District of Columbia

Office of the State Superintendent of Education

Office of Review and Compliance
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OSSE
STUDENT HEARING OFFICE
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Confidential

STUDENT'S PARENT[1], Petitioner, v. District of Columbia Public Schools ("DCPS") Respondent.	HEARING OFFICER'S DETERMINATION <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened for two days on August 16, 2012, and August 17, 2012, at the Office of the State Superintendent of Education ("OSSE") Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age in grade attending a District of Columbia Public Schools ("DCPS") special education high school program, hereinafter referred to as "School A," where he began attending at the start of the 2011-2012 school year ("SY"). The student has been determined by DCPS to be a child with a disability under IDEA with a disability classification of multiple disabilities ("MD") including emotional disturbance ("ED"). During SY 2011-2012 the student had repeated behavioral difficulties and was suspended on a number of occasions from School A.

Petitioner filed a previous due process complaint in December 2011 that resulted in a due process hearing that was held on February 13, 2012, and resulted in a Hearing Officer's Determination ("HOD") issued March 18, 2012. The HOD concluded the student's previous DCPS educational placement at a DCPS full time special education program, hereinafter referred to as "School B," was an inappropriate placement for the student and awarded the student compensatory education services. The HOD also concluded that there was insufficient evidence presented at the hearing that the student's current educational placement, School A, was inappropriate, but ordered DCPS to convene an IEP meeting to review updated information for the student and if warranted review and revise as the student's IEP and review the student's school placement and/or location of services.

On June 7, 2012, the student's parent, through counsel, filed a due process complaint against DCPS alleging DCPS failed to provide the student an appropriate educational placement and failed to review the student's recent speech and language evaluation. Petitioner seeks as relief and order placing the student at with DCPS funding, amendment of the student's individualized educational program ("IEP") to include one hour of speech language services and compensatory education for the alleged inappropriate placement and missed speech-language services (specifically, 24 hours of speech and language services and 144 hours of tutoring and 24 hours of behavioral support and counseling and 24 hours of mentoring). Petitioner presented DCPS with a proposed compensatory education proposal on or about July 19, 2012.

DCPS filed a response to the complaint on June 22, 2012. DCPS asserts that it never received the November 2011 speech language evaluation prior to the complaint being filed and because the student's IEP did not include speech and language services and the evaluation was never received there was no need for a speech language pathologist to be present at student's IEP

meeting(s). DCPS asserts School A can implement the IEP and the school is an appropriate educational placement and location of services for the student.

The resolution meeting was held July 19, 2012, but was unsuccessful in resolving the dispute between the parties. The 45-day period began on July 15, 2012, and ends (and the HOD is due) on August 28, 2012.

The Hearing Officer[2] conducted a pre-hearing conference on August 1, 2012, at which the issues to be adjudicated were discussed and determined. On July 10, 2012, the Hearing Officer issued a pre-hearing order outlining the issues to be adjudicated.[3]

Petitioner's Motion for Admission of Rebuttal Evidence:

At the conclusion of the hearing Petitioner's counsel made an oral motion to have a document submitted post-hearing that would rebut testimony that DCPS had not received the student's November 12, 2012, speech and language evaluation. The Hearing Officer denied that motion. Subsequent to the hearing, on August 20, 2012, Petitioner's counsel submitted a written motion again seeking to have the Hearing Officer consider the document as rebuttal evidence as to DCPS' receipt of the speech language evaluation and to submit written argument on compensatory education. DCPS counsel opposed the motion both at the hearing and in a written opposition filed August 24, 2012.

Pursuant to 34 C.F.R. § 300.512(a) any party to a due process hearing has the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing. There was no showing by Petitioner's counsel that the document she attempted to submit was not available to her prior to the hearing, or that DCPS had not asserted prior to the hearing that it had not received the evaluation in question. Because the document that Petitioner's counsel seeks to have admitted was not timely disclosed and DCPS counsel has opposed its admission, Petitioner's motion filed August 20, 2012, is hereby denied.

ISSUES: [4]

The issues adjudicated are:

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[2] This case was previously assigned to another Hearing Officer and reassigned to current Hearing Officer on July 24, 2012.

