

District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
Student Hearing Office
810 First Street, NE – Second Floor
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Case #</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: September 23, 2013</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner:</p> <p>Counsel for DCPS:</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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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 one day on September 23, 2013, at the Office of the State Superintendent (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2004.

BACKGROUND AND PROCEDURAL HISTORY:

The student is a child with a disability under IDEA with a disability classification of multiple disabilities (“MD”) for other health impairment (“OHI”) for Attention Deficit Hyperactivity Disorder (“ADHD”) and specific learning disability (“SLD”). is age sixteen and currently attends a private special education program (“School A”) with District of Columbia funding.

At a June 7, 2012, individualized educational program (“IEP”) meeting at the student’s previous school an IEP team determined the student was entitled to receive compensatory education and on July 12, 2012, a compensatory education was developed for the student that included an on-line credit recovery program for the student to earn three high school credits (Carnegie units).

On March 15, 2013, Petitioner filed a due process complaint seeking DCPS payment for the student’s compensatory education. On May 8, 2013, Petitioner withdrew the due process complaint that was dismissed on May 29, 2013, without prejudice.

On July 15, 2013, Petitioner filed the current complaint alleging DCPS had not yet funded the student’s on-line courses that were a component of compensatory education. Petitioner also asserted that at a May 24, 2013, IEP meeting the team agreed the student’s current placement at School A was inappropriate. DCPS indicated that it would refer the student for another placement but as of the date the complaint was filed a placement had not been secured. Petitioner also requested that DCPS conduct or fund a comprehensive psychological evaluation and a psychiatric evaluation to determine the appropriateness of residential placement for the student. Petitioner alleged that DCPS had neither conducted the evaluations nor provided an authorization for independent evaluations.

Petitioner sought as relief DCPS payment of the student’s compensatory education on-line courses, the student’s placement at a private special education day school and DCPS funding of the requested evaluations so that the appropriateness of residential placement can be determined and compensatory education for the time the student has been without an appropriate placement.

DCPS filed a timely response² to the complaint on July 17, 2013, and an amended response on August 23, 2013. DCPS denied the allegation that it failed to provide the student a FAPE and

² DCPS counsel styled the response also as a motion to dismiss and motion for summary adjudication. Because the motion was filed as a separate document and there had not yet been any stipulations of fact, the Hearing Officer did

requested that the Hearing Officer dismiss the complaint. Respondent initially asserted that a placement decision would be made by the start of school year (“SY”) 2013-2014, and in the amended response stated that a certain location was being considered but there has been no acceptance at that time. DCPS asserted that the student’s IEP and placement had not been changed and location is at the discretion of the LEA. As to the compensatory education/on-line courses DCPS asserted that the matter was resolved with payment on or before May 6, 2013.

The resolution meeting was held July 25, 2013, and was unsuccessful in resolving the issues. The parties expressed no desire to proceed directly to hearing but to allow the full 30-day resolution period expire before the 45-day timeline began. Thus, the 45-day period began on August 15, 2013, and ends (and the Hearing Officer Determination “HOD” is due) September 28, 2013. The Hearing Officer issued a pre-hearing conference order on August 28, 2013, outlining the issues to be adjudicated.

A pre-hearing conference (“PHC”) was convened on August 19, 2013. At the PHC the parties indicated that the credit recovery/compensatory education issue was likely to go forward to hearing and the placement issue may be resolved when DCPS proposes a placement shortly and at that placement the requested evaluation could be conducted.³

On September 16, 2013, Petitioner submitted a motion for a five day continuance and extension of the HOD due date because of Petitioner’s counsel was unavailable. Respondent did not object to the continuance and Petitioner’s motion was granted. The HOD due date was extended to October 3, 2013.

