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Office of the State Superintendent of Education
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Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS") ["LEA"]</p> <p>Respondent.</p> <p>Case # 2015-0301</p> <p>Date Issued: November 20, 2015</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Hearing Date: November 6, 2015</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Domiento C.R. Hill, Esq. Law Office of Domiento Hill, LLC 37 Florida Avenue, Suite 100 Washington, D.C. 20002</p> <p>Counsel for Respondent: Daniel McCall, Esq. District of Columbia Office of the General Counsel 1200 First Street, NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to

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 November 6, 2015, 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 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student is currently attending a District of Columbia public charter middle school (“School A”). The District of Columbia Public Schools (“DCPS”) is the local education agency (“LEA”) for special education purposes for School A.

The student is eligible for special education and related services under the category of specific learning disability (“SLD”) and the student’s individualized education program (“IEP”) dated November 14, 2014, required that he receive specialized instruction in the areas of mathematics, reading, and written expression of 15 hours per week inside the general education setting and 1 hour per week of behavioral support services outside general education.

At meetings with School A and DCPS the student’s parent (“Petitioner”) requested and ultimately received authorization for an independent comprehensive psychological evaluation and independent functional behavior assessment (“FBA”). Petitioner alleges the psychologist who conducted the independent evaluation recommended that the student receive a neuropsychological evaluation in order to rule out Attention Deficit Hyperactivity Disorder (“ADHD”) and recommended a classroom for the student with 10 or less students.

Petitioner alleges that copies of the independent comprehensive psychological evaluation and FBA were provided to DCPS on May 20, 2015, with a letter requesting that the student’s multidisciplinary team (“MDT”) be reconvened. The student’s MDT meeting was reconvened on June 17, 2015. Petitioner alleges that during this meeting all team members agreed that the student required placement in a full-time, separate, special education school. Petitioner contends that despite this, the student’s IEP has not been changed to reflect his needs, he has not received the recommended neuropsychological evaluation and does not have an appropriate placement.

On September 10, 2015, Petitioner filed this due process complaint alleging DCPS denied the student a free appropriate public education (“FAPE”) by (1) failing to review the student’s independent FBA, (2) failing to provide the student with an appropriate IEP; (3) failing to provide the student with an appropriate placement and location of services; (4) failing to involve Petitioner in the decision-making process regarding the student’s placement; (5) failing to implement the student’s IEP; and (6) failing to perform a recommended neuropsychological evaluation.

As relief Petitioner requests that the Hearing Officer find that DCPS denied the student a FAPE and order DCPS to immediately place and fund the student at a private full time out of general education school ("School B") for school year ("SY") 2015-2016 and provide transportation. Petitioner requests a MDT revise the student's IEP to reflect 30 hours of specialized instruction and 1 hour of behavioral supports per week to be provided outside general education. Petitioner also seeks a review of the student's FBA and the creation of a behavioral intervention plan ("BIP") at this meeting, an independent neuropsychological evaluation and an IEP meeting be convened to review the evaluations and, if necessary, revise the student's IEP. Lastly, Petitioner requests that DCPS fund an evaluation to be used to help ascertain appropriate compensatory education due the student.

On September 21, 2015, DCPS filed a timely response to Petitioners' complaint in which it denied that it failed to provide the student with a FAPE. DCPS asserted that it has determined an appropriate location of service ("LOS") for the student and that any losses sustained by the student from attending School A can be promptly addressed when the student attends his LOS. DCPS asserted the student's BIP needs to be individualized to the student's actual classroom behavior and environment and requires that the student attend his LOS. DCPS claims the student has received full and appropriate evaluations.

On October 2, 2015, a resolution meeting was held. The case was not resolved and the parties mutually agreed to proceed to hearing. The 45-day period began on October 3, 2015, and originally ended [and the Hearing Officer's Determination ("HOD") was originally due] on November 16, 2015.

The Hearing Officer convened a pre-hearing conference ("PHC") on October 6, 2015, and issued a pre-hearing order ("PHO") on October 9, 2015, outlining, inter alia, the issues to be adjudicated.