[3] The Hearing Officer directed Petitioner's counsel in the pre-hearing order to send to DCPS counsel by August 8, 2012, the student's November 12, 2011, speech-language evaluation along with proof the evaluation was provided to DCPS. Petitioner's counsel presented no documentary proof prior to the hearing that the evaluation was sent to DCPS.

[4] The alleged violations and/or issues listed in the complaint do not directly correspond to the issues outlined here. The Hearing Officer restated the issues in the pre-hearing order and at the outset of the hearing and the parties agreed that these were the issues to be adjudicated.

1. Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing to provide the student an appropriate educational placement/location of services at School A during SY 2011-2012, because School A could not implement the student's behavior intervention plan ("BIP") due to insufficient and/or ineffective behavioral staff to address the student's needs. [5]

2. Whether DCPS denied the student a FAPE by failing to include the appropriate personnel, specifically a speech-language pathologist, at the student's December 16, 2011 and April 12, 2012, IEP meetings.

3. Whether DCPS denied the student a FAPE by failing to review the student's November 12, 2011, speech-language evaluation (provided to DCPS on or about November 15, 2011) at the student's December 16, 2011, and the April 12, 2012, IEP meetings.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-15 and DCPS Exhibit 1-8)[6] that were admitted into the record and are listed in Appendix A. Any documents not admitted into the record are so noted in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: [7]

1. The student is age in grade attending School A, a DCPS special education high school program where he began attending at the start of SY 2011-2012. The student has been determined by DCPS to be a child with a disability under IDEA with a disability classification that includes ED. (Petitioner's Exhibit 2-1)

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[5] Petitioner alleges the student had negative relationships with the existing behavioral support staff such that they were unable to effectively deal with his behaviors and unable to implement his BIP and thus impeded the student's ability to be successful at that location. Petitioner alleges these factors and the alleged inappropriateness of School A were discussed at the student's April 12, 2012, meeting.

[6] At the hearing Petitioner's counsel submitted a copy of the disclosure letter from a previous due process hearing in attempts to demonstrate DCPS had received the November 2011 speech and language evaluation. The Hearing Officer did not allow the document into the record or allow even as rebuttal evidence because the document was disclosed for the current hearing. Subsequent to the hearing Petitioner counsel filed a motion to allow the same disclosure letter as rebuttal evidence. The motion was denied in this HOD.

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

2. In January 2010 DCPS conducted a comprehensive psycho-educational evaluation of the student when the student was age 12 years 9 months and attending his previous DCPS special education school, School B. The student's cognitive abilities were determined to be borderline with a full scale IQ of 73. The student's academic abilities were determined to be low average generally at 3rd to 4th grade level. The evaluator noted that student had significant emotional and behavioral concerns. (Petitioner's Exhibit 8-1, 8-3, 8-6, 8-7, 8-8, 8-9, 8-11)

3. On November 3, 2011, an independent speech and language evaluation was conducted with a report dated November 12, 2011. The evaluator concluded the student had severe communication deficits that would impact his ability to access the general education curriculum. The evaluator recommended the student be provided individual and/or group speech-language services. (Petitioner's Exhibit 6-1, 6-5)

4. On November 10, 2012, Natasha Nelson, Psy.D. conducted an independent functional behavioral assessment ("FBA") based on an observation of the student in two of his classes conducted at School A on November 10, 2011. Dr. Nelson observed that the student was disrespectful to staff and off task in both classes. Dr. Nelson noted that the student terrorized peers by grabbing their belongings and yelling and screaming at them and making sexual remarks to female peers. Dr. Nelson made several recommendations in her report to be used to construct a BIP to address the student's in school behaviors. (Petitioner's Exhibit 7-1, 7-6, 7-7)

5. On November 15, 2011, the parent's attorney[8] at the time sent a letter to DCPS along with copies of a completed independent comprehensive psychological evaluation and the independent FBA requesting DCPS convene a meeting to discuss the student's educational placement. There was no mention in the November 15, 2012, letter from the parent's attorney of the independent speech language evaluation report prepared on November 12, 2012. (Petitioner's Exhibit 7)

