

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
July 6, 2015

STUDENT, ¹)	Date Issued: 7/3/15
through his Parent,)	
Petitioner,)	Case No.: 2015-0172
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 6/30/15
("DCPS"),)	ODR Hearing Room: 2004
Respondent.)	
)	Counsel of Record:
)	Roberta Gambale, Esq.
)	Daniel McCall, Esq.
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s mother, filed a due process complaint on 5/13/15, alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because DCPS failed to conduct a Functional Behavioral Assessment (“FBA”) and develop a Behavioral Intervention Plan (“BIP”), and failed to develop an appropriate Individualized Education Program (“IEP”), including Extended School Year services (“ESY”) and transportation for the 2015/16 school year. DCPS responded that an appropriate IEP was provided and that Student’s IEP team found that an FBA, ESY and transportation were not required for Student to receive a FAPE.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”) and 38 D.C. Code 2561.02.

¹ Personally identifiable information is provided in Appendix A.

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Procedural History

Following the filing of the due process complaint on 5/13/15, the case was assigned to the undersigned on 5/14/15. DCPS's response to the complaint was timely filed on 5/22/15. The response did not challenge jurisdiction.

The resolution session meeting ("RSM") took place on 5/22/15, but the parties neither resolved the case nor ended the resolution period early. The 30-day resolution period ended on 6/12/15. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination ("HOD") by 7/27/15.

The due process hearing took place on 6/30/15 and was closed to the public. Petitioner was represented by Roberta Gambale, Esq. DCPS was represented by Daniel McCall, Esq. Counsel briefly discussed settlement without success at the beginning of the hearing. Petitioner was present in person for the hearing, apart from the last few minutes. Neither party objected to the testimony of witnesses by telephone. The parties made no admissions and agreed to no stipulations.

Petitioner's Disclosure statement, filed on 6/19/15, consisted of a witness list of 3 witnesses and documents P1 through P15. Petitioner's Disclosure statement and documents were admitted into evidence without objection.

Respondent's Disclosure statement, filed on 6/23/15, consisted of a witness list of 6 witnesses and documents R1 through R7.² Respondent's Disclosure statement and documents were admitted into evidence without objection.

Petitioner's counsel presented 2 witnesses in Petitioner's case-in-chief (*see* Appendix A):

1. Psychologist – qualified without objection as an expert in Clinical and School Psychology
2. Parent

Respondent's counsel presented no witnesses in Respondent's case. Thus, there were no rebuttal witnesses.

The issues³ to be determined in this Hearing Officer Determination are:

² Document R5 was misnumbered and corrected during the hearing, so that Bates number DCPS-000028 is R5-1; DCPS-000029 is R5-2; DCPS-000030 is R5-3; DCPS-000031 is R5-4 (not R5-1 as originally marked); and DCPS-000032 is R5-5 (not R5-2).

³ The first issue in Petitioner's due process complaint asserted that DCPS/Charter School failed to conduct or fund a neuropsychological reevaluation of Student. That issue was

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Issue 1: Whether DCPS/Charter School denied Student a FAPE by failing to conduct an updated FBA and develop a BIP despite behavior issues throughout the 2014/15 school year; the existing school-wide behavior plan is not individualized or sufficient for Student's needs.

Issue 2: Whether DCPS/Charter School denied Student a FAPE by failing to develop an appropriate IEP on 3/10/15 with appropriate and measurable goals, baseline data, and present levels of performance information, along with ESY for Summer 2015 and/or specialized instruction for Summer School, and transportation for the 2015/16 school year. Parent has been informed that Student will be retained in 6th grade unless he attends Summer School this summer. The IEP team discussed on 3/10/15 that Student is eligible for transportation which should be added to his IEP as a related service.

