District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
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OSSE
STUDENT HEARING OFFICE
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Confidential

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

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

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened for two days starting on November 30, 2011, and concluding on December 6, 2001, at the OSSE Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003 and Hearing Room 2008 respectively.

BACKGROUND:

The student is age in the grade and has been determined eligible as a child with a disability under IDEA with a disability classification of emotional disturbance ("ED"). During the 2011-2012 school year ("SY") and the previous three school years the student attended a District of Columbia public high school hereinafter referred to as "School A." The student spent his two years at School A in ninth and grade and was recently moved to eleventh grade.

On October 20, 2011, a due process complaint was filed alleging, *inter alia*, that the student's current individualized educational program ("IEP') and placement are inappropriate. The complaint also alleged issues beyond the two-year period of limitation under IDEA. Along with the complaint Petitioner's counsel filed a motion for expedited hearing. One of the issues in the complaint related to a disciplinary matter. On October 26, 2011, DCPS counsel filed an opposition to the motion for expedited hearing. On October 28, 2011, the Hearing Officer issued an order granting the motion for expedited hearing for the disciplinary matter only and bifurcating the remaining issues. The parties conducted a resolution meeting on November 1, 2011, and reached a settlement agreement as to the single issue involving the disciplinary matter. Consequently, on November 2, 2011, Petitioner's counsel withdrew the issue regarding the disciplinary matter. Based on the Hearing Officer's ruling the motion for expedited hearing, with the withdrawal this issue the remainder of the case proceeded on a non-expedited tract.

At the November 1, 2011, resolution meeting the remaining issues raised in the complaint were not resolved. The parties agreed for the resolution period to end and to immediately proceed to hearing. Thus, the 45-day timeline ends and the HOD is due on December 16, 2011.

On November 3, 2011, DCPS counsel filed a motion to dismiss the complaint alleging the parent did not have standing to file the due process complaint as the student had reached age 18 and educational rights had transferred from the parent to the student. DCPS counsel had not yet filed a response to the complaint.

A pre-hearing conference was held on November 7, 2011, at which DCPS' motion to dismiss was discussed along with the issues raised in the complaint. The Hearing Officer informed DCPS counsel that if the motion to dismiss was not granted the Hearing Officer would direct that a response be filed by a date certain. Petitioner's counsel was directed to file any response to the motion they intended to file by November 8, 2011. On November 8, 2011, Petitioner's counsel filed an opposition to DCPS' motion to dismiss coupled with a motion for default judgment

based on DCPS having not filed a timely response to the complaint. On November 9, 2011, DCPS counsel filed an opposition to Petitioner's motion for default judgment.

On November 10, 2011, the Hearing Officer issued a pre-hearing order ("PHO") directing, *inter alia*, that Petitioner file by November 15, 2011, a motion to substitute the student as petitioner and a motion substantiating claims beyond the two-year period of limitation. The PHO also directed DCPS to file a response to the complaint by November 15, 2011.

On November 12, 2011, the Hearing Officer issued an order denying Petitioner's motion for default judgment and denying DCPS' motion to dismiss but directing that an inquiry be made of the student by the Hearing Officer as to whether he desired to proceed with the complaint and desired to be represented by the current counsel.

On November 14, 2011, DCPS filed its response to the complaint. On November 15, 2011, Petitioner's counsel filed its motion to substitute the student and its motion to assert claims beyond the two-year limitation.

On November 17, 2011, DCPS counsel filed an opposition to Petitioner's motion to substitute the student as petitioner and an opposition to Petitioner's motion regarding the two-year period of limitation.

