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Office of Review and Compliance  
Student Hearing Office  
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**Confidential**

<p>STUDENT<sup>1</sup>, by and through her Parent Petitioners,  v.  District of Columbia Public Schools (“DCPS”) Respondent.  Case:</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: December 28, 2010</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Alana Hecht, Esq. Brown and Associates 1220 L Street, NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Assistant Attorney General Kendra Berner, Esq. 1200 First Street, NW Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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<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 December 28, 2010, at the OSSE Student Hearing Office 810 First Street, NE, Washington, DC 20003, in Hearing Room 2009.

## **BACKGROUND:**

Student or "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 emotional disturbance ("ED"). The student is attending a DCPS full time special education program for children with the primary disability of ED, hereinafter referred to as "School A."

During the 2009-2010 school year the student was in the fifth grade at a DCPS elementary school, hereinafter referred to as "School B," where she received full-time special education services. Because the student was transitioning to middle school for the 2010-2011 school year, DCPS convened a placement meeting on August 10, 2010, which the parent attended. DCPS proposed two educational placement locations at the meeting. The parent did not agree with either location offered.

On August 10, 2010, DCPS issued a prior written notice for the student to attend one of the two locations offered: School A. On August 12, 2010, the parent, through counsel filed a due process complaint challenging the appropriateness of School A as the student's educational placement (Case 2010-0989). In addition, the complaint alleged the educational placement was predetermined by DCPS administrators and thus alleged the parent did have meaningful involvement in the placement decision.

The parent failed to participate in the resolution meeting and pursuant to the 34 C.F.R. §300.510(b)(3)<sup>2</sup> DCPS asserted the due process hearing should not proceed. Petitioner filed an unopposed motion to continue to allow for the resolution session to be reconvened with the parent in attendance. A continuance was granted. The resolution session was rescheduled and eventually convened October 15, 2010. The matter was not resolved at the resolution session.

The parties agreed to a hearing date of Monday, November 15, 2010. On October 19, 2010, this Hearing Officer convened a prehearing conference. In addition to the issues raised in the complaint Petitioner stated that since the complaint was filed and the student began attending School A there were additional facts that were the basis for Petitioner's claim of

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<sup>2</sup> Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (b)(1) and (2) of this section, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

inappropriateness of School A. This Hearing Officer issued a prehearing order October 22, 2010, that included an instruction to Petitioner that if she wished to proceed on a claim of the inappropriateness of the student's placement on any basis other than that alleged in the August 12, 2010, complaint Petitioner's counsel should notify this Hearing Officer and DCPS counsel immediately to discuss amending the complaint or filing of second complaint and possible consolidation.

On October 27, 2010, Petitioner filed a second due process complaint alleging additional facts that occurred after the August 12, 2010, complaint. Petitioner's counsel filed a motion to consolidate the two cases with the timeline for the hearing and decision tracking with the second complaint. Because the consolidated complaint could not proceed on the timeline of the second complaint Petitioner's counsel later withdrew her motion and withdrew the first complaint.<sup>3</sup> She then submitted a motion for the second complaint to be amended to include the alleged facts, claims and issues raised in the August 12, 2010, complaint. The motion was unopposed and granted November 22, 2010. On November 19, 2010, a resolution meeting was held on the October 27, 2010, complaint. The complaint was not resolved.

This Hearing Officer convened a pre-hearing conference on the amended complaint on December 6, 2010.<sup>4</sup> This Hearing Officer issued a pre-hearing order on December 9, 2010, certifying the issue to be adjudicated, the relief Petitioner is seeking and Respondent's position with regard to the complaint and/or defenses. On December 14, 2010, this Hearing Officer issued a revised prehearing order restating the issues to be adjudicated.

#### **ISSUES: <sup>5</sup>**

The issues adjudicated are:

- (1):** Did DCPS deny the parent involvement in the placement decision for the student as a result of DCPS central office personnel (who did not participate in the placement meeting) pre-determining the placement/location of services prior to the placement meeting? And if DCPS did engage in the alleged action, did that action impede the child's right to FAPE, significantly impede the parent's opportunity to participate in the decision making process regarding provision of FAPE, or cause the child a deprivation of educational benefits?
  
- (2):** Whether the School A can implement the student's IEP?