Petitioner seeks the following relief:

1. A finding that Student has been denied a FAPE.
2. DCPS/Charter School shall immediately amend Student's IEP for Summer 2015 to (a) provide ESY, (b) provide specialized instruction during Summer School, or (c) fund services comparable to ESY.
3. DCPS/Charter School shall fund the following evaluation of Student: FBA.⁴
4. DCPS/Charter School shall convene an IEP meeting within 15 days after receiving the evaluation in the previous paragraph, review the evaluation, modify Student's IEP as needed, and develop a BIP.
5. DCPS/Charter School shall provide compensatory education⁵ for any denial of FAPE.
6. Any other just and reasonable relief.

Oral closing arguments were made by counsel for both parties at the end of the due process hearing.

expressly withdrawn without prejudice by Petitioner on the record at the due process hearing because Respondent funded a neuropsychological assessment on 6/23/15 (*see* R7), so the issue is not further addressed in this HOD.

⁴ In addition to withdrawing at the due process hearing the issue of DCPS/Charter School failing to conduct or fund a neuropsychological reevaluation, Petitioner also withdrew the corresponding remedy of seeking funding for a comprehensive neuropsychological reevaluation.

⁵ Petitioner expressly did not seek any compensatory education during the due process hearing. While the Prehearing Order stated the possibility of reserving Petitioner's request for compensatory education pending completion of evaluations, no evaluation is ordered in this HOD, so nothing is reserved.

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Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁶ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's mother ("Parent").⁷ Student is ■ years old and in 6th grade at Charter School,⁸ where he began the 2014/15 school year after graduating from Prior School.⁹

2. Student is eligible for special education and related services as a child with a Traumatic Brain Injury ("TBI"); Student was hit by a car, which fractured his skull and pelvis, requiring a long hospital stay and difficult rehabilitation.¹⁰ Student has also been diagnosed with Attention-Deficit/Hyperactivity Disorder ("ADHD").¹¹

3. Student's current IEP, dated 3/10/15, provides for 15 hours per week of specialized instruction inside general education, in addition to related services.¹²

4. Student's IEP team on 3/10/15 concluded that Student "does not need an FBA or BIP."¹³

5. An FBA was requested by Petitioner's counsel on 3/26/15.¹⁴ At the RSM, Charter School Psychologist stated that she would "go ahead and do the FBA"; a 1-1/2 page document was prepared and dated 6/4/15.¹⁵

6. The 6/4/15 FBA did not have much detail or specificity from any observations and did not include any interviews with teachers, Parent or Student.¹⁶ Without sufficient detail a helpful BIP cannot be developed.¹⁷ The FBA noted in conclusory fashion that Student

⁶ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁷ Parent.

⁸ DCPS is the Local Educational Agency ("LEA") for Charter School.

⁹ Parent.

¹⁰ P7-1; P8-1; Parent.

¹¹ P6-17.

¹² P5-9.

¹³ P11-4.

¹⁴ P4-1.

¹⁵ R5-4; R3.

¹⁶ Psychologist; R3.

¹⁷ Psychologist.

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accrued 46 infractions that were of “mild to moderate” intensity, but relying on an infractions list is not sufficient for an FBA.¹⁸

7. Student’s Behavior Records indicate that Student acted inappropriately from time to time by things such as talking at inappropriate times,¹⁹ an occasional verbal altercation or disruption,²⁰ not following directions and being unprepared by not bringing pencils or other needed items to class.²¹ There was no evidence of suspensions of Student or other serious behavioral or disciplinary issues.²²

8. Parent is understandably concerned about frequent calls and communications she received from teachers about Student being disruptive or not bringing what he needs to class.²³ At the RSM, Charter School Psychologist responded to those concerns as not being specific to Student, but common among 6th graders.²⁴

9. Student is in the school-wide behavior modification system in which students receive negative points for infractions and positive points for good behavior; on balance, Student is in the positive by 829 points.²⁵ The Charter School Psychologist sees Student weekly in group counseling and believes he is “faring (sic) quite well.”²⁶

10. Student’s IEPs indicate that he is not a child whose behavior impedes his own learning or that of others.²⁷

11. An FBA discussed by Student’s IEP team at Prior School on 3/7/14 found “nothing . . . that was significant,” the evaluator did not recommend a BIP, and the Prior School psychologist thought counseling would suffice for Student.²⁸

12. Student has difficulty with his memory and memorization as a result of his TBI.²⁹ Student’s memory issues affect him academically; he requires scaffolding of information and constant repetition.³⁰

13. Based on Psychologist’s work with Student when administering a Neuropsychological Evaluation in October 2013 and her review of the Disclosures in this

¹⁸ Psychologist; R3-1.

