



## **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 on April 1, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2005.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student resides in the District of Columbia (D.C.) with her parent and is a child with a disability pursuant to IDEA with a disability classification of multiple disabilities (“MD”) including emotional disability (“ED”) and specific learning disability (“SLD”). The student attended a private full time special education day school (“School A”) during school year (“SY”) 2011-2012 and SY 2012-2013.

While attending School A the student progressed well both academically and behaviorally. An individualized educational program (“IEP”) was developed for the student at School A on October 18, 2012. The IEP prescribed the following weekly services outside general education: 26 hours per week of specialized instruction, 1 hour per week of behavioral support and 30 minutes per week of occupational therapy (“OT”) services.

DCPS convened an IEP meeting for the student at School A on May 7, 2013. The IEP team discussed the student’s transition to a less restrictive school placement and determined that the student required a reevaluation to determine the types of supports the student would need when such a transition occurred. The student’s parent provided written consent for the reevaluation to DCPS on May 13, 2013.

On June 2, 2013, a meeting was convened at School A at which the team discussed the student’s anxiety about transitioning out of School A. The DCPS representative recommended to the team that the student would attend a self-contained special education setting in a DCPS school.

In July 2013 DCPS identified a DCPS senior high school (“School B”) as the location to implement the student’s IEP for SY 2013-2014. The student began attending the School B at the start of SY 2013-2014. In October 2013 the special education case manager at School B updated the student’s IEP; that IEP is dated October 17, 2013. The services in the student’s October 17, 2013, IEP remained the same as her October 18, 2012, IEP and the least restrictive environment (“LRE”) remained the same.

From the time the student began attending School B she was enrolled in all general education classes contrary to what her IEP prescribed. The student’s began experiencing academic and emotional difficulties and eventually stopped attending school before the mid year break. The student has not returned to School B and has not been attending school at all since then.

On February 4, 2014, Petitioner filed the due process complaint asserting the student's transition to School B was a failure. Petitioner asserted, inter alia, that the student's October 18, 2013, IEP is inappropriate and both School B and its self-contained program that the student was supposed to attend are inappropriate for the student. Petitioner seeks as relief the student's placement and return to School A for the remainder of SY 2013-2014. Petitioner also seeks an independent OT evaluation.<sup>2</sup>

DCPS filed a timely response to the complaint on February 11, 2014, and asserted there has been no denial of a free and appropriate public education ("FAPE") to the student. DCPS asserted the student's IEP is the same as when she attended School A and is appropriate and DCPS attempted to reevaluate the student but the student was unavailable for testing; the student was not yet due for triennial evaluations and there was no request by the parent for any specific evaluation. DCPS also asserted School B is an appropriate location of services and the selection of a location of services is entirely at the discretion of the local educational agency ("LEA") as long as the location is capable of implementing the student's IEP, which School B is.

A resolution meeting was held February 18, 2014. No issues were resolved at the resolution meeting. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on March 7, 2014, and ended (and the Hearing Officer's Determination ("HOD") is due) on April 20, 2014. The Hearing Officer convened a pre-hearing conference on March 12, 2014. On March 13, 2014, the Hearing Officer issued a pre-hearing order that outlined the issues to be adjudicated.

### **ISSUES:**<sup>3</sup>

#### **The issues adjudicated are:**

1. Whether DCPS denied the student a FAPE by failing provide the student an appropriate IEP for SY 2013-2014.
2. Whether DCPS denied the student a FAPE by failing to evaluate the student in all areas of suspected disabilities when the parent provided consent to DCPS for a reevaluation in May 2013.
3. Whether DCPS denied the student a FAPE by failing to provide the student an appropriate location of services at School B.

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<sup>2</sup> Petitioner initially also requested an independent comprehensive psychological, independent functional behavior assessment ("FBA") and compensatory education. Prior to the hearing DCPS granted Petitioner an independent psychological evaluation. Petitioner's counsel stated at the outset of the hearing that Petitioner is now seeking the student's placement at School A also as compensatory education and withdrew the request for a psychological evaluation and a FBA.

<sup>3</sup> The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may 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. Petitioner withdrew at the outset of the hearing the issue related to the student's transition (reintegration) plan to a less restrictive setting.