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<sup>3</sup> On November 25, 2010, this Hearing Officer issued an order dismissing Case 2010-0989.

<sup>4</sup> Scheduling of the pre-hearing conference was attempted within a week of the resolution session but the first available date for the parties was December 6, 2010.

<sup>5</sup> 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 dated December 12, 2010, are the issue(s) to be adjudicated.

(3): Whether School A is able to meet the individual and unique needs of the student and/or is there a condition that would be so severely detrimental to the student so as to render School A an inappropriate placement for the student?<sup>6</sup>

(4): Whether DCPS denied the student a FAPE by failing to implement her IEP at School A?

Petitioner seeks as relief: (1) DCPS funding of a private placement and (2) DCPS funding of a compensatory education plan for missed counseling services and missed academic services as a result of two suspensions since the student began attending School A.<sup>7</sup>

#### **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-19 and DCPS Exhibit 1-17) that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

#### **FINDINGS OF FACT:<sup>8</sup>**

1. Student or "the student" is age eleven in the sixth 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 ED. The student is attending School A, a DCPS full time special education program for children with the primary disability of ED. She started attending School A shortly after the start of the 2010-2011 school year. (Parent's testimony, Petitioner's Exhibit 18-1)
2. When the student was evaluated in May 2008 her cognitive scores reflected borderline intellectual functioning and weak academic skills. The student has been diagnosed with Oppositional Defiant Disorder, and Disruptive Behavior NOS. She has had a history (as

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<sup>6</sup> Petitioner's counsel acknowledged during the hearing that the student's IEP developed August 10, 2010, is the IEP that the placement is measured against and the parent is not challenging any of the services or the LRE in the IEP.

<sup>7</sup> Petitioner's counsel in her opening statement clarified the relief being sought which was different than that stated during the prehearing conference both as to placement and compensatory education. Petitioner was seeking a private placement and had submitted placement packets to several private schools. By the time of the hearing, however, she had only received one acceptance conditioned on the student's upcoming interview at the school. In addition, Petitioner's counsel was unable to present a witness to testify to the appropriateness of that one placement. Consequently, Petitioner's counsel requested that this Hearing Officer, if School A was found to be inappropriate, order DCPS to convene a meeting to determine a new placement allowing time for responses from the outstanding admission applications. As to compensatory education Petitioner's counsel stated at the hearing she was seeking compensation for missed academic services during the times the student was suspended from School A, not for time the student was at School A in an alleged inappropriate placement.

<sup>8</sup> The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may perhaps only cite one party's exhibit.

early as the third grade) of fighting in school, frequent use of profanity, not following school and class rules and aggression toward authority figures and classmates. (Petitioner's Exhibits 10-9, 8-1)

3. During the 2009-2010 school year the student was in the fifth grade in a full time special education cluster program within a DCPS elementary school, hereinafter referred to as "School B." (Petitioner's Exhibits 4-1, 14-1, 14-4)
4. On February 19, 2010, School B convened an annual IEP meeting for the student. The team noted the student's improved behavior and social/emotional functioning. The team also noted the student had moved from below basic to proficient in the recent DC Benchmark Assessment System ("DCBAS") and remained below basic in reading although she had progressed since the assessment the prior school year. The team prepared an individualized educational program ("IEP"). The IEP prescribed 26.5 hours per week of specialized instruction outside general education and 2 hours of behavioral support services per week. The team briefly discussed the student's placement for the next school year. There was some mention to the parent that there were ED programs within DCPS middle school using some inclusionary services with general education students. The student's actual placement for the following year was left undecided. (Ms. Miskel's testimony, Petitioner's Exhibits 11-1, 11-2, 11-3, 14-1)
5. On August 10, 2010, School B convened an IEP/placement meeting. The parent attended along with her educational advocate. The DCPS personnel attending the meeting included School B's special education coordinator ("SEC"), the school social worker and the student's special education teacher. The team updated the student's IEP by increasing specialized instruction to 30 hours per week and 2 hours of behavioral support services. The IEP includes academic goals in Math, Reading, Written Expression, and Social/Emotional and Behavioral Development. The student's IEP has five annual goals in Math, four annual goals in Reading, four annual goals in Written Expression, and three annual social/emotional/behavioral goals. The student's IEP notes that she requires considerable remediation and spiraling even after she has shown mastery of a skill. (DCPS Exhibit 1-2 through 1-8)
6. Because the student was transitioning to middle school in the 2010-2011 school year, at the August 10, 2010, meeting the team discussed placement options. The least restrictive environment ("LRE") section of the IEP states: "[the student] was placed in a ED Cluster program. She still requires a full time placement." (DCPS Exhibits 1-9, 1-10, Petitioner's Exhibit 12-2)
7. DCPS proposed two educational placement locations at the August 10, 2010, meeting: School A and the full time ED cluster program at a DCPS middle school. The parent did not agree with either location and stated her desire that the student be placed in a private full time special education program. There were no representatives at the meeting from the locations DCPS proposed. The School B SEC stated that DCPS central office provided the proposed DCPS placement locations. (DCPS Exhibits 1-9, 1-10, Petitioner's Exhibit 12-2, 17-2)

