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Office of the State Superintendent of Education
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OSSE
Office of Dispute Resolution
October 16, 2014

Confidential

<p>Adult Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Date Issued: October 15, 2014</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: October 8, 2014</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on October 8, 2014, 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 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student _____ attends a DCPS high school (“School A”). The student has an individualized educational program (IEP) with a disability classification of emotional disturbance (ED).

The student first entered ninth grade at School A in school year (“SY”) 2011-2012. The student remained in ninth grade for three consecutive school years and has earned 12 credits toward his high school diploma. During SY 2013-2014 the student failed all subjects except two.

The student has a history of attendance problems. DCPS provided the student an attendance plan that was not successful in getting him to attend school and in May 2014 DCPS referred the student for truancy enforcement.

The student has had several behavior intervention plans. All the BIPs addressed, among other things, the student’s attendance problems.

The student’s April 8, 2014, IEP provides the student with 29 hours per week of specialized instruction out of the general education setting, 180 minutes per month of direct behavioral supports and a dedicated aide.

Petitioner filed this due process complaint on July 22, 2014, asserting that DCPS failed to fully implement the student’s IEP by failing to provide all IEP services. Petitioner also claimed DCPS failed to provide the student with an appropriate IEP due to the reduction in behavioral support service at his most recent IEP meeting and failed to effectively address the student’s attendance issues.

Petitioner seeks as relief and order directing DCPS revise the student’s IEP to include 240 minutes of counseling per month outside of a general education setting, an updated behavior plan or attendance intervention plan that effectively addresses his school attendance and an award of compensatory education.

DCPS filed a timely response to the complaint on August 4, 2014. DCPS denied any alleged violation(s) or denials of a free appropriate public education (“FAPE”).

DCPS asserts the student had significant truancy issues for which the student was placed on two (2) attendance contracts and had his BIP updated. The student received his counseling and special instructional services when he attended school. DCPS reduced the number of service hours for behavioral supports from 240 minutes per month to 180 because the student had made no progress.

A resolution meeting was held August 3, 2014. Nothing was resolved. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on August 23, 2014, and originally ended (and the Hearing Officer's Determination ("HOD") was due) on October 5, 2014. The parties agreed to an extension of the HOD date to allow for their requested hearing date of October 8, 2014. Their motion was granted. The HOD is now due October 14, 2014.

The Hearing Officer convened a pre-hearing conference on September 10, 2014, and issued a pre-conference order on September 14, 2014, outlining, inter alia, the issues to be adjudicated.

ISSUES:²

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to fully implement the student's counseling services, transition services, and instructional hours outside of the general education setting.
2. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP by reducing the level of behavioral supports, by failing to revise his behavior intervention plan and not addressing his attendance issues.

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 33 and Respondent's Exhibits 1 through 16) that were all admitted into the record and are listed in Appendix A.³ Witnesses are listed in Appendix B.