ISSUES: ⁴

The issues adjudicated are:

1. Whether DCPS denied the student a free appropriate public education (“FAPE”) by failing to provide the student compensatory education by failing to make payment for the student’s on-line credit recovery program that is a component of July 12, 2012, compensatory education plan.
2. Whether DCPS denied the student at FAPE by failing to provide the parentally requested evaluations: comprehensive psychological and psychiatric.
3. Whether DCPS denied the student at FAPE by failing to provide the student an appropriate placement for SY 2013-2014.

not treat the response as a motion. A motion was subsequently filed and denied at the outset of the hearing.

³ DCPS agreed to conduct a comprehensive psychological evaluation but not the psychiatric evaluation.

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

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 87 and DCPS Exhibit 1 through 4) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT:⁵

1. The student is a child with a disability under IDEA and resides with parent in the District of Columbia. The student has a disability classification of MD because of OHI and SLD in math. is age sixteen and currently attends School A in ninth grade. (Witness 1's testimony, Petitioner's Exhibit 42)
2. School A is a therapeutic program designed to reintegrate students to mainstream classes. (Witness 1's testimony)
3. The student's current IEP developed at School A and dated May 9, 2013, prescribes that the student be provided services outside general education, specifically 30 hours of specialized instruction and 30 minutes of behavioral supports. The IEP indicates that extended school year services ("ESY") had not yet been determined. (Petitioner's Exhibit 42-1, 42-7, 42-8, 42-10)
4. At a June 7, 2012, IEP meeting at the student's previous school an IEP team determined the student was entitled to receive compensatory education and on July 12, 2012, a compensatory education was developed for the student that included an on-line credit recovery program for the student to earn three high school credits (Carnegie Units) for total cost up to \$525.00. (Petitioner's Exhibits 12, 18)
5. Petitioner had difficulty accessing the on-line courses that were a part of the student's compensatory education plan for a number of reasons including because DCPS had not made appropriate payment to the vendor and the student did not have appropriate training to access the program. As a result the student was not able to fulfill the on-line requirements for the three credits was slated to complete. Ultimately DCPS made arrangements for the student to access the on-line courses during the school day at School A and School A arranged for the student to have access to a computer. On one particular day when the student was to obtain on the phone training to access the on-line program became frustrated and stormed out of the room. School A, however, was only providing the student the opportunity to access the program at school as a courtesy it was not a part of school programming provided by School A. (Witness 3's testimony, Petitioner's Exhibits 25, 27, 29, 30)

⁵ 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.

6. On March 15, 2013, Petitioner filed a due process complaint seeking DCPS payment for the student's compensatory education. On May 8, 2013, Petitioner withdrew the due process complaint that was dismissed on May 29, 2013, without prejudice.
7. On May 24, 2013, DCPS convened an IEP meeting at School A. The student's parent and her educational advocate participated in the student's IEP meeting. The purpose of the meeting was to discuss concern raised by School A administrators about the student's behavior. had become unruly after the athletic programs had participated in had ended. The student had begun cutting classes, arriving late and smelling of marijuana, being disrespectful to school staff, eloping from school program and refusing redirection. (Witness 1's testimony)
8. The DCPS representative present at the meeting discussed placement. The School A director was willing to design a hybrid schedule for the student to go to library with work packets but no longer wanted in the building and this was for a short-term solution. The team determined at that meeting that School A was no longer an appropriate location of services for the student and the DCPS representative stated that would send referrals to other appropriate schools for the student to attend. (Witness 1's testimony)
9. Following the May 24, 2013, meeting the parent requested that DCPS conduct updated evaluations of the student including a psychiatric and a comprehensive psychological evaluation. The DCPS representative responded that was not aware of the request for the evaluations and noted that was aware that there was a request for ESY services but the IEP team had not agreed to the ESY services. The DCPS representative later indicated by email correspondence that would issue authorization for independent evaluations. (Petitioner's Exhibits 55, 56, 57, 61, 62)
10. On July 15, 2013, Petitioner filed the current complaint alleging DCPS had not yet funded the student's on-line courses. Petitioner also asserted that at the May 24, 2013, IEP meeting the team agreed the student's current placement was inappropriate. Although DCPS indicated that it would refer the student for another placement, as of the date the complaint was filed a placement had not been secured. Petitioner also requested that DCPS conduct or fund a comprehensive psychological evaluation and a psychiatric evaluation to determine the appropriateness of residential placement for the student. Petitioner alleged that DCPS had neither conducted the evaluations nor provided an authorization. (Petitioner's Exhibit 3)
11. DCPS referred the student to a potential school and the DCPS representative presumed that the student would be accepted and therefore did not immediately send referrals to other schools as alternatives. When the student was not accepted to that first school in August 2013, DCPS sent a referral to another school. As of the date of the hearing the student was due to interview at the new school to which DCPS had made the referral. (Witness 2's testimony, Petitioner's Exhibits 68, 79, 86)
12. Because the student did yet have new location of services was still assigned to School A at the start of SY 2013-2014 while was awaiting another placement/location