8. On August 10, 2010, DCPS issued a prior written notice for the student to attend one of the two locations offered: School A. (Petitioner's Exhibit 17-1)
9. On August 12, 2010, the parent, through counsel filed a due process complaint challenging the appropriateness of School A as a educational placement for the student and alleged the student's educational placement was predetermined by DCPS administrators and thus claimed she did have meaningful parental involvement in the placement decision. (August 12, 2010, complaint)
10. School A serves students with the primary disability of ED. The school has a therapeutic and academic component working in tandem throughout the school day. The school provides emotional support to the students in conjunction with the academic program. The school's therapeutic staff is contracted through a private provider. There are six total therapeutic support team members. They provide group and individual counseling to students and co-teach a social skills curriculum for the students. The school has a therapeutic crisis intervention ("TCI") program to address students when in crisis. The other therapeutic component assists students in developing social skills, problem solving, and empathy and anger management. This component assists students in developing these skills inside and outside the classroom. (testimony)
11. School A is reconstituted at the start of the 2010-2011 school as a result of not making adequate yearly progress ("AYP"). School A has a lower school (grades three to six) and an upper school (grades seven and eight). The lower school has approximately thirty-two students. The school has a total of fifty-five students. School A's goal is to track student's daily and weekly in academic and behavioral progress to gauge their progress toward eventually transitioning from School A to their neighborhood school. (testimony)
12. School A shares its school building with a general education middle/high disciplinary program. There is little if any interaction between the students in School A which occupies the full third floor with the student in the disciplinary program on the second floor of the building. These are high school and middle school students who have been removed temporarily from their regular school for disciplinary reasons. Walls separate the cafeteria each of the programs uses. There is staff supervising from both schools whenever there is the possibility of interaction. (testimony)
13. Since the student has began attending School A near the start of the 2010-2011 school year she has been in a full time special education classroom with a special education teacher and educational aide. The student is one of six students in the classroom. The student is provided the thirty hours of specialized instruction in her IEP in all the academic areas prescribed. The student is also provided behavioral support services by one of the six contracted therapeutic counselors at the school. These services are provided to the student in both individual and group settings. The student is provided opportunities for counselor supervised social skill development during school activities. (testimony, testimony)

