

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on April 30, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student _____ has attended a District of Columbia public charter school (“School A”) since school year (“SY”) 2012-2013. He is currently in the tenth grade. The student is a child with a disability pursuant to IDEA with a classification of specific learning disability (“SLD”)

Prior to attending School A the student attended another public charter school (“School B”) until he completed eighth grade at the end of SY 2011-2012. School B is its own local education agency (“LEA”). While attending School B a clinical psychological evaluation was conducted of the student in October 2010 and psycho educational evaluation, was conducted on September 28, 2010, that found the student’s cognitive abilities to be extremely low. School B conducted a psycho-educational evaluation addendum on May 2, 2012, that reviewed and relied upon the student’s cognitive assessments in the 2010 psychological evaluation. The psychologist compared the student’s cognitive scores from 2010 with the 2012 adaptive assessments and concluded the student’s scores were suggestive of an intellectual disability (“ID”).

At school B the student’s individualized educational program (“IEP”) part time special education services and the student took that IEP with him when he began attending School A in ninth grade during SY 2012-2013 the student had all passing end of year grades at School A and was promoted to tenth grade. The student’s current IEP developed by School A on May 21, 2013, prescribes more instruction outside general education than his School B IEP, but does not prescribe a full-time out general education placement. The student began having academic difficulties at School A during his tenth grade year.

On February 26, 2014, Petitioner filed the current complaint alleging, inter alia, that the student’s current IEP is inappropriate because it does not prescribe full time out of general education services and because School A inappropriately reduced the student’s speech language services and allegedly failed to fully implement the student’s May 21, 2013, IEP. Petitioner seeks and order directing that the student’s IEP be revised to prescribe full time out of general education and 90 minutes of speech language services per week and that DCPS be ordered to fund an independent comprehensive psycho-educational assessment, a vocational level 2 assessment and fund compensatory education.

DCPS filed a response to the complaint on March 5, 2014, and an amended response on March 13, 2014. DCPS denied any violation and asserted that the student has been appropriately evaluated. The student’s speech and language was appropriately reduced, as he was determined

to have made significant progress and the student's least restrictive environment ("LRE") is appropriate as the student is making academic progress.

A resolution meeting was held March 26, 2014. Nothing was resolved. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on March 28, 2014, and ends (and the Hearing Officer's Determination ("HOD") is due) on May 12, 2014.

The Hearing Officer convened a pre-hearing conference on April 8, 2014, and issued a pre-conference order outlining, inter alia, the issues to be adjudicated.

ISSUES: ²

The issues adjudicated are:

1. Whether DCPS/School A denied the student a free and appropriate public education ("FAPE") by failing to provide him an appropriate May 21, 2013, IEP because the IEP (1) reduced the student's speech-language services from 90 minutes per week to 60 minutes per week, (2) is based on outdated academic data, and (3) insufficient out of general education instruction.
2. Whether DCPS/School A denied the student a FAPE by failing to implement the student's out of general education specialized instruction during SY 2013-2014.
3. Whether DCPS/School A denied the student a FAPE by failing to complete an appropriate transition/vocational II assessment and develop appropriate post-secondary transition goals.

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 26 and Respondent's Exhibits 1 through 10) that were all admitted into the record and are listed in Appendix A. Witnesses a listed in Appendix B.

FINDINGS OF FACT: ³

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated. Petitioner attempted to assert that DCPS/School A failed to appropriately evaluate the student. However, Petitioner did not present a sufficient basis and accurate reference to a IDEA provision that asserted a legitimate violation. Thus, the Hearing Officer removed without prejudice issue #2 that was stated in the pre-hearing conference order. Thus, there were three issues that remained to adjudicated.

³ The evidence that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

1. The student _____ has attended a District of Columbia public charter school (“School A”) since school year (“SY”) 2012-2013. He is currently in the tenth grade. The student is a child with a disability pursuant to IDEA with a classification of specific learning disability (“SLD”)

2. Prior to attending School A the student attended another public charter school (“School B”) until he completed eighth grade at the end of SY 2011-2012. While attending School B a clinical psychological evaluation was conducted of the student in October 2010 while he was in seventh grade. The following assessments were conducted : BASC-2-SRP, BASC-2-PRS, Beck Youth Inventories, Sentence Completion Series, Graphic Projective Drawings, Robert’s Apperception Test, along with various interviews with student, parent and teachers. The student was diagnosed with Depressive Disorder, Not Otherwise Specified and ADHD. (Petitioner’s Exhibit 12-1, 12-8

3. A psycho educational evaluation, was conducted on September 28, 2010, that included among the assessments conducted a WISC-IV, a WIAT-III. The student had the following scores:

WISC Scale	Composite Score	% Rank	Description
Verbal Comp	75	5	Borderline
Perceptual Reason	63	1	Extremely Low
Working Memory	54	.1	Extremely Low
Proc Speed	53	.1	Extremely Low
FSIQ	54	.1	Extremely Low

