District of Columbia

Office of the State Superintendent of Education

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Confidential

STUDENT[1], by and through her Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Dates: June 28 & 29, 2011 July 12 & 13, 2011 Representatives: Counsel for Petitioners: Margaret Kohn, Esq. 1320 19th Street, NW #200 Washington, D.C. 20036 Counsel for DCPS: Assistant Attorney General Daniel McCall Esq. 1200 First Street, NW Washington, DC 20002 Hearing Officer: Coles B. Ruff, Esq.

[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 June 28, 2011, and continued on June 29, 2011, July 12, 2011, and concluded on July 13, 2011. The hearing was conducted at the D.C. Office of State Superintendent of Education ("OSSE") Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.[2]

BACKGROUND:

Student or "the student" is age in grade and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of specific learning disability ("SLD"). The student is currently enrolled at a private full-time special education school located in the District of Columbia, hereinafter referred to as "School A." The student's parents enrolled her at School A at the start of the 2010-2011 school year. The parents have funded the student's tuition at School A since she was enrolled.

The student was first found eligible for special education services in February 2007 when she was in kindergarten and attending a DCPS elementary school, hereinafter referred to as "School B." The student's initial disability classification was speech language impairment ("SLI"). The student continued attending School B in first and then second grade. While in second grade, during the 2009-2010 school year, the student experienced academic and emotional difficulties. As a result the student's parents chose not to re-enroll the student in School B for third grade during the 2010-2011 school year. Rather, the parents enrolled her at School A after she had attended a summer language program there during the summer of 2010.

On December 21, 2010, the parent's made a written request to DCPS, through the Private and Religious School Office at Early Stages, to again provide the student special education services. The parent submitted the student's evaluations, report cards, previous DCPS individualized educational programs ("IEP") and her IEP from School A. The parents requested the student be provided a full-time special education program.

On February 15, 2011, DCPS convened an IEP meeting and developed an IEP for the student. The parents participated in the meeting along with an education consultant they engaged to assist in meetings with DCPS and in the development of the student's IEP and educational placement. The IEP team met again on March 15, 2011. The parents requested DCPS provide the student a full-time special education program. DCPS IEP team members did not agree that the student was in need of a full-time IEP and placement and issued a prior written notice which stated that a

[2] On July 12, 2011, the hearing was conducted in Hearing Room 2004 and on July 13, 2011, the hearing was begun in hearing room 2004 and concluded in Hearing Room 2008.

full-time placement was not the least restrictive environment ("LRE") for the student. DCPS proposed the student's part-time IEP could be implemented at her neighborhood school, School B.

Petitioner filed the current due process complaint on May 6, 2011. In the complaint Petitioner asserts, inter alia, the IEP drafted by DCPS has insufficient hours of specialized instruction and an inappropriate placement and LRE. Petitioner is seeking reimbursement for the student's tuition at School A from March 21, 2011, and prospective placement and DCPS funding for the student at School A.[3] Petitioner is also seeking compensatory education for the period the student was allegedly not in appropriate program and placement and missed special education services from November 2009 to the end of the 2009-2010 school year.[4]

The parent participated in a subsequent IEP meeting on May 15, 2011, at which the student's extended school year goals and objectives were added the student's DCPS IEP.[5] The resolution meeting was held May 17, 2011, and the matter was not resolved.[6] A pre-hearing conference in this matter was held on May 25, 2011.[7] A draft pre-hearing order was issued to the parties on May 31, 2011. A second pre-hearing conference was convened on Wednesday, June 1, 2011, to review the issues to be adjudicated and DCPS' response. A second pre-hearing order was issued June 3, 2011, outlining the issues to be adjudicated the relief sought by Petitioner and DCPS' position relative to the alleged violations by Petitioner and the claims for relief.

ISSUES:[8]

The issues adjudicated are:

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[3] Petitioner seeks as relief: (1) DCPS to place and fund the student at School A from March 15, 2011, to the end of SY 2010-2011 including ESY for 2011; (2) DCPS place and fund the student at School A for the 10 month period starting March 15, 2011, and that it be her current program and placement; (3) DCPS reimburse the parent's for the costs of School A, parent provided transportation at the rate of $.50 per mile, from March 15, 2011, through the end of SY 2010-11, including ESY; (4) DCPS reimburse the parents for the cost of the 2010 independent neuropsychological evaluation because it allegedly resulted in a change in the student's eligibility classification and a substantial increase in the level of services DCPS was willing to provide to the student; (5) DCPS reimburse the parents the cost of the speech language evaluation conducted at School A during 2010 because it allegedly resulted in DCPS adding SLP services to the student's IEP in March, 2011; (6) DCPS reimburse the parents or pay directly for compensatory education designed to compensate the student for the harm she experienced due to the alleged denial of FAPE during SY 2009-10.

