

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 July 6, 2016, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age ____ and in grade ____.² He is a child with a disability pursuant to IDEA under the classification of multiple disabilities (“MD”) due to emotional disturbance (“ED”) and other health impairment (“OHI”) for Attention Deficit Hyperactivity Disorder (“ADHD”). The student’s parent (“Petitioner”) filed a due process complaint on April 29, 2016, alleging that the District of Columbia Public Schools (“DCPS”) as the local education agency (“LEA”) denied the student a free appropriate public education (“FAPE”) by: (1) failing to comply with the terms and conditions of the August 2, 2013, Hearing Officer Determination (“HOD”); (2) failing to develop an appropriate individualized educational program (“IEP”); (3) failing to provide the student with an appropriate placement/program, and (4) significantly impeding the opportunity of Petitioner to participate in the decision-making process regarding the provision of FAPE by pre-determining the student’s placement.

Petitioners seek as relief that the Hearing Officer find DCPS denied the student a FAPE. Petitioner requests that DCPS immediately place and fund the student at a non-public school (“School A”) where the student currently attends and was unilaterally placed by Petitioner, with transportation, and reimburse School A for all tuition and expenses incurred for the student to date. Petition requests that DCPS convene an IEP meeting within fifteen (15) days to review and revise the student’s IEP, including his behavior intervention plan (“BIP”) as appropriate. Petitioner also wants the IEP team to discuss and determine appropriate compensatory education or in the alternative that DCPS fund an independent evaluation at market price in order to determine appropriate compensatory education.³

On May 10, 2016, the LEA filed a timely response to Petitioner’s complaint, and on June 3, 2016, filed an amended response in which it denies that it failed to provide the student with a FAPE. DCPS contends that since April 29, 2014, Petitioner has made no attempt to contact DCPS to request a meeting or to contest the student’s IEP and placement; the student was unilaterally placed at School A without notice to DCPS in accordance with 34 CFR

² The student’s current age and grade are noted in Appendix B.

³ Petitioner also requested the right, after the evaluation was completed, to file a due process complaint and for the Hearing Officer assigned to that complaint to determine compensatory education. In addition to this request regarding compensatory education made in the complaint, Petitioner presented a witness at hearing who proposed a compensatory education plan she developed that she believed would compensate the student.

§300.148(d).⁴ Additionally, DCPS asserts the student's IEP is dated March 5, 2014, and Petitioner failed to file a complaint within two years of the IEP and all claims arising from the August 2, 2013 HOD, or the March 5, 2014, IEP are barred by the IDEA's two-year statute of limitations.

The parties participated in a resolution meeting on May 17, 2016. The parties did not resolve the complaint and did not mutually agree to proceed directly to hearing. The 45-day period began on May 29, 2016, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on July 13, 2016. Petitioner's witnesses were unavailable for the scheduled hearing date and requested a continuance of the hearing and extension of the HOD due date. Petitioner filed an unopposed motion to extend the HOD due date by twenty-one (21) calendar days that was granted. The HOD is now due on August 3, 2016.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on the complaint on May 31, 2016, and issued a pre-hearing order ("PHO") on June 6, 2016, outlining, inter alia, the issues to be adjudicated.⁵

ISSUES: ⁶

The issues adjudicated are:

1. Whether the LEA denied the student a FAPE by failing to comply with the terms and conditions of the August 2, 2013, HOD, by failing to timely convene the student's eligibility meeting and timely develop an IEP and propose a school placement.
2. Whether the LEA denied the student a FAPE by failing to develop an appropriate IEP for the reason, among others, of failure to prescribe at least 23 hours per week of specialized instruction outside general education.⁷

⁴ The LEA asserts this action should be dismissed and Petitioner should be ordered to: (1) provide consent for DCPS to obtain all of the student's records at School A, (2) agree to a DCPS comprehensive psychological evaluation and functional behavior assessment ("FBA"), (3) agree to a date certain to meet and review and revise the student's IEP as necessary, after receipt of the School A records and completion of evaluations.

⁵ The PHO stated that if DCPS was asserting the 2-year statute of limitations as a defense it should do so by motion to be filed by June 15, 2016. The motion was not timely filed. However, the Hearing Officer allowed the motion despite its untimeliness and heard argument at the outset of the July 6, 2016, hearing on both DCPS' motion to dismiss and for summary adjudication and Petitioner's motion to strike and limit DCPS' defenses filed June 29, 2016, in opposition to DCPS' motion. The decision on the motion is contained in this HOD.

⁶ 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.

⁷ The PHO stated, and the parties agreed at hearing, with regard to this issue, Petitioner was alleging the assertions in paragraphs 63 and 64 of the due process complaint as to what was inappropriate about the student's IEP. Petitioner alleged in the complaint that the IEP dated March 5, 2014, and transmitted to Petitioner on April 29, 2014, is inappropriate for the following reasons:

1) The Consideration of Special Factors section does not list the communication considerations Petitioner and School A articulated at the last IEP meeting.

3. Whether the LEA denied the student a FAPE by failing to provide the student with an appropriate placement/program, to wit: the least restrictive environment (“LRE”) and school placement proposed (School B) are inappropriate because the student’s LRE is allegedly a separate special education school.
4. Whether the LEA denied the student a FAPE by significantly impeding the opportunity for Petitioner to participate in the decision-making process regarding the provision of a FAPE, to wit: in the development of the student’s IEP (dated March 5, 2014, and/or April 29, 2014) and by pre-determining that the student’s school placement would be School B.

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 56 and Respondent’s Exhibits 1 through 34) that were admitted into the record and are listed in Appendix A.⁸ Witnesses’ identifying

