

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 and concluded on June 23, 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 2004.

BACKGROUND AND PROCEDURAL HISTORY:

The student is _____ with a disability pursuant to IDEA with a disability classification of specific learning disability (“SLD”). The student is currently in seventh grade and attending a DCPS middle school (“School A”). The student’s initial IEP was developed at School A on March 10, 2014.

Petitioner filed the due process complaint in this matter on April 21, 2014. Petitioner alleged the student’s March 10, 2014, IEP is inappropriate. Petitioner asserted the data available to the IEP team revealed severe behavioral problems and academic delays that supported the need for a more restrictive IEP and placement up to and including a full-time out of general education placement.

Petitioner seeks as relief an order allowing the hearing officer to develop an appropriate IEP based on the information available and/or order requiring DCPS to do so. Petitioner originally requested that DCPS be ordered to provide funding and transportation for the student to attend private full time out of general education day school and provide compensatory education. However, at the hearing Petitioner did not present a school for the student to attend.

DCPS filed a response to the complaint on April 30, 2014. DCPS denied any alleged violation(s) and asserted that the student’s March 10, 2014, IEP is based upon the available data and DCPS developed what it considered, and still considers, an IEP reasonably calculated to provide the student with educational benefit.

A resolution meeting was held May 7, 2014. The complaint was unresolved. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on May 21, 2014, and ends (and the Hearing Officer’s Determination (“HOD”) is due) on July 5, 2014. On May 27, 2014, the Hearing Officer convened a pre-hearing conference and issued a pre-hearing order on May 30, 2014, outlining, inter alia, the issues to be adjudicated.

ISSUE: ²

The issue adjudicated is:

Whether DCPS denied the student a free appropriate public education (“FAPE”) by failing to develop an appropriate March 10, 2014, IEP due to an inappropriate disability classification and an insufficient level of service. ³

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 17 and Respondent’s Exhibits 1 through 14) that were admitted into the record and are listed in Appendix A. Petitioner’s and Respondent’s witnesses are listed in Appendix B.

FINDINGS OF FACT: ⁴

1. The student _____ is a child with a disability pursuant to IDEA with a disability classification of SLD. The student is currently in seventh grade and attending School A. (Petitioner’s Exhibit 2-1)
2. Before attending School A the student attended another DCPS middle school for three years where he did not do well academically or behaviorally. The student has been retained twice and at his previous school had a number of in school and out of school suspensions. (Parent’s testimony)
3. On or about August 30, 2013, the Petitioner filed a due process complaint alleging, inter alia, failure to evaluate in a timely manner. The complaint was resolved through a settlement agreement and DCPS agreed to conduct a comprehensive psychological and functional behavioral assessment (“FBA”) and convene a meeting to review the assessments and determine the student’s eligibility for special education. (Respondent’s Exhibit 1-1)
4. The student started attending School A in October 2013. For the first month he had no

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order (“PHO”) do 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 this was the issue(s) to be adjudicated. At the outset of the hearing Petitioner’s counsel withdrew issues #2 & #3 that were stated in the PHO.

³ Petitioner asserts the student’s disability classification should also include emotional disability (“ED”) and that the level of service in the IEP should be increased up to and including a full time out of general education placement.

⁴ 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.

problems but soon began to engage in disruptive behaviors. He was suspended from school at least once prior to being determined eligible for special education and twice after. The student's parent does recall that the student has had any in-school suspensions since attending School A. (Parent's testimony, Petitioner's Exhibit 12, Respondent's Exhibit 13)