[4] Petitioner presented a compensatory education plan which asserted that after school tutoring would not be productive for the student and instead requested either one semester at School A with two summers of the phonological awareness reading fluency program offered by School A or in the alternative three summers of that program along with morning academic programming in small structured classes at School A during those three summers. In addition Petitioner requested 44 weeks of one-hour sessions per week of emotional counseling.

[5] There were other minor changes made to the IEP including evaluation schedule for academic goals and clarification of accommodations.

[6] The parties agreed for the full 30-day resolution period to proceed and the 45-day timeline for a decision to be rendered ended July 20, 2011. At the conclusion of the hearing on July 13, 2011, DCPS counsel submitted a continuance motion to allow a ten (10) day extension of the HOD due to allow for submission of closing briefs. The motion was granted by an order issued July 14, 2011.

[7] Attempts were made by the Hearing Officer to schedule the PHC within a week of the resolution meeting; however, this date was the first date that was mutually available for both counsel.

[8] The alleged violation(s) and/or issue(s) listed in the complaint do not directly correspond to the issue(s) outlined here. However, the parties agreed following the pre-hearing conference that the issue(s) listed here and as stated in the second pre-hearing order, are the issue(s) to be adjudicated.

1. Did DCPS deny the student a free and appropriate public education ("FAPE") by failing to appropriately revaluate the student during the 2009-2010 school year so as to fully address aspects of the student's behavior and learning? [9]

2. Did DCPS deny the student a FAPE by failing develop and implement an appropriate IEP, program and placement during the 2009-2010 school year? [10]

3. Did DCPS deny the student a FAPE during the 2009-2010 school year by failing to consistently provide the student with the 7.5 hours of specialized instruction on her IEP by certified special education teacher(s)?[11]

4. Did DCPS deny the student a FAPE by developing an inappropriate IEP and placement for the student on March 15, 2011, when it provided an IEP with only 13.5 hours of specialized instruction and 3.5 hours of related services to be implemented at School B?[12]

5. Did DCPS deny the student a FAPE by requiring (pursuant to the June, 2010 DCPS Directive "DCPS Guidelines for IEP Team Meetings to Consider Placement to More Restrictive Environment") approval the LRE Team and thus preventing the properly constituted IEP team from promptly considering all of the student's needs and all levels of program that the team may determine the student requires? [13]

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[9] Petitioner alleges there was no evaluation of the student's behavior and learning and no evaluation to address her social skills problems, plummeting self-esteem and emotional needs manifested by her increasing somatic complaints during the school day that were being exhibited that school year. Petitioner also alleges DCPS should have conducted a speech/language evaluation based on the student's displayed speech/language difficulties. Petitioner alleges these evaluations should have been initiated by the time the student's IEP was amended in November 2009.

[10] Petitioner alleges the IEP written by DCPS for the student in November 2009 was inappropriate because, among other things, there were no speech language goals. Petitioner alleges the School A speech language evaluation found deficits in reading, writing, speaking and listening that limit the student's access to the general education curriculum and language goals should have been added back into the IEP. There were no goals to address the student's social deficits, her inability to remain focused, her need for constant movement, her lack of self esteem, and her inability to complete her home work assignments without massive amounts of parental assistance. Specialized instruction for only 7.5 hours a week was too low, and it was all to be delivered in the general education setting, not withstanding the fact that the student is highly distractible. In addition to the deficits in the IEP, Petitioner alleges the student needed a full time program with a low student teacher ratio and intensive individualization. Petitioner alleges School B could not and did not provide the student what she needed for FAPE in second grade during SY 2009-2010. Petitioner alleges School B had insufficient special education staff to address the student's needs, and implemented of an inclusion model for all specialized instruction and it would have been impossible for the student to receive a full time special education program at School B during SY 2009-2010.

[11] Petitioner alleges the student's special education teacher was on maternity leave and the student did not receive consistent specialized instruction as a result.

[12] Petitioner alleges the IEP developed by DCPS on March 15, 2011 is inappropriate because among other things it offers only 10. 5 hours of specialized instruction outside of general education per week with insufficient supports in social studies, science or any subject other than reading, writing and math and provides no individual speech language therapy. Petitioner also alleges it is unclear whether she will receive any individual OT services and she will not receive no behavioral support during hours when she does not receive either specialized instruction or related services. In addition, Petitioner alleges the IEP would implement in a 3rd Grade School B class of 20-25 students in which differentiated instruction was not integral to the instructional program, and teachers have too many students under their supervision to provide the supports and individualization that the student needs.

[13] Petitioner alleges at the IEP team the parent asked for a full time placement and DCPS told the parent that the matter would have to be reviewed by the LRE team and that a meeting would be reconvened in May 2011. Petitioner alleges there was a May 2011 meeting at which a report from Ms. Gwendolyn Brown who conducted an observation of the student was considered and DCPS concluded the student would remain at School B and a prior notice issued by DCPS naming School B as the placement/location of services.

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 1-9) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B. The Hearing Officer also considered the written briefs submitted by the parties on July 21, 2011.