## **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 21 and Respondent's Exhibits 1 through 14) that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.<sup>4</sup>

## **FINDINGS OF FACT:<sup>5</sup>**

1. The student resides in D.C. with her parent and is a child with a disability pursuant to IDEA with a disability classification of MD including ED and SLD. The student attended School A during SY 2011-2012 and SY 2012-2013 in ninth grade and tenth grade respectively. (Petitioner's Exhibits 1-1, 8-2)
2. While attending School A the student progressed well both academically and behaviorally. An IEP was developed for the student at School A on October 18, 2012. The IEP prescribed the following weekly services outside general education: 26 hours per week of specialized instruction, 1 hour per week of behavioral support and 30 minutes per week of OT services. (Student's testimony, Witness 1's testimony, Witness 2's testimony, Petitioner's Exhibit 1-1, 1-8)
3. DCPS convened an IEP meeting for the student at School A on May 7, 2013. The IEP team discussed the student's transition to a less restrictive placement and determined that the student required a reevaluation to determine the types of supports the student would need when such a transition occurred. There was a discussion of a psychological evaluation but no discussion of the need for an OT evaluation. The student's parent was not present for the meeting but the student was and agreed to take the evaluation consent form home for her parent to sign. (Witness 2's testimony, Petitioner's Exhibit 4-1)
4. The student's parent provided written consent for the reevaluation to DCPS on May 13, 2013, to "determine if [the student] is eligible or continues to be eligible for special education and to determine educational needs." (Petitioner's Exhibit 6-1)
5. On June 2, 2013, a meeting was convened at School A at which the team discussed the student's anxiety about transitioning out of School A. The DCPS representative recommended to the team that the student would attend a self-contained setting in a

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<sup>4</sup> A notice of appear was issued to the student's School B case manager; however, the witness did not appear for the hearing. Consequently, the Hearing Officer considered as fact the statements attributed to the case manager in Petitioner's Exhibit 10 regarding the services provided to the student at School B and the inappropriateness for the student of School B's self contained special education program.

<sup>5</sup> The evidence that is the source of the Finding of Fact ("FOF") 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 more than one party separately the Hearing Officer may only cite one party's exhibit.

DCPS school. The student was simply moving from a separate day school to a separate special education class. The team agreed to a gradual transition for the student to a less restrictive setting. (Witness 2's testimony, Petitioner's Exhibit 8-2, 8-3, Respondent's Exhibit 3)

6. DCPS attempted to conduct a comprehensive psychological reevaluation of the student after obtaining the parent's consent. The DCPS psychologist contacted the student's parent and was instructed by the parent to contact the student directly on her mobile phone. The psychologist made several attempts to contact the student but the student was unavailable for testing. (Parent's testimony, Respondent's Exhibits 6, 7)
7. In July 2013 DCPS identified School B as the location to implement the student's IEP for SY 2013-2014. (Respondent's Exhibits 5, 8)
8. The student began attending the School B at the start of SY 2013-2014. In October 2013 the special education case manager at School B updated the student's IEP. The School B case manager had a telephone conversation with the student's parent in October 2013, but the parent never attended an IEP meeting at School B. (Parent's testimony, Petitioner's Exhibit 2 )
9. The student's current IEP dated October 17, 2013, prescribes the following weekly services outside general education: 26 hours per week of specialized instruction, 1 hour per week of behavioral support and 30 minutes per week of OT services. (Petitioner's Exhibit 2-1, 2-12)
10. The services in the student's IEP dated October 17, 2013, remained the same as her October 18, 2012, IEP and the LRE remained the same as the previous IEP. (Witness 2's testimony, Petitioner's Exhibits 1-9, 2-12)
11. From the time the student began attending School B she was enrolled in all general education classes and contrary to what her IEP prescribed she received no special education instruction outside general education. The student's began experiencing academic difficulties because the work in her classes was too difficult and she received little or no support from the special education staff at School B. Eventually she stopped attending school sometime before the mid year break. The student has not returned to School B and has not been attending school at all since then. Due in part to the resulting anxiety the student experienced in the months she attended School B, she had at least two psychiatric hospitalizations after she stopped attending School B. (Student's testimony, Parent's testimony, Petitioner's Exhibit 9)
12. School B has a self contained special education program that can provide the out of general education services that are contained in the student's current IEP. (Witness 3's testimony)
13. Petitioner filed the current due process complaint on February 4, 2014. DCPS convened a resolution meeting that the student's parent attended along with her legal counsel. The

student's School B case manager also attended and stated during the meeting that at School B the student was receiving all her specialized instruction in the general education setting with an "inclusion" model and stated that the self-contained program at School B was inappropriate for the student because she is too mature for that program and her being in that program would only further hinder her academic progress. (Petitioner's Exhibit 10-3)

14. The student benefitted from the small group instruction and related services she was provided when she attended School A. The student has low academic skills but can function well academically and behaviorally and make academic progress when provided the appropriate supports. The student can return to School A and there this a space for her in the school's special education program which has proven to be an appropriate placement for her in the past. School A has a OSSE COA and its tuition and fees are approved by OSSE. (Witness 1's testimony)

### **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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.<sup>6</sup> *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.

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<sup>6</sup> 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.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. 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 provide the student an appropriate IEP for SY 2013-2014.

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student’s October 17, 2013, IEP is inappropriate or prescribed an LRE different that what she had when she attended School A.