At the conclusion of the hearing on November 6, 2015, Petitioner's counsel requested and later submitted a motion to extend the HOD due date to allow for Petitioner to submit written closing arguments. Respondent did not oppose the motion. The Hearing Officer granted Petitioner's motion and the HOD due date was extended four calendar days to November 20, 2015.

Petitioner submitted written closing argument on November 10, 2015. Respondent made oral closing arguments at the hearing on November 6, 2015, and was allowed to submit a written response to Petitioner's written closing but chose not to do so. The record was therefore closed with the submission of Petitioner's written closing argument on November 10, 2015.

ISSUES:²

The issues adjudicated are:

² The alleged violation(s) and/or issue(s) listed in the complaint or in the PHO do not directly correspond to the issues outlined here. During the November 6, 2015, hearing the Hearing Officer restated the issue(s) the hearing and the parties agreed that the issues as listed in this HOD are the issue(s) to be adjudicated.

1. Whether DCPS denied the a FAPE by failing to review the student's independent FBA in accordance with 34 C.F.R. §300.502(c) 2 on June 17, 2015, or subsequent thereto because a social worker was not available to participate in the meeting.
2. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP on August 24, 2015, that was reasonably calculated to provide the student with an educational benefit, pursuant to 20 U.S.C. §1401(28) and 34 C.F.R. §300.39 because the IEP does not prescribe a full-time out of general education program.
3. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate placement and location of services that is full-time, outside of general education.
4. Whether DCPS denied the student a FAPE by failing to involve Petitioner in the decision-making process for the student's placement and location of services, in accordance with 34 C.F.R. §300.116(a)(1), by referring the decision to the DCPS LRE team on August 24, 2015.
5. Whether DCPS denied the student a FAPE by failing to implement the student's IEP, by not providing at least 20 hours of specialized instruction per week at School A since the start of the SY 2015-2016.³
6. Whether DCPS denied the student a FAPE by failing to perform a recommended neuropsychological evaluation in compliance with 34 C.F.R. § 300.304(c)(4) by August 24, 2015.

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 27 and Respondent's Exhibits 1 through 10) that were admitted into the record and are listed in Appendix A).⁴ Witnesses are listed in Appendix B.

³ DCPS asserted and Petitioner did not disagree that the claim is only until DCPS notified Petitioner of the LOS for SY 2015-2016 in a letter dated September 11, 2015. Petitioner acknowledged receiving the letter but the date of receipt was unclear from the record. Both parties agreed, however, the letter was provided Petitioner at the resolution meeting on October 2, 2015.

⁴ Any documents that were objected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

FINDINGS OF FACT:⁵

1. The student is in middle school and attends School A, a D.C. public charter school. DCPS is the LEA for School A. The student is eligible for special education with a SLD disability classification. The student's IEP dated November 14, 2014, prescribed 15 hours per week of specialized instruction inside general education in math, reading and written expression and 1 hour per week of behavioral support services outside general education. (Petitioner's Exhibit 13-1, 13-11)
2. The student has attended School A for the past [REDACTED] school years starting in SY 2013-2014. The student was easily accepted to School A and did well in [REDACTED] grade but struggled in [REDACTED] grade. His grades were generally "C"s with some "B"s. The student's teachers consistently told the student's parent during parent-teacher conferences that the student was struggling with reading and math and wanted him to attend afternoon sessions to assist with homework. (Parent's testimony)
3. The student's parent and the educational advocate participated in the student's December 11, 2014, IEP meeting. At the outset of the meeting the School A staff expressed concerns about the student's reading deficits and were surprised the student had been able to reach his current grade given his reading deficits. The student's teacher offered to provide the student some remediation assistance after school. The team also discussed the student's recent behavior concerns of being out of area, not following directions and talking back to staff. The parent asked that School B conduct a re-evaluation as a result of the information the staff provided at the meeting. (Parent's testimony, Witness 3's testimony, Petitioner's Exhibits 11, 12, 13-1, 13-15)
4. The student's next IEP meeting was held February 10, 2015, to review the student's educational testing conducted by School A. Because of concerns about the accuracy of the data the parent asked for independent evaluations. A complaint was filed and settled and the independent evaluations were approved along with compensatory education hours at Lindamood Bell where an assessment of the student's reading abilities was conducted. (Witness 3's testimony, Petitioner's Exhibit 14, 15, 16)
5. In April 2015 an independent clinical psychologist conducted a FBA and comprehensive psychological evaluation of the student. The psychologist conducted a classroom observation of the student at School A. She observed the student was inattentive and required redirection from teachers and had difficulty transitioning to new activities. The evaluator spoke with two of the student's teachers who shared their concerns that the student's inattentive behaviors were typical, he often needed redirection and his organizational skills were lacking. The evaluator suggested that the BIP be developed to address his behaviors. She also recommended a neuropsychological evaluation to