FINDINGS OF FACT: [14]

1. The student is age in grade and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of specific learning disability ("SLD"). The student resides with her parents in the District of Columbia. She is currently enrolled at a private full-time special education school located in the District of Columbia, School A. The student's parents enrolled her at School A at the start of the 2010-2011 school year. The parents have funded the student's tuition at School A since she was enrolled. (Mother's testimony, Petitioner's Exhibit 34)

2. The student was first found eligible for special education services in February 2007 when she was in pre-kindergarten and attending a DCPS elementary school, School B. Prior to being determined eligible the student was referred by her classroom to the student support team ("SST") at School B because of the student's difficulty in retaining academic information and over-activity. The student's parents provided DCPS an independent developmental evaluation of the student conducted in November 2005. DCPS reviewed that evaluation at a January 11, 2007, multidisciplinary team ("MDT") meeting that was recommended as a result of the SST process. The MDT concluded additional assessments were necessary. (Petitioner's Exhibit 17-1)

3. DCPS conducted initial evaluations (a psychological evaluation and an occupational therapy ("OT")) of the student in January 2007 when the student was just turning age five and in pre-kindergarten. (Petitioner's Exhibit 16 & 17)

4. The initial psychological evaluation included cognitive, academic achievement and visual motor assessments. The evaluator concluded the student had a full-scale IQ score of 89 and her overall cognitive functioning was in the average range. The student's academic functioning was not commensurate with her cognitive profile. The student's visual perception was assessed to be in the low average range. The evaluator concluded the student would require interventions to access the general education curriculum. (Petitioner's Exhibit 17-3)

5. On February 16, 2007, DCPS conducted its OT evaluation. The evaluation assessed the student's visual perception, visual motor integration, and sensory behaviors. The evaluation revealed the student's visual perception was on the lowest end of the average

[14] 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.

scale. Her visual motor integration (ability to coordinate eye-hand actions) was at the 12th percentile. The sensory checklist revealed the student was sensory seeking of tactile, pressure and movement to assist with her focus and attention. The evaluator recommended the student receive direct OT services. (Petitioner's Exhibit 16-1, 16-2, 16-3, 16-6)

6. The student was found eligible with a disability classification of speech language impairment ("SLI"). The student was provided an IEP that was updated in June 2008 and on January 15, 2009, while the student was in the first grade. The January 15, 2009, IEP included academic goals in math and reading, goals in communication and speech and language and motor skills/physical development and classroom accommodations such as extended time for tasks and test taking and repetition of directions. The IEP prescribed 7.5 hours of special instructions per week in the general education setting and 1 hour of "pull out" OT services and consultative speech and language services for 15 minutes per week. (Petitioner's Exhibit 7-1)

7. In February 2009 DCPS conducted a speech and language reevaluation. The student's scores all fell within the average range. The student did not qualify for formal speech and language services, although it was noted she had some minor articulation and expressive deficits. (Petitioner's Exhibit 19-3)

8. In March 2009 DCPS conducted a psychological reevaluation. The same DCPS school psychologist who conducted the student's 2007 psychological evaluation conducted this evaluation. The evaluation consisted of a WISC-IV, Woodcock Johnson III, BASC-2, Clinical Observation of Behavior and a behavioral observation by the evaluator. Although the student's full scale IQ was assessed at the borderline range, the evaluator noted that the student's cognitive performance was consistent with the previous psychological evaluation. The student's verbal reasoning abilities were in the average range. In academic achievement the student was assessed to have average reading abilities. However, her math abilities were mixed. Her calculation skills were measured as extremely low. Her ability to identify the correct math operation and use it was measured as average. The student's social/emotional and behavioral functioning was found to be appropriate. (Petitioner's Exhibit 18)

9. On March 12, 2009, DCPS updated the student's IEP and removed speech language therapy services and changed the student's disability classification from SLI to SLD. The speech and language consult services were eliminated. The goals and objectives in math, reading and motor were sustained and the student was prescribed 7.5 hours a week of specialized instruction in general education and 60 minutes per week of OT pull out services. (Petitioner's Exhibit 8-1, 8-5)

10. The student continued attending School B through the first and second grade. The student progressed academically and socially during her first grade year and the parents were hopeful that with the services the student was being provided she would remain successful at School B. (Mother's testimony, Petitioner's Exhibits 8, 9, 11-2)

11. Soon after starting the second grade the student began having difficulties at school. On September 30, 2009, the student's mother expressed to the student's classroom teacher that the student was struggling with the second grade curriculum and requested a meeting with the teacher. On October 7, 2009, the parents sent an email to the School B principal expressing concern that the student, unlike her success during first grade, was experiencing academic difficulties in her second grade classroom and a result was feeling anxious and reluctant to attend school. The parents requested a meeting with the principal. (Petitioner's Exhibits 10 & 11)