-
- 2) The present levels of performance (“PLOP”) for math is not accurate, as standard scores of 88 and 82 cannot both be “low average”.
 - 3) The “progress in general ed. curriculum” sections are not appropriate in math, reading and written expression.
 - 4) The baseline for goal number one in math does not correlate with the proposed goal, thus making the goal immeasurable.
 - 5) The baselines for the emotional, social, and behavioral goals, numbers one(1) and three (3), do not correlate to the goals, thus making them inappropriate and immeasurable.
 - 6) The special education and related services sections are not appropriate. The student needs 23 hours per week of specialized instruction outside of general education, 30 minutes per week of boys group therapy, and 15 minutes per week of individual (1:1) counseling. None of this is currently reflected on the IEP (although “Small groups All boy groups” is written on the LRE page but not explained.
 - 7) Extended time on tests (in addition to subtests) and use of a graphic organizer were not added as classroom and statewide accommodations.
 - 8) No Transportation.
 - 9) The Post-Secondary Plan is almost completely inappropriate: the first page (Page 13) is almost entirely unhelpful and it is obvious that appropriate post-secondary assessments were never conducted despite DCPS’ agreement at the last IEP meeting. (a) In the area of post-secondary education, there are no appropriate long-term and short term goals, no appropriate baselines, no actual transition services prescribed, no transition setting prescribed, no justification for the amount of time prescribed, inappropriate extracurricular activities and community participation listed, and no actual courses of study listed. (b) In the area of employment, there is no appropriate long range goal, an immeasurable and/or compound short-term goal that does not correlate with the long-term goal, an inappropriate/immeasurable baseline for short-term goal, no/inappropriate transition services prescribed, no/inappropriate transition settings prescribed, no justification for the amount of time prescribed, inappropriate extracurricular activities and community participation listed, and no actual courses of study listed. (c) In the area of independent living, an inappropriate/immeasurable long-term goal, an immeasurable and/or compound short-term goal, an inappropriate/immeasurable baseline for the short-term goal, no/inappropriate transition services prescribed, no/inappropriate transition settings prescribed, no justification for the amount of time prescribed, and no/inappropriate extracurricular activities and community participation listed.
 - 10) Nowhere on the IEP does it reflect that the student requires an 11-month program, despite Petitioner and School A stating that he needs this.
 - 11) There were no changes made to the BIP and does not include any actual interventions.

⁸ Any items disclosed and not admitted or admitted for limited purposes were noted on the record and summarized in Appendix A.

information is listed in Appendix B.⁹ The Hearing Officer found all witnesses who testified credible unless otherwise noted although all testimony from the witnesses may have not been deemed relevant and incorporated into any finding of fact.

SUMMARY OF DECISION:

Petitioner sustained the burden of proof by a preponderance of the evidence on all issues. As relief for the denials of FAPE found in the HOD, the Hearing Officer grants Petitioner the requested relief of the student's interim placement at School A, while DCPS completes the other requested relief and develops an IEP and proposes an appropriate placement and awards an independent evaluation from which compensatory education should be determined.

FINDINGS OF FACT: ¹⁰

1. The student is a child with a disability pursuant to IDEA with a MD disability classification including MD and OHI for ADHD. (Petitioner's Exhibit 35-1)
2. On January 7, 2013, before the student was found eligible and while he was attending a DCPS [REDACTED] school, Petitioner sent a letter to DCPS requesting the student be evaluated in order to determine his eligibility for specialized instruction and related services. (Petitioner's Exhibit 1-5)
3. On May 23, 2013, Petitioner filed a due process complaint against DCPS alleging DCPS had failed to identify, locate, and evaluate a student pursuant to Child Find and in the alternative, failed to evaluate the student upon Petitioner's request, and/or failed to timely evaluate upon Petitioner's request. (Petitioner's Exhibit 1-4)
4. A Hearing Officer Determination ("HOD") was issued on August 2, 2013, concluding the student had been denied a FAPE, that DCPS' Child Find obligation with regard to the student had been triggered on March 30, 2012, and the student should have been evaluated and his eligibility or ineligibility for special education should have been determined by August 27, 2012. (Petitioner's Exhibit 1-9)
5. The August 2, 2013, HOD ordered DCPS (1) to fund an independent comprehensive psychological evaluation and an independent FBA; and "(2) Within 10 school days of the completed independent evaluations, DCPS to convene a multidisciplinary team meeting

⁹ Petitioner presented the following witnesses: Petitioner, an independent clinical psychologist, Petitioner's co-counsel who did not participate in the hearing other than as a witness, and an educational consultant who testified about compensatory education. Respondent presented one witness, a DCPS progress monitor assigned to School A. The identifying information for the witnesses is in Appendix B.

¹⁰ The evidence (documentary and/or testimony) that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. 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.

to review the results of the independent assessments/evaluations to determine whether the student is eligible for special education and related services. If the student is eligible for special education and related services, develop an IEP for the student, specifically addressing the needs of the student given DCPS' failure to provide services to the student beginning August 27, 2012.” (Petitioner’s Exhibit 1-11)

6. The Hearing Officer also stated earlier in the HOD the following: “The Petitioner also requested that either DCPS be ordered to discuss and determine compensatory education for the student or DCPS fund an independent evaluation to determine compensatory education. At this point, the student has not been determined to be eligible for special education and related services therefore the issue of compensatory education is not yet ripe. However, should the student be found eligible for special education and related services the student’s IEP Team should discuss the student’s needs in relation to the period he was without services.” (Petitioner’s Exhibit 1-11)
7. In September 2013, an independent comprehensive psychological evaluation and an independent functional behavioral assessment (“FBA”) were conducted. The psychological evaluation assessed the student’s cognitive, academic, social, emotional and behavioral functioning. At the time of the evaluation the student was attending School A, where Petitioner had placed the student unilaterally for school year (“SY”) 2013-2014.
8. The comprehensive psychological evaluation revealed that the student’s cognitive functioning was in the low range compared to others in his age range. The student’s reading abilities were average, his math functioning was low average and his written language abilities were average. The student’s ADHD diagnosis was confirmed and he also met the criteria for Oppositional Defiant Disorder. The evaluation recommended the student be classified for special education under OHI and ED. (Petitioner’s Exhibit 12-6, 12-7, 12-8, 12-9, 12-13, 12-14)
9. The same psychologist who conducted the independent comprehensive psychological evaluation also conducted the independent FBA. The psychologist found that even in a small class setting at School A with structure, individualized attention and redirection, the student was displaying impulsive behaviors, was inattentive, oppositional and disruptive and struggled to complete his work. In the FBA the psychologist recommended, among other things, that the student receive specialized instruction in a full time special education school and be provided in-school therapy and a BIP to address his aggressive and oppositional behaviors. The psychologist was of the opinion that the student should remain in the type of placement he was in at the time of the evaluation: a therapeutic stand-alone school. That was the paradigm in which he was being educated and in her opinion it should be continued. (Witness 1’s testimony, Petitioner’s Exhibit 13-7, 13-8, 13-9)
10. On September 20, 2013, Petitioner’s counsel sent both the independent psychological evaluation and the FBA to the DCPS by email. On October 1, 2013, Petitioner’s counsel

proposed the multidisciplinary team (“MDT”) be convened on October 3, 2013. (Petitioner’s Exhibits 43-1, 44-10)