⁵ The evidence that is the source of the Finding of Fact 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.

determine the appropriateness of an ADHD diagnosis being included as the basis for a multiple disability classification. Although there were other tools to assess for ADHD the evaluator believed that a neuropsychological evaluation was the best measure. (Witness 1's testimony, Petitioner's Exhibit 7-1, 7-4, 7-5, 7-10, 7-11, 7-12)

6. The evaluator also conducted the psychological evaluation assessing the student's cognitive, academic and social/emotional functioning. The student's cognitive functioning was determined to be in the average range except for processing speed. The student's academic functioning was below average for math (third to fifth grade level) and his reading skills were in the very low range (second grade level). The student's social/emotional functioning demonstrated some anxiety related to his academics and some hyperactivity, but no behavioral concerns or acting out in class. The evaluator diagnosed the student with a specific learning disorder in reading and written expression and a rule-out diagnosis for ADHD. (Witness 1's testimony, Petitioner's Exhibit 8-7, 8-9, 8-13)
7. The evaluator observed the student in an inclusion classroom at School A. The evaluator considered the student well adjusted and able to work within the classroom as he was making passing grades in the general education curriculum. However, the evaluator noted the student was struggling academically and just making average grades. Based on the student's low academic achievement scores and her observation the evaluator recommended the student be placed in a special education classroom ideally with less than 10 students to allow for significant teacher attention to assist the student in making up his academic deficits. The evaluator did not recommend that the student be totally removed from his non-disabled peers. (Witness 1's testimony, Petitioner's Exhibit 8-13, 8-14)
8. Petitioner provided School A and DCPS the independent evaluations on May 20, 2015. (Witness 3's testimony, Petitioner's Exhibit 22-5)
9. At a June 17, 2015, IEP meeting the MDT reviewed the student's psychological evaluation. The FBA was not reviewed because there was no DCPS social worker available for the meeting to review the FBA. The School A psychologist generally agreed with the results of the independent evaluation. The team did not, however, believe it had enough data for a multiple disability classification to include other health impairment ("OHI") for ADHD and School A requested the student's parent provide a written justification from the evaluator for the neuropsychological. (Witness 3's testimony)
10. The student's parent participated in the June 17, 2015, IEP meeting. Based upon the student's teacher comments about the student's low reading level the student's parent polled each member of the team as to what they believed the student needed to be successful. The student's parent and her advocate were left with the impression that everyone agreed the student needed a full time special education placement. (Parent's testimony, Petitioner's 19)