12. As the academic demands increased during second grade the student could not keep up. She became isolated from peers and her self-esteem plummeted. The student's classroom teacher seemed inflexible which the mother believed increased the student's anxiety. The classroom teacher expressed to the parent that the special education teacher was primarily focused on the student's needs, as the student was the only special education student in the classroom. The student was not receiving homework as other student's in the classroom were. The student's original special education teacher for second grade was on maternity leave and the student was provided another special education teacher who provided the student services. (Mother's testimony)

13. On November 12, 2009, DCPS convened an IEP meeting for the student. The parents attended. The IEP team revised the student's IEP to increase her OT services to 90 minutes per week. The parents requested the additional OT services to help address the student's increased sensory behaviors. The student missed some of her OT services during the school year and DCPS at the end of the year offered make-up services. However, the parents decided not to take advantage of the make-up services. (Parent's testimony, Petitioner's Exhibit 9-1, 9-7)

14. In March 2010, one of the student's male classmates was physically aggressive with the student and on one occasion choked her. The parents were concerned the male student would be returned to the classroom and continue to harass the student and requested that the School B principal change the student's classroom, which was done. (Mother's testimony, Petitioner's Exhibit 13)

15. The student changed classrooms for the remainder of the second grade and had a different classroom teacher. The student's second grade report card reflected that she was performing below basic in Reading/English Language Arts and performing at basic for Math and Science and proficient in Social Studies. She was promoted to third grade. By year end the student had mastered two of her five IEP Math goals and was progressing on the remaining three. She was progressing on all of her five Reading goals but has mastered none. The student was progressing in four of her five OT goals and mastered one. (Petitioner's Exhibit 14 & 15)

16. The parents had a speech language evaluation conducted in May 2010 by School A. The evaluation concluded the student had a mixed expressive and receptive language disorder and recommended the student receive weekly individual and group speech and language therapy. (Petitioner's Exhibit 22-15)

17. As a result of the student's academic and emotional difficulties during second grade the student's parents chose not to re-enroll the student at School B for third grade during the 2010-2011 school year. Rather, the parents enrolled her at School A after she had attended a summer language program there during the summer of 2010. (Mother's testimony)

18. In August 2010 the parent had an independent neuropsychological evaluation conducted seeking feedback regarding the student's overall intellectual-cognitive, academic and social emotional functioning. The evaluator noted the student showed some Attention Deficit Hyperactivity Deficit ("ADHD") features; she was highly inattentive and distractible with very poor focus and concentration. The student also showed difficulties with planning, organization and task completion. The student's full scale IQ was measured at 81 in the low average range. The evaluator concluded the student was within the low-average range of intelligence. The evaluator also conducted the Gilliam Asperger Disorder Scale and the student was found to have a borderline probability of Asperger Disorder. With regard to language development the student was assessed at the low-average to average range in most areas. I n academic achievement the student was assessed at a first grade equivalency in Reading and Math and at the kindergarten level in written expression and oral language. The evaluator concluded the student has a significant pattern of Developmental Dyslexia involving linguistic and visual-perceptual processing deficits related to children who have Alcohol/Drug Related Birth Defect Syndromes. The evaluator recommended the student be in a very intensive school program that can provide one-on-one intervention through out the day. She is not the type of student who can handle any type of immersion classroom and she has a global pattern of developmental difficulties related to Fetal Alcohol Spectrum Disorder. (Petitioner's Exhibit 19-5, 19-7, 19-8, 19-9, 19-11, 19-24)

19. On October 28, 2010, School A developed an IEP for the student for the 2010-2011 school year. School A conducted at Woodcock Johnson-III assessment of the student as basis for the IEP. The student was assessed at approximately the start of the second grade level in Reading and Written Expression. The student's Math skills were assessed at just below beginning second grade level. The IEP prescribed specialized instruction and goals in Reading, Math, Written Expression and related services of speech and language therapy and social/emotional counseling. The IEP concluded the student's least restrictive environment ("LRE") was an out of general education setting. (Petitioner's Exhibit 37-2, 37-27)

20. The parents informed DCPS in writing that student was not returning to School B. On December 21, 2010, as part of their request for special education services for the student, the parents submitted all the required paperwork to the Private and Religious school Office of DCPS at Early Stages along with evaluations, report cards, previous DCPS IEPs and the educational plan prepared for her at School A. These documents contained the parents' written request for a full time special education program for the student. Early Stages wrote the parents instructing them to take a one-page document to School B. The parents delivered that page to School B in early January 2011. (Mother's testimony, Petitioner's Exhibits 24 & 25)

21. During the student's attendance at School A's summer language program the student received intensive phonological and reading fluency development. The student showed enthusiasm and a good work ethic and significantly developed her reading and spelling skills. The student required redirection to stay on task due to attention difficulties and continued intervention and individualized speech language therapy was recommended for the student following the summer program. (Petitioner's Exhibit 38-1, 38-5, 38-12)

22. At School A the student receives both individual and group speech and language therapy. The speech and language service provider also participates with the student's teachers and faculty to review and coordinate services and their integration in the classroom. The student is reluctant to ask questions in the classroom due to her language difficulties. The student has made progress relative to these goals since she has been attending School A. testimony, Petitioner's Exhibit 37)