14. On November 10, 2010, School A prepared the student's quarterly progress report for her IEP goals. The progress report reflects that the student is demonstrating progress in two of her five Math goals; the remaining goals have not been introduced. The student is demonstrating progress in two of her four Reading goals. She is showing no progress in one goal and the remaining goal has not been introduced. The student is demonstrating progress in two of her Written Expression goals; the remaining two have not been introduced. The student is demonstrating progress in all three of her Social/Emotional/Behavioral goals. (DCPS Exhibit 2)
15. The student's special education teacher has observed that the student's Math order of operations and multiplication skills are not where the need to be. The student can perform addition and subtraction but is having difficulty with division. However, the student is demonstrating more confidence in her work and is willing to take more risks. The guided reading in the class is above the student's grade level and the independent reading is on her reading level. However, the student struggles with reading fluency; yet she appears to be close to fourth grade reading level. The student is one of the highest academic performers in her class. (testimony)
16. DCPS has prepared service tracker logs to record the behavioral support services the student has been provided. For the first month of school the student was not receiving behavioral support services and/or individual counseling. The School A counselor assigned to the student acknowledged to the parent at the October 18, 2010, Parent/Teacher conference that she had not provided the student services up until that time. The service tracker logs indicate the first time the counselor met with the student was October 6, 2010. Since October 2010 the student has been receiving a combination of individual counseling and group counseling sessions for the number of hours prescribed by the IEP. Some of the group counseling sessions have involved small group activities rather than talk therapy. (Parent's testimony, DCPS Exhibit 3-1)
17. The student sometimes gets very upset and uses profanity and curses out her classroom teacher and classroom aide. In an average week she will have two bad days. She has been bullying another girl in the class and torn up the girl's class work. The student is often rude and profane. She has been in two fights with other students since the start of the school year. (testimony)
18. The student's behavior has been influenced by other students at School A but she has not had been considered to have been in crises since attending School A. The staff has identified the student as one of the student who has the potential to transition to her neighborhood school within a reasonable time. (testimony)
19. The student has been suspended twice this school year and has been sent to the school's Alternative Behavior Classroom ("ABC") on a few occasions because of disruptive behavior. The student has begun to demonstrate some maturity, however. When she does get upset she does not stay upset as long and be able to talk about why she is upset and move to solutions to resolve why she has gotten upset - demonstrating exactly the skill set the school is attempting to get the students to demonstrate. The student has at

least on one occasion ripped down the classroom bulletin board, cursed out her teacher and shown aggression to other students. (testimony)

20. Since the student began attending School A the parent is concerned with the student's safety and concerned whether the school is a therapeutic setting that can implement the student's IEP. The parent has visited School A on several occasions including the Parent/Teacher conference on October 18, 2010. The parent is concerned that during her visits she has observed bullying, fighting and cursing among the students and students were able to listen to the foul music on the computer in the classroom. The parent has acknowledged the student has learned some math she did not know prior to coming to School A. However, the parent is concerned the student struggles reading perhaps even more than at School B. (Parent's testimony)
21. The School A staff believed the student was in the fifth grade when she first arrived and attempted to give her a fifth grade class. In October the student was placed in the correct grade. It did not change the classroom but it changed the starting point for her work and progress. The parent has requested that the student not be in group counseling with one of the other students because that student is talking about sexual acts and is already sexually active based on information the parent gained from phone calls that student made to the student at home. (Parent's testimony)
22. The student came home one day and told the parent about another female student being assaulted by a male student and the perpetrator telling the student she was next. Soon thereafter, the student called the parent crying. A staff member forced the student off the phone before she could relate to the parent what had happened. The parent later found out that a male student had sexually groped the student from behind. The School A principal later told the parent that male student was removed from the student's classroom but the parent is not sure whether the male student still attends School A. (Parent's testimony)
23. Petitioner engaged the services of a consultant, (testimony) to prepare a compensatory education plan. The consultant was employed by DCPS and was trained by DCPS to propose compensatory education at IEP meetings and for settlement agreements. (testimony) determined based on her experience and review of the student's educational records the student should receive 14 hours of independent counseling services as a result of having missed behavioral support services from the start of the 2010-2011 school year until mid October when the services began and that amount would be reasonable put the student in the place she should have been had the services been provided initially. (testimony)

#### CONCLUSIONS OF LAW:

Pursuant to IDEIA §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 IDEIA §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 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.<sup>9</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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.

**Issue 1:** Did DCPS deny the parent involvement in the placement decision for the student as a result of DCPS central office personnel (who did not participate in the placement meeting) pre-determining the placement/location of services prior to the placement meeting? And if DCPS did engage in the alleged action, did that action impede the child's right to FAPE, significantly impede the parent's opportunity to participate in the decision making process regarding provision of FAPE, or cause the child a deprivation of educational benefits?

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

Pursuant to 34 C.F.R. §300.116:

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.

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<sup>9</sup> 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 that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Pursuant to 34 C.F. R. §300.327:

Each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

Pursuant to 34 C.F.R. §300.114:

(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. 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.

Pursuant to DC Code § 38-2561.02 (b) and (c):

DCPS shall place a student with a disability in an appropriate special education school or program in accordance with this chapter and the IDEA. (c) Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;(2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

Petitioner alleges that DCPS came to the August 10, 2010, IEP/placement meeting with two schools for the student to attend for SY 2010-2011 and the DCPS central office made the placement/location of services decision prior to the meeting.