“The IEP is the “centerpiece” of the IDEA’s system for delivering education to disabled children,” *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (*quoting Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch .Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.” *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009).

The evidence demonstrates that the student’s IEP as updated in October 2013 after she began attending School B prescribed a placement and LRE that was no different than when she attended School A, specifically, all the student’s services are to be provided outside the general education setting.<sup>7</sup> The student’s school location was changed and she was to attend a program at School B where all her services would continue to be provided outside general education. Petitioner made no other challenge to the appropriateness of the student’s current IEP other than the placement or LRE it prescribed. Because the facts indicate that the current IEP prescribed a full time out general education placement, the Hearing Officer concludes that that Petitioner did not sustain the burden of proof that the student’s October 17, 2013, IEP is inappropriate or that the student was denied a FAPE in this regard.

**ISSUE 2:** Whether DCPS denied the student a FAPE by failing to evaluate the student in all areas of suspected disabilities when the parent provided consent to DCPS for a reevaluation in May 2013.

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<sup>7</sup> FOF #s 9, 10

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE by not conducting a reevaluation.

34 C.F.R. §300.303 (a)(1) requires that the student be reevaluated when the public agency determines that the educational or related service needs, including improved academic achievement and functional performance of the child warrants a reevaluation.

DCPS was contemplating returning the student to a less restrictive school setting, therefore, the team determined that the reevaluation was needed and the student's parent provided consent to DCPS on May 13, 2013. The evidence demonstrates that in June 2013 DCPS attempted to conduct that evaluation. The student's parent attested to the fact that the evaluator contacted the parent and was instructed by the parent to contact the student directly on her mobile phone. After attempts were made to contact the student were unsuccessful the evaluator was unable to complete the evaluation.<sup>8</sup>

The Hearing Officer concludes that DCPS made good faith efforts to complete the evaluation and there was no denial of a FAPE to the student because DCPS did not conduct the evaluation prior to the complaint being filed. DCPS has now authorized Petitioner to obtain an independent psychological evaluation. Thus, the Hearing Officer can grant no further relief to Petitioner regarding that evaluation.

Petitioner also asserted that DCPS should have conducted an OT evaluation; however, the evidence does not demonstrate that DCPS ever agreed to conduct the evaluation or that the student's IEP team ordered that evaluation be completed. Thus, Petitioner did not sustain the burden of proof as to an OT evaluation.<sup>9</sup>

**ISSUE 3:** Whether DCPS denied the student a FAPE by failing to provide the student an appropriate location of services at School B.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that School B is an inappropriate school location for the student.

34 C.F.R. § 300.116(d) requires that in selecting the LRE of a student consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs. According to the Office of Special Education Programs (OSEP): [P]lacement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. 71 Fed. Reg. 46588 (August 14, 2006).

In the present case the IEP team discussed a change in the student's school location at the June 2, 2013, IEP team meeting and the team determined a less restrictive school setting was appropriate

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<sup>8</sup> FOF # 6

<sup>9</sup> However, as a part of the relief for the student' being in an appropriate location of services at School B as discussed below the Hearing Officer directs that DCPS conduct an OT evaluation of the student.

but no specific school was offered at that time. DCPS later notified the parent of the chosen location: School B. When the student arrived at School B she was not provided the special education placement and services that her IEP required. To the contrary, she was thrust into general education classes without support and consequently became emotionally overwhelmed and stopped attending school.<sup>10</sup>

Although there is indication that School B has a self-contained special education program that can implement the service hours in the student's IEP, the Hearing Officer infers (and considers as fact) from the statements attributed to the student's School B special education case manager that (1) School B used the inclusion model in general education classes for this student while she attended School B and that (2) the self-contained program at School B is inappropriate for the student and her placement in that program would only further hinder her academic progress.<sup>11</sup> Consequently, the Hearing Officer concludes that the student's placement at School B was and is inappropriate and denied the student a FAPE.

Petitioner has presented evidence sufficient to demonstrate that the requested relief of the student's placement at School A is appropriate and that School A meets the standards that the Hearing Officer is to consider in granting a private placement.<sup>12</sup> Thus, the Hearing Officer directs in the Order below that the student return to School A.

**ORDER:**

1. Within five (5) school days of the issuance of this Order DCPS shall place and fund the student's attendance for the remainder of SY 2013-2014 at School A (High Road Upper School of Washington D.C.) and provide her transportation services.
2. DCPS shall within 45 calendar days of the issuance of this Order conduct an OT evaluation of the student and convene an IEP team meeting to review the evaluation.
3. All other requested relief is denied.

**APPEAL PROCESS:**

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

*/s/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**

**Date: April 20, 2014**

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<sup>10</sup> FOF # 11

<sup>11</sup> FOF # 13

<sup>12</sup> FOF # 14, *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005)