23. The student has had two IEP meeting since she began attending School A. On May 19, 2011, School A updated the student's IEP in preparation for the upcoming school year. The parent's were provided a report of the student's progress relative to her speech and language goals when the updated IEP was provided to them on May 19, 2011. testimony, Petitioner's Exhibits 40)

24. Since attending School A the student has become more expressive and confident and has displays greater self-esteem as compared to when she attended School B. (Ms. Otten's testimony, Dr. Booker's testimony)

25. Since the student has been attending School A she the student's reading has improved. She recently picked out a chapter book to read and tries to sound out words when reading with her father. She is reading poems by herself. The student's verbal communications skills are improved and she more able to explain what she means and more engaging with adults. Her writing has also improved. (Father's testimony)

26. On February 15, 2011, DCPS convened an IEP meeting, found the student eligible for special education as a student with a learning disability, created new academic, OT and social emotional goals, and prescribed special education instructional hours to 13, with 2.5 in general education. The student was also to receive 3.5 hours a week of related services in the categories of OT, SLP and behavioral support. (Petitioner's Exhibit 28 & 30)

27. On March 15, 2011, developed an IEP for the student. The parents participated in the meeting along with an education consultant they had engaged to assist in the parents in meetings with DCPS and the development of the student's educational program and placement. The IEP team met again on March 21, 2011. The parents requested DCPS provide the student a full-time special education program. DCPS IEP team members did not agree that the student was in need of a full-time program and placement and issued a prior written notice which stated that a full-time placement was not the least restrictive environment ("LRE") for the student. The team at School B asked for observations at School A. (Petitioner's Exhibits 29, 30, 31)

28. The IEP team reconvened on March 15, 2011 for further discussion of the IEP. Among other things, at this meeting the parents and the educational consultant requested a full time program for the student and objected to the 16.5 hours of special education that DCPS proposed because it was not sufficient or intense enough to meet the student's needs. DCPS staff spoke of changes at School B and that with additional supports provided by DCPS personnel the student would likely be successful. The parents did not change their position on the desire for a full-time out of general education placement for the student. (Petitioner's Exhibit 29)

29. The parent's had hearing evaluation conducted of the student at Georgetown University Hospital in January 2011. Based on the evaluation the student is not a candidate for hearing aides. The evaluation revealed the student had a slight hearing loss in the right ear and mild loss in the her left her and that she is hypersensitive to noise which could be indicative to fluid in the ears. The DCPS audiologist participated in the student's February 15, 2011, IEP meeting and as a result of the hearing evaluation recommended a FM amplification system be used in the student's classroom if she attended School B so the sound would not be as direct and powerful for the student. She also recommended consultation to monitor the occurrence of fluid in the ear to increase the student's comprehension in the classroom. The FM system usually assists with the comprehension of all students in the classroom. testimony, DCPS Exhibit 2, Petitioner's Exhibit 23)

30. The DCPS Autism program coordinator attended two of the student's IEP meetings convened by DCPS and she was called upon to develop a behavior intervention plan ("BIP") for the student. If the student were to attend School B the DCPS Autism team would train the school staff to work with the student regarding her autistic like behaviors. Basic training would be provided to the general education teacher and the school social workers. testimony)

31. Following the March 15, 2011, meeting and based on the parent's request that the student have a full time special education IEP and placement despite the conclusion of the DCPS team members, DCPS referred the student's case to DCPS headquarters for an observation to be conducted to determine if a more restrictive environment as the parent requested should be considered. DCPS maintains written guidelines that are to be followed when a change to a more restrictive environment is suggested. As a result of the referral, a DCPS special education supervisor conducted an observation of the student at School A. Subsequent to the observation DCPS reconvened an IEP/placement meeting on May 10, 2011, at which the observation results were shared. DCPS maintained that the placement and LRE that had been agreed to at the previous IEP meeting on March 15, 2011, remained appropriate for the student. The student's IEP was amended to include ESY services and goals. On May 11, 2011, DCPS issued a prior written notice stating that student's educational placement was School B. testimony, testimony, Petitioner's Exhibit 34, 35, 36)

32. School A is a non-public school in Washington, DC designed to meet the needs of students with learning disabilities and attention challenges who have average and above average ability. During SY 2010-11 DCPS funded approximately 93 students at School A. School A is on the OSSE approved list of non-public schools. The related services of speech and language, OT and psychological counseling are available to students at School A if their IEP includes such services. Many students at School A have attention challenges. A significant number have social skills deficits and unusual classroom behaviors which would mark them as vulnerable for negative peer attention in a general education setting. The small student teacher ratios, close and individualized adult supervision and the classroom management approaches used at School A help students gradually learn the techniques that will enable them to be more socially acceptable and self reliant. testimony)