On November 29, 2011, the Hearing Officer issued an order denying Petitioner's motion to assert claims beyond the two-year period of limitation and issued an order directing that the student be present for the hearing on November 30, 2011, for direct inquiry by the Hearing Officer.[2]

At the outset of the hearing on November 30, 2011, the student appeared and represented to the Hearing Officer that he desired to proceed with the claims alleged in the complaint and desired that the current counsel represent him. The Hearing Officer then granted the motion to substitute the student as Petitioner and the hearing proceeded. [3]

Petitioner seeks as relief the following: (1) DCPS immediately place and fund the student at the Phillips School, (2) DCPS convene an IEP meeting within 10 days of the student starting at the new placement at which an appropriate IEP would be developed, (3) DCPS fund an independent FBA, (4) subsequent to the functional behavior assessment ("FBA"), DCPS convene an IEP team meeting to develop a behavior intervention plan ("BIP"), (4) DCPS fund an independent comprehensive psychological evaluation and (5) DCPS provide the student with compensatory

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[2] The PHO directed that a second pre-hearing conference be held so inquiry of the student could be made earlier. However, the parties had difficulty scheduling a mutually agreeable date and time and Petitioner's counsel had difficulty securing the student's participation for the second pre-hearing conference.

[3] Based on DCPS counsel desire that DCPS be allowed to participate in a resolution meeting with the student as Petitioner, the parties agreed to participate in a second resolution meeting prior to the second day of hearing. At the second resolution session DCPS offered to increase the student specialized instruction to full-time and place him at a full-time ED program at a DCPS public high school.

education for the time DCPS denied the student a free and appropriate public education ("FAPE").

DCPS asserted in its response that student's IEP and placement were and are appropriate and the student had significance absences during SY 2009-2010 and SY 2010-2011 and yet still earned passing grades. DCPS asserted that the student has not been denied a FAPE and the part of the relief sought, an independent psychological evaluation, was granted at the resolution meeting on November 1, 2011.

ISSUES: [4]

The issues adjudicated are:

1) Whether DCPS failed to provide the student with a FAPE by failing to develop appropriate IEPs on February 4, 2009, January 8, 2010, June 9, 2010 and May 26, 2011.[5]

2) Whether DCPS denied the student a FAPE by failing to implement his February 2009, January 2010, June 2010 and May 2011 IEPs by failing to provide the student all required hours of specialized instruction and behavioral support.

3) Whether DCPS failed to include the student's parent in the IEP meeting and made a unilateral decision regarding the student's educational placement at the January 8, 2010, IEP meeting at which DCPS developed an IEP and determined the student's educational placement.

4) Whether DCPS failed to provide the student with an appropriate placement for the 2009-2010, 2010-2011 and 2011-2012 school years when the student attended H.D. Woodson High School.

5) Whether DCPS failed to issue prior written notice ("PWN") to the parent when DCPS reduced the student's special education hours on May 26, 2011, from 26.5 hours to 14 hours per week.

6) Whether DCPS failed to issue PWN to the parent indicating the student's placement for the 2009-2010, 2010-2011, and 2011-2012 school years.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-42 and DCPS Exhibit 1-14) that were admitted

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[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 eliminated all issues that were alleged that fall beyond the two-year period of limitation. The parties agreed at the outset of the hearing to the issues to be adjudicated in light of the Hearing Officer's ruling regarding the two-year period of limitation.

[5] Petitioner alleges the IEP(s) is/were inappropriate because it/they (1) does/did not have sufficient hours of specialized instruction, (2) has/had inappropriate related services and insufficient therapeutic interventions and supports, (3) has/had inappropriate classroom accommodations, (4) does/did not include a BIP, have/had inappropriate transition services, (5) it has/had inappropriate goals and objectives.

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: [6]

1. The student is age in grade and has been determined eligible as a child with a disability under IDEA with a disability classification of ED. During SY 2011-2012 and the previous three school years the student attended a District of Columbia public high school hereinafter referred to as "School A." The student spent his three years at School A in ninth and grade and in the current school year was moved to eleventh grade due to the number of credits he had earned the previous years. (Parent's testimony, Petitioner's Exhibit 1-2)

2. The student and his family received services, including psychiatric and psychological therapeutic intervention from Community Connections since approximately 2008. At that time the student was exhibiting significant psychological distress and exhibited self-injurious behavior. The student suffers from extreme anxiety and depression and paranoia of being hurt or killed related to incidences of violence in his neighborhood and school. The student has been prescribed medication but there are issues of medication compliance. (Parent's testimony, Petitioner's Exhibits 1-2, 8-2)