This Hearing Officer is not convinced by Petitioner's assertion in this regard and concludes that the evidence demonstrates that the parent had sufficient involvement in the placement decision. The evidence demonstrates that the parent fully participated along with her advocate in the determination that the student would remain in a full time special education placement and the LRE of the IEP states: "[the student] was placed in a ED Cluster program. She still requires a full time placement." Petitioner's counsel acknowledged during the hearing that Petitioner was not challenging the student's IEP, its services or the LRE.

There is a distinction between a placement and a location assignment under IDEA. The U.S. Department of Education, Office of Special Education Programs ("OSEP") highlighted the difference between placement and location in its responses to comments submitted to the then proposed regulations implementing the IDEA, See 71 Federal Register 46588 (August 24, 2006). OSEP explained that placement refers to the "continuum of placement options available

for a child with a disability, and "location" as the physical surrounding in which a child with a disability receives special education and related services. OSEP went on to say that school administrators have flexibility in assigning a child to a particular school provide the assignment is consistent with the decision concerning placement. In Letter to Trigg, 50 IDELR 48 (November 30, 2007) OSEP further stated "Educational placement" does not refer to the school location, but the setting indicated on the IEP.

At the August 10, 2010, meeting the parent proposed that the student be placed at a private full time special education program. DCPS is justified in first proposing a public educational placement location if it meets the student's LRE and can implement the student's IEP.

In this regard, the parent had involvement in the placement decision (in determining the services, educational setting of a full time special education program and the student LRE) as defined pursuant to 34 C.F.R. §300.116, §300.327 and §300.114. Consequently, this Hearing Officer concludes DCPS by proposing the placement locations even if determined at the DCPS central office did not impede the child's right to FAPE, significantly impede the parent's opportunity to participate in the decision making process regarding provision of FAPE, or cause the child a deprivation of educational benefits. Thus, Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

**Issue (2):** Whether School A can implement the student's IEP?

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

Pursuant to 34 C.F.R. §300.323:

- (a) At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in Sec. 300.320.
- (c) Each public agency must ensure that-- (1) A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and (2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.
- (d) Accessibility of child's IEP to teachers and others. Each public agency must ensure that-- (1) The child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and (2) Each teacher and provider described in paragraph (d)(1) of this section is informed of--(i) His or her specific responsibilities related to implementing the child's IEP; and (ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

Petitioner alleges the student's specialized instruction was increased at the August 10, 2010, IEP meeting from 26.5 hours per week of specialized instruction and 2 hours of behavioral support per month to 30 hours of specialized instruction and 2 hours of behavior support services per week. Petitioner alleges pursuant to the IEP the student is not to spend anytime with general

education, and alleges School A cannot implement the full-time special education program (out of general education) that the student's IEP requires.

The evidence presented clearly demonstrates the contrary. There was sufficient credible testimony from Ms. Stepp and Mr. Sugarman as well as the service tracker logs presented by DCPS that School A is able to and is implementing the specialized instruction and behavioral support services prescribed in the student's IEP and that School A is a full time special education placement that meets the student's LRE. The student's quarterly progress reports demonstrate that Ms. Stepp and Ms. Towns, the School A counselor assigned to the student, have access to the student's IEP are aware of her IEP goals and are addressing those goals with the services provided.

Although, Petitioner presented testimony from Ms. Miskel that the student was demonstrating academic skills at School B that seem not to be yet introduced since the student began attending School A, the student's IEP clearly notes that she requires considerable remediation and spiraling even after she has shown mastery of a skill. Ms. Stepp pointed out in the progress notes that some of the student's goals have not been introduced because of the need to reinforce other skills before moving on to other goals. The goals are expressed as annual goals in the August 10, 2010, IEP and, therefore, it does not seem unreasonable that in the first quarter of school some of the goals had not been introduced.

This Hearing Officer concludes that there was sufficient evidence presented that School A can and is implementing the student's IEP and thus concludes Petitioner's counsel did not sustain the burden of proof by a preponderance of the evidence this issue and concludes the student is not being denied a FAPE in this regard.