33. The students at School A are at average or above average intelligence and the program finds strengths to build on and improve self-esteem and do this primarily through the arts program. Some children might be described as Asperger systems similar to autism but not autism. In the classroom there are twelve to thirteen students. Half the children are in another class or activity. There are either six or seven with the three adults to work with the six or seven children during the reading period. The classes are multi-aged. At least a year spread. The students are placed together so that children have a mix and exposure to students with varied skill levels. There are up to ten children in the art, science and club classroom. Children each lunch in the classroom for half hour. It is used as a time for socialization and coaching. School A provides related services. testimony)

34. Each teacher has a behavior plan – using a positive reward system the students earn educational money each day and there is time during the week they can buy at the school store. There are ten students funded by the District of Columbia at School A at the school is on the DC approved list from OSSE. Every student in the school has an IEP. The parent has input and it is a regular IEP process. Any related service providers participate in the IEP meeting and choose goals for the IEP. After the IEP meeting the IEP is updated each quarter to see how the student is doing relative to the goals. There is a mid-year meeting and/or report with the parents. In mid-spring there is an annual meeting to review goals for following year. testimony)

35. The parents paid tuition and fees for the student at School B since March 15, 2011, in the following amounts: and incurred transportation costs in the amount of for transporting the student to and from school at a rate of .50 per mile. In addition the parents intended to have the student participate in School A's summer program and paid the costs of (Petitioner's Exhibit 39-1, 39-3)

36. The educational consultant prepared a compensatory education plan to compensate the student for her time at School B following the November 2009 IEP meeting when she believed the student's specialized instruction should have been increased and the IEP should have prescribed additional services until June 2010. The consultant recommended the following as compensatory education: either one semester at School A with two

summers of the phonological awareness reading fluency program offered by School A or in the alternative three summers of that program along with morning academic programming in small structured classes at School A during those three summers. In addition Petitioner requested 44 weeks of one-hour sessions per week of emotional counseling. (Dr. Booker's testimony, Petitioner's Exhibit 42)

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 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [15] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

34 C.F.R. § 300.17 provides that a free appropriate public education or FAPE means special education and related services that- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.

Issue (1): 1. Did DCPS deny the student a free and appropriate public education ("FAPE") by failing to appropriately revaluate the student during the 2009-2010 school year so as to fully address aspects of the student's behavior and learning?

Conclusion: DCPS conducted appropriate reevaluations of the student. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

34 C.F.R. § 300.303 provides, regarding reevaluations:

> (a) A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with Sec. Sec. 300.304 through 300.311--
>
> (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation;

[15] 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.

or (2) If the child's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under paragraph (a) of this section--

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary. [16]

In this case DCPS conducted revaluations of the student in February and March 2009. The student was not due triennial reevaluation until 2012. Petitioner asserts that DCPS should have conducted a reevaluation of the student while she was in the second grade due to her academic and emotional difficulties that school year. There was no specific request made by the parents. The parent testified that during the student's first grade year the student adjusted well, liked school and was progressing. It was not until the second grade year that the student began to display difficulties. In hindsight, after the parent has conducted an independent evaluation and after the parent has removed the student from DCPS, it is apparent the student had a substantially more complex profile that originally thought.

However, the parents are now seeking reimbursement for an evaluation that was apparently intended as preparation for the student to enroll in a private school. It would inequitable for DCPS to now be now required to incur the cost of this evaluation. When the student's began to display difficulties, DCPS convened an IEP meeting and amended the student's IEP to increase OT services. It appears that once the student's classroom teacher was changed in the second semester some of her emotional and behavioral difficulties improved. The Hearing Officer concludes DCPS took reasonable efforts to address the student's needs and there was no denial of FAPE to the student for DCPS not conducting a reevaluation of the student during the 2009-2010 school year.[17]

Issue (2): Did DCPS deny the student a FAPE by failing develop and implement an appropriate IEP, program and placement during the 2009-2010 school year for the student?

Conclusion: DCPS provided the student an IEP during the 2009-2010 school year that was reasonably calculated to provide her educational benefit. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

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[16] 34 C.F.R. § 300.305 (b) provides, regarding additional requirements for reevaluations: (B) In the case of a reevaluation of a child, [the IEP Team and other qualified professionals, as appropriate, must-- (1) Review existing evaluation data on the child, including] whether the child continues to need special education and related services; and (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum...(d)(1) If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of-- (i) That determination and the reasons for the determination; and (ii) The right of the parents 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. (2) The public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section unless requested to do so by the child's parents.

[17] Petitioner also asserted the DCPS evaluation reflected the student had borderline intelligence rather than average intelligence. However, the DCPS evaluator noted the student's cognitive functioning was comparable to that of the initial evaluation which was in the average range. The student's IEP also reflected the student could function in a general education setting which belies the assertion that DCPS thought the student had lower cognitive abilities and thus expected less of her.

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.