5. DCPS' comprehensive psychological was completed on or about December 12, 2013, and found the student's cognitive functioning to be in the below average range and his adaptive functioning to be average. The evaluation found the student to be functioning at 2nd to 3rd grade levels in all academic areas except reading comprehension in which he had a score at just below 2nd grade. The student had significant behavioral problems relating to inattention, impulsivity, and aggression. The DCPS psychologist concluded the student met the criteria for specific learning disability. There was no diagnosis in the evaluation of any other psychological condition other than a learning disability. (Witness 1's testimony, Petitioner's Exhibits 5-1, 5-8, 5-11, 5-20)
6. On March 10, 2014, DCPS determined the student eligible with the SLD classification. Despite the student's oppositional behaviors the team looked carefully at the disability criteria and concluded SLD was the appropriate classification. The criteria for emotional disability were not in their opinion evidenced at that time. Rather, the student's behaviors were thought to be the result of his embarrassment about his academic deficits. The student's initial IEP dated March 10, 2014, prescribes that the student be provided 15 hours per of specialized instruction per week outside the general education setting and 120 minutes per month of behavioral support services outside of the general education setting. (Witness 1's testimony, Petitioner's Exhibits 2-10, 7-1)
7. DCPS developed a behavior intervention plan ("BIP") based on the FBA that was conducted. The BIP targets the student's verbal and physically aggressive behavior in the classroom that he uses to avoid attention being drawn to and his embarrassment of his academic deficits. The BIP lists behaviors the student's teachers will help him develop to request assistance in the classroom when he does not understand the instruction and it describes actions the teachers should employ to assist the student when he engages in the targeted behaviors. The BIP also includes rewards and reinforcements for the student displaying desired behaviors and consequences for displaying disruptive behaviors. Data is to be gathered and examined weekly to gage the student's progress and the effectiveness of the BIP. (Witness 1's testimony, Petitioner's Exhibits 6-1, 7-1, 7-2, 7-3)
8. At the time of the student's initial IEP meeting the student's parent agreed with the SLD classification. The parent believes the student learns differently from his academically successful siblings and she believes he has a learning disability. At that meeting the DCPS team members explained to the parent that they did not want to put the student in a special education classroom the full day and the parent agreed with this at the time of the meeting. She has not requested another meeting after the IEP was developed to review the student's level of services. (Parent's testimony, Witness 1's testimony)

9. The student's IEP indicates his behavior impedes his learning or that of other children. The IEP has the following statement regarding positive behavior interactions and supports: "[The student's] behavior is a distraction for himself and his peers in the classroom. He is consistently off task and has trouble focusing on assignments given. [The student] exhibits inappropriate behaviors when interacting with his peers and adults inside and outside of the classroom setting, he will frequently make inappropriate comments and has difficulty with keeping his hands to himself. He will often challenge authority and uses excessive profanity when speaking. [The student] is provided the opportunity to speak to a social worker when he is having difficulty calming down, however, on occasion this does not assist in diffusing the situation. He is provided a wake-up call in the morning to assist with starting his day off positively and is allowed the opportunity to check in with the school psychologist at the beginning of the day and frequently throughout the day, so as to diffuse any feelings of anxiety or anger that he may be experiencing. [The student] is allowed to frequently do his classwork in a one-on-one setting with the psychologist or the special education teacher." (Petitioner's Exhibit 2 -2)
10. Regarding the present level statements in the area of mathematics the student's IEP states: "...[The student] requires a one-on-one setting where there are minimal distractions. When in a whole group or small group setting, [the student] lacks focus, he will not only distract himself but will distract the entire class. He is a bully in the classroom, he harasses students, shouts obscenities, uses obscene gestures, frequently puts his hand on other and makes the females in the classroom uncomfortable with his sexual advances and commentary. His harassment is not limited to the students in the classroom but can frequently be directed to the adults in the classroom setting. When [the student] is in a one-on-one setting he attempts to do his work but requires significant prompting in order to solve problems..." (Petitioner's Exhibit 2- 3)
11. Regarding the present levels statement in the area of reading the student's IEP states: "...he struggles significantly with comprehending what he reads. When [the student] is not given his way in the classroom he becomes loud and belligerent. He will disrupt the class by singing profane lyrics loudly and repeatedly, pretending that he is having flatulence problems, provoking and bullying other student's with name calling, threats, obscene gestures, obscene language and other obscene and highly sexual commentary. ...[The student] does this so as to distract the student's in the classroom from his deficits in reading and his inability to read fluently... [The student] has an impressive age appropriate verbal vocabulary despite his difficulties in and deficits with reading. . . [he] reads comfortably at approximately a third grade level. . . He refuses to work productively in a classroom setting as he does in a one-one-one setting. " (Petitioner's Exhibit 2-5)
12. Regarding the description of how the student's disability affects the student's access to the general education curriculum for reading the student's IEP states: "His extreme and negative behaviors seriously impact the learning environment. [The student's] inability to focus in a typical classroom setting serves as a major hindrance to his learning." (Petitioner's Exhibit 2-5)
13. Regarding the description of how the student's disability affects the student's access to the