11. The DCPS compliance case manager confirmed the meeting for October 3, 2013. On October 2, 2013, the DCPS compliance case manager advised Petitioner that the school psychologist was not available on October 3, 2013. (Petitioner’s Exhibit 44-10)
12. After correspondence back and forth between Petitioner’s counsel and DCPS about the date and location of the meeting, DCPS convened the student’s eligibility meeting on November 19, 2013, and reviewed the student’s independent psychological evaluation and FBA and found the student eligible with the MD classification. The team agreed to reconvene to develop the student’s IEP on a later date. (Petitioner’s Exhibits 35-1, 44, 45-8, Respondent’s Exhibits 19)
13. During the November 19, 2013, meeting, the DCPS representative stated, with regard to the number of hours of specialized instruction the student would receive, that the level of hours DCPS proposed was the level the DCPS psychologist thought the student required. The DCPS psychologist had not reviewed the independent FBA prior to the meeting. Petitioner’s counsel expected the student’s BIP to be developed at that meeting but DCPS said it would be done at a subsequent meeting. Petitioner’s counsel objected. (Witness 2’s testimony, Petitioner’s Exhibits 27-2, 27-3, 28, 29)
14. A second MDT was scheduled for December 10, 2013, but did not occur until January 10, 2014. Petitioner and her counsel participated along with a representative from DCPS and the student’s special education teacher at School A. During the meeting, DCPS reviewed a draft IEP DCPS had developed. Petitioner’s counsel and the student’s School A special education teacher objected to a number of elements of the IEP including that there were no reading comprehension and writing goals. The student’s School A special education teacher asserted the student was in need of 23 hours per week of specialized instruction outside general education. No one from DCPS disagreed with the assertion. The IEP was started but not completed during the January 10, 2014, meeting. DCPS proposed to review the goals and reconvene the meeting on January 27, 2014. (Respondent’s Exhibits 19-2, 20-2, 20-3, Petitioner’s Exhibit 30-2)
15. During the January 10, 2014, meeting Petitioner’s counsel also inquired about compensatory education that he believed was mandated by the August 2, 2013, HOD. A DCPS representative stated that DCPS would not be discussing compensatory education until the student’s IEP was completed. Petitioner’s counsel also asked about an extended school year (“ESY”), however, that discussion did not occur because DCPS required more time in order to complete the IEP. The parties agreed to reconvene the IEP meeting on January 27, 2014. However, Petitioner could not attend on that date and the meeting was rescheduled. (Respondent’s Exhibits 20-2, 20-3, 22-1, Petitioner’s Exhibit 30-3, Witness 2’s testimony)
16. On January 24, 2014, DCPS developed a BIP for the student. (Respondent’s Exhibit 34)

17. On January 29, 2014, DCPS sent Petitioner a copy of the revised draft IEP and on January 30, 2014, Petitioner, through counsel, advised DCPS that the draft did not include any of the changes that had been agreed upon at the January 10, 2014, meeting.
18. The parties agreed to reconvene the student's IEP meeting on March 5, 2014. On March 4, 2014, in response to a draft IEP that had been provided to Petitioner by DCPS, Petitioner's counsel sent an email to DCPS citing Petitioner's disagreements with the draft IEP including, among other things, that the IEP did not include 23 hours per week of specialized instruction outside general education. (Witness 2's testimony, Petitioner's Exhibit 48-1)
19. At the March 5, 2014, IEP meeting DCPS proposed the student be provided 10 hours of specialized instruction, to which Petitioner and her counsel disagreed. As far as DCPS was concerned, the student's IEP was completed except for a transition plan. DCPS agreed to complete the transition plan and forward a copy of the final IEP to Petitioner's counsel. DCPS stated the IEP had to be finalized that day and it would be up to School A to finalize a transition plan later. Petitioner's counsel objected because it was the IEP that would be in effect when the student turned 16. There was no discussion about ESY during this meeting. (Witness 2's testimony, Respondent's Exhibits 23, 24, Petitioner's Exhibit 33-5)
20. The DCPS representative announced there was no need for transportation in the IEP because the student could attend his neighborhood school. During the March 5, 2014, meeting the parent said she disagreed with the placement decision and intended to keep the student at School A and expected DCPS to pay for it. (Petitioner's Exhibit 33-4, Witness 2's testimony)
21. DCPS did not develop a compensatory education plan for the student at any of the three IEP meetings. Petitioner's counsel raised the issue at each meeting. At the March 5, 2014, meeting, DCPS said the student was not entitled to any compensatory education. (Witness 2's testimony)
22. DCPS sent Petitioner another copy of the student's IEP after the March 5, 2014, meeting that included a transition plan. DCPS did not provide a new draft IEP until March 25, 2014. On March 27, 2014, Petitioner's counsel sent an email to DCPS stating that Petitioner still disagreed with the IEP that had been provided, reiterating, among other things, that the student needed 23 hours per week of specialized instruction outside general education and that the proposed transition plan in the IEP was inappropriate. (Petitioner's Exhibit 49-1)
23. On April 2, 2014, April 8, 2014, and April 11, 2014, Petitioner's counsel engaged in email correspondence reiterating Petitioner's concerns and disagreements with student's IEP and inquiring when the student's IEP would be finalized. (Petitioner's Exhibits 50-1, 51-1, 53-1)

24. On April 25, 2014, DCPS prepared a prior written notice stating that the student had been found eligible and that his IEP had been developed. (Respondent's Exhibit 33)
25. On April 29, 2014, DCPS provided Petitioner's counsel a copy of the student's finalized IEP by email and indicated that DCPS would present the student's IEP to the DCPS location of service team to determine the appropriate location of services for the student. DCPS did not issue a prior written notice ("PWN") with the finalized IEP. The email simply directed Petitioner to "please find attached IEP." (Witness 2's testimony, Respondent's Exhibit 26-13, Petitioner's Exhibit 53-1)
26. The student's finalized IEP was dated March 5, 2014. It included goals in the areas of math, reading, written expression and social, emotional and behavioral development. The IEP prescribed that the student be provided 10 hours per week of specialized instruction outside general education and 45 minutes per week of behavioral support services outside general education. The IEP included a transition plan. (Respondent's Exhibit 25)
27. On May 5, 2014, DCPS sent Petitioner's counsel a letter identifying the location of service where DCPS was proposing that the student's IEP be implemented. The letter identified a DCPS [REDACTED] school ("School B") as the location. (Respondent's Exhibit 27-1, 27-2)
28. Petitioner requested to visit and observe the proposed location of services, School B, but Petitioner and DCPS were not able to reach agreement regarding such a visit. The student remained at School A for the remainder of SY 2013-2014 and continued to attend School A for SY 2014-2015 and SY 2015-2016. (Petitioner's testimony, Witness 2's testimony, Petitioner's Exhibit 56-1)
29. Since April 29, 2014, Petitioner has received no letter of invitation from DCPS to review or revise the student's IEP or to discuss his placement assignment. Since the August 2, 2013, HOD was issued DCPS has only offered School B as the student's location of services. At the time DCPS offered School B, the student was in the last grade that School B offered. The student would have had to attend a different school than School B for SY 2014-2015. DCPS has not invited Petitioner to a meeting to discuss the student's IEP or placement since the IEP was sent to Petitioner on April 29, 2014, IEP. (Petitioner's testimony, Witness 2's testimony)
30. On December 21, 2015, DCPS generated a Child Find Referral Form for the student identifying him as attending School A. On the form Petitioner grants DCPS permission to obtain the student's records from School A. (Respondent's Exhibit 28)
31. DCPS generated a letter of invitation to Petitioner dated March 1, 2016, inviting her to a meeting regarding the student to discuss "initial eligibility and data review." The date proposed for the meeting was April 8, 2016. (Respondent's Exhibit 2)