¹⁹ P14-1.

²⁰ P14-2.

²¹ P14-3,4,5,6.

²² Administrative Notice.

²³ Parent.

²⁴ R5-3.

²⁵ R5-2; R3-1.

²⁶ R5-2.

²⁷ P5-2 (3/10/15); P12-2 (3/7/14).

²⁸ P8-3.

²⁹ Psychologist; P6-10,11.

³⁰ Psychologist.

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case, ESY is needed for Student because he is prone to forget and needs the support of special education teachers over the summer break.³¹ Otherwise, Student will return to school in the Fall with a deficit and be further behind his peers due to his injury and ADHD.³²

14. This Spring, Student was on the verge of failing and being retained in 6th grade unless he attended summer school at Charter School to retake required classes.³³ However, there was no specialized instruction available for Student at Charter School's summer school.³⁴ On 3/10/15, Student's IEP team discussed ESY compared to summer school at Charter School out of concern that Student would be retained if he did not attend summer school.³⁵ The Meeting Notes indicate that "currently" the team decided Student did not require ESY.³⁶ Parent signed up Student for summer school in case that was necessary to keep him from being retained.³⁷

15. Petitioner's counsel responded to the draft Meeting Notes from the 3/10/15 team meeting to make clear that the team "did not determine that [Student] does not require ESY" and that "the only question" preventing ESY was whether Student would be retained if he participated in ESY rather than summer school at Charter School.³⁸ The Special Education Compliance Coordinator at Charter School did not disagree with counsel and responded that her "amendment" would be added to the Meeting Notes and promised an update the next business day, which never arrived.³⁹

16. Student's final report card for the 2014/15 school year shows that Student barely passed classes he had been failing earlier in the term and was promoted without retaking any classes in summer school.⁴⁰

17. Student's IEP team concluded on 3/10/15 that Student "does require Transportation" and Parent agreed to it for the 2015/16 school year.⁴¹ But transportation was not included on Student's IEP.⁴²

18. In Student's 3/10/15 IEP, the "Baselines" sections were blank for Mathematics, Reading and Written Expression.⁴³

³¹ *Id.*

³² *Id.*

³³ Parent; R5-2; P2-1; P3-3.

³⁴ Parent; R5-2.

³⁵ P11-4.

³⁶ *Id.*

³⁷ Parent.

³⁸ P1-2.

³⁹ P1-7.

⁴⁰ R2-1,2.

⁴¹ P11-4; P1-2.

⁴² P5-12.

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Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"[T]o further Congress' ambitious goals for the IDEA, the Supreme Court has focused on the centrality of the IEP as 'the centerpiece of the statute's education delivery system for disabled children.'" *Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 67 (D.D.C. 2008), quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

Once a child who may need special education services is identified, DCPS is obligated to conduct an initial evaluation and make an eligibility determination within 120 days. D.C. Code § 38-2561.02(a). If the child is found eligible, DCPS must then devise an IEP, 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); *Sch. Comm. of Town of Burlington, Mass. v. Dep't 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); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. 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 IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [Act] 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).

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an

⁴³ P5-3,4.

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IDEA claim is viable only if those procedural violations affected the child's *substantive* rights.