**Issue (3):** Whether the Hamilton Academy is able to meet the individual and unique needs of the student and/or is there a condition that would be so severely detrimental to the student so as to render the Hamilton Academy an inappropriate placement for the student?

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

Pursuant to 34 C.F.R. §300.116:

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-- ... Is made in conformity with the LRE provisions ... 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** [emphasis added]; 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.

Petitioner alleges since the student arrived at School A there is evidence of its inappropriateness; specifically, the student has been suspended, subjected to sexual abuse from another student and the student is inappropriately exposed to students from the middle/high school disciplinary program that share the building.

It is clear from the testimony provided that School A is designed to be a therapeutic academic setting for students with serious emotional disturbance. It is also clear that this student has had a history since at least the third grade of fighting in school, frequent use of profanity, not following school and class rules and aggression toward authority figures and classmates. And the evidence is also clear that since the student began attending School A her behavior has been unchanged.

Ms. Stepp credibly testified that the student gets very upset, uses profanity and curses out her classroom teacher and classroom aide. In an average week she will have two bad days. She has been bullying another girl in the class and torn up the girl's class work. The student is often rude and profane. She has been in two fights with other students since the start of the school year.

Despite the principal's attempt to point the student's behaviors in the best light, this Hearing Officer is convinced that School A, although recently reconstituted, has demonstrated that it is an inappropriate educational placement for this student. This Hearing Officer is particularly concerned that the student was assaulted in school and it is unclear whether the perpetrator is still attending School A. The mother's testimony in this regard was credible.

Despite the diligent efforts of the student's classroom teacher and the principal's obviously heroic efforts to transform School A, with regard to this student, the Hearing Officer concludes School A has presented harmful effect on the child or on the quality of services that she needs and the student has thus been denied a FAPE.

**(4):** Whether DCPS denied the student a FAPE by failing to implement her IEP at School A?  
Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

Pursuant to 34 C.F.R. §300.323(c)(2):

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

Petitioner alleged the student has not consistently received her 2 hours of weekly counseling services and has missed at least 10 hours of these services and as a result the student has been harmed and denied a FAPE.

The parent credibly testified that when she visited School A for parent teacher conference she met with the student's counselor Ms. Towns and Ms. Towns acknowledged that up to that point she had not provided the student any counseling services. The tracker forms presented by DCPS seem to indicate the counseling services were provided for the first time to the student on October 6, 2010. There is a week or two discrepancy between the parent's testimony and the documented tracker forms. This Hearing Officer credits the parent's testimony, however, in this

regard and concludes the student missed a total of seven weeks of counseling in the 2010-2011 school year for a total of fourteen hours of counseling 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." In every case, however, 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 v District of Columbia, 365 401 F3d 516, 526 (D.C. Cir. 2005).

Ms. Miller provided testimony that based on her experience in developing compensatory education plans while employed by DCPS and her review of the student's records she recommended that the 14 hours of counseling services would make up for the services the student missed at put her in the position she would have been had the services from the time she began attending School A. Although this award is a one to one hour for services, the evidence of the student's continued behavioral difficulties seems to more than warrant this level of award to assist the student in reaching the place she would have had the services been provided in the first place as required by the mandates of Reid.

The Petitioner also sought compensatory education as a result of the student being suspended since attending School A. However, the suspensions were not challenged and there was no claim that the time the student missed from school because of the suspensions was beyond that allowed under IDEA for school conduct violations. Thus, this Hearing Officer finds no basis in fact or law for any missed academic services for the suspensions and there was no other evidence of compensatory education for missed academic services.

**ORDER:**

1. DCPS shall provide the student 14 hours of independent counseling as compensatory education for the counseling services she was not provided during the her first month of attendance at School. A.
2. Within ten (15) school days of the issuance of this order DCPS shall convene an IEP/placement meeting and determine an appropriate education placement and location of services for the student.