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

³ Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

FINDINGS OF FACT:⁴

1. The student _____ attends School A. The student has an IEP with a disability classification of ED. (Petitioner's Exhibit 1-1)
2. The student first entered ninth grade at School A in SY 2011-2012. He remained in ninth grade for three consecutive school years and has earned 12 credits toward his high school diploma. During SY 2013-2014 the student failed all subjects except two. (Petitioner's Exhibits 1-18, 8-1, 9-1)
3. The student's academic achievement was last assessed in January 2011. The student had a broad reading composite reading score at 6.5 grade equivalency. His math composite score was at 4.0 grade equivalency. His written expression skills were at third to fourth grade level. (Petitioner's Exhibit 1-3, 1-4, 1-5)
4. The student has a history of attendance problems. The student generally has problems getting to school because he does not get proper rest and in the mornings he can't "get it together." He also was ill during part of SY 2013-2014 and as a result missed school. He was hospitalized from time and had trouble catching up with his academics when he returned to school. He struggles in classes particularly math. The student also has a daughter and on occasion he has child care difficulties that prevent him from attending school. The student is the minister of music at his church and also on occasion misses school due to his music activities. During SY 2013-2014 the student told his parent he was not getting all of his counseling services. (Parent's testimony)
5. The student's attendance problems were identified by the School A attendance counselor's before school started for SY 2013-2014. On October 16, 2013, DCPS held _____ and meeting with the student and his parent and developed an attendance plan. Pursuant to the plan the attendance counselor tracked the student's attendance daily with an attendance sheet and the student was to communicate regularly with the school counselor about his academics. The DCPS student support team ("SST") was to convene an attendance meeting that was held on October 17, 2014, and DCPS referred the student to First Home Care, for community support services to assist him with personal and family issues that were preventing him from attending school. However, the student never received services from First Home Care and the attendance counselor in not sure why. (Witness 3's testimony, Respondent's Exhibit 5)
6. After the attendance counselor's initial meeting with the student in October 2013 he had 3 to 4 impromptu meetings with the student one to one to address his attendance. After they talked the student's attendance would improve for a couple of days and then the absences resumed. The student often explained that he either had to pick up his daughter,

⁴ 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.

his mom was ill and he was sick himself. The student's hand written notes from his parent to explain his absences became excessive and some of his illness described seemed to have warranted a doctor's note. The attendance counselor called the student's mother 3 or 4 times during the school year. (Witness 3's testimony)

7. School A's efforts to address the student's school attendance were not successful and in May 2014 DCPS referred the student for truancy enforcement. The truancy court referral for the student could have been made earlier but the attendance counselor had been hopeful the student's attendance would improve. (Witness 3' testimony, Petitioner's Exhibit 16, Respondent's Exhibits 5, 6)
8. The student has had several behavior intervention plans with the following dates: February 14, 2013, March 24, 2014 and April 10, 2014. All the BIPs addressed, among other things, the student's attendance problems. (Petitioner's Exhibits 3, 4, Respondent's Exhibits 7, 8, 9, 10)
9. The student's April 19, 2013, IEP provided the student with 29 hours per week of specialized instruction out of the general education setting, 240 minutes per month of direct behavioral supports and a dedicated aide. (Petitioner's Exhibit 6-8)
10. The student's IEP was updated on April 8, 2014. The student's behavioral support services were changed to reduce the direct behavioral support services from 240 minutes per month to 180 and consultative behavioral support services were added of 180 minutes per month. The IEP team maintained the 29 hours per week of specialized instruction out of the general education setting and the dedicated aide. (Petitioner's Exhibit 1-8)
11. The student's educational advocated participated in the student's April 8, 2014, IEP meeting. The advocate first requested a meeting to review the student's IEP in October 2013 to address, among other things, the student lack of motivation to attend school and his absenteeism. A meeting was scheduled in December 2013 but not held because the School A special education coordinator was on medical leave. (Witness 1's testimony, Petitioner's Exhibits 24, 25, 26, 27)
12. At the April 8, 2014, IEP meeting the team discussed the student's attendance, his IEP and his behavior intervention plan. The DCPS team members discussed reducing the student's counseling services but the student's parent was not in agreement because she believed the student had not mastered the goals and he was continuing to have behavior difficulties. The advocate requested additional tutoring services for the student so he could catch up on courses he had failed. The team agreed to make a referral for credit recovery services. The advocate also requested that the student's BIP be amended to include new interventions to address his attendance. DCPS mentioned that despite the student being referred to an outside agency and using the student's participation in the school band as an incentive for him to attend school, the student continued to have significant attendance problems. (Witness 1's testimony, Petitioner's Exhibits 2, 22)