11. During the meeting the student's parent stated that School A could not meet the student's needs and did not have the level of supports the student needed to make up the deficits. The team members agreed that School A could not meet his needs. The IEP was unchanged as of that meeting. The team agreed to reconvene and proposed dates in July 2015 and the parties eventually agreed to a July 17, 2015, meeting date. (Witness 3's testimony, Petitioner's Exhibit 22-12, 22-13,)
12. Petitioner provided School A with the independent psychologist's justification for the neuropsychological on June 18, 2015. (Witness 3's testimony, Petitioner's Exhibit 22-14, 22-15)
13. The student's parent had a Lindamood Bell assessment conducted on June 24, 2015, that noted the student's significant academic deficits and recommended the student be provided 160 to 200 hours of tutoring in its program. The student's parent provided DCPS the assessment report. (Parent's testimony, Petitioner's Exhibit 9)
14. On July 17, 2015, the meeting could not proceed as scheduled because a DCPS social worker could not attend. The parent's educational advocate corresponded with the School A special education coordinator ("SEC") recounting a conversation he and the parent had with the SEC regarding (1) additional meeting dates, (2) noting that the parent had provided School A with the Lindamood Bell assessment and (3) that the parent was expecting to discuss the student's school placement for SY 2015-2016 given that the team at the previous meeting were in consensus that student was in need a more restrictive environment in his IEP and placement than he currently had at School A. The correspondence indicated that the SEC stated to the parent that she should come to the next meeting prepared to propose prospective school placements she would like DCPS to explore. A July 29, 2015, meeting was eventually confirmed but the meeting did not convene that day because School A was unable to meet. (Witness 3's testimony, Petitioner's Exhibit 22-19, 22-21, 22-22)
15. The team eventually reconvened on August 24, 2015. The agenda was to review and revise the IEP and review the FBA. Again no social worker was available and the FBA was not reviewed. (Witness 3's testimony)
16. The School A SEC facilitated the August 24, 2015, IEP meeting. The team presented a draft IEP initially with 15 hours of specialized instruction outside general education. There was some discussion of whether School A could provide the student an IEP with 20 hours of specialized instruction outside general education. The DCPS compliance manager who participated in the August 24, 2015, meeting mentioned that 20 hours of specialized instruction was a full time IEP. The student's parent did not agree to the 20 hours but wanted 27.5 hours of specialized instruction per week. In the SEC's opinion there was no additional data presented that justified the student having 27.5 hours of instruction outside general education. The student's parent asked each of the team members what they thought the student needed and if he needed a 27.5 hour IEP. After a discussion the team, except the student's parent and her advocate, agreed to amend the student's IEP to prescribe 20 hours of specialized instruction per week outside general

education based on the available data. No specific schools were discussed and there have been no subsequent meetings at School A where other schools for the student were presented. (Witness 4's testimony, Respondent's Exhibits 3-1, 3-11, 4-2)

17. The student can participate in lunch and elective classes with non-disabled peers and be successful. However, in his core classes at School A the current accommodations he has been provided have not been sufficient. School A cannot implement the IEP proposed at the August 24, 2015, meeting and has involved DCPS, the LEA, to determine the student's LOS. (Witness 4, Respondent's Exhibit 3-11, 3-12)
18. School A's SEC is of the opinion that the August 24, 2015, IEP is the student's correct LRE and is a decision that was made by the IEP team. Neither School A nor DCPS represented at the August 24, 2015, meeting that student is in need in full time out of general education program. (Witness 4's testimony, Respondent's Exhibit 3-11, 3-12)
19. The student has remained at School A during the pendency of this proceeding because School A allowed the student to do so and the parent agreed. At School A the student generally gets along with his non-disabled peers and has developed relationships with them. Since the beginning of SY 2015-2016 the student's behavior at School A has improved but his academic deficits persist, as do his attention and organizational issues. (Witness 3's testimony)
20. At School A the student has earned a failing grade in one class for the first advisory of SY 2015-2016. (Witness 4's testimony)
21. The student's parent did not get a copy of the IEP at the August 24, 2015, meeting; she was provided the IEP after the meeting despite the fact that the DCPS representative at the meeting stated that only the DCPS LRE team, after an observation was conducted of the student, could approve an IEP with 20 hours per week of specialized instruction outside general education. (Witness 3's testimony, P-20-11, 20-12)
22. DCPS sent the letter to the student's parent dated September 11, 2015, stating that the student's LOS for SY 2015-2016 was School C. The LOS letter was also issued at the resolution meeting held on October 2, 2015. No one had discussed School C with the parent prior to her receiving the letter. (Parent's testimony, Respondent's Exhibit 5-1)
23. The student's parent was told she should withdraw the student from Student A and enroll him at School C. There was no representative of School C present at the resolution meeting and no description of the School C program; only a direction that the parent should visit School C. The parent was in disagreement with School C at the resolution meeting. (Witness 3's testimony, Petitioner's Exhibit 22-45, 22-46)
24. The parent visited School C but she did not visit any classrooms. She is uncomfortable with the security at the school and the distance the student would have to travel from home to get to School C. (Parent's testimony)