6. On December 16, 2011, DCPS convened an IEP meeting for the student at School A. The student's parent participated in the meeting by telephone. The parent's educational advocate attended the meeting. The IEP team discussed the student's behaviors and their effects on his academic performance. The parent's advocate requested the student be moved to a different school or program. The DCPS and School A staff did not agree to the request. (Respondent's Exhibit 3, Petitioner Exhibit 3-1, 3-3)

7. School A developed an IEP for the student dated December 16, 2012, that prescribed that the student receive 31 hours of specialized instruction outside general education and one hour per week of behavioral support services also outside general education. (Petitioner's Exhibit 2-1, 2-7)

[8] The same law firm but a different attorney represents the parent in this matter.

8. On December 21, 2012, the student's parent filed a due process complaint alleging DCPS had failed to provide the student an appropriate educational placement for SY 2010-2011 at School B and for SY 2011-2012 at School A. The complaint resulted in a due process hearing and HOD on March 15, 2012, concluding the student's prior placement was inappropriate. However, as to School A, the Hearing Officer [9] concluded there was insufficient evidence that School A was inappropriate. The HOD provided the student 50 hours of independent tutoring and 100 hours of independent mentoring and/or behavioral support services to by completed by March 15, 2013. The HOD also required DCPS to convene an IEP meeting by April 14, 2012, to review updated information concerning the student's educational needs, including any new information provided by Petitioner and any information from the school staff concerning the student's behaviors, and to the extent warranted by any new information, review and revise the student's IEP and discuss and determine an appropriate school placement and/or location of services. (Petitioner's Exhibit 5-9, 5-10, 5-15)

9. On April 12, 2012, DCPS convened another IEP meeting at School A to address the directives of the March 18, 2012, HOD. The student's parent participated by telephone. The parent's educational advocate attended the meeting. At the time of the meeting the student was not attending School A but in a temporary residential program at the Psychiatric Institute of Washington ("PIW") where he remained until May 14, 2012, when he returned to School A. The DCPS IEP meeting notes reflect that the student's present levels of performance in academics and emotional, social and behavioral concerns were reviewed, and the fact that DCPS attempted to conduct educational assessments but the student refused to be assessed. The team discussed the student's behavior and noted that his behavior varied based upon whether the student had taken medication. The school A staff stated that the student has access to medication at School A's full-service school-based health center and that the school staff could bring his medication to him to avoid his missing class. (Respondent's Exhibit 2-2, Petitioner's Exhibit 4-1)

10. At the April 12, 2012, IEP meeting the parent and her advocate stated that they believed School A was not meeting the student's needs and that he regularly engaged in disruptive behaviors and had poor relationships with school staff and requested that student be placed at another educational setting with therapeutic supports. The School A staff disagreed and stated that the school could meet his needs and the goals in the student's IEP were appropriate but the student had not been in attendance at School A because of his court involvement and his placement by the court at PIW. The student's IEP was not changed and the student's educational? at School A was continued. (Parent's testimony, Respondent's Exhibit 2-2, Petitioner's Exhibit 4-1)

[9] The current Hearing Officer did not conduct the previous hearing or issue the previous HOD.

11. During SY 2011-2012 the student has had at least three behavioral incidents that resulted in documentation: October 4, 2011, November 16, 2011, and May 16, 2012. On October 4, 2011, the student threatened and attacked a staff member and failed to comply with classroom directions. The staff member was able to fend off the attack and process the student's behavior with him and he ultimately returned to class. (Respondent's Exhibit 8-1)

12. On November 16, 2011, the student disrupted the class by continually throwing objects and was ultimately removed from the classroom. The incident report School A staff prepared for that date reflects the following: "The student's words and actions were continually sexual in nature. These included objects, discussing and the frequency with which he allegedly participated in such behavior and general leering at classmates." The report notes that the student eventually returned to class and stayed on task, only when working one-on-one with a staff member, and was able to complete a large portion of his class work. (Respondent's 8-3)

