

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 May 20, 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 2007.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age nineteen and has been diagnosed with autism. The student currently attends a special education program located at a DCPS high school (“School A”) where he has been attending since November 18, 2013. During SY 2012-2013 the student and his parent were residents of Prince George’s County (“PGC”), Maryland and the student attended a program at a PGC high school.

The student’s parent, Petitioner, asserts that after she moved to the District of Columbia and un-enrolled the student from his PGC school she attempted to enroll the student at several DCPS schools on or about September 17, 2013. She asserts, however, that it took DCPS until November 18, 2013, for the student to begin attending School A and for him to be provided any services from DCPS due to numerous delays including delays in providing the student transportation to and from school. Petitioner also asserts that at an IEP meeting held once the student began attending School A the parent requested DCPS and DCPS refused.

Petitioner seeks as relief an order directing DCPS hold a meeting within 15 school days of receipt of the independent evaluation in order to update the student’s IEP to fund the compensatory education plan presented by Petitioner at the due process hearing.

DCPS filed a timely response to the complaint on March 24, 2014, and asserted there has been no denial of a free and appropriate public education (“FAPE”) to the student. DCPS asserted the Petitioner did not move to the District of Columbia until September 11, 2013, and DCPS was not provided an opportunity to review the student’s PGC IEP until on or around October 10, 2013. Shortly after Petitioner provided the student’s previous IEP DCPS provided a location of service for this student and provided a Transfer IEP Letter to parent, which stated that the student would receive comparable services to his previous IEP until a new IEP would be drafted. Since that time and until the student was provided a DCPS IEP in December 2013 the student was offered special education and related services comparable to those service provided to him by his previous LEA. On December 4, 2013, the student’s IEP team developed and appropriate IEP and provided the student with a FAPE from which the student could derive an educational benefit. DCPS was under no obligation to conduct a comprehensive psychological reevaluation as

the student's previous school had conducted an appropriate assessment.

The parties did not waive resolution or mutually agree to proceed directly to hearing. The 45-day period began on April 14, 2014, and ends (and the Hearing Officer's Determination ("HOD") is due) on May 28, 2014.

On April 9, 2014, the Hearing Officer convened a pre-hearing conference and issued a pre-hearing order outlining, inter alia, the issues to be adjudicated.

ISSUES:²

The issues adjudicated are:

Whether DCPS denied the student a FAPE from September 17, 2013, through November 18, 2013, by failing to provide the student an educational placement and implementing his IEP and/or providing him services comparable to those in his Prince George's County IEP until DCPS adopted that IEP or developed its own pursuant to 34 C.F.R § 300.323(f)

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 21 and Respondent's Exhibits 1 through 9) that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT:³

1. The student is _____ diagnosed with autism. The student currently attends a special education program located at School A where he has been attending since November 18, 2013. During SY 2012-2013 the student and his parent were Maryland residents and the student attended a program at a PGC, Maryland high school. (Parent's testimony, Petitioner's Exhibit 5)

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order ("PHO") may not directly correspond to the issues outlined here. The Hearing Officer listed three issues in the PHO. At the outset of the Hearing Petitioner withdrew one of the three issues as the relief sought with regard to that issue had been provided to Petitioner by DCPS. DCPS counsel then offered (and by the conclusion of the hearing provided an independent educational evaluation ("IEE") authorization) an independent comprehensive psychological evaluation. The Hearing Officer therefore eliminated the second issue in the PHO with regard to that evaluation and in the order below grants the relief sought of ordering DCPS to convene an IEP meeting to review the IEE once it is completed and provided to DCPS. Thus, only one issue was adjudicated at hearing.

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.

2. The student and his parent moved to the District of Columbia in September 2013 and the parent un-enrolled the student from his PGC school. On September 17, 2014, the student's parent went to her neighborhood school (School B) in an attempt to register the student and have him attend school. She filled out residency verification documents. Staff at School B told her the school did not have space and referred her to another DCPS school (School C) where she went the same day. She was told at School C that it could not meet the student's needs but staff at School C telephoned three other DCPS schools to inquire about the student attending and they all said they did not have space. The parent thereafter telephoned DCPS headquarters and was connected with an individual who agreed to assist in getting the student in school. When the parent did not get prompt enough action by DCPS she obtained counsel. (Parent's testimony, Petitioner's Exhibits 3, 11)
3. On October 23, 2013, DCPS issued a letter to the student's parent stating that the student could attend School A and his special education services would be provided there. (Petitioner's Exhibit 2-22)
4. On October 30, 2013, DCPS adopted the student's previous IEP. The student's previous IEP prescribed transportation services. (Respondent's Exhibit 8-1, 8-21)
5. On November 15, 2013, the student's parent signed a consent form for DCPS to conduct evaluations of the student to determine his continued eligibility. (Respondent's Exhibit 9-1)
6. It took DCPS until November 18, 2013, for the student to begin attending School A and for him to be provided any services from DCPS due to numerous delays including delays in providing the student transportation to and from school. (Parent's testimony)
7. The student started at School A on Monday, November 18, 2013. The parent's counsel's office contacted School A and spoke with the student's mother and confirmed that the student began attending on that date. (Witness 1's testimony)
8. DCPS convened an IEP meeting for the student on December 4, 2013, reviewed his eligibility and determined he continued to be eligible and developed a DCPS IEP. DCPS agreed to conduct evaluations and agreed to investigate whether there was an existing evaluation from Maryland. There was sufficient information to find him eligible. DCPS offered tutoring and ABA services for the time the student was not in school. (Witness 4's testimony, Respondent's Exhibits 6, 7)
9. At the December 4, 2013, the parent declined the DCPS offered tutoring services and no tutoring has been provided to the student. (Parent's testimony)
10. At School A the student attends a self-contained autism program with five other students. When the student first began attending School A his special education teacher used the student's Maryland IEP and implemented its goals. She assessed the student's skills and began providing instruction to improve his reading comprehension. The only goals that