general education curriculum for writing the student's IEP states: "[The student's] deficits in reading prevent him from being able to independently access grade level text and consequently also affects his ability to produce grade level writing. His negative behaviors and lack of focus seriously impacts the learning environment and hinders his academic progress." When provided with proper modifications he is able to access grade level materials. The comments made by student's general education teachers that are in the psychological evaluation and included the student's IEP about him needing one-to-one attention were describing the students' needs in the general education environment and were made prior to the student being found eligible and receiving any special education services. (Witness 1's testimony, Petitioners Exhibit 2-7)

14. Regarding the social emotional area, the student's IEP states: "[the student's evaluation reports indicated] concerns with inattention, adaptability, aggression, impulsivity, withdrawal and conduct problems. [his] teachers report [he] is often disruptive, disrespectful to teachers and peers, inattentive, impulsive, and uses profane language to express his feelings. Parent checklists were significant for withdrawal, aggression, impulsivity, and hyperactivity." (Petitioner's Exhibit 2-8)
15. The student's has had failing grades at School A. Prior to the due process hearing the student's parent talked to the student's math and reading teachers. The math teacher told the parent that the student doesn't focus in class and puts up a fight to get put out of class and is seldom in the class. His reading teacher related a similar description of the student's behavior in her classroom. The parent spoke to the student's science teacher and the teacher stated the student passed the class. However, it seems the student has failed all others classes based on the progress reports the parent received from School A. The parent is not aware of whether the student will pass to eighth grade. (Parent's testimony)
16. The principal at School A informed the student's parent that he intended to skip the student and put him in ninth grade at a DCPS high school. The parent opposes the student being placed in ninth grade because she believes he has not learned anything while at School A due to his behaviors, his suspensions and his resulting inability to access instruction. The student's parent now believes the student requires more services than his IEP prescribes and he needs a smaller class size and more one-to-one assistance. (Parent's testimony)
17. The student was suspended from School A on April 10, 2014, for nine days for fighting. The student has been sent home from School A on occasion for his behavior in addition to the suspension and the seventh grade assistant principal at School A called the parent about the student's behavior two to three time per week and spends a good bit of time with the School A psychologist. (Parent's testimony, Petitioner's Exhibit 8-1, Respondent's Exhibit 13)
18. The student has not been diagnosed with any psychological condition and does not take any medication. The student is currently involved with an out of school mentoring program that provides him tutoring on two days per week for a few hours and on activities

on weekends. At home the student's behaviors are similar to what has been described at school. He uses profanity with his parent and refusing to do things she asks him to do. (Parent's testimony)

19. The student feels he is not learning anything at School A because he gets distracted in classes where there are more than twenty students. Since March 2014 he has getting pulled out of his general education classes for special education. Sometimes there are other students in the special education classroom and sometimes the special education teacher works with him one- on-one. He likes going to the special education classroom and believes it helps him some but not enough. The special education teacher works with him for what he considers a short time and then sends him back to his general education class and helps in class if he has questions. When the student is in classroom with a whole lot of students he doesn't get his work done and he becomes disruptive in class making fun of other students. Because of this he is sometimes sent home early. The student has been seeing the school psychologist and social worker regularly and finds working with them helpful. The student is scheduled to attend summer school. (Student's testimony)
20. Although the student is often disruptive in the classroom the School A psychologist has been able to provide him interventions that work to calm the student to allow him to return the general education classroom. The student has always had difficulty with attendance. He will not attend school when the weather is bad as he takes public transportation. The student's special education teacher provides the student both pull out and push in instructional services. The student is not as disruptive in the classroom as he was before his special education services began. However, there is more progress that can be made. The student recently had a speech language evaluation and qualified for speech language services that have now been added to his IEP. (Witness 1's testimony)
21. The parent had a consultant propose a compensatory education program based upon the consultant's meeting with the student, her review of his evaluations and IEP and providing him academic work to assess his skill level. Based upon the claim that the student had insufficient hours of specialized instruction in his IEP of less than a full time out general education behavior support program from March 2014 to present, the consultant proposed 65 hours of independent tutoring. (Witness 3's testimony, Petitioner's Exhibits 9, 15)

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. ⁵ *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: Whether DCPS denied the student a FAPE by failing to develop an appropriate March 10, 2014, IEP due to an inappropriate disability classification and an insufficient level of service.