13. On February 29, 2012, School A staff wrote an incident report noting the student engaged in sexually inappropriate behaviors toward students and a female staff member. School A staff counseled the student and warned him that his behaviors could result in the police being called. (Respondent's 8-3)

14. On May 16, 2012, School A staff wrote an incident report noting that after completing 30 seconds of work the student asked to the leave the classroom to go the office and was later found somewhere else in the school. The behavior resulted in a conference with the teacher and the teacher noting in the report " [the student] needs one-on-one small group instruction in this class. It's good to have him back, though." (Respondent's Exhibit 8-4)

15. The student's parent participated in the student's most recent IEP meetings by telephone and on occasion came to School A when the student had behavioral issues. During SY 2011-2012 the parent stayed in regular contact with School A staff including the school's assistant principal and the student's therapist, Ms. Countee. The parent acknowledged Ms. Countee worked regularly and well with the student but noted the student was often disrespectful to other school staff. The student has an outside support team including a counselor and mentor and Ms. Countee regularly collaborated with this outside support team regarding the student's behaviors and school progress. (Parent's testimony, Respondent's Exhibit 7)

16. The student's parent is aware that the student has speech and language deficits. She describes the student as having difficulty expressing himself verbally and difficulty understanding all that is said to him. However, the student's parent could not confirm that DCPS ever received the November 15, 2011, speech language evaluation or whether the speech language services were discussed at the student's most recent IEP meetings. The student's parent also did not remember whether her advocate raised a concern at the most recent IEP meetings

that a speech language evaluation should have been reviewed or that a speech language evaluator should have participated in the meetings. (Parent's testimony)

17. The DCPS case manager, Ms. Jessica Chapman, who was assigned to handle Petitioner's previous due process complaint and to ensure that the mandates of the March 15, 2012, HOD were implemented, participated in the student's April 2012, IEP meeting. The case manager acknowledged DCPS received the independent comprehensive psychological and the independent FBA? sent in November 2011, but never received or even knew about the independent speech and language evaluation until the complaint in the current case was filed. There is no indication that either School A staff or other DCPS personnel ever received the evaluation. testimony)

18. Ms. Chapman participated in the April 2012 IEP meeting and was not provided with the evaluation by Petitioner's counsel and neither the parent nor her educational advocate raised the issue of the evaluation at the meeting. Ms. Chapman did not know that the evaluation existed and needed to be reviewed. It was not mentioned at the April 2012, IEP meeting and its existence was not known until the current due process complaint was filed. There was no speech language provider at the April 2012, meeting and neither the parent nor her advocate raised any discussion as to why a speech language provider was not at the meeting. There was no request by the parent for the evaluation to be reviewed prior to the complaint being filed. testimony)

19. After returning to School A from the PIW program on May 14, 2012, the student attended School A intermittently due to behavioral difficulties. The parent regularly sent him off to school but was uncertain that he arrived or stayed. (Parent's testimony)

20. The student was kicked out of extended school year ("ESY") for the summer of 2012 because of his disrespect to the summer staff. She believes the staff could not handle the student and his disrespect and he was sometimes non-compliant. (Parent's testimony)

21. Since July 31, 2012, the student has been detained at the due to juvenile court involvement. The student was due back in court on August 21, 2012, for a review of his status and the issues related to his detention at YSC. (Parent's testimony)

22. The student's parent believes School A cannot adequately meet the student's needs because he is sometimes allowed to walk out of class. She believes he needs a smaller setting with more intense therapeutic setting. She believes the staff could not adequately handle the student and he was continually non-compliant. (Parent's testimony)

23. School A is a self-contained special education program for students with ED disability classification with full time IEPs. School A has approximately 100 students registered in grades 9 through 12. The average daily attendance is 65 to 70. The school provides all core academic areas and electives and has general educators with content certification and certified special educators. There are

approximately 15 classrooms each with a special educator, a general educator, and a paraprofessional. Each class has no more than 12 students. Students transition from class to class. The school has a social worker, three behavior technicians and related services providers for speech and language and occupational therapy. testimony)