3. The student was first evaluated and found eligible for special education services at age 15 during SY 2008-2009. A psycho-educational evaluation was conducted in January 2009. The student's cognitive abilities were found to be in the borderline range with a full scale IQ of 72. With regard to academic achievement the student's reading abilities were found to be at a 4.2 grade level. His math abilities were found to be on the 6th grade level and his written language abilities were found to also be on the 6th grade level. Based on the student's below average academic performance and behavioral and emotional assessments the evaluator recommended the student for special education services with a disability classification of ED. (Petitioner's Exhibit 2-3, 2-5, 2-7)

4. The student's initial IEP was developed February 9, 2009, when he was age 15 in ninth grade in a School A program located in a DCPS middle school building. The parent and student participated in the IEP meeting. The IEP prescribed that the student be provided 14 hours of specialized instruction per week outside general education and 1 hour of behavior support services out side general education. The IEP included academic goals in the area of Math, Reading and Written Expression and goals for Emotional/Social/Behavioral Development. The IEP included accommodations for standardized testing and accommodations for the general education classroom. The IEP did not include a post-secondary transition. (Petitioner's Exhibit 34-1, 34-4)

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[6] 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.

5. The student's IEP was updated on January 8, 2010, when the student was age 16 and when he was in ninth grade for the second time. The parent did not attend the meeting because she was hospitalized at the time. The IEP noted the strengths in academic areas. The number of Math, Reading and Written Expression goals were increased as well as their level of challenge and complexity. The student's specialized instruction remained at 14 hours per week of specialized instruction. However, the instruction was to be provided within the general education setting. Behavior support services of 1 hour per week outside general education remained the same. The number of classroom accommodations were reduced and goals and services were added to the student's post secondary transition plan. The student had only one general education class during that school year. His other classes were taught by special education teachers. The parent was not provided a prior written notice that school year and was latter provided a copy of the IEP and asked to sign it. (Parent's testimony, Petitioner's Exhibit 33-2, 33-3, 33-4, 33-7, 33-9 33-10, 33-11)

6. In February 2010 the student was psychiatrically hospitalized for four days due to suicidal ideations. He was diagnosed with Major Depressive Disorder with a rule out of psychotic features, marijuana abuse and anxiety disorder. (Petitioner's Exhibits 1-3, 8-1)

7. In October 2010 the student was charged with possession of marijuana and was arrested and suspended from school. The student reportedly uses marijuana daily to assist him with anxiety. It was determined that his marijuana use may contribute to his symptoms of paranoia. (Petitioner's Exhibit 1-8, 1-9)

8. The student's IEP was updated on June 9, 2010. The parent participated in the IEP meeting. The student's hours of specialized instruction were increased from 14 hours in general education to 26.5 hours of instruction per week outside general education as a result of his noted academic failure. Behavioral support services were changed from 1 hour per week to 4 hours per month. The student's academic, emotional/social/behavioral, and transition goals and services remained the same with the same achievement date: June 18, 2010. The student's classroom accommodations also remained the same. The parent was satisfied with the IEP and pleased that the student would be receiving full time special education services. (Parent's testimony, Petitioner's Exhibit 32-5,32-6, 32-7)

9. During SY 2010-2011 the special education teacher worked with the student on a daily basis. The student's teacher made the observation that the student is very emotional and needs a great deal of attention. However, he was never physically disruptive, but at times he was verbally aggressive. By second semester the student did not want to work with the special education teacher as much because of his concern for what other students thought of him. As a result the student was not provided full time special education services in the second semester. He was in more general education classes more and a result began to have more difficulty. testimony)

10. The student was more motivated about school during SY 2010-2011 and worked well with his special education teacher. During this school year the student earned the best

grades he had in any of the years he attended School A. The student's parent believes one reason the student did so well was because he was repeating ninth grade for the third time. The student was able to better perform academically when he was provided more individualized attention. This was also a reason that SY 2010-2011 was his most successful. (Parent's testimony).