32. DCPS prepared an Analysis of Existing Data form for the student and on April 8, 2016, DCPS prepared a draft eligibility determination report and generated a prior written notice indicating DCPS was not proceeding with the evaluation process for the student because of non-cooperation from Petitioner. (Respondent's Exhibits 29, 32)
33. At the DCPS [REDACTED] school the student attended prior to attending School A he was failing and was suspended often. Although he had a rocky start at School A, the student has progressed and recently made honor roll. He has had no out of school suspensions at School A. The reports now from school staff about the student are excellent and his most recent grades are "B"s. The student has two more years of [REDACTED] school left but School A has offered the student the opportunity to complete his [REDACTED] requirements in less time. (Petitioner's testimony, Petitioner's Exhibits 38, 39, 42)
34. The student has been attending School A on a D.C. opportunity scholarship. The student has had a scholarship at School A for both SY 2013-2014 and SY 2014-2015. Petitioner has no agreement with School A about his tuition and her obligation to pay any cost beyond what the scholarship covers. Petitioner has not received a bill from School A for the past two years, for any of the services School A has provided the student. Petitioner has applied for and been awarded an opportunity scholarship for School A for 2016-2017. (Petitioner's testimony)
35. School A has used the IEP developed for the student by DCPS in March 2014 and made educational plans for the student based on his academic progress, behavior and teacher's interaction since that IEP was developed. School A has provided the specialized instruction prescribed in the IEP, and implemented the FBA recommendations. The student is on [REDACTED] diploma track. The student has had a few challenges behaviorally, but has improved and has passed all his classes, and made academic improvement in SY 2015-2016. (Witness 3's testimony, Petitioner's Exhibit 12-10 through 12-13, 12-14, 13-9)
36. The basic Cost for School A is \$25,500 per year, excluding costs for related services. School A has an OSSE Certificate of Approval ("COA"). At School A the teacher to student ratio is 1 to 7. Three of School A's teachers are dually certified in special education and their content areas. Two of the other teachers are certified in special education along with a substitute teacher. The student receives behavior support services as a related service. (Witness 3's testimony)
37. An opportunity scholarship that covers 50 % of the student's School A tuition. School A has not informed Petitioner that she owes any money to School A. However, because School A understood Petitioner to be in litigation regarding the student's placement at School A, School A has not informed or billed Petitioner for any tuition since the student has been attending School A. School A also has not informed DCPS that any money is owed for the student because the student was not placed by DCPS. School A's principal has had communication with Petitioner's counsel about the student attending School A and about seeking funding for the student's tuition. The current bill for the student for

2014-2015 and 2015-2016 that has not been covered by scholarship, both for tuition and related services, is somewhere between \$37,000 and \$40,000. (Witness 3's testimony)

38. The current DCPS program monitor for School A monitors the progress of five students who attend School A, four of whom were placed there by DCPS. The monitor has concerns about the truancy rate of some of those students and has concerns about School A's attendance policy, behavior management system, teacher preparedness and whether students are always provided needed supports. (Witness 5's testimony)
39. Petitioner had an educational consultant propose a compensatory education plan for the student to compensate him for the special education services he should have received from August 27, 2012, through SY 2012-2013. The consultant spoke with and obtained input from Petitioner and School A's principal in developing her proposal. They both reported the student finished up the school year well and he is now performing well. However, because he still has weaknesses in math, reading comprehension and writing, the consultant recommended the student be provided the following as compensatory education: 200 hours of tutoring, a laptop computer, funding for an independent transitional program at [REDACTED], and 36 hours of boxing training in lieu of counseling. (Witness 4's testimony)

DCPS' Motion to Dismiss and for Summary Adjudication

On June 24, 2016, DCPS filed its Motion to Dismiss/Motion for Summary Adjudication. DCPS asserted that Petitioner's complaint was filed on April 29, 2016, and the HOD referenced in the complaint was issued on August 2, 2013, and parent failed to file a complaint within two years of the HOD.

On Jun 29, 2016, Petitioner filed a Motion to Strike and/or Motion to Limit DCPS' Defenses asserting that DCPS did not file its motion within the time frame allotted in the PHO, citing Rule 6(b) of the Federal Rules of Civil Procedure as the basis for denial of DCPS' motion. Petitioner claimed there was no request for an extension by DCPS to file its motion. On July 1, 2016, DCPS filed an Opposition to Petitioner's motion.

The Hearing Officer concluded that despite the requirement in the PHO that a motion be filed, as DCPS asserted in its motion, DCPS set forth a defense relative to the two-year statute limitation in its response to the complaint. The purpose of the PHO motion requirement was principally for Petitioner to have a motion to respond to so that she could assert her-exceptions, if any, to the two-year statute of limitation. Petitioner also filed an Opposition to DCPS' motion setting forth the argument that the violations alleged are "continuing violations" and thus not barred by the two-year statute of limitation. In addition, with regard to the IEP, the Petitioner asserted she received the IEP on April 29, 2014, within the 2-year period of limitation, and she had no awareness of the IEP until it was transmitted to her.

The Hearing Officer concludes that the Federal Rules of Civil Procedure are not applicable in this administrative proceeding, and that despite the PHO directive, neither IDEA, nor the SOP, require that a motion be filed in order to assert the defense of the two-year statute of limitation. Therefore, the Hearing Officer concludes that it would produce an unjust result contrary to IDEA

if the two-year statute of limitation were not considered and analyzed as it applies to this case.

