that an appropriate equitable remedy is to extend the time for the student to use the remaining hours of tutoring and counseling, authorized pursuant to the February 25, 2015, Settlement Agreement, through the end of December 2016 and provide the student the additional 16 hours of independent counseling that was requested by Petitioners due to the fact that the student has begun to be more open to independent counseling from his current provider.

**ORDER:**<sup>18</sup>

1. DCPS shall, within five (5) school days of issuance of this order, revise the student’s IEP to prescribe placement in a separate special education school.
2. The dead line date for completion of the hours of compensatory education - tutoring and counseling services - authorized by DCPS’ letter to the student’s parent dated March 3, 2015, and extended by the August 28, 2015, HOD, shall be further extended to December 31, 2016.
3. In addition, as additional compensatory education for the student not having been immediately placed in a separate school following the October 7, 2015, meeting, DCPS shall provide the student an additional 16 hours of independent counseling/behavioral

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<sup>17</sup> FOF # 28

<sup>18</sup> Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

support services at the OSSE/DCPS prescribed rate to be used in addition the services described in the paragraph above, also to be used by Petitioners no later than December 31, 2016.

4. All other relief requested by Petitioners herein is 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*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: December 29, 2015**

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