25. The student can start now at School C and School C can implement the student's August 24, 2015, IEP in a program with students who have the same disability classification as the student. If the student came to School C he would be in the SLD track with a combination of a self-contained program with his remaining hours of instruction provided in an inclusion setting in a classroom with both a general education teacher and special education teacher. (Witness 6's testimony)

26. The student visited and has been accepted to School B, a private separate special education school. School B has certificate of approval ("COA") from OSSE and serves students from pre-kindergarten to twelfth grade with a variety of disability classifications including SLD. School B currently has thirty-two students in its middle school. The student can start School B immediately and would be in need of transportation services. The average class size at School B is eight students to one adult teacher. All content teachers are special education certified and the specialty teachers are dual certified in their area of specialty. The structure of the School B program provides accommodations to assist students who have attention and organization difficulties. School B has no non-disabled students. The rate for tuition and related services are specified by OSSE and the tuition rate is approximately \$43,000 per year. Related services hourly rates vary and behavior support services are billed at \$109 per hour for individual support. (Witness 2's testimony, Petitioner's Exhibit 23)

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.⁶ *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 denied the student a FAPE by failing to review the student's independent FBA in accordance with 34 C.F.R. §300.502(c) 2 on June 17, 2015, or subsequent thereto because a social worker was not available to participate in the meeting.

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

Pursuant to 34 C.F.R. § 300.502 (c), If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation (1) must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and (2) may be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part.

The evidence demonstrates that the parent, by and through counsel, on or about May 20, 2015, provided DCPS with a copy of the parent's independent FBA. The FBA notes the evaluator's conclusions about the student's inattentiveness, need for redirection and disorganization and recommends a BIP be developed.⁷ A MDT meeting was held on three occasions and in each instance DCPS did not have a social worker present to review the FBA. As a result the student's FBA has still not been reviewed and the student began SY 2015-2016 without the benefit of the review and a BIP being developed to address the concerns noted in the FBA. Although the evidence demonstrates that the student's behavior has improved the student's inattention, organization deficits and academic deficits have persisted and the student has earned at least one failing grade during the current school year.⁸ As a result, the Hearing Officer concludes that DCPS' failure to timely review the independent FBA that was provided in May 2015 has denied the student a FAPE.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP on August 24, 2015, that was reasonably calculated to provide the student with

⁶ 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.

⁷ FOF #5

⁸ FOF #s 19, 20

an educational benefit, pursuant to 20 U.S.C. §1401(28) and 34 C.F.R. §300.39, because the IEP does not prescribe a full-time out of general education program.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE on this issue.

“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 Individuals with Disabilities Education Improvement Act (“IDEIA”) of 2004 requires that all students be provided with a Free Appropriate Public Education (“FAPE”). FAPE means:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...”34 C.F.R. § 300.17, 30 DCMR Sec. § 3001.1.

Special education is defined as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.” 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1.

The evidence demonstrates despite the fact that the student’s achievement scores in reading and math show significant deficits and the need for intense remediation, there was insufficient evidence that the student should be totally removed from his non-disabled peers or that in the non-academic elective courses he cannot make progress in general education. The testimony of the evaluating psychologist did not support the student’s total removal from the general education setting. In addition, the student, despite his academic deficits, has been able to make passing grades while attending School A and has developed and benefitted from interaction with his non-disabled peers.⁹

⁹ FOF #s 7, 17, 18, 19

The student's IEP dated August 24, 2015, prescribes that the student be provided twenty (20) hours per week of specialized instruction and one (1) hour per week of behavioral support services outside general education. Heretofore the student's academic progress has been measured in an inclusion setting at School A. Considering IDEA's mandate regarding the least restrictive environment it seems quite reasonable to the Hearing Officer that the student's IEP services are being increased so that his performance relative to the increase can be measured prior to him being totally removed from general education.

The evidence demonstrates that the IEP is reasonably calculated to provide the student educational benefit. Accordingly, the Hearing Officer concludes Petitioner did not meet the burden of demonstrating the student's most recent IEP is inappropriate.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate placement and location of services that is full-time, outside of general education.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE on this issue.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision 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 is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

As stated above, despite the fact that his achievement scores in reading and math demonstrate significant deficits and need for intense remediation there was insufficient evidence that the student should be totally removed from his non-disabled peers or that in the non-academic elective courses he cannot make progress in general education. The testimony of the evaluating psychologist did not support the student's total removal from the general education setting.