The Hearing Officer therefore, did not hold DCPS to the limitation imposed in the PHO as to when its motion should have been filed. The Hearing Officer denied Petitioner's Motion to Strike and Limit DCPS' Defenses. The Hearing Officer will consider the merits of DCPS' motion. The Hearing Officer entertained arguments from both parties at the outset of the hearing as to the applicability of the two-year statute of limitation and whether any of the claims and issues in the complaint were barred thereby.

After a review and consideration of the facts in this case, the Hearing Officer concludes that because the culmination of the directives contained in the August 2, 2013, HOD were completed, on April 29, 2014, when DCPS sent Petitioner the finalized IEP and later DCPS officially notified Petitioner of the location at which the IEP would be implemented, April 29, 2014, is the earliest date by which Petitioner knew or should have known of a violation, including the alleged failure to comply with the directives of the HOD. Likewise, the other violations alleged in the complaint derive from this April 29, 2014, date or later. As pointed out in a recent case: as long as the complaint is filed within two years of the date Petitioner knew or should have known ("KOSHK date"), Petitioner is entitled to full relief for that violation and injury.

Damarcus S. v. District of Columbia, 67 IDELR 239 (D.D.C. 2016).¹¹

Accordingly, the Hearing Officer concludes that Petitioner filed the complaint within two years of the "KOSHK" date and can thus pursue the claims and issues alleged in the complaint.

DCPS' Motion to Dismiss/Motion for Summary Adjudication based on the two-year statute of limitations is, therefore, denied.

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 Petitioner'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

¹¹ *Damarcus S. v. District of Columbia*, 67 IDELR 239 (D.D.C. 2016). "Adopting the Third Circuit's analysis, this Court concludes that as long as the complaint is filed within two years of the KOSHK date, plaintiffs are entitled to full relief for that injury. See *id.* At 626. The Hearing Officer concluded that plaintiffs' complaint "may only include violations dating back as far as two years prior to the filing" of the complaint. (AR at 17.) This phrasing suggests that she incorrectly applied the backward looking occurrence rule rather than the IDEA's forward-looking discovery rule, see G.L., 802 F.3d at 613, but when read in context, it is clear that she calculated KOSHK dates in order to apply the discovery rule. (See AR at 17 ("[T]he KOSHK date for the violations alleged in the instant case is the same date as the alleged violations themselves.") That is, because she believed that the KOSHK dates were identical to the occurrence dates, the limitations period would have been the same regardless of whether she counted forward two years from the KOSHK date or two years backward from the filing date. (See *id.*) Thus, the Court takes no issue with her application of the discovery rule except to the extent that she determined that plaintiffs should have discovered the alleged IDEA violations on the very date that they occurred."

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. *7 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.

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 the LEA denied the student a FAPE by failing to comply with the terms and conditions of the August 2, 2013 HOD, by failing to timely convene the student's eligibility meeting and timely develop an IEP and propose a school placement.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS did not timely convene the student's eligibility meeting and timely develop an IEP and propose a school placement.

Petitioner asserts that DCPS failed to comply with the August 2, 2013, HOD by failing to timely convene the student's eligibility meeting and timely develop an IEP and propose a school placement. The evidence demonstrates the August 2, 2013, HOD directed that "within 10 school days of the completed independent evaluations, DCPS was to convene a multidisciplinary team meeting to review the results of the independent assessments/evaluations to determine whether the student is eligible for special education and related services.

Petitioner provided DCPS the independent evaluations on September 20, 2016. A final IEP was not developed and provided Petitioner until April 29, 2014, and a school placement where the IEP was to be implemented was not officially proposed until a letter was sent to Petitioner May 5, 2014. Virtually an entire school year went by before the directives of the HOD were fulfilled.

The IDEA does not specifically empower a due process hearing officer to sanction a party for violating a HOD, except to the extent that a LEA's failure to comply with the HOD results in an independent violation of the IDEA or denial of FAPE. ¹²

¹² Although the Hearing Officer found no case directly on point, by analogy it has been determined that a Hearing Officer has no authority to enforce a settlement agreement between the parties. See, e.g., *H.C. ex rel. L. C. v. Colton-Pierrepont Central School District*, No. 08-4221-CV, 52 IDELR 278, 109 LRP 44855 (2d Cir. July 20,

Therefore, the Hearing Officer will consider whether DCPS' alleged untimely convening of the student's eligibility meeting and untimely developing an IEP and proposing a school placement was a separate violation.

34 C.F.R. § 300.306 provides: Upon completion of the administration of assessments and other evaluation measures— (1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8, in accordance with paragraph (b) of this section and the educational needs of the child.

§5-E3007 of the DCMR mandates that the IEP team shall meet and develop an IEP for a child with a disability within thirty days of a determination that a child needs special education and related services.

As stated, in this case, Petitioner's counsel forwarded the student's independent psychological and speech-language evaluations to DCPS on September 20, 2012. After receiving those evaluations DCPS attempted to schedule an eligibility meeting on October 3, 2013. DCPS rescheduled that meeting because of unavailability of its psychologist. The eligibility meeting was convened on November 19, 2013. The evidence indicates that the initial delay in determining eligibility from the meeting scheduled for October 3, 2013, was due to DCPS.

An IEP meeting was scheduled and held on December 10, 2013. The student's IEP was not completed on that date and the IEP meeting needed to be rescheduled to January 10, 2014. On January 10, 2014, DCPS was unable to complete the student's IEP because DCPS did not have sufficient time. The student's IEP meeting was then scheduled for January 27, 2014. That meeting did not occur because Petitioner was unavailable. The final IEP meeting was convened on March 5, 2015, and the student's IEP was still not completed on that date because it lacked a transition plan. DCPS had not yet completed a transition assessment.

Finally, on April 29, 2014, DCPS sent Petitioner what DCPS termed a finalized IEP. It took DCPS five months from the date the student was determined eligible to complete the student's IEP when the mandate is that the IEP should be completed within 30 days of a student's eligibility determination. The facts of this case reveal that most of delay was due to DCPS not providing sufficient meeting time to complete the student's IEP and having to reschedule the meetings and/or having not completed required assessment needed to finalize the student's IEP.