were not immediately implemented were some of the transition goals because his teacher was still trying to assess his skills and build a relationship with him. The student has been making some progress relative to his IEP goals. His teacher believes the student would benefit from tutoring to improve on his reading skills and to assist him to not regress in math skills. He would also benefit from job skills training. The student has been approved to attend extended school year (“ESY”) that starts July 7, 2014, and ends August 1, 2014. During ESY the student will continue to work on goals in his IEP. The ESY program is 9 am to 3 pm each day and the student will be receiving 4 hours of instruction during that time. (Witness 3’s testimony, Respondent’s Exhibits 1, 2)

11. The parent’s educational consultant proposed a compensatory education program to compensate the student for the alleged denial of FAPE. The consultant believes the student lost some skills during the time he was not in school. The consultant recommended the student be provided a functional work skills program of 150 hours at Seeds of Tomorrow. The program would provide functional and pre-work skills training. 150 hours is the number of hours the program runs: 5 days a week for 4 hours per day for 6 weeks during the summer and the student would need transportation services to and from the program. (Witness 2’s testimony, Petitioner’s Exhibit 1)

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

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

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 denied the student a FAPE from September 17, 2013, through November 18, 2013, by failing to provide the student an educational placement and implementing his IEP and/or providing him services comparable to those in his Prince George's County IEP until DCPS adopted that IEP or developed its own pursuant to 34 C.F.R. § 300.323(f)

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS failed to provide the student's services from September 17, 2013, until November 18, 2013, and thus denied the student a FAPE.

34 C.F.R. § 300.323(f)⁵ requires that when a child with a disability transfers from another state with an IEP from the previous state and enrolls in a new school within the same school year the new LEA must provide the student with a FAPE with services comparable to those described in the child's IEP.

The evidence demonstrates that the student's parent took sufficient steps to get the student enrolled in a DCPS school as of September 17, 2013, when she provided residency forms. It took several other attempts and phone calls by the parent and then her counsel prior to DCPS issuing a location of services letter on October 23, 2013, assigning the student a school and program where he could be provided services. On October 30, 2013, DCPS officially adopted

sufficient evidence to meet the burden of proof.

⁵ 34 C.F.R. § 300.323 (f) IEPs for children who transfer from another State. If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency--

(1) Conducts an evaluation pursuant to Sec. Sec. 300.304 through 300.306 (if determined to be necessary by the new public agency); and

(2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in Sec. Sec. 300.320 through 300.324.

(g) Transmittal of records. To facilitate the transition for a child described in paragraphs (e) and (f) of this section--

(1) The new public agency in which the child enrolls must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled, pursuant to 34 CFR 99.31(a)(2); and

(2) The previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency.

the student's Maryland IEP until it could develop its own. The student's Maryland IEP prescribed transportation services and School A is not the student's neighborhood school. Thus, DCPS was required to also provide the student transportation services to and from school. This was not done until November 18, 2013. Thus, the student was without services for nearly two months. Although the student has made progress since attending School A, the evidence of his lack of services for the two months is a sufficient basis for the Hearing Officer to conclude the student was denied a FAPE as a result of not being provided a school location and his IEP services not being implemented during that two month period.

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.

The evidence demonstrates the student missed approximately two months of services during the time the student did not have a DCPS school location and transportation services to get to school. Petitioner has requested compensatory education in the amount of 150 hours at a summer functional skills program. However, the student is scheduled to attend ESY services for much of the summer so the student will not be available during that period. The evidence does demonstrate based on the student's teacher's testimony that he would benefit from tutoring and job skills training. Even though the proposed compensatory plan is unworkable during the summer because of the student's attendance at ESY the Hearing Officer concludes that to award the student nothing would be inequitable. Thus, the Hearing Officer concludes that the student should have access to tutoring. Thus, the Hearing Officer grants what he considers to be a reasonable amount of compensatory services for the actual services missed that will allow the student to recoup some, if not all, of any lack of services.

ORDER:

1. DCPS shall convene an IEP meeting to review the student's independent comprehensive psychological evaluation and update the student's IEP as appropriate within fifteen (15) school or business days after Petitioner provides the evaluation report to DCPS.
2. DCPS shall provide the student 100 hours of independent tutoring at the DCPS/OSSE prescribed rate to be used by Petitioner by December 31, 2014.
3. All other requested relief is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: May 28, 2014