11. DCPS convened an IEP meeting at School A on February 10, 2011. The student and parent attended the meeting. The parent expressed her concern that the student was feeling overwhelmed at school. The student expressed his desire to graduate from high the following school year. The student's teachers expressed the intention to continue to provide the student classroom accommodations to assist in meeting the student's needs. The student noted that he did not always take advantage of the specialized instruction that was being offered him because he could not deal with other students teasing him when they saw him in the special education classes and thus he often avoided these classes. The School A staff stated the student's IEP was being implemented through the student's two special education teachers in Math and English and through the special education teachers availability to the student. The parent requested that another evaluation be conducted of the student prior to the student's IEP being updated. (Petitioner's Exhibit 31-2, 31-3, 31-4)

12. In March 2011 an educational evaluation was conducted of the student at School A. His reading abilities were measured to be at the 4.1 grade level. His math abilities were measured to be at 6.0 grade level and his written expression abilities were measured to be at the 4.5 grade level. (Petitioner's Exhibit 29-6)

13. On March 14, 2011, an IEP meeting was convened at School A. The student and his mother attended the meeting. Most of the student's teachers reported that the student was performing well in the subjects he was taking. The School A special education coordinator ("SEC") acknowledged that the student had only been receiving 14 hours of specialized instruction per week that school year despite the fact the student's IEP prescribed that he receive 25 hours per week. The SEC suggested changing the student's IEP to reflect the actual number of hours to specialized instruction the student was receiving. (Petitioner's Exhibit 30-3)

14. The student's IEP was changed at an IEP meeting held on May 26, 2011. The student and his parent participated in the meeting. The student's specialized instruction was reduced to 14 hours per week outside general education. DCPS also developed a BIP for the student. The student's behavioral support services remained 4 hours per week. The student's special education teacher stated the student was on track to move from 9th grade to 11th grade if he continued in the afternoon credit recovery program. The special education teacher noted that that the student's academic progress was sufficient enough that he did not need full time special education services and could participate in some general education classes with appropriate supports. The school staff noted that in some of the student's classes there were as many as 20 students. Because the student is usually punctual in getting to class and many other students are late the student often benefited from the resulting increase in teacher interaction when fewer students are present. The

School A staff stated that in light of the student's progress he should be in a less restrictive setting than full time special education. The parent was not provided a PWN indicating the student's special education hours were being reduced. (Parent's testimony, Petitioner's Exhibit 28, DCPS Exhibit 5-1, 9)

15. At the start of SY 2011-2012 the student told the parent he had all general education classes. The parent went to the school to investigate the student's class schedule. The special education teacher stated that the student was only to receive 7 hours of specialized instruction per week. However, the student's scheduled was adjusted to provide the required 14 hours per week required by his IEP. The student was enthusiastic at the start of the school year but as the year has progressed the student has become less motivated. By the first advisory the student received a deficiency report which stated the student was in danger of failing some of his courses. The parent believes the student is struggling academically and in jeopardy of failing. In each of the three prior school years the student attended School A he earned low grades (mostly Fs and Ds) and was required to repeat the ninth grade three times.

16. In November 2011, DCPS prepared an IEP progress report for the student for the first advisory of SY 2011-2012. The report indicates that student is making progress in all his academic and social/emotional/behavioral goals. (DCPS Exhibit 6)

17. The student has earned 17.5 credits of the 24 credits that are needed to obtain his high school diploma. He has a cumulative GPA of 1.16 and his current class rank is 142 out of 156. (DCPS Exhibit 3)

18. The student has consistently been provided the behavioral support services that have been prescribed in his IEP. (DCPS Exhibit 13)