The student's IEP dated August 24, 2015, prescribes that the student be provided twenty (20) hours per week of specialized instruction and one (1) hour per week of behavioral support services outside general education. The evidence demonstrates that the IEP is reasonably calculated to provide the student educational benefit particularly given that his performance heretofore has been measured in an inclusion setting at School A. Accordingly, the Hearing Officer concludes Petitioner did not meet the burden of demonstrating the student's placement as prescribed in his August 24, 2015, IEP is inappropriate

The Hearing Officer has made no determination as to the appropriateness of the LOS that was proposed by DCPS for the student for SY 2015-2016 as that location was determined subsequent to the filing of the due process complaint and was not an issue adjudicated.

ISSUE 4: Whether DCPS denied the student a FAPE by failing to involve the Petitioner in the decision-making process for the student's placement and location of services, in accordance with 34 C.F.R. §300.116(a)(1), by referring the decision to the DCPS LRE team on August 24, 2015.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE on this issue.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision 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 is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

Although the evidence demonstrates that there were statements made at the August 24, 2015, IEP meeting that the student's LRE would need to be determined after a review by the DCPS LRE team, Witness 4's credibly testified that a draft IEP was presented of 15 hours outside general education and the team ultimately agreed that the student's IEP should prescribe 20 hours of specialized instruction per week outside general education.¹⁰

The Hearing Officer does not based on the evidence conclude that that the student's placement was determined outside the IEP team or that the parent did not have participation in the placement decision albeit the parent and her advocate did not agree with the level of services and the LRE proposed by the rest of the team and believed the student should be totally removed from general education. Nonetheless, the Hearing Officer concludes that the evidence supports a conclusion that the parent was involved in the placement decision when the IEP was developed.

ISSUE 5: Whether DCPS denied the student a FAPE by failing to implement the student's IEP, by not providing at least 20 hours of specialized instruction per week at School A since the start of the SY 2015-2016 [until the date that DCPS notified the parent of the LOS for the student.]¹¹

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE on this issue.

DCPS, as the local and state education agency, is to make certain that the educational placement, for each child with a disability within its jurisdiction, is able to implement the student's Individualized Educational Program. Pursuant to 34 C.F.R. § 300.17,

¹⁰ FOF #s 16, 18. Although Petitioner's witnesses testified that the School A team had previously agreed the student needed a placement totally removed from general education the Hearing Officer did not conclude that the documentary evidence other than the witnesses own notes supported that interpretation of the facts. The Hearing Officer gave credit to Witness 4's testimony about what occurred at IEP meetings regarding the team's decision and the IEP proposed based on that witness' clear, calm and unequivocal testimony.

¹¹ DCPS asserted that it notified Petitioner of the LOS for the student for SY 2015-2016 in a letter dated September 11, 2015, and Petitioner acknowledged receiving the letter but the date of receipt was unclear. Both parties agreed, however, the letter was provided Petitioner at the resolution meeting on October 2, 2015.

Free appropriate public education or FAPE means special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..."

DCPS shall implement an IEP for each student with a disability. See *id.* at § 614(d)(2). Pursuant to D.C. MUN. REGS. tit. 5, § 3010.2 (2003), DCPS "shall implement an IEP as soon as possible after the meeting where the IEP is developed..." Pursuant to 34 C.F.R. § 300.115(a), DCPS "must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services."

Once School A proposed the IEP at the August 24, 2015, meeting and acknowledged it could not implement the IEP then the LEA was to provide the student a LOS that could. Petitioner acknowledged receiving the LOS letter but the date of receipt was unclear from the record. Both parties agreed, however, the letter was provided Petitioner at the resolution meeting on October 2, 2015.