24. School A can be chaotic on occasion when individual students are disruptive. The behavior technicians monitor behavior in the hallways and are in the classroom when necessary. The behavior specialists are posted at the entrances/exists to ensure that students do not leave and that other students who are not in the program but in the same building do not enter. The school uses classroom incentive programs to incent students behaviorally and academically. The staff uses an on-line Google document to track daily behavior and academic performance so behaviors can be addressed and school staff can see how a student has performed and behaved from class to class. testimony)

25. The D.C. Department of Mental Health provided the student a community based intervention worker, to assist with the student's mental health needs at home and at school for a period of six months. began working with the student in February 2012 and sees him up to ten hours per week. He helps the student develop life skills, coping skills, and provides parent training to help stabilize the student both at school and at home. regularly met with School A staff members, checked on the student's progress and came to the school when the student needed crisis intervention. At times when he visited School A observed that the student's interaction with his teacher was poor. He was failing almost all of his classes and struggling academically. The student had a good relationship with his school therapist but his general attitude about the School A was poor and he felt he was too often reprimanded and could not learn anything. At times the student would refuse to go to school because he felt there was no future for him at the School A. testimony)

26. At School A the student often attempted to challenge authority and challenge the school rules and at times became aggressive. School A staff addressed his behaviors with prompting, counseling and dialogue after he engaged in a behavioral incident. However, the student usually challenged any staff person who attempted to hold him accountable for his behaviors. The student also has problems with sexually inappropriate behavior. On those occasions when he displayed such behavior the school staff counseled him and warned him that police involvement could result from his continued behavior. Sometimes he heeded the advice and at other times he denied engaging in the behavior. The student is capable being successful academically when he is focused and has less behavioral difficulties when he has had appropriate medication. There have been incidents when the student he has left the building and in those instances every attempt was made to persuade him to stay. However, the staff considered it unsafe to restrain the student. testimony)

27. The student generally has good relationships with School A staff but seemed to have particular difficulty with male staff and difficulty with authority. The student sometimes made threats but was never violent. When the student is

engaged in inappropriate behavior he was counseled. The student's BIP was being implemented at School A and all staff were given a copy of his IEP and BIP at the start of school year. The school social work staff and behavior staff generally implemented the BIP. However, there were times when the student's behavior interfered with his academics and his attendance at School A was sporadic. (Ms. Nadir's testimony, Respondent's Exhibit 6)

28. The student has been accepted at
Road is a private full time special education day school that provides services only to special education students. has certified special education teachers and certified related services providers. High Road offers vocational and technical skills programming to its students. The High Road admissions director interviewed the student in May 2012 and met with the student's parent. The admissions director reviewed the student's evaluations and IEP and has determined the school would be a good fit for the student. High Road has a speech language specialist and a reading specialist on staff. There are 42 students enrolled and classes consist of 3 to 8 students. The staff includes licensed clinical social workers. There is a behavioral modification program in which students earn points each day and receive rewards. The program uses daily point sheets for both behavior and academics. The school staff is trained in therapeutic aggression techniques for crisis intervention. The school does not provide medication management services. The school has quiet rooms to de-escalate students when necessary. Generally students are not allowed to leave the campus. If a student tries to leave the school on his or her own, however, intervention is attempted first. If a student walks out of the school parents and police are notified. High Road's annual cost is approximately (Ms. Stith-Twine's testimony, Petitioner's Exhibit 12)

29. Newlen Educational Services, LLC ("Newlen') has provided the student tutoring and mentoring the student was awarded in the March 15, 2012, HOD. Newlen provided the student tutoring in March and April 2012 while he was at PIW. Once the student returned to School A his parent thought it better to reserve the remainder of the tutoring in the HOD award until the student is and better able to engage in the tutoring. The student has 25 hours of tutoring is left of the 50 hours that were awarded. However, the mentoring services have continued to be provided. (Dr. Lennon's testimony)