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3. The burden of proof is on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

Issue 1: *Whether DCPS/Charter School denied Student a FAPE by failing to conduct an updated FBA and develop a BIP despite behavior issues throughout the 2014/15 school year; the existing school-wide behavior plan is not individualized or sufficient for Student's needs.*

Petitioner first asserts that Respondent denied Student a FAPE by failing to conduct a Functional Behavioral Assessment and develop a Behavioral Intervention Plan. In appropriate circumstances failing to conduct an FBA and develop a BIP may be a denial of FAPE. *See, e.g., Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 61 (D.D.C. 2011). However, pursuant to the framework established by the IDEA, it is up to the IEP team as an initial matter to determine what Student needs to receive a FAPE. *See* 34 C.F.R. 300.305, 300.321, 300.324. Here, Student's IEP team concluded on 3/10/15 that Student did not need an FBA or BIP. This Hearing Officer concludes that Petitioner did not meet her burden of proving that the IEP team was incorrect.

The IDEA mandates an FBA in limited circumstances. Respondent must conduct an FBA and develop behavioral intervention services and modifications after a child with a disability has been removed from his current placement for over 10 school days in the same school year. *See* 34 C.F.R. 300.530(d)(1)(ii). Alternatively, an FBA and BIP may be required in connection with a determination after a change in placement that misconduct was a manifestation of a child's disability. *See* 34 C.F.R. 300.530(f)(1)(i). Here, there was no allegation that Student was removed from his current placement and thus there was no obligation to conduct a formal FBA and develop a BIP.

In addition, the IDEA requires, in the case of a child whose behavior impedes his own learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 34 C.F.R. 300.324(a)(2)(i); *Harris*, 561 F. Supp. 2d 63. However, Student appears not to have serious behavioral issues. Student's Behavior Records indicated that – typical of other 6th graders – Student acted up from time to time by talking at inappropriate times, the occasional verbal altercation or disruption, not following directions and being unprepared by not bringing pencils or other needed items to class. Notably, there was no indication that Student has been suspended or received other serious disciplinary measures. Furthermore, Student's recent IEPs confirm that he is not a child whose behavior impedes his own learning or that of others.

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Parent's counsel did request an FBA,⁴⁴ but the IDEA does not require a public agency to administer every test requested by a parent or recommended in an evaluation, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information. *Letter to Baumtrog*, 39 IDELR 159 (OSEP 2002); *Letter to Anonymous*, 20 IDELR 542 (OSEP 1993). Nonetheless, Charter School agreed at the RSM in late May 2015 to conduct an FBA, and produced a short report dated 6/4/15. Petitioner objected to that FBA as insufficiently detailed and thorough, but since this Hearing Officer concludes that an FBA and BIP are not required under the IDEA, the merits of the 6/4/15 FBA need not be analyzed.

Issue 2: *Whether DCPS/Charter School denied Student a FAPE by failing to develop an appropriate IEP on 3/10/15 with appropriate and measurable goals, baseline data, and present levels of performance information, along with ESY for Summer 2015 and/or specialized instruction for Summer School, and transportation for the 2015/16 school year. Parent has been informed that Student will be retained in 6th grade unless he attends Summer School this summer. The IEP team discussed on 3/10/15 that Student is eligible for transportation which should be added to his IEP as a related service.*

Petitioner met her burden of proof as to ESY for Summer 2015 and transportation for the 2015/16 school year, but not on the other concerns raised about Student's IEP, as discussed below.

ESY. Looking first at the conclusions of Student's IEP team, there was uncertainty over ESY for Summer 2015 because of the possible need for Student to go to regular summer school at Charter School to repeat required courses in order to avoid being retained in 6th grade. As it turned out, Student was promoted from 6th grade without having to repeat courses in summer school. This is significant because Charter School did not have specialized instruction available for Student during regular summer school, which Student needs in order to be able to access the curriculum. Further, because of the scheduling overlap, regular summer school would have prevented Student from attending ESY.⁴⁵ It appears to this Hearing Officer that the intent of the IEP team, which was not expressed clearly in the 3/10/15 Meeting Notes, was for Student to attend ESY if possible.