In this case the student's IEP was reasonably calculated to provide educational benefit and although the student might have in hindsight benefited from increased specialized instruction, based upon the student's success during her first grade year with the special education services provided, it was reasonable for the School B staff to continue the student's same educational program. Although Dr. Booker testified that it would have been beneficial to first increase the student's specialized instruction prior to placing in her in a full time out of general education setting, the student's progress as reflected by her report card and her special education progress reports reflected the student was at basic skills level in most areas and was making some progress toward her goals although most were not mastered.

"It may well be inappropriate to assess the validity and sufficiency of an IEP solely by the student's lack of academic success after it is implemented. There is necessarily a time lag between the creation of an IEP, its implementation by DCPS, and judicial evaluation of its sufficiency. If progress or lack of it during that period of time was to become the only criterion of cusses, the court would be judging the sufficiency of the IEP by a single standard rather than by the nuanced, deferential and multi-faceted approach it is supposed to use. See *D.F. ex rel. N. F. v. Ramapo Cent. Sch. Dist.*, 430 F.3d 595, 598-99 (2d Cir. 2005) (quoting Roland M. V. Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990) *See also Thompson R2 J Sch. Dist. V. Anderson Matrejek v. Brewster Cent. Sch. Dist.,* 471 F. Supp. 2d 415, 431 (S.D.N.Y. 2005)

In assessing whether a FAPE has been provided, a court must determine whether (1) the school complied with the IDEIA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *Bd. Of Educ. V. Rowley*, 458 U.S. 176 206-07 (1982) Jolloh v. District of Columbia 535 F. Supp. 2d. 13, 16 (D.D.C. 2008). In considering the substantive validity of an IEP pursuant to the second part of this test, a number of circuits have held that a court must judge prospectively. [B]ecause the question… is not whether the IEP will guarantee some educational benefit, but whether it is

reasonably calculated to do so, ... the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. Neither the statute nor reason countenance "Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement. S.S. Howard Road Academy, 585 F. Supp. 2d. 56, 51 (D.D.C. 2008)

Based on the evidence presented, despite the parent's expressed concern that the student was having difficulty during the second grade year, the Hearing Officer does not conclude that the preponderance of the evidence demonstrated the student's IEP during the 2009-2010 school year was inappropriate.

Issue (3): Did DCPS deny the student a FAPE during the 2009-2010 school year by failing to consistently provide the student with the 7.5 hours of specialized instruction on her IEP by certified special education teacher(s)?

Conclusion: DCPS provided or at least offered to provide all special education and related services prescribed by the student's IEP. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

Petitioner asserts that the student was not consistently provided the specialized instruction prescribed by her IEP during the 2009-2010 school year. However, the parent testified that although the student's initial special education teacher was on maternity leave there was a special education teacher assigned to provide the student services. Dr. Booker also testified that during her observation a special education teacher was assisting the student in the classroom. Although the student's IEP progress report in the record did not reflect comments in the first semester of the school year, this evidence was insufficient to demonstrate that any specialized instruction was missed. Petitioner's witnesses made no assertion the student had missed any specialized instruction. There was evidence that all the student's OT services were not provided. However, DCPS offered to make these services up. The parents declined the make-up service and are not seeking compensatory education for the missed OT services.

Petitioner requested that the student be provided compensatory education for the student being in an inappropriate program during the 2009-2010 school year and for the student having not been provided all of her special education services.

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.

Compensatory Education is an equitable remedy crafted to remedy educational deficit created by "an educational agency's failure over a given period of time to provide FAPE to a student" Id.

"Appropriate compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place." Id. The student's right to receive compensatory education is reasonable in light of DCPS' continued failure to provide FAPE to this student.

Based on the evidence presented, despite the parent's expressed concern that the student was having difficulty during the second grade year, the Hearing Officer does not conclude that the preponderance of the evidence demonstrated the student's missed any special education services (other that OT which the parent was offered make-up services for but declined) such that she is due any compensatory education.

Issue (4): Did DCPS deny the student a FAPE by developing an inappropriate IEP and placement for the student on March 15, 2011, when it provided an IEP with only 13.5 hours of specialized instruction and 3.5 hours of related services at School B?[18]

Conclusion: DCPS did not develop an appropriate IEP for the student with an appropriate LRE and placement. Petitioner sustained the burden of proof by a preponderance of the evidence.

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.

The evidence demonstrates that in academic achievement the student was assessed in August 2010 at first grade equivalency in Reading and Math and at the kindergarten level in written expression and oral language. The evaluator concluded the student has a significant pattern of Developmental Dyslexia involving linguistic and visual-perceptual processing deficits related to children who have Alcohol/Drug Related Birth Defect Syndromes. The evaluator recommended the student be in a very intensive school program that can provide one-on-one intervention throughout the day. "She is not the type of student who can handle any type of immersion classroom and she has a global pattern of developmental difficulties related to Fetal Alcohol Spectrum Disorder."