30. Dr. Sharon Lennon of Newlen prepared a proposed compensatory education program for Petitioner designed to remediate for the student allegedly being in an inappropriate placement at School A and for not being provided speech language services during SY 2011-2012. Dr. Lennon proposed 24 hours of speech language services one hour per week for 6 months, 144 hours of academic tutoring 2 hours per day for 3 times per week for 6 months, 24 hours of independent counseling and behavior support services one hour per week for 6 months and 24 hours of mentoring one hour per week for 6 months. In preparing the plan Dr. Lennon reviewed a number of evaluations including the student's speech language evaluation, the 2010 comprehensive psychological evaluation and the student's 2011 FBA. Dr. Lennon acknowledges that some of the services

that the student is already being provided would be duplicated by the services proposed in the compensatory education plan. (Dr. Lennon's testimony, Petitioner's Exhibit 13)

31. Because the student successfully worked one-on-one with the independent tutor and with his independent mentor Dr. Lennon consulted the tutor and mentor in designing the proposed plan. The plan was designed to maximize the student's abilities to access the school curriculum and supplement the services he will be provided at school and to enable him to develop self-monitoring skills to use in redirecting his behavior. The plan is designed to allow him begin to progress in his 10th grade classes and be available for academics and attain the skill level that he would have attained had be been in an appropriate placement during SY 2011-2012. (Dr. Lennon's testimony, Petitioner's Exhibit 13)

CONCLUSIONS OF LAW:

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

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [10] *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:

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

To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was

[10] 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.

reasonably calculated to enable the student to receive educational benefits. *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003).

Issue 1: Whether DCPS denied the student a FAPE by failing to provide the student an appropriate educational placement/location of services at School A during SY 2011-2012, because School A could not implement the student's BIP due to insufficient and/or ineffective behavior staff to address the student's needs. [11]

Conclusion: The evidence demonstrates that the student's behavioral difficulties could not be effectively managed at School A and his behaviors interfered with his academic progress and put his peers and School staff at risk with his constant aggressive, threatening and sexually inappropriate behavior. Petitioner sustained the burden of proof by a preponderance of the evidence that the student's placement at School A was inappropriate and his educational placement should have been changed as of the April 12, 2012, IEP meeting.

A student's placement is to be in the least restrictive environment and ***in a school that is capable of meeting the student's special education needs***. See Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C.§ 1402 (9) (D) ("FREE APPROPRIATE PUBLIC EDUCATION- The term 'free appropriate public education' means special education and related services that include an appropriate preschool, elementary school, or secondary school education in the state involved" [and] "are provided in conformity with the individualized education program"); § 1401 (29) (D) ("The term 'special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability [. . .]."); 34 C.F.R. § 300.17 & 39; 34 C.F.R. § 300.116 (placement is to be based on student's IEP as determined by team including the parents); 34 C.F.R. § 300.327 & 300.501 (c); D.C. Mun. Regs. Tit. 5E § 3013.1-7 (LEA to ensure that child's placement is based on the IEP); and D.C. Mun. Regs. Tit. 5E § 3000.

Petitioner presented convincing evidence, through the parent's credible testimony[12], supplemented by that of Mr. Conner and echoed even by DCPS' witnesses that the student engaged in repeated aggressive threatening and sexually inappropriate behaviors that continued unabated during the student's time at School A. The student's FBA points to the student's disruptive behaviors in classroom; the DCPS behavior incident reports point to the student's aggressive behaviors and sexually inappropriate conduct and language. The DCPS witness even attested to the student's continual inappropriate behaviors that were apparently addressed with counseling and the stated risk of police intervention but the counseling did nothing to stop the threatening, aggressive, disruptive and sexually inappropriate behaviors. The DCPS witness acknowledged the student's behavior interfered with his academic progress and there was evidence the student was failing academically. Based on this evidence the Hearing Officer

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[11] Petitioner alleges the student had negative relationships with the existing behavioral staff such that they were unable to effectively deal with his behaviors and unable to implement his BIP and thus impeded the student's ability to be successful at that location. Petitioner alleges these factors and the alleged inappropriateness of School A were discussed at the student's April 12, 2012, meeting.

[12] The parent's credibility was based on her demeanor.

concludes that School A was not meeting the student's needs and was an inappropriate and effective educational placement for him.