Although there appears to be at least one rescheduling of an IEP meeting due to Petitioner, the majority of the delays were due to DCPS. Consequently, the offer to Petitioner of an IEP and school placement that Petitioner could either accept or challenge was delayed by nearly a full school year. There was no evidence presented by DCPS that adequately refute the evidence that demonstrated an inordinate delay.

The Hearing Officer concludes, therefore, that DCPS' delay in convening the student's eligibility meeting and then failure to timely complete the student's IEP and offer the student's a placement

2009) (summary order) (in which a Hearing Officer was found to have no authority to enforce settlement agreement.)

was at least a procedural violation.¹³ To establish a denial of FAPE, Petitioner was required to show that the delay affected the student's substantive rights. See, e.g., *Taylor v. District of Columbia*, 770 F.Supp.2d 105, 109-110 (D.D.C.2011) (IDEA claim is viable only if DCPS' procedural violations affected the student's substantive rights.)

When DCPS finalized the student's IEP the IEP team finally met it proposed an IEP and placement for student that the August 2, 2013, HOD implicitly concluded should have been provided more than 18 months prior to when the IEP and placement was proposed. The Hearing Officer concludes that because DCPS' delay in completing the student's IEP and proposing a placement that could either be accepted or challenged by Petitioner, DCPS' procedural violation significantly impeded the Petitioner's opportunity to participate in the decision making process regarding provision of FAPE and resulted in a denial of FAPE.

ISSUE 2: Whether the LEA denied the student a FAPE by failing to develop an appropriate IEP for the reason, among others, of failure to prescribe at least 23 hours per week of specialized instruction outside general education.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that IEP developed by Respondent dated March 5, 2013, is inappropriate.

To provide a FAPE, the school district is obligated to devise an IEP for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir.1991); *District of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir.2010).

The FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)).

The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167

¹³ An LEA's failure to timely convene an IEP meeting to revise a child's IEP violates the IDEA. Cf. *Foster v. District of Columbia*, Civil Action No. 82-0095, Memorandum Opinion and Order of February 22, 1982, at 4 (D.D.C.) (J.H. Green, J.) ("Any agency whose appointed mission is to provide for the education and welfare of children fails that mission when it loses sight of the fact that, to a young, growing person, time is critical. While a few months in the life of an adult may be insignificant, at the rate at which a child develops and changes, . . . a few months can make a world of difference in the life of that child." Id.) The violation is procedural, not substantive. See, e.g., *D.R. ex rel. Robinson v. Government of District of Columbia*, 637 F.Supp.2d 11, 18 (D.D.C.2009) (DCPS' delay in convening the team meeting amounts to a failure to meet procedural deadline.) Cf. *Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. 2010)

(D.D.C.2005) (quoting *Rowley*, 458 U.S. at 201.) The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200 (1982), the Hearing Officer must first look to whether the State complied with the procedures set forth in the IDEA, and second, whether an individualized educational program developed through the IDEA's procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. *Id.* at 206-07

"[T]he 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. ex rel. Schank v. Howard Road Academy*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008) (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008)). An IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley*, 458 U.S. at 204. "An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is at the time the IEP was promulgated." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). *District of Columbia v. Walker*, 2015 WL 3646779, *6 (D.D.C. Jun. 12, 2015) ("the adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.").

An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. See *Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002). While parents may desire "more services and more individualized attention," when the IEP meets the requirements discussed above, such additions are not required. See, e.g., *Aaron P. v. Dep't of Educ., Hawaii*, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011)

The evidence in this case demonstrates that the DCPS developed an IEP that included goals in the areas of math, reading, written expression and social, emotional and behavioral development. The IEP prescribed that the student be provided 10 hours per week of specialized instruction outside general education and 45 minutes per week of behavioral support services outside general education. The IEP also included a transition plan.

Petitioner asserts the March 3, 2013, IEP was inappropriate for a number of reasons including because the IEP did not include at least 23 hours of specialized instruction outside general education.

The independent psychologist credibly testified that the student was in need of a full time placement out of general education placement and the type of setting the student was in during the time she evaluated the student, which was School A.

There was no documentary or testimonial evidence offered by Respondent that refuted the testimony of this expert witness that the student was in need of a drastically different educational placement than DCPS had offered and therefore a different IEP for the student than DCPS had developed. The IEP DCPS developed only prescribed 10 hours of specialized instruction for the student outside general education. Based on this one element alone the Hearing Officer concludes that the IEP DCPS developed for the student dated March 5, 2013, was inappropriate at the time it was developed. Thus, the student was denied a FAPE.

Petitioner also asserted a number of other alleged deficiencies in the complaint and had Petitioner's co-counsel testify that the deficiencies were raised during the IEP meetings that occurred when the IEP was developed and the concerns were not sufficiently addressed by DCPS. However, other than this testimony there was no corroborating and substantive testimony regarding the deficiencies other than that offered by the independent psychologist who evaluated the student and testified about his need for an out of general education placement.

As to the other reasons asserted that the IEP was inappropriate, it is not clear from the evidence that any of these deficiencies, although unrefuted by evidence from Respondent, were significant enough to rise to level of denial of FAPE to the student. Petitioner is not seeking any remedy for the current due process complaint beyond reimbursement and development of an IEP. Petitioner is not seeking compensatory education for any violations alleged in the current complaint.¹⁴ Nonetheless, in the order below the Hearing Officer directs that DCPS evaluate the student and develop an updated IEP in which the other areas that were raised by Petitioner as concerns during development of the March 5, 2013, IEP can be readdressed if need be.

ISSUE 3: Whether the LEA denied the student a FAPE by failing to provide the student with an appropriate placement/program, to wit: the LRE and school placement proposed (School B) are inappropriate because the student's LRE is allegedly a separate special education school.

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

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. 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.

¹⁴ Petitioner's counsel made it known during the hearing that Petitioner is only seeking the compensatory education Petitioner alleges she is due and should be awarded for the denial(s) of FAPE found in the August 2, 2013, HOD.

34 C.F.R. § 300.114 provides: (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 “educational placement” consists of: (1) the education program set out in the student’s IEP, (2) the option on the continuum in which the student’s IEP is to be implemented, and (3) the school or facility selected to implement the student’s IEP. *Letter to Fisher*, 21 IDELR 992 (1994).

The evidence of this case demonstrates that the DCPS developed an IEP that included goals in the areas of math, reading, written expression and social, emotional and behavioral development. The IEP prescribed that the student’s be provided 10 hours per week of specialized instruction outside general education and 45 minutes per week of behavioral support services outside general education. The IEP included a page entitled “Least Restrictive Environment (LRE)” that delineated the services the student would be provided outside general education.