More recently, the Woodcock Johnson-III assessment of the student at School A assessed the student at approximately the start of the second grade level in Reading and Written Expression. The student's Math skills were assessed at just below beginning second grade level. The IEP prescribed specialized instruction and goals in Reading, Math, Written Expression and related

[18] Although DCPS redrafted the student's IEP on May 10, 2011, that IEP also prescribed part-time special education services and not full-time out of general education services and placement.

services of speech and language therapy and social/emotional counseling. The evidence, including the student's recent evaluation demonstrates that she is clearly in need of intensive special education services in a full-time out of general education setting. By contrast the IEP and placement DCPS offered on March 15, 2011, was a immersion program in which the student would be with general education students and in a class size comparable to when she was in second grade at School A. The student's academic deficits and unique learning disabilities warrant a lower student to teacher ratio and more specialized instruction than DCPS has offered that than can apparently be provided in the placement and location DCPS put forth. This Hearing Officer concludes that the IEP developed for the student including the educational placement and LRE are inappropriate for this student and result in a denial of FAPE.

The student has been attending School A and has gained education benefit since her attendance. Once DCPS provided the student an IEP on March 15, 2011, it was obligated to provide the student an appropriate placement. The Hearing Officer concludes based on the evidence of the services provided to the student at School A she was provided educational benefit and consistent with "decisions in *Burlington and Carter*...IDEA authorizes reimbursement for the cost of private special education services when a school district fails to provide FAPE and the private-school placement is appropriate. *Forest Grove District v. T.A.* 129 S. Ct. 2484 (U.S.S.C. 2009)

Issue (5): Did DCPS deny the student a FAPE by requiring (pursuant to the June, 2010 DCPS Directive "DCPS Guidelines for IEP Team Meetings to Consider Placement to More Restrictive Environment") approval the LRE Team and thus preventing the properly constituted IEP team from promptly considering all of the student's needs and all levels of program that the team may determine the student requires?

Conclusion: DCPS did not require approval of the LRE team and prevent the IEP team from developing an appropriate IEP for the student with an appropriate LRE and placement. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

The parents assert there was a referral to an LRE team which was the result of the June 2010 Directive–DCPS Guidelines for IEP Meetings to Consider Placement to More Restrictive Setting–approved by DCPS.

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.

The evidence demonstrated that following the March 15, 2011, meeting and based on the parent's request that the student have a full time special education IEP and placement, despite the conclusion of the DCPS team members, DCPS referred the student's case to DCPS headquarters for an observation to be conducted to determine if a more restrictive environment as the parent requested should be considered. DCPS maintains written guidelines that are to be followed when a change to a more restrictive environment is suggested. As a result of the referral, a DCPS special education supervisor conducted an observation of the student at School A. Subsequent to the observation DCPS reconvened an IEP/placement meeting on May 10, 2011, at which the observation results were shared. DCPS maintained that the placement and LRE that had been agreed to at the previous IEP meeting on March 15, 2011, remained appropriate for the student. The student's IEP was amended to include ESY services and goals and on May 11, 2011, DCPS issued a prior written notice stating that student's educational placement was School B.

Despite this apparent extra effort by DCPS to consider the parents' request for the student to be in a full-time out of general education program and placement, the evidence does not demonstrate that the student's placement decision was made outside the IEP team or that the placement was directed by DCPS headquarters. The existence of the DCPS policy and procedure for considering more restrictive placements did not interfere with the IEP team making a placement decision for the student on March 15, 2011, which was confirmed by the team on May 10, 2011. The Hearing Officer concludes there was no violation by DCPS regarding the student's placement decision and no denial of FAPE in this regard.

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.*

Petitioner sought the student's placement for the 2011-2012 school year at School A. Although this Hearing Officer has concluded based on the evidence that the LRE for the student is not the combination special education program DCPS proposed for the student but instead a full-time special education program outside the general education setting, this Hearing Officer does not conclude it is appropriate to automatically grant Petitioner this relief. The school year has yet to begin and DCPS should be provided the opportunity based upon the conclusions and directives of this decision to first propose an appropriate full-time out of general education placement and location of services for the student.

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.

Accordingly, the Hearing Officer directs DCPS in the Order below to promptly convene an IEP/placement meeting to revise the student's IEP consistent with this decision and determine and an appropriate placement with the parents' full participation and full consideration of the placement/location of services proposed by the parent.

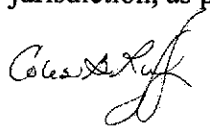
ORDER:

1. DCPS shall promptly reimburse Petitioner the cost of the student's tuition and fees for the period the student was to be provided a full-time special education placement following the student's March 15, 2011, IEP meeting through the end of ESY summer 2011 including transportation costs. The total amount of the reimbursement is for tuition and fees for transporting the student to and from school and for the student's ESY services at school A. Petitioner shall provide appropriate documentation of payment of the charges to DCPS prior to reimbursement.

2. Within thirty (30) calendar days of the issuance of this Order DCPS shall convene an IEP/placement meeting to revise the student's IEP to provide for a full-time special education placement with corresponding hours of specialized instruction and to and determine an appropriate placement/location of services for the 2011-2012 school year.

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: July 30, 2011