District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
Student Hearing Office

1150 5th Street, SE
Washington, DC 20003
Tel: 202-698-3819
Fax: 202-698-3825

Confidential

STUDENT[1], by and through his Parent Petitioners, v. DCPS Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Date: May 6, 2009 Representatives: Counsel for Petitioners: Joy Coulbary-Freeman, Esq. 5885 Colorado Avenue, NW Suite 102 Washington, DC 20011 Counsel for DCPS: Laura George, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002 Hearing Officer: Coles B. Ruff, Esq.

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STUDENT HEARING OFFICE
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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* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened May 6, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on April 1, 2009, alleging the issues outlined below.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-17 and DCPS Exhibits 1-4) which were admitted into the record.

ISSUE(S): [2]

1. Did DCPS deny the student a free and appropriate public education by inappropriately exiting the student from special education services and failing to implement the February 2009 HOD? Specifically, Petitioner alleges the student was not returned to special education services following the issuance of the HOD.

2. Did DCPS deny the student a free and appropriate public education by providing an inappropriate placement? Petitioner alleges the student's current placement at School A is inappropriate.

FINDINGS OF FACT [3]:

1. The student is years old, is currently in the grade at School A and resides in the District of Columbia with this parent(s), (hereinafter "Petitioner" or "Parent") (Petitioner's Exhibit 2)

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[2] The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

[3] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding.

2. The student had been identified a child with a disability and in need of special education services for a number of years and his disability classification was Learning Disability (LD). His most recent individualized educational program (IEP) was developed on February 12, 2008, at School A, a District of Columbia public middle school. The student's IEP prescribed fifteen (15) hours of specialized instruction and thirty (30) minutes of psychological counseling per week. (Petitioner's Exhibit 2)

3. In March 2008, DCPS conducted a psychological evaluation. The evaluation revealed the student was operating in the average to low average range in cognitive functioning. The evaluating psychologist made two recommendations of teaching strategies to improve the student's sequential and deductive reasoning. The evaluator made no recommendation that the student be exited from special education services. (Petitioner Exhibit 2)

4. On December 9, 2008, DCPS convened a multidisciplinary team (MDT) meeting to review the student's psychological evaluation. At the meeting the DCPS members of the MDT determined the student should be exited from special education. The parent's attorney who attended the meeting disagreed a filed a due process complaint which resulted in a Hearing Officer's Determination (HOD) issued February 5, 2009, which concluded the student was inappropriately exited from special education and ordered DCPS to immediately reinstate the student into special education services pursuant to his February 2008 IEP and to conduct an educational assessment and convene a MDT to review the evaluation and determine the student's continued eligibility for special education services. (Petitioner's Exhibit 2)

5. On February 19, 2009, DCPS conducted an educational evaluation of the student. The evaluator concluded the student academic skills are limited and he was operating at approximately the third grade level in reading, math and written expression (three to four grades levels below his current grade level). (DCPS Exhibit 4)

6. On February 25, 2009, DCPS convened a MDT meeting to review the student's recent educational evaluation. The student's general educator reported at the meeting the student "consistently displayed negative behaviors, had trouble following directions and gets into arguments with peers repeatedly." The special educator noted: "[the student] has the potential to be good student; however, his attendance is hindering him to perform to the best of his ability." The DCPS psychologist who attended the meeting notes the student's third grade educational achievement scores and noted the student's excessive absences significantly impacted his performance in class and on standardized tests. The MDT noted the student was "reinstated to special education "under the consultation model of the full inclusion model as a special education student." The MDT concluded the student did not meet the criteria for a student with a learning disability and was not eligible for special education services. DCPS thereafter issued a prior notice stated the student was not eligible. (DCPS Exhibits 1, 2 & 3)

7. Petitioner filed the current complaint challenging the February 25, 2009, determination of ineligibility and alleging the student was not returned to special education services as required by the February 5, 2009, HOD. (Petitioner's Exhibit 1)

8. The student has not received any specialized instruction or related services since October 2008. The student has been in general education classes since October 2008 and has not received and services or consultation from a special education teacher since that time. (Parent's testimony, Student's testimony)

9. The student is failing many of his classes for the second semester. The student has trouble reading the text books used in his general education classes and has difficulty determining meanings of many of the words used in the text book. The classes the student finds most productive are those in which the teachers are able to work with him one on one. The student has difficulty with the large class size and often if he does not understand the work he will sit and not ask for help. The student receives limited assistance from his general education teachers in order to grasp the work. The student is most comfortable and able to perform best in his class where there are only twelve students. The student missed some days of school because of concern for his safety due to students from another school coming to School A to bother the student. (Student's testimony)