assignment from DCPS. At the time of the hearing the student was on suspension from School A because of weapon was found in backpack at school. (Witness 1's testimony)

13. As of the date of the hearing DCPS has not issued the authorization to the parent for the requested evaluations to be conducted. The student's most recent psychiatric and psychological evaluations were conducted in 2010. (Witness 1's testimony, Petitioner's Exhibits 10, 11)
14. As a result of the student not having an immediate placement the student missed instruction and services including specialized instruction and behavioral support services. (Parent's testimony, Witness 1's testimony)
15. The parent's educational advocate proposed a compensatory education program to compensate the student for the alleged denials of FAPE that allegedly included the student not receiving the online credit recovery services.⁶ (Witness' 1's testimony, Petitioner's Exhibit 24)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

⁶ The proposed plan sought to compensate the student for missed on-line credit recovery services from Fall 2012 and for the student having to return to School A for SY 2012-2013. The plan proposed that the student be provided 5 hours per week for 5 weeks of instruction/tutoring services for a total of 25 hours and 2 hours per week for 5 weeks (10 hours) for organization, transition and task management and an hour-long tutorial/demonstration of the on-line credit recovery program.

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). The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied the student a FAPE by failing to provide the student compensatory education by failing to make payment for the student’s on-line credit recovery program that is a component of July 12, 2012, compensatory education plan.

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

Although there was evidence that the student had difficulty accessing the on-line courses that were a part of compensatory education program there was also evidence that the course was made available to the student but failed to take advantage of the services when it was made available. The Hearing Officer credited the testimony⁸ of Witness 3 that the service was available to the student but became frustrated stormed from the room and did not complete the course at least on that one occasion. Consequently, the Hearing Officer concludes Petitioner did not meet the burden of proof on this issue. However, because of denial of a FAPE discussed below the Hearing Officer will order as a provision of the compensatory education plan granted herein that DCPS pay for and provide the on-line courses/credits to the student to complete by the January 31, 2014.

ISSUE 2: Whether DCPS denied the student at FAPE by failing to provide the parentally requested evaluations: comprehensive psychological and psychiatric.

Conclusion: There was insufficient evidence that the student was harmed by the requested reevaluation not being conducted prior to the complaint being filed.

34 C.F.R. § 300.303(a)(2) make clear that, “A local education agency (“LEA”) *shall ensure* that a re-evaluation of each child with a disability is conducted...if the child’s parents or teacher requests a re-evaluation.” (emphasis added). 34 C.F.R. § 300.305(d)(2) also clarifies that the parent must be advised by the LEA of the right to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child’s educational needs. *See also Letter to Copenhaver*, 108 LRP 16368 (OSEP 2007).

The evidence demonstrates that Petitioner requested that the student be reevaluated soon after the May 24, 2013, IEP meeting. Although the IEP team had determined that the student behavior at School A necessitated that school placement be changed, DCPS later indicated its intention to authorize the evaluation. There was insufficient evidence that the student has been significantly harmed as a result of the evaluation not having yet been conducted. The Hearing Officer does not consider the period from the May 29, 2013, parental request until the complaint was filed to

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.