The March 15, 2012, HOD concluded that as of that hearing Petitioner failed to prove that School A was an inappropriate educational placement for the student and directed that at the ordered IEP meeting the student's educational placement be reevaluated. At the April 12, 2012, IEP meeting the parent and her advocate requested the student be placed in another placement with sufficient therapeutic supports to address the student's behaviors and allow him to make academic progress. DCPS refused. The Hearing Officer concludes based on the evidence presented in this case that as of April 12, 2012, DCPS should have provided the student an appropriate placement other than School A and its failure to do so was a denial of a FAPE.

The Hearing Officer concludes based on the evidence presented that High Road Upper School can provide the student educational benefit and is an appropriate placement for the student. Consequently the Hearing Officer grants, in the order below, Petitioner's request for prospective relief that the student be placed at the High Road Upper School for SY 2012-2013. *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). *Branham v. District of Columbia* 44 IDELR 149 427 F.3d 7

However, as of date the due process hearing the student was detained at YSC and it was uncertain whether the student would be committed or allowed to return to the community in the final determination of his juvenile proceeding. Consequently, the Hearing Officer directs in the Order below that DCPS first determine whether the student is available and in the community to allow for his educational placement by DCPS prior to his placement at High Road.

Issue 2. Whether DCPS denied the student a FAPE by failing to include the appropriate personnel, specifically a speech-language pathologist, at the student's December 16, 2011 and April 12, 2012, IEP meetings.

Conclusion: There was insufficient evidence that DCPS has been provided the student's November 12, 2011, speech language evaluation or that there was a reason or request for a speech-language pathologist to attend the student's IEP meetings. Petitioner failed to satisfy the burden of proof on this issue by a preponderance of the evidence.

34 C.F.R.§ 300.321 provides:

> (a) The public agency must ensure that the IEP Team for each child with a disability includes--
>
> (1) The parents of the child;
>
> (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
>
> (3) Not less than one special education teacher of the child, or where appropriate, not less then one special education provider of the child;
>
> (4) A representative of the public agency who--
>
> (i) Is qualified to provide, or supervise the provision of, specially designed instruction to

meet the unique needs of children with disabilities;

(ii) Is knowledgeable about the general education curriculum; and

(iii) Is knowledgeable about the availability of resources of the public agency.

(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;

Petitioner asserts that DCPS should have conducted a review of the student's November 12, 2012, speech and language evaluation and should have reviewed the evaluation at both the student's December 16, 2012, and April 12, 2012, IEP meetings and should thus have had a speech language pathologist present at both meetings. While the evidence demonstrates that Petitioner's previous counsel forwarded to DCPS two other evaluations on November 15, 2012, there was no evidence that the November 12, 2012, speech and language evaluation was so forwarded. There was no fax confirmation presented indicating that it was faxed to DCPS along with or simultaneous to the other evaluations. The student's parent could not attest to the fact that the evaluation was sent to DCPS, nor could any other witnesses.

To the contrary, the DCPS witness Ms. Chapman credibly[13] testified that she did not know that the speech and language evaluation existed until the complaint was filed in this matter. The parent also could not attest to the fact that she requested at either of the IEP meetings that the evaluation be reviewed or that a speech and language pathologist be present at the meeting. The meeting notes from both the parent's advocate and DCPS do not reflect that there were any discussion regarding the evaluation, the student's speech and language needs or any request from the parent or her advocate regarding speech and language services. Without a speech and language evaluation or any speech and language issues of the student being addressed there was no reason for a speech and language pathologist to present at either IEP meeting. Consequently, the Hearing Officer concludes that there was insufficient evidence that a speech language pathologist should have been present at the IEP meetings. The Hearing Officer concludes Petitioner failed to sustain the burden of proof on this issue.

Issue 3: Whether DCPS denied the student a FAPE by failing to review the student's November 12, 2011, speech-language evaluation (provided to DCPS on or about November 15, 2011) at the student's December 16, 2011, and the April 12, 2012, IEP meetings.