10. The student has been admitted to the is a full time special education placement and is able to provide the student specialized instruction and related services. The student will be in class with no more than ten students. The school is a therapeutic setting and can provide the student counseling. The school has specialized reading and math programs to assist in remediating the student's academic deficiencies. testimony)

11. There is no indication this student has not been in school for an extended period such that he would be three to four grades levels behind as he now absent some form of learning disability. Psychologists will consider a student to have a learning disability if a student is more than two grades behind and the student has had continuous academic instruction and no extended period of non instruction. Based upon the student's academic deficits - 3 to 4 grades behind - the student has a learning disability. Although the student has made some academic progress between his previous and most recent educational assessments the progress is not significant and he remains years behind academically. The student should not have been exited from special education services with the significant academic deficit his evaluations demonstrate. The student is due some form of additional services for being excluded from special education services since October 2008. A (Dr. McKinney's testimony [4])

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[4] This witness has experience from which she can offer a credible opinion as to the student's cognitive and academic functioning based on analysis of the student's recent evaluations.

CONCLUSIONS OF LAW:

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

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

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief. [5] 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.

1. Did DCPS deny the student a free and appropriate public education by inappropriately exiting the student from special education services and failing to implement the February 2009 HOD? Specifically, Petitioner alleges the student was not returned to special education services following the issuance of the HOD. Conclusion: Petitioner's counsel sustained the burden of proof by a preponderance of the evidence.

34 C.F.R. 300.305(e) provides: (1) Except as provided in paragraph (e)(2) of this section, a public agency must evaluate a child with a disability in accordance with Sec. Sec. 300.304 through 300.311 before determining that the child is no longer a child with a disability

The meeting notes for the February 25, 2009, offer scant rationale for the student being exited from special education services. The educational evaluation results belie this ineligibility determination. The student is operating significantly below grade level and has demonstrated continued poor academic performance and has recently begun to demonstrate behavioral difficulties. The student apparently has not received any special education services since October 2008 and the student credibly testified the he has significant difficulty in his current classes and he is failing many of them. Although there was evidence the student has not attended his classes regularly, the student credibly stated he missed school due to concern for his safety and otherwise attends class. He also credibly testified that he receives little assistance in his general education classes and has received no special education assistance since October 2008.

The Hearing Officer does not find the simple statement in the MDT meeting notes from February 25, 2009, sufficient proof the student was reinstated to special education services as required by the February 5, 2009, HOD. The notes state: [the student was] "reinstated to special education "under the consultation model of the full inclusion model as a special education student."

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[5] Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Absent any evidence to support this statement and given the credible testimony of the student that he has received no special education services the Hearing Officer concludes DCPS did not fully comply with the HOD by reinstating the student's special education services. The failure to comply with a HOD creates a rebuttable presumption of harm under the Blackman/Jones consent decree and entitles the student to compensatory education. DCPS denied the student FAPE through its inappropriate removal from services and failure to implement the previous HOD, both which has substantially harmed the student.

2. Did DCPS deny the student a free and appropriate public education by providing an inappropriate placement? Petitioner alleges the student's current placement at School A is inappropriate. Conclusion: Petitioner's counsel sustained the burden of proof by a preponderance of the evidence.

Based on the student's credible testimony that he has not been provided special education services since October 2008 and the MDT action by twice attempting to inappropriately exit the student from special education services, the Hearing Officer concludes the student's IEP cannot and apparently will not be implement at School A and it is thus an inappropriate placement.

The Hearing Officer concludes based on the evidence that the student has been accepted to the and that school can provide the student specialized instruction and related services and has specialized programs to assist the student in reading and math, the student shall be placed at the on an interim basis and shall be provided extended school year (ESY) services for summer 2009 as compensatory education for the missed services the student was not provided during the 2008-09 school year.[6]

ORDER:

1. DCPS shall immediately (as of the first school day following the issuance of this Order) place and fund the student at the on an interim basis and provide transportation services.

2. DCPS shall provide the student as compensatory education extended school year (ESY) services at the for the summer 2009.

3. Within thirty calendar days of the student's attendance at the DCPS shall convene a MDT meeting to review the student's evaluations, update the student's individualized educational program (IEP) and discuss and determine an appropriate placement for the student.

4. The MDT meeting shall be scheduled through counsel for the student and parent.

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[6] The Hearing Officer was not convinced the proposed compensatory education offered by Ms. McKinney was appropriately supported so as to meet the Reid and thus fashioned an alternative compensation for the loss.

5. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

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. § 415(i)(2).

s/ Coles B. Ruff, Esq.

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Coles B. Ruff, Esq.
Hearing Officer
Date: May 16, 2009

Appendix A