13. The student's parent participated in the April 2014 IEP meeting by telephone but could not really remember the meeting and typically does not look over the documents the school provides her. (Parent's testimony)
14. The student believes that during SY 2013-2014 his English, band and play writing courses were general education courses because he was in the class with students from his neighborhood he does not believe were not in special education and at least. The student also believes during SY 2013-2014 he had some of his courses with general education students because the classes were conducted on a different floor than the floor his self-contained special education program occupies. (Student's testimony)
15. The student believes that because of his poor school attendance his counseling services were discontinued. Prior to SY 2013-2014 the counselor would come get him every Wednesday but not the does not now have a set day on which he is provided counseling services. The student has with his counselor regarding his transition goals but met with her seldom during SY 2013-2014. The student does not believe he had benefitted from the services because he would rather have life skills classes that will prepare him for life after he graduates. (Student's testimony)
16. During SY 2013-2014 the student missed a significant number of counseling hours that he was to receive pursuant to his IEP. Often when the student did attend school he came after 10:00 am so his counselor would normally try to locate him for services near the end of the day. Often during SY 2013-2014 when the student's counselor would go to his class to pull him out for services the student was not present. Because the student attended school so irregularly he did not have a set day or time when his counseling services were scheduled. (Witness 4's testimony, Respondent's Exhibit 1)
17. When the student was available for services the counselor provided him individual counseling, group counseling and counseling with the student together with his dedicated aide. During the counseling sessions the counselor would address the student's attendance and the student would share obstacles he was experiencing outside of school that prevented him from attending. The counselor would engage the student in problem solving to assist the student in overcoming the factors that prevented him from attending school. (Witness 4's testimony)
18. The student's behavior support services were changed at the April 18, 2014, meeting because his attendance was so sporadic and he was not receiving the services that were prescribed in the IEP and he needed be more available for his academic classes. The student's legal team at the meeting requested the consultative behavior support services be added to the student's IEP. (Witness 4's testimony, Respondent's Exhibit 1)
19. After completing the credit recovery course one summer the student has become interested in obtaining more tutoring hours to assist him in making up credits so can graduate high school as quickly as possible. (Student's testimony)

20. The student's educational advocate prepared a compensatory education plan designed to remediate the student failing almost all of his courses during SY 2013-2014. The advocate based the proposed plan on the services she believed the student missed because he did not get all of his behavioral support services and some of his instruction was provided in general education. The advocate proposed the student be provided six credits in a credit recovery plan that might allow him to graduate high school by December 2015. She also requested 30 hours of mentoring to assist the student in completing the courses. (Witness 1's testimony, P-30)
21. The advocate proposed that Seeds of Tomorrow provide the credit recovery services. The student worked with this agency during one summer and the student was able to complete a one-credit course. The agency contracts for the online courses from another company (Connections) for course content. Seeds of Tomorrow provides the student support of a special education teacher and the learning coach to assist the student in completing the course. Online courses range in price from \$350 to \$395 for half credit depending on the course. A full credit course is \$700 to \$800. 75 to 100 hours of academic support (independent tutoring is provided by Seeds of Tomorrow to assist the student in course completion at a rate of \$65 per hour. The total cost for 6 credits would be approximately \$43,800. One credit per semester is the most that is recommended by Seeds of Tomorrow for the student to attempt. (Witness 2's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking

relief.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.

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 FAPE by failing to fully implement the student’s counseling services, transition services, and instructional hours outside of the general education setting.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS did not provide the student all instructional hours outside general education, or his counseling and transition services.

Petitioner presented insufficient proof that the any of the student’s specialized instruction was provided inside general education. Petitioner did not demonstrate from the documents presented which, if any, of the courses the student took that were not special education courses. The Hearing Officer notes that the student is on a diploma tract and would be required to take courses that may have general education content. However, that is an insufficient basis to demonstrate that any of his courses were not provided in a special education setting. The Hearing Officer was not convinced by the student’s testimony that he was provided courses in general education simply because he believed some of the students he took classes with were not special education students or that the classes were provided on a floor other than the floor where his self-contained program was located.⁶

Likewise, the Hearing Officer was not convinced that the student was not provided transition services. The student testified that he was provided transition services. He may have been dissatisfied with the type of transition services that he was provided but his testimony was insufficient to establish that he was not provided these services.