19. In November 2011 a comprehensive psychological evaluation was conducted of the student. The evaluation included cognitive, educational, emotional/behavioral and educational assessments. The evaluator found the student's cognitive abilities are in the low average range with a full scale IQ score of 80 and found his academic functioning to be consistent with his cognitive functioning in most areas. The student's reading abilities were approximately at a 4th grade level, and his math and written language abilities were at approximately a 6th grade level. The student showed clinically significant or at risk characteristics in emotional and behavioral areas. The evaluator recommended the student be placed in a separate day school program for students with ED and be in a classroom with a low student to teacher ratio. The evaluator noted the student needs a higher level of adult structured supervision and more support most than most students his age and the school program should include a strong behavior management system such as a token economy. The evaluator also recommend the student receive tutoring support two hours daily for ten hours per week from a special education teacher to improve his academics and as compensatory education for any missed services. (Dr. Kovac's testimony, Petitioner's Exhibit 1-1, 1-11, 1-12, 1-12, 1-13, 1-15, 1-17, 1-18, 1-19)

20. The student has been interviewed by and accepted to the School. is a private full time special education day program that provides small group instruction with certified special education teachers and behavioral support and counseling. The school offers occupational therapy and speech language services for those students whose IEPs require these services. The school has a wide age range from 3rd grade to age 20 with different disability classifications. The overall goal of the program is to provide students the skills they need to be successful for post secondary, trade school or a job. follows the DCPS curriculum and only has up to 9 students in a classroom. Some classes only have 3 based on the number of students who might need a particular class for graduation. The DCPS students attending can earn and DCPS diploma. There were total of 20 DCPS student at last year school year. The school offers classes in career development. has a behavior point system with rewards. School staff provide intervention to assist students with off task behaviors and to get them refocused. If a student is ever in crisis there are assistants whose job is to monitor the students and provide appropriate crisis intervention. All students at the school have full time IEPs. If the student attends he will one of a number of ED classified students. The teachers who teach Music, PE and Art are dually certification. All other teachers are certified in special education. The cost of the program is per year plus the cost of related services. testimony, Petitioner's Exhibit 39)

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.

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [7] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent

[7] 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.

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.

ISSUE 1: Whether DCPS failed to provide the student with a FAPE by failing to develop appropriate IEPs on February 4, 2009, January 8, 2010, June 9, 2010 and May 26, 2011.

Conclusion: There was sufficient evidence presented that the student January 8, 2010 IEP and his May 26, 2011, IEP were inappropriate.

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also Scott v. District of Columbia, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

20 U.S.C. 1414(a)(i) defines Individualized Education Program as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes a statement of the child's present levels of academic achievement and functional performance." It includes measurable goals, statements of related services, assistive technology and other appropriate accommodations. It is developed by the IEP team which consists of the child's parent, general education teachers, LEA special education teachers and anyone deemed as a necessary participant by reason of the services provided to the student. The IEP is the centerpiece or main ingredient of special education services.

The evidence demonstrates that the student initial IEP was reasonably calculated to provide the student educational benefit. At the time of its development the IEP included academic and social/emotional and behavioral goals that were designed to address the areas of concern identified in the student's initial evaluations. Although in hind site given the student's lack of academic progress as evidenced by his educational evaluations over the years, the student could have been and was later provided more services. However, the services and goals in the student's initial IEP were reasonable. When the student's IEP was revised in January 2010 the student's specialized instruction was changed so that it would be provided in a general education setting. This was done despite the fact that student was being retained in the ninth grade. The fact that the student completed his second year in special education and was retained in the ninth grade for a second time is proof the student's IEP was inappropriate. DCPS then in the subsequent IEP, June 2010, increased the student's services to full time and provide the specialized instruction in a general education setting. The evidence reflects that in at least the first semester of SY 2010-2011 the student began to make significant progress as evidenced by the parent's testimony and the comments of his teachers in IEP meeting notes. This is evidence that the student's full time IEP developed January 8, 2010 was appropriate. In the second semester of SY 2010-2011, however, the student's IEP was not fully implemented and his performance began to

plummet as evidenced by the concerns raised in the March 2010 IEP meeting. Despite these difficulties and the fact that the student's March 2010 educational evaluation demonstrated that the student had made little if any academic progress since his initial evaluations, DCPS reduced the student's hours of specialized instruction to 14 hours per week. With the student poor academic performance in the second semester of SY 2010-2011 and the student's recent educational evaluation that demonstrated the student had made little progress in the years he had been in special education, there was an insufficient basis for the student's specialized instruction to be reduced. The Hearing Officer thus, concludes that the student's current IEP developed May 26, 2011, is inappropriate IEP. The failure of DCPS to provide the student appropriate IEPs in the two instances cited above resulted in the student making little if any academic progress and denied him a FAPE.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to implement services and provide the student appropriate special education services in accordance with the student's February 2009, January 2010, June 2010 and May 2011 IEPs by failing to provide the student all required hours of specialized instruction and behavioral support.