As discussed in the issue above, Petitioner presented sufficient evidence to demonstrate that the IEP DCPS developed for the student on March 5, 2013, was inappropriate because it did not prescribe at least 23 hours of specialized instruction outside general education. Petitioner also asserts that the student’s LRE was a special education school. Petitioner’s witness, the independent psychologist who evaluated the student and credibly testified that she believed the student benefited from and needed the type of placement he was in at the time he was evaluated was sufficient proof from which the Hearing Officer can conclude that the student’s LRE was a separate school. This evidence was unrefuted by Respondent. The credible testimony from both Petitioner and the principal of School A demonstrate that since the student has attended School A, which is a separate special education school, he has demonstrated academic and behavioral progress. This evidence is sufficient for the Hearing Officer to conclude that Petitioner sustained the burden of proof on this issue.

ISSUE 4: Whether the LEA denied the student a FAPE by significantly impeding the opportunity for Petitioner to participate in the decision-making process regarding the provision of FAPE, to wit: in the development of the student’s IEP (dated March 5, 2014, and/or April 29, 2014) and by pre-determining that the student’s school placement would be School B.

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

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...

34 C.F.R. § 300.322 (a) provides; Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including-- (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place.¹⁵

34 C.F.R. § 300.501 (b) provides:

(1) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to-- (i) The identification, evaluation, and educational placement of the child; and (ii) The provision of FAPE to the child. (2) Each public agency must provide notice consistent with Sec. 300.322(a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1) of this section.¹⁶

¹⁵ (b) Information provided to parents.

(1) The notice required under paragraph (a)(1) of this section must--

(i) Indicate the purpose, time, and location of the meeting and who will be in attendance; and

(ii) Inform the parents of the provisions in Sec. 300.321(a)(6) and (c) (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child), and Sec. 300.321(f) (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP Team meeting for a child previously served under Part C of the Act).

(2) For a child with a disability beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, the notice also must--

(i) Indicate--

(A) That a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child, in accordance with Sec. 300.320(b); and

(B) That the agency will invite the student; and

(ii) Identify any other agency that will be invited to send a representative.

(c) Other methods to ensure parent participation. If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls, consistent with Sec. 300.328 (related to alternative means of meeting participation).

(d) Conducting an IEP Team meeting without a parent in attendance. A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as--

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) Use of interpreters or other action, as appropriate. The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

(f) Parent copy of child's IEP. The public agency must give the parent a copy of the child's IEP at no cost to the parent.

¹⁶ (3) A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(c) Parent involvement in placement decisions.

(1) Each public agency must ensure that a parent of each child with a disability is a member of any group that makes

There is no dispute that Petitioner was notified of and participated in the student's eligibility and IEP meeting along with her counsel. Petitioner and her counsel also participated in development of the student's IEP. Although there were a number of requests for changes to the IEP that DCPS did not agree to, Petitioner, nonetheless, participated in the development of the student's IEP.

The evidence demonstrates that at the March 5, 2016, meeting DCPS indicated the student could attend his neighborhood school and that therefore transportation Petitioner was inquiring about was unnecessary. This was sufficient evidence that DCPS had determined the student could and would attend his neighborhood school prior to the student's IEP being completed. The evidence demonstrates that the IEP was not finalized until April 29, 2014. DCPS then sent Petitioner a letter indicated that School B was where DCPS proposed that the student's IEP would be implemented. Petitioner's counsel credibly testified regarding this apparent pre-determination of the student's placement prior to the student's IEP being completed. This testimony was unrefuted. Consequently, the Hearing Officer concludes that Petitioner sustained the burden of proof by a preponderance of the evidence on this issue and that DCPS significantly impeded the opportunity for Petitioner to participate in the decision-making process regarding the provision of FAPE.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.)

Petitioner requests that DCPS immediately place and fund the student at School A with transportation, and reimburse School A for all tuition and expenses incurred for the student to date. Petitioner also requests that DCPS convene an IEP meeting within fifteen (15) days to review and revise the student's IEP, including his BIP as appropriate. Petitioner also wants the Hearing Officer to award compensatory education, or the IEP team to discuss and determine appropriate compensatory education, or in the alternative that DCPS fund an independent evaluation at market price to be used in a subsequent due process hearing, if need be, to determine appropriate compensatory education.

decisions on the educational placement of the parent's child.

(2) In implementing the requirements of paragraph (c)(1) of this section, the public agency must use procedures consistent with the procedures described in Sec. 300.322(a) through (b)(1).

(3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.

(4) A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement.

34 C.F.R. § 300.323(c)(2) requires that, as soon as possible following the development of an IEP, special education and related services are made available to the child in 300.148(b)

The evidence in this case demonstrates that the student has received benefit from attending School A and that the parent has obtained scholarships, perhaps funded by the District of Columbia, that have satisfied at least part of the cost of the student's attendance at School A for SY 2014-2015 and 2015-2016 and that the parent has been awarded a similar scholarship for SY 2016-2017.

Petitioner has asked that the student be prospectively placed at School A and that DCPS review and revise the student's IEP as appropriate including a BIP. Although the evidence indicates that School A meets the requirements that the Hearing Officer is to consider in a prospective placement for the student,¹⁷ it has been nearly three years since the student was last evaluated and the student has not had a formal IEP developed since the March 5, 2014, IEP was developed.

Consequently, it is difficult at this juncture to determine if the student continues to be in need of a type of setting that the student currently attends. The expert witness who testified to the student's need for a separate day school testified based on her observations and findings about the student nearly three years ago. The Hearing Officer concludes that the student's prospective placement should be determined after the student has been sufficiently evaluated and an IEP developed. However, until that is accomplished, pursuant to the order below, the student's shall remain at School A.

As to the request for reimbursement:

34 C.F.R. § 148 (a) provides: an LEA need not pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility.... Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in Sec. Sec. 300.504 through 300.520.

34 C.F.R. § 148 (c) provides: If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

¹⁷ The Hearing Officer has determined based on the evidence presented about School A that it meets the Branham factors. "for determining whether a particular private school placement is appropriate[.]" "[C]ourts have identified a set of considerations 'relevant' to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment." *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005)

The LEA asserts that the student was unilaterally placed at School A without notice to DCPS in accordance with 34 CFR §300.148(d). However, the evidence demonstrates that at the March 5, 2014, IEP meeting Petitioner notified DCPS that she intended for the student to remain at School A and intended for DCPS to fund its placement there. The Hearing Officer, therefore, concludes that there is no basis to reject Petitioner request for reimbursement based on any alleged failure by Petitioner to comply with 34 CFR §300.148(d).¹⁸

Respondent did not assert, as a reason for not reimbursing for School A, that the student had not previously been provided special education services by DCPS.¹⁹ The Hearing Officer concludes that under his equitable authority to award appropriate relief, despite the fact that the student had not yet been provided special education and related services by DCPS prior to the parent unilaterally placing the student in School A, the partial reimbursement for his attendance at School A for the portions of the student's costs at School A for SY 2014-2015 and SY 2015-2016 that were not covered by scholarship is justified and warranted.