**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).



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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: January 3, 2011**

Appendix A  
 In the MATTER of Jernyah Wood v. DCPS  
 INDEX OF EXHIBITS

Petitioner's EXHIBIT # 1	Compensatory Education Plan 12/20/10	ADMITTED
Petitioner's EXHIBIT # 2	Ms. Ericka Miller's Resume	ADMITTED
Petitioner's EXHIBIT # 3	Ms. Carolyn Miskel Resume	ADMITTED
Petitioner's EXHIBIT # 4	DCPS Prior Action Notice 7/21/08	ADMITTED
Petitioner's EXHIBIT # 5	DCPS Speech and Language Evaluation 2/6/08	ADMITTED
Petitioner's EXHIBIT # 6	DCPS Social History Evaluation 12/21/07	ADMITTED
Petitioner's EXHIBIT # 7	DCPS Functional Behavior Assessment 4/23/08	ADMITTED
Petitioner's EXHIBIT # 8	DCPS Behavior Intervention Plan 4/23/08	ADMITTED
Petitioner's EXHIBIT # 9	DCPS Educational Evaluation 1/23/08	ADMITTED
Petitioner's EXHIBIT#10	Independent Comprehensive Evaluation 5/20/08	ADMITTED
Petitioner's EXHIBIT#11	Advocate's IEP Meeting Notes 2/19/10	ADMITTED
Petitioner's EXHIBIT#12	Advocate's IEP Meeting Notes 8/10/10	ADMITTED
Petitioner's EXHIBIT#13	Confirmation of Referral for Placement to Pathways School 11/2/10	ADMITTED
Petitioner's EXHIBIT#14	IEP 2/19/10	ADMITTED
Petitioner's EXHIBIT#15	IEP Progress Report from 2/19/10	ADMITTED
Petitioner's EXHIBIT#16	IEP 3/19/10	ADMITTED
Petitioner's EXHIBIT#17	DCPS Prior Written Notice 8/10/10	ADMITTED

Petitioner's EXHIBIT#18	IEP 8/10/10	ADMITTED
Petitioner's EXHIBIT#19	Conditional Acceptance Letter to The Foundation School 12/21/10	ADMITTED
DCPS Disclosures:		
DCPS EXHIBIT 1	IEP 8/10/10	ADMITTED
DCPS EXHIBIT 2	Progress Report 11/10/10	ADMITTED
DCPS EXHIBIT 3	Services Trackers	ADMITTED
DCPS EXHIBIT 4	BIP	ADMITTED
DCPS EXHIBIT 5	Behavior Goals	ADMITTED
DCPS EXHIBIT 6	Math Goals and Work Samples	ADMITTED
DCPS EXHIBIT 7	Reading Goals and Work Samples	ADMITTED

**Appendix B**

INDEX OF NAMES

In the MATTER OF Jernyah Wood v. DCPS

Child and "Student"	Jernyah Wood D.O.B: 3/16/1999
Child's Parent(s) (specific relationship)	Ms. Trilinda Wood (Mother) + Designated as Parent in the HOD
Child/Parent's Representative	Alana Hecht, Esq.
DCPS's Representative	Kendra Berner, Esq.
Principal, Hamilton Academy	Mr. Scott Sugarman +*
Parent's Educational Advocate	Ms. Carolyn Miskel +
Educational Advocate (Comp Ed.)	Ms. Erick Miller +
Hamilton Special Education Teacher	Ms. Whitney Stepp +*
	+*
Student's School in SY 2010-2011 and current school she is attending: Hamilton Academy identified in the HOD as "School A"	
Student's School in SY 2009-2010: Kimball Elementary School in the HOD as "School B"	* Participated by Telephone + Witness

**DCSHO: Re: Case # 2010-1380 Jernyah Wood HOD From  
<coles.ruff2@dc.gov>**

admin@dcsho.i-sight.com [admin@dcsho.i-sight.com]

**Sent:** Monday, January 03, 2011 11:52 PM  
**To:** ahecht@jeblaw.biz; Berner, Kendra E. (DCPS)  
**Cc:** Due, Process (OCTO); Student Hearing Office (OSSE); Ruff, Coles (OSSE)  
**Attachments:** Jernyah Wood 2010-1380 HOD .pdf (264 KB)

STUDENT HEARING OFFICE  
2011 JAN -4 11:52:07

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\*\* NOTE: Please do not modify subject line when replying \*\*

\*\* This email was sent by Coles Ruff [mailto: coles.ruff2@dc.gov] \*\*

Attached is the HOD in this matter.

Thank you,

C. Ruff