WIAT Scale	Composite Score	% Rank	Description
Oral Language	73	4	Borderline
Basic Reading	76	5	Borderline
Written Exp	72	3	Borderline
Math	63	1	Extremely Low

(Petitioner’s Exhibit 13-11, 13-12)

4. School B conducted a psycho-educational evaluation addendum on May 2, 2012, in which a Vineland-II, The Vineland Adaptive Behavior Scales, and the Comprehensive Test of Non-Verbal Intelligence (CTONI-2) was used. As a part of her evaluation the School B psychologist reviewed and relied upon the student's cognitive assessments in the 2010 psychological evaluation. On the CTONI-2 the student obtained a composite index score of 68, 2nd percentile rank that was considered "Very Poor." The student's Adaptive Behavior Composite score was 76, "Moderately Low" in the 5th percentile. The psychologist compared the student's cognitive scores from 2010 and the results of the CTONI-2 and the Vineland and concluded the student's scores were suggestive of an intellectual disability ("ID"). (Petitioner's Exhibit 15-1, 15-3, 15-5, 15-8)
5. On May 2, 2011, an auditory processing assessment was conducted of the student that determined that he has deficits in all areas of auditory information processing. (Respondent's Exhibit 2)
6. At school B the student's individualized educational program ("IEP") dated May 7, 2012, prescribed 10 hours of specialized instruction per week inside general education and 5 hours per week of specialized instruction outside general education, and the following weekly related services: 1.5 hours of speech language pathology and 1 hour of behavior support services. (Petitioner's Exhibit 7-1, 7-6)
7. During the student's first year at School A in ninth grade during SY 2012-2013 the student had all passing end of year grades and was promoted to tenth grade. (Petitioner's Exhibit 17-1)
8. The student's current IEP developed by School A on May 21, 2013, prescribes the following weekly services: 10 hours of specialized instruction in reading outside of general education, 10 hours of specialized instruction in math outside of general education and 5 hours of specialized instruction inside general education. The IEP also prescribes 240 minutes per month of speech and language pathology and 240 minutes per month of counseling. He has the following accommodations: reading test questions, repeating directions. The IEP also includes a post secondary transition plan that indicates that an educational assessment (TPI by Pro-Ed) was administered on May 2, 2013, in preparation for preparing the transition plan. When the student's IEP was developed a DCPS representative participated by telephone in the meeting and stated that the student needed to enroll in his neighborhood school the following school year for the updated IEP to be implemented and that it could not be implemented at School A. (Petitioner's Exhibit 10-1, 10-7, 10-9, 10-11, Witness 3's testimony)
9. The student attends school regularly and been taking advantage of in school tutoring that has been made available to him. Despite the fact that the student's current IEP prescribes that he be provided out of general education specialized instruction, all his specialized instruction is being provided in an inclusion setting. The student believes that his academic performance is being hindered at School A because he is not being provided sufficient assistance or pull out services. He wants and needs more assistance and is

reluctant to ask for help because he does not want to be viewed by his peers as not being able to do the work, yet he is willing to be received pull-out services if they were provided. Although the student is doing poorly in some of his classes currently, he is still close enough to successfully pass his courses if he completes remaining assignments and does well in the fourth quarter. (Student's testimony, Witness 2's testimony)

10. During SY 2013-2014 the student failed the following courses: Spanish I and English II during the 1st quarter. He failed Spanish I and Biology during the 2nd quarter and is currently failing Algebra Concepts and Biology. (Petitioner's Exhibit 18-1)
11. The annual reading goals on the May 7, 2012, IEP were repeated word for word on the May 21, 2013, IEP, and the student's baseline in reading was the exact same in May 2012 as it was in May 2013.
12. And the present levels of performance on the May 21, 2013, IEP are repeated from the May 7, 2012, IEP indicating that presently he only shows mastery of basic addition and subtraction, knowledge of single digit division using multiples of 1-5, and basic knowledge of simple algebraic expressions. The student's speech and language goals from the May 7, 2012, IEP are repeated, on his May 21, 2013, IEP, with the baselines also repeated. (Petitioner's Exhibits 7, 10, Witness 1's testimony)
13. Petitioner proposed a compensatory education program to compensate the student for the alleged denials of FAPE during SY 2013-2014 4 hours per week for 32 weeks of independent tutoring and 1 hour per week for 32 weeks of independent mentoring to appropriately compensate him for the missed services. (Petitioner's Exhibit 24)

CONCLUSIONS OF LAW:

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

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved;

and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.⁴ *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 DCPS/School A denied the student a free and appropriate public education (“FAPE”) by failing to provide him an appropriate May 21, 2013, IEP because the IEP (1) reduced the student’s speech-language services from 90 minutes per week to 60 minutes per week, (2) is based on outdated academic data, and (3) insufficient out of general education instruction.