Conclusion: The evidence demonstrates that during the second semester of SY 2010-2011 the student was not provide the services that were prescribed in his June 8, 2010, IEP.

The evidence clearly demonstrates based on the student's special educations teacher's testimony that in the second of SY 2010-2011 the student was not being provided full time special education services that his IEP required. The Hearing Officer concludes that based on the fact that the student continues to struggle academically and based upon the three educational evaluations that demonstrate that the student's academic achievement has been virtually unchanged that the failure to provide the student the full measure of services that the IEP required resulted in the student academic harm. The student is still reading on a 4th grade level and still operating on a 6th grade level in Math and Written Expression, despite years of specialized services at School A. Consequently, the Hearing Officer concludes the student was harmed and was denied a FAPE by School A's failure to provide the full level of services the student was to be provided and by failing to ensure that the student availed himself of the services despite the student's reluctance to avail himself of those services. The school staff was obligated to investigate and come up with techniques, methods and or accommodations that would ensure the prescribed level of services were provided.

ISSUE 3: Whether DCPS failed to include the student's parent in the IEP meeting and made a unilateral decision regarding the student's educational placement at the January 8, 2010, IEP meeting at which DCPS developed an IEP and determined the student's educational placement.

34 C.F.R. § 300.116 provides:

> In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that--
> (a) The placement decision--
> (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
> (2) Is made in conformity with the LRE provisions of this subpart, including Sec. Sec. 300.114 through 300.118;

(b) The child's placement--
(1) Is determined at least annually;
(2) Is based on the child's IEP; and
(3) Is as close as possible to the child's home;
(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

Conclusion: Although the parent testified that she was not included in the meeting the school attempted to have her participate meeting. The parent was hospitalized at the time. Nonetheless, DCPS proceeded with the meeting. During this meeting, however, the student's special education services were increase and the increase in services resulted in the student have what she acknowledge was the best year academically the student had had at School A. Consequently, there was insufficient evidence presented that this procedural inadequacy 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. Consequently, the Hearing Officer does not conclude that Petitioner sustained the burden of proof by a preponderance of the evidence on this issue. A violation must negatively affect a student's substantive rights. See *Lesesne v. District of Columbia* 447 F. 3d 828 (D.C. Cir. 2006).

ISSUE 4: Whether DCPS failed to provide the student with an appropriate placement for the 2009-2010, 2010-2011 and 2011-2012 school years when the student attended H.D. Woodson High School.

Conclusion: The evidence demonstrates that at least as of the current school year the student's current placement School A is an inappropriate placement. Petitioner sustained the burden of proof by a preponderance of the evidence at the inappropriateness of School A for SY 2011-2012

34 C.F.R. § 300.114 provides:

LRE requirements.(a) General. (1) Except as provided in Sec. 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and Sec. Sec. 300.115 through 300.120.
(2) Each public agency must ensure that--
(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

DCPS has an obligation to ensure that a student is educated with his non-disabled peers prior to the student be removed to a full time out of general education setting. This Hearing Officer concludes that the IEP developed for the student including the educational placement and LRE

are is in appropriate for this student. Based on the student apparent stagnant academic progress over the years the student is clearly in need of a full time special education services and full time IEP and placement.

The student continues to struggle academically and based upon the three educational evaluations that have been virtually unchanged. He is still reading on a 4th grade level and still operating on a 6th grade level in Math and Written Expression, despite years of specialized services at School A. Consequently, the Hearing Officer concludes the student is being harmed by his continued attendance at School A.