When it seemed that Student might well need to repeat courses in regular summer school, the team stated in the Meeting Notes that "currently" Student did not require ESY. Petitioner's counsel responded to the draft Meeting Notes to make clear that the team "did not determine that [Student] does not require ESY" and that "the only question" preventing ESY was whether Student would be retained if he participated in ESY rather than summer school at Charter School. The Special Education Compliance Coordinator of Charter School did not dispute the accuracy of the statements and responded that the proposed changes would be added to the Meeting Notes.

⁴⁴ Petitioner's request for an FBA was made by letter dated 3/26/15, less than 50 days before filing the due process complaint in this case.

⁴⁵ Counsel stated at the due process hearing that ESY begins on 7/7/15.

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ESY is necessary to provide FAPE under 34 C.F.R. 300.106(a) “when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” *Johnson v. Dist. of Columbia*, 2012 WL 3758240, at *3 (D.D.C. 2012), *report and recommendation adopted*, 873 F. Supp. 2d 382 (D.D.C. 2012), *quoting MM v. School Dist. of Greenville County*, 303 F.3d 523, 537-38 (4th Cir. 2002).

The unambiguous and uncontroverted evidence at the hearing was that ESY is necessary for Student due to his TBI and difficulty retaining information, and that he needs the support of special education teachers over summer break, as Psychologist credibly testified. Otherwise, Student would return to school in the Fall with a deficit and be further behind his peers due to his disability. Accordingly, this Hearing Officer concludes that the IEP team intended Student to attend ESY, as long as he did not need to go to regular summer school to avoid being retained, and that in any case ESY is necessary for Student to avoid jeopardizing his gains from the regular school year.

Transportation. Student’s IEP team concluded on 3/10/15 that Student “does require Transportation” and DCPS made clear at the due process hearing that there is no issue about providing transportation to Student for the 2015/16 school year. Parent also agreed to transportation for the 2015/16 school year on 3/10/15. Yet transportation was not included in Student’s IEP. As ordered below, transportation is to be included in Student’s IEP prior to the 2015/16 school year.

Other IEP Concerns. Petitioner also asserted that the 3/10/15 IEP denied Student a FAPE due to a lack of appropriate and measurable goals, baseline data (which was entirely missing for Mathematics, Reading and Written Expression), and present levels of performance information, which would be IDEA procedural violations. *See A.I. ex rel. Iapalucci v. Dist. of Columbia*, 402 F. Supp. 2d 152, 164-65 (D.D.C. 2005). However, procedural violations of the Act do not necessarily mean that Student was denied a FAPE. *See Schoenbach v. Dist. of Columbia*, 309 F. Supp. 2d 71, 78 (D.D.C. 2004). A procedural violation must result in a loss of educational opportunity or seriously deprive Parent of her participation rights to be actionable. *See Lesesne ex rel. B.F. v. Dist. of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). Here, Petitioner did not meet her burden of demonstrating that these IEP issues rose to the level of substantive violations. This Hearing Officer concludes that Student’s IEP was “reasonably calculated to confer educational benefits on [Student.]” *J.N. v. Dist. of Columbia*, 677 F. Supp. 2d 314, 322 (D.D.C. 2010), *quoting Anderson v. Dist. of Columbia*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009) (internal quotation omitted).

ORDER

Petitioner has met her burden of proof on certain claims as set forth above. Accordingly, **it is hereby ordered that:**

- (1) DCPS shall provide ESY, with transportation, for Student for Summer 2015 beginning on 7/7/15 or as soon thereafter as possible, and fund academic tutoring for Student on an hour-for-hour basis for any ESY missed by Student on or after 7/7/15 due to delays by DCPS in providing ESY.

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- (2) DCPS shall amend Student's IEP prior to the 2015/16 school year to provide transportation from the beginning of the 2015/16 school year.
- (3) All other relief sought by Petitioner is **denied**.

IT IS SO ORDERED.

Dated in Caption

/s/ *Keith Seat*

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

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