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

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

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

The evidence demonstrates that the student’s IEP was updated in May 2013 after he had successfully completed his ninth grade and first year at School A. The IEP actually increased the number of hours of specialized instruction that the student had at School B. This increase in hours coupled with the student’s successful academic performance during SY 2012-2013 as evidenced by his report card support a conclusion that the student’s IEP was reasonable

⁴ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

calculated to provide him educational benefit. There was insufficient evidence that the student was in need of a full time out of general education IEP. There was also insufficient evidence presented that the student was in need of more speech language services than were prescribed in the IEP or that IEP was not based on accurate data. There October 2013 after she began attending School B prescribed a placement and LRE that was no different than when she attended School A, specifically, all the student's services are to be provided outside the general education setting. The evidence demonstrates that although the student is doing poorly in some of his classes currently, he is still close enough to successfully pass his courses if he completes remaining assignments.

Conclusion: Petitioner did not to sustain the burden of proof that student's IEP was inappropriate because his speech language services were reduced, or were based on outdated academic data or insufficient out of general education instruction.

ISSUE 2: Whether DCPS/School A denied the student a FAPE by failing to implement the student's out of general education specialized instruction during SY 2013-2014.

Conclusion: Petitioner sustained the burden of proof that his IEP was not implemented at School A during SY 2013-2014 because he was not provided out of general education specialized instruction.

5E DCMR 3002.3 provides that:

(c) The LEA shall ensure that an IEP is developed and implemented for each eligible with a disability served by the LEA.

(d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP...

(f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

“To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the IEP “*Savoy v. District of Columbia* (DC Dist. Court) February 2012 adopted *Houston Indep. School District v. Bobby R.* 200 F3d 341 (5th Circ. 2000)

The student credibly testified that he is not being provided instruction outside general education and he is need of pull out services that he is not being provided and that his IEP prescribes. The student's academic performance has suffered as result. The student wants and needs more assistance and is reluctant to ask for help. The student was not provided out of general education specialized instruction and that his academic performance suffered as a result. Consequently, the Hearing Officer concludes the student was denied a FAPE. Although there was testimony that DCPS made clear at the time the student's most recent IEP was developed the School A could not implement the IEP School A and DCPS allowed the student to enroll the following school

year and did not implement the IEP as it was prescribed. The Hearing Officer concludes that this was nonetheless a denial of FAPE.⁵ As partial relief for the denial the Hearing Officer directs DCPS to conduct the evaluations noted in the order below.

ISSUE 3: Whether DCPS/School A denied the student a FAPE by failing to complete an appropriate transition/vocational II assessment and develop appropriate post-secondary transition goals.

Conclusion: Petitioner did not sustain the burden of proof that DCPS failed to complete an appropriate assessment and develop an appropriate post-secondary transition plan.

There is no evidence that any particular type of assessment such as a vocational 2 is required to develop a student's transition plan. The evidence demonstrates the student's IEP contains a transition plan that was developed based on an assessment. There was insufficient evidence that the student's transition plan or the assessment upon which it was based was inappropriate.⁶

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid, 401 F.3d 522 & 524*. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

Evidence demonstrates that the student's IEP was not fully implemented during SY 2012-2013 as he was not provided out of general education instruction as his IEP prescribes. The Hearing Officer concludes that tutoring and mentoring requested by Petitioner would serve to place the student in the stead he would have been had received appropriate services consistent with his IEP during SY 2013-2014 at School A. However, the evidence did not support the amount of services requested. The Hearing Officer concludes that to award the student no compensation for the missed services would be inequitable and therefore concludes that the student should be awarded at nominal services as compensation. Consequently, the Hearing Officer directs in the Order below that the student be provided academic tutoring and mentoring services in the order below.

⁵ The Hearing Officer was not convinced on presented legal authority that DCPS did not remain responsible for the failure to implement the student's IEP during SY 2013-2014.

⁶ FOF # 8; Petitioner's witness' testimony regarding the transition plan was not convincing that the transition plan was inappropriate.

ORDER:⁷

1. DCPS shall within thirty (30) school days of the issuance of this Order conduct a comprehensive psychological evaluation and auditory processing evaluation of the student.
2. Within ten (10) school days of the completion of the evaluations listed above DCPS shall convene an IEP meeting to review the evaluations, review the student's disability classification and update the student's IEP as appropriate and determine an appropriate school location to implement the student's IEP.
3. As compensatory education DCPS shall within 30 calendar days of the issuance of this Order provide the student 30 hours of independent tutoring and 15 hours of independent counseling or mentoring at the prescribed OSSE/DCPS rates. Petitioner shall use and complete this award by December 31, 2014.
4. 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: May 12, 2014

⁷ Any delay in Respondent 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.