Conclusion: Petitioner did not sustain the burden of proof by preponderance of the evidence that the student's March 10, 2014, IEP is inappropriate because of the student's disability classificatoin does not include ED or because the IEP should have prescribed more hours of specialized instruction and/or related services than it does.

Pursuant to 34 C.F.R. § 300.08(c)(4)(i):

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.

⁵ 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.

- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.
- (ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

The evidence demonstrates that the student has been diagnosed with a learning disability and that the eligibility team including parent agreed with this classification.⁶ Although there was evidence presented including descriptions in the student's IEP of his disruptive behaviors, the evidence indicates that the disruptive behaviors were not related to any diagnosed psychological disorder but actually related to his learning disability and his embarrassment and attempts to avoid attention being drawn to his academic deficits.⁷

Petitioner presented no witness who could dispute this assessment of the student's behavior or to substantiate any of the criteria noted above that would qualify the student for an ED classification pursuant to IDEA or who could counter the DCPS psychologist's credible testimony of the appropriateness of the student's SLD classification. The behaviors listed in the IEP were descriptions provided by his general education teachers about the student's behaviors in the general education classroom prior to him being provided any special education services that were in part designed to address these behaviors.⁸

In addition, there was insufficient evidence that the student's special education programming would any different as this juncture if his disability classification included ED. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of proof that the student's IEP is inappropriate because it does not include the ED classification.

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.

To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

"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).

⁶ FOF #s 6, 8

⁷ FOF # 7

⁸ FOF #13

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).

Requirements of the IDEA are satisfied when a school district provides individualized education and services sufficient to provide disabled children with some educational benefit. *Blackmon v. Springfield R-XII Sch. Dist.* 198 F.3d 648, at 653 (8th Cir. 1999)

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

The evidence demonstrates that the student has below average cognitive functioning and is operating at about third grade although he is in seventh grade and chronologically should be in ninth grade. It is clear the student’s academic deficits are significant. However, it is not clear from the evidence that his academic deficits cannot be addressed with the level of services that are currently in his IEP.

The testimony by the parent that the student has continued to have difficulties since the IEP was developed was not compelling. Although she related information she had been purportedly provided by the the student’s teachers it was unclear from her testimony whether this information was provided to her before or after the IEP was implemented. On the otherhand, the student stated that he has benefited from the special education services he has received although he believes he would benefit if he had more and the DCPS witness also testified that since the student’s IEP has been implemented his behaviors have improved.⁹

The student’s progress, albeit slight, indicates the appropriateness of the IEP and placement at the time the IEP was developed. Although the IEP itself documents repeatedly the student disruptive behaviors in the classroom and how they interfere with his and other students’ learning, as previously noted, this information was in the student’s evaluation and placed in the IEP prior to the IEP’s implementation.

Although during the hearing there was some alluding to a request for more services at a recent IEP meeting there is no evidence that prior to the complaint being filed there was any request made for a meeting at which the student’s teachers could be present and relate whether the specialized instruction and implementation of the BIP and related services have been effective. Although the evidence indicates the student had a suspension in April 2014 and may have been suspended just prior to the due process hearing the suspensions were not sufficient to

⁹ FOF #s 19, 20

demonstrate that the student's IEP was inappropriate when it was developed. Accordingly, the Hearing Officer concludes that Petitioner failed to demonstrate by a preponderance of the evidence that the student's current IEP was not reasonably calculated to confer educational benefit when it was developed and/or that the student has been denied a FAPE.

Rather than conclude that the student's IEP is inappropriate, based upon the evidence presented it is reasonable to conclude that a review of the IEP and the effectiveness of the level of services the student has received is necessary prior to any change in the IEP being made or ordered. The Hearing Officer anticipates that such a meeting will be requested and held.

ORDER:

1. The complaint is hereby dismissed with prejudice.
2. All 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: July 5, 2014