The LOS was clearly not provided until after SY 2015-2016 had begun. The evidence demonstrates that although the student's behavior has improved he has failed at least one class in the current school year at School A. Based on this evidence the Hearing Officer concludes the student has been harmed by the student's current IEP not being implemented from the start of SY 2015-2016 while he remained at School A at least up until the LOS was determined and provided to Petitioner. Consequently, the Hearing Officer concludes the student was denied a FAPE as a result.

ISSUE 6: Whether DCPS denied the student a FAPE by failing to perform a recommended neuropsychological evaluation in compliance with 34 C.F.R. § 300.304(c)(4) by August 24, 2015.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE on this issue.

Pursuant to 34 C.F.R. § 300.304(c)(4) and (6), DCPS shall ensure that "the child is assessed in all areas related to the suspected disability...[and] in evaluating each child with a disability...the evaluation is sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified." In the instant matter it is clear DCPS has failed to comply with the requirements of the IDEIA.

The evidence demonstrates that the student, per the recommendations of a recent comprehensive psychological evaluation, was recommended for further assessment with a neuropsychological evaluation to determine if the student's problems are the result of attention issues related to ADHD and whether the student's disability classified should be amended to include his attention issues.¹²

¹² FOF # 5

At an MDT meeting convened in June of 2015 DCPS requested from the parent and her educational advocate a written explanation from the clinical psychologist who conducted the comprehensive psychological evaluation as to why there was a need for a neuropsychological evaluation. That request was fulfilled. As of the filing of the due process complaint DCPS had yet to conduct the recommended evaluation. The evaluator credibly testified why the student required the neuropsychological evaluation and how it would help in identifying the student's special education needs. DCPS has yet to perform the neuropsychological evaluation. Consequently, the Hearing Officer concludes that DCPS' failure to perform or authorize this evaluation has denied a FAPE to the student.

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..."

Petitioner did not present a compensatory education plan in writing or present a witness or documentary evidence to support a finding with respect to compensatory education. Because there was no evidence presented from which the Hearing Officer can conclude what, if any, compensatory education is appropriate for the student, the Hearing Officer makes no finding or conclusion as to any compensatory education due the student for any time during SY 2015-2016, but grants Petitioner's request for an evaluation to assist in determining what if any compensatory education would be appropriate for the student. In the alternative, the Hearing Officer concludes that Petitioner may elect to receive an amount of compensatory education the Hearing Officer deems nominal.¹³

ORDER:

1. DCPS shall, within five (5) school days of issuance of this order, provide Petitioner authorization for an independent neuropsychological evaluation at the DCPS/OSSE approved rate.
2. DCPS shall, within fifteen (15) school days of the completion of independent evaluation authorized by this order, convene an IEP meeting to review that evaluation make appropriate adjustments to the student's IEP and educational programming that

¹³ The Hearing Officer concludes that despite Petitioner's inability to establish appropriate compensatory education, to award nothing would be inequitable. (A party need not have a perfect case to be entitled to compensatory education. Stanton v. D.C . 680 F Supp. 201 (D.D.C. 2011). If a student is denied a FAPE a hearing officer may not "simply refuse" to grant a compensatory education award. Henry v. D.C . 55 IDELR (D.D.C. 2010))

the team deems warranted and make a determination regarding the student's educational placement and location of services for the remainder of SY 2015-2016.

3. As remedy for the denial of FAPE DCPS shall fund an independent educational assessment at the DCPS/OSSE approved rate for purposes of determining an appropriate amount of compensatory education the student would be due for the delay in conducting the neuropsychological evaluation and the review of the FBA and the failure to implement the student's IEP from the start of SY 2015-2016 until DCPS proposed a LOS for the student; or in the alternative shall provide the student 20 hours of independent tutoring at the DCPS/OSSE approved rate(s) as nominal compensatory education for the violations determined.¹⁴
4. Although the Hearing Officer has concluded that the student's IEP dated August 24, 2015, is reasonably calculated to provide the student educational benefit the Hearing Officer has made no determination as to the appropriateness of the LOS that was proposed by DCPS for the student for SY 2015-2016 as that location was determined subsequent to the filing of the due process complaint and was not an issue adjudicated.
5. 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: November 20, 2015

Copies to:

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Appendix A

¹⁴ Petitioner shall be allowed to elect which of the alternatives presented herein she chooses.