Conclusion: There was insufficient evidence that DCPS has been provided the student's November 12, 2011, speech language evaluation or that there had been a reason or request for a speech-language evaluation to be reviewed at the student's IEP meetings. Petitioner failed to satisfy the burden of proof on this issue by a preponderance of the evidence.

34 C.F.R.§ 300.324 provides:

(a) Development of IEP.

(1) General. In developing each child's IEP, the IEP Team must consider--

(i) The strengths of the child;

[13] The witness was found credible based on her demeanor.

(ii) The concerns of the parents for enhancing the education of their child;
(iii) The results of the initial or most recent evaluation of the child; and
(iv) The academic, developmental, and functional needs of the child.

Petitioner asserts that DCPS should have conducted a review of the student's November 12, 2012, speech and language evaluation and should have reviewed the evaluation at both the student's December 16, 2012, and April 12, 2012, IEP meetings. However, as previously stated, while the evidence demonstrates that Petitioner's previous counsel forwarded to DCPS two other evaluations on November 15, 2012, there was no evidence that the speech language evaluation was so forwarded. There was no fax confirmation presented that it was faxed to DCPS along with or simultaneous to the other evaluations. The student's parent could not attest to the fact that the evaluation was sent to DCPS, nor could any other witnesses.

To the contrary, the DCPS witness Ms. Chapman credibly testified that she did not know that the speech and language evaluation existed until the complaint was filed in this matter. The parent also could not attest to the fact that she requested at either of the IEP meetings that the evaluation be reviewed. The meeting notes from both the parent's advocate and DCPS do not reflect that there were any discussion regarding the evaluation, the student's speech and language needs or any request from the parent or her advocate regarding speech and language services. Consequently, the Hearing Officer concludes that there was insufficient evidence that DCPS had received the speech and language evaluation and it was thus not obligated to review the evaluation at the meetings. The Hearing Officer concludes Petitioner failed to sustain the burden of proof on this issue.

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.

Dr. Sharon Lennon testified that she proposed the compensatory education program to remediate for the student allegedly being in an inappropriate placement at School A and for not being provided speech language services during SY 2011-2012. Dr. Lennon proposed 24 hours of speech language services one hour per week for 6 months, 144 hours of academic tutoring 2 hours per day for 3 times per week for 6 months, 24 hours of independent counseling and behavior support services one hour per week for 6 months and 24 hours of mentoring one hour per week for 6 months. However, the Hearing Officer has concluded that the student's educational placement should have been changed as of April 12, 2012, and he is thus do compensation from that date and not the entire school year. In addition, Dr. Lennon proposed speech language services although the Hearing Officer concluded there was no denial of a FAPE

with regard to speech language services. Dr. Lennon also proposed both counseling and mentoring services but did not delineate the differences between the two and what they are to address and because there was no evidence that the student had been denied any counseling services that were prescribed in his IEP, and Dr. Lennon admitted that some of the services proposed were duplicative of the services that the student is already being provided, the Hearing Officer will not award any counseling or mentoring services to the student.

Because there is evidence student successfully worked one-on-one with the independent tutor and that tutoring will allow the student to begin to progress and be available for academics and move toward the skill level that he would have attained had be been in an appropriate placement, the Hearing Officer awards the student 50 hours of independent tutoring for the student being in an inappropriate placement form April 12, 2012, to the end of SY 2011-2012.

ORDER:

1. DCPS shall within ten (10) school days of this issuance of this Order convene a placement meeting for the student to determine if the student has been committed to or otherwise detained by If the student is not so committed or detained DCPS shall place and fund the student's attendance at the School and that shall be his placement for SY 2012-2013.

2. DCPS shall within 60 calendar days of the student's placement at School convene and multidisciplinary team meeting to determine the student's progress at School and make any appropriate and necessary modifications to the student's program and/or placement to ensure his continued academic and behavioral success.

3. As compensatory education for the student having been in an inappropriate placement at School A from April 12, 2012, to the end of SY 2011-2012, DCPS shall fund for the student 50 hours of independent tutoring.

4. All other relief requested by Petitioner is hereby denied.

APPEAL PROCESS:

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

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.
Hearing Officer
Date: August 28, 2012