The evidence demonstrates that the School can provide the student full time special education and related services and can provide the student educational benefit. However, a school district is not required to implement a program that will maximize the handicapped child's potential. *Rowley, 458 U.S. at 198-99*. Rather, a handicapped child has a right to "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley, 458 U.S. at 203*. Rowley explained that implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.. . .We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley, 458 U.S. at 200-02.*

Pursuant to D.C. Code § 38-2561.02 (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.

DCPS offered the student a full time IEP and a full time special education placement at a DCPS school. However, the Hearing Officer concludes that although DCPS may be able to offer an appropriate program to the student, the denials of FAPE that have been proved as to this student warrant as a remedy along with compensatory education that the student's placement at the Phillips School be funded by DCPS at least for the remainder of the current school year.

ISSUE 5: Whether DCPS failed to issue Prior Written Notice to the parent when DCPS reduced the student's special education hours on May 26, 2011, from 26.5 hours to 14 hours per week.

34 C.F.R. §300.503 provides:

> Prior notice by the public agency; content of notice.

(a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—
(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.
(b) Content of notice. The notice required under paragraph (a) of this section must include—
(1) A description of the action proposed or refused by the agency;
(2) An explanation of why the agency proposes or refuses to take the action;
(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
(4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and (7) A description of other factors that are relevant to the agency's proposal or refusal.

Conclusion: Although the parent testified that she was not provided prior written notice following the May 26, 2011, meeting when the students IEP was changed to reduce the hours of specialized instruction, there was insufficient evidence that this 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. The parent along with her counsel attended the meeting and was full aware of the change in the IEP and the rationale given that the student was not availing himself of the full time services. Consequently, the Hearing Officer does not conclude that Petitioner sustained the burden of proof by a preponderance of the evidence on this issue. A violation must negatively affect a student's substantive rights. See *Lesesne v. District of Columbia* 447 F. 3d 828 (D.C. Cir. 2006).

ISSUE 6: Whether DCPS failed to issue Prior Written Notice to the parent indicating the student's placement for the 2009-2010, 2010-2011, and 2011-2012 school years.

Conclusion:

Although the parent testified that she was not provided prior written notice at or following any of the IEP meetings when the student placement continued to be School A, there was no evidence that any other placement or location of services was proposed by the parent or student such that DCPS would have needed to include in a notice the reason an alternative consideration was rejected. Other than the assertion that School A allegedly was and remains an inappropriate placement for the student there is insufficient evidence that this procedural inadequacies of

DCPS failing to issue a PWN 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. The parent along with her counsel attended the meeting and was full aware of the change in the IEP and the rationale given that the student was not availing himself of the full time services. Consequently, the Hearing Officer does not conclude that Petitioner sustained the burden of proof by a preponderance of the evidence on this issue. A violation must negatively affect a student's substantive rights. See *Lesesne v. District of Columbia* 447 F. 3d 828 (D.C. Cir. 2006).

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.

The testimony and documents offered by Petitioner with regard to compensatory education did not specifically prove the total number of hours the student missed warrant the tutoring hours requested. Despite the fact that Petitioner presented insufficient evidence that student's missed services have been sufficiently linked to the compensatory education services being requested in the case of independent tutoring it is inequitable for the student to be provided nothing. The student's prospective placement at the Phillips School for the remainder of SY 2011-2012 will be the remedy and compensatory education for the student being denied a FAPE by the failure to provide the student appropriate IEPs as mentioned above and for the student's IEP not being fully implemented during the second semester of SY 2010-2011.

ORDER:

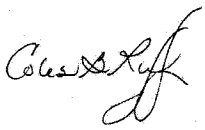
1. DCPS shall within twenty (20) school days of the issuance of this order place and fund the student's attendance at the Phillips School for the remainder of SY 2010-2011 and provide transportation services.

2. DCPS shall within thirty (30) calendar days of the student's start at the Phillips School shall convene a IEP team meeting to review the student's most recent psychological evaluation, review his progress at School and review and revise the student's IEP as appropriate.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of

the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: December 16, 2011