Finally, the Hearing Officer was unconvinced that the counseling services that the student missed were due to any reason other than his failure to attend school. It does not seem unreasonable that with the student’s severe truancy his counselor was unable to deliver a significant quantity of the services. The counselor credible testified that she made sufficient attempts to provide the services that the student was to receive pursuant to his IEP. The evidence is clear from the

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.

⁶ The Hearing Officer notes that student’s testimony in this regard was weakened by witness 3’s testimony coupled with the student’s class schedule that indicated a course the student claimed was on another floor was actually on the same floor as his self-contained program.

student's attendance records, his parent's testimony and his own testimony that the student seldom attended school and was eventually referred, although belatedly, to court for his truancy.

Consequently, the Hearing Officer was not convinced that any services the student missed were the result of DCPS not providing or attempting to provide the services and thus, Petitioner did not sustain the burden of proof on this issue.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP by reducing the level of behavioral supports, by failing to revise his behavior intervention plan and not addressing his attendance issues.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS' attempts to address the student school attendance were ineffective and the reduction of the student behavioral support services in light of his attendance was not appropriate.

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits." *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009).

The evidence demonstrates that DCPS made attempts to address the student's truancy through the efforts of the behavior counselor and with a attendance plan initiated in October 2013. However, a central component of that plan, the student's referral to First Home Care, did not happen and DCPS could not explain why. Although the attendance counselor met with the student in October 2013 and was to tract the student's attendance daily, the counselor testified that he only met with the student sporadically and that his attendance would improve for a few days and then fall off again. The student should have been referred for truancy earlier than he actually was. Although the student's BIP addressed his attendance there was no indication from the evidence that they were effective in altering the student's behaviors. In addition, the evidence demonstrates that the single reason for the student's counseling services being reduced was simply because he was not taking advantage of the services due to his non-attendance. If any thing it seems to the Hearing Officer that DCPS would have attempted to increase and or modify services provided to the student in light of fact that the the actions DCPS attempted were ineffective and unsuccessful. Consequently, the Hearing Officer concludes that Petitioner

sustained the burden of proof on this issue and that the student's was denied a FAPE in this regard.

Compensatory Education

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

Petitioner did not sufficiently demonstrate that the amount of compensatory services that were requested were warranted given that the alleged missed services were not due to DCPS's failure to provide or its failure to attempt to provide services.

However, there is evidence that the student has benefitted from credit recovery intervention and thus the Hearing Officer concludes that because of the denial of FAPE that has been determined the student should be provide a one-credit course and along with tutoring services to support him in completing the course as compensatory education. In addition, because the evidence demonstrates that the student has not recently been assessed academically the Hearing Officer directs in the order below that DCPS conduct a comprehensive psychological evaluation of the student including academic achievement testing and appropriate assessments of the student's social emotional functioning that may be affecting his non-attendance in school and review that with an IEP to team to update the student's BIP or develop an comprehensive attendance plan to ensure the student attends school regularly.

ORDER:⁷

1. The student is hereby granted with DCPS funding an online credit recovery course at a cost not to exceed \$800 and 75 hours of independent tutoring at the OSSE/DCPS prescribed rate.
2. DCPS shall within thirty (30) calendar days of the issuance of this order conduct a comprehensive psychological evaluation of the student including academic achievement testing and appropriate assessment of the student's social emotional functioning that may be affecting his non-attendance in school attendance and review that evaluation with an IEP to team to update the student's BIP or develop

⁷ 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.

an comprehensive attendance plan to help ensure the student attends school regularly.

3. All other requested relief 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

Coles B. Ruff, Esq.
Hearing Officer
Date: October 15, 2014