Thus, the Hearing Officer directs in the Order below that DCPS reimburse School A for the portion of the costs up to a total amount not to exceed \$40,000 upon Petitioner and School A presenting to DCPS proof of scholarship and School A costs not covered by scholarship for SY 2014-2015 and SY 2015-2016.

Compensatory Education

When a hearing officer or district court concludes that a school district has failed to provide a student with a FAPE, it has "broad discretion to fashion an appropriate remedy," which can go beyond prospectively providing a FAPE, and can include compensatory education. *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015)

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

¹⁸ 34 C.F.R. § 148 (d)(1) provides: that the cost of reimbursement described in paragraph (c) above may be reduced or denied if-- (i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or (ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section; (2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in Sec. 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation;

¹⁹ 34 C.F.R. § 148 (c).

educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526. *Davis v. District of Columbia*, 817 F.3d 792

Petitioner is seeking compensatory education only for the denial(s) of FAPE that were determined in the August 2, 2013, HOD. That HOD stated in pertinent part:

“If the student is eligible for special education and related services, develop an IEP for the student, specifically addressing the needs of the student given DCPS’ failure to provide services to the student beginning August 27, 2012.”²⁰

Compensatory education is not being sought for any violation in the current complaint but for the time covered by the prior HOD. The HOD holds that the student should have been found eligible one year prior to the student starting at School A, at the start of SY 2012-2013. Thus, the assertion is that the student should have been in a full time out of general education setting one year prior to the date he actually was.

Despite Petitioner’s expert witness’ testimony proposing a compensatory education plan, the Hearing was not convinced by this testimony that the plan proposed is reasonably calculated to provide the educational benefits that likely would have accrued to the student if he had been provided the services he missed during SY 2012-2013. Although Petitioner’s witness spoke with the student’s parent and the principal of School A as to what they felt the student’s concerns were, there was little testimony that tied the recommendation to the loss the student incurred. In addition, there has been no recent evaluations of the student conducted to determine whether the loss has already been ameliorated. The compensatory education proposed was highly speculative given a denial that occurred nearly four years ago and since that time the student has apparently been provided the services that his evaluator in September 2013 believed he should have been provided.

Nonetheless, the student incurred a loss by not having been found eligible and provided appropriate services for a full year and he may be entitled to compensatory services. The Hearing Officer believes it more appropriate for the student to be evaluated and for there to be a specific evaluation to look at where the student was operating when the denial of FAPE occurred, what he could have reasonably been expected to achieve both academically and behaviorally since that time had he been provided appropriate services during SY 2013-2014 and where the student is currently operating and what services would make up for that loss.²¹

Thus, the Hearing Officer will grant Petitioner an independent evaluation that assess the student’s academic and behavioral needs for the purposes of determining appropriate

²⁰ FOF # 5

²¹ *Davis v. District of Columbia*, 817 F.3d 792 “In carrying out the complicated work of fashioning such a remedy, the district court or Hearing Officer should pay close attention to the question of assessment. Assessments sufficient to discern B.D.'s needs and fashion an appropriate compensatory education program may now exist. But it may also well be that further assessments are needed. If so, the district court or Hearing Officer should not hesitate to order them, including, if appropriate on the updated record, assessment at a residential treatment facility.”

compensatory education for the denials of FAPE determined by the August 2, 2013, HOD and if the parties are unable to reach an agreement on compensatory services after a review of that evaluation then Petitioner may pursue that claim in a separate due process complaint.

ORDER: ²²

1. DCPS shall, within ten (10) business day of the issuance of this order, convene a multidisciplinary team (“MDT”) meeting for the student and determine what if any evaluations need to be conducted.
2. At the MDT meeting mentioned above DCPS shall review and update the student’s IEP as appropriate including a behavior intervention plan.
3. Any evaluations the MDT determines should be conducted of the student shall be conducted within forty-five (45) days calendar of the issuance of this order.
4. DCPS shall within sixty (60) calendar days of the issuance of this order review any evaluations conducted of the student and review and revise the student’s IEP as appropriate and determine the student’s placement and location of services for the remainder of SY 2016-2017 and issue a prior written notice to that effect.
5. DCPS shall, within five (5) business days of issuance of this order, place and fund²³ the student at School A () with transportation and continue to do so until the directives in #1, #2, #3, and #4, above of this order, regarding the student’s IEP, placement, location of services, and prior written notice have been implemented.
6. DCPS shall, within ten (10) business days of the issuance of this order, fund at the OSSE prescribed rate, an independent educational evaluation that assesses the student’s academic and behavioral needs for the purposes of determining appropriate compensatory education for the denials of FAPE determined by the August 2, 2013, HOD and if the parties are unable to reach an agreement on compensatory services after a review of that evaluation then Petitioner may pursue that claim for compensatory education in a separate due process complaint.
7. DCPS shall, within sixty (60) calendar days of the issuance of this order reimburse School A () for the portion of the costs of the student attending School A for SY 2014-2015 and SY 2015-2016, up to a total amount not to exceed \$40,000, upon Petitioner and School A presenting to DCPS proof of scholarship(s) awarded and the School A costs not covered by scholarship(s) during SY 2014-2015 and SY 2015-2016.

²² Any delay in Respondent DCPS in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

²³ Based on Petitioner’s testimony that she has been awarded a scholarship for SY 2016-2017 for the student to attend School A, DCPS shall in conjunction with Petitioner and School A, determine the appropriate amount of funding due, if the scholarship for SY 2016-2017 has in fact been awarded.

8. 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

Coles B. Ruff, Esq.
Hearing Officer
Date: August 3, 2016

Copies to: Counsel for Petitioner: Nicholas Ostrem, Esq. & Douglas Tyrka, Esq.
Counsel for DCPS: William Jaffe, Esq.-
OSSE-SPED {due.process@dc.gov}
ODR {hearing.office@dc.gov}
CHO {osse.cho@dc.gov}
{contact.resolution@dc.gov}