⁸ The witness was straightforward, emphatic and believable.

be an inordinate time for the reevaluation to have been conducted. Thus, the Hearing Officer does not conclude that the student was denied a FAPE as a result of the evaluation not being conducted. DCPS has stated its intention to authorize the evaluation; however, the evaluation has not yet been completed. Thus, the Hearing Officer will, in the order below, direct that the evaluation be authorized by a date certain. The evidence does not indicate that DCPS authorized a psychiatric evaluation, but in light of the student's behaviors at School A the Hearing will also direct that a team determine whether such an evaluation is necessary particularly in light of the fact that as of the hearing a school location for the student for SY 2013-2014 had not yet been determined.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to provide the student an appropriate placement for SY 2013-2014.

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

IDEA ensures that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. §1400(d)(1)(A). The IDEA guarantees children with disabilities the right to a FAPE. *Id.* In seeking an appropriate education for students with disabilities, the child's parents, teachers, school officials, and other professionals collaborate to develop an IEP to meet the child's unique needs. See 20 U.S.C. §1414(d)(1)(B). "The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir.2005) (quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203 (1982)). Local school officials utilize the IEP to assess the student's needs and assign a commensurate environment. See 20 U.S.C. § 1414(d)(1)(A).

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

The evidence in this case clearly demonstrates that an IEP team on May 24, 2013, determined that the student's continued placement at School A was inappropriate. Therefore, the Hearing Officer concludes that the student has been denied a FAPE from May 24, 2013, until the end of the regular school DCPS school year and from the start of SY 2013-2014 until the present. The student's significant behavioral challenges at School A and being forced to return to School A at the start of SY 2013-2014 because DCPS had not yet found a placement is sufficient evidence was harmed by remaining in an inappropriate placement. Although DCPS made referrals to programs the referrals were made one at a time rather than simultaneously. And although the student was slated to visit another proposed school soon after the hearing, at the time of the hearing remained without an appropriate school placement.

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 loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

Although Petitioner has requested compensatory education for the student allegedly not having access to online credit recovery program in addition to not being in appropriate placement, the Hearing Officer determined the student was provided access to the online services but failed to avail himself of the services. The proposed compensatory education plan overstates the services the student actually missed. Nonetheless, the Hearing Officer concludes based upon the evidence that the student has been without an appropriate educational placement based on the evidence of the student's in school behavioral issues just prior to the change in location and at the start of SY 2013-2014, that the student should be provided some compensatory services. Even though the proposed plan has overestimated the actual missed services, to provide the student nothing would be inequitable. Therefore, the Hearing Officer will provide what considers to be nominal compensatory services and access for reasonable period to the on-line credit recovery program the student should have completed.

ORDER:⁹

1. DCPS shall within ten (10) calendar days of the issuance of this Order, (if it has not already done so by the time this Order is issued) issue to Petitioner an authorization for Petitioner to obtain an independent comprehensive psychological evaluation (to include cognitive, academic and social/emotional components) at the DPCS/OSSE prescribed rate.
2. DCPS shall, within thirty (30) calendar days of the issuance of this Order (if it has not already done so by the time this Order is issued), place and fund the student in an appropriate educational program other than School A that can implement the student's IEP.
3. DCPS shall within thirty (30) calendar days of the issuance of this Order convene a multi-disciplinary team ("MDT") meeting to determine whether a psychiatric evaluation and or other evaluation is required to determine the appropriateness of the student's IEP and programming.

⁹ Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

4. DCPS shall fund the following as compensatory education to the student for the time the student was in an inappropriate placement from May 24, 2013, until the end of SY 2012-2013 and for the first five weeks of SY 2013-2014:

Online credit recovery program for three-credits (Carnegie Units) up to a total cost of \$525.00

15 hours of independent tutoring at the DCPS/OSSE approved rate.

The compensatory services listed above must be used by Petitioner by January 31, 2014.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: October 3, 2013