District of Columbia

Office of the State Superintendent of Education

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OSSE
Student Hearing Office
June 03, 2013

Confidential

Parent on Behalf of Student[1], Petitioner, v. District of Columbia Public Schools ("DCPS") Respondent. Case #	HEARING OFFICER'S DETERMINATION Hearing Dates: May 20, 2013 May 21, 2013 <u>Representatives:</u> Counsel for Petitioner: Joy Purcell, Esq. Children's Law Center 616 H Street, N.W. Suite 300 Washington, D.C. 20001 Counsel for DCPS: Steven N. Rubenstein District of Columbia Assistant Attorney General Lynette Collins, Esq. 1200 First Street, NW Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

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 for two days on May 20, 2013, and May 21, 2013, at the Office of the State Superintendent ("OSSE") Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age in grade and resides in the District of Columbia. The student has been determined to be student with a disability under IDEA with a disability classification of intellectual disability ("ID"). Previously, the student's disability classification had been specific learning disability ("SLD"). The student currently attends a District of Columbia public high school ("School A").

The student was referred for special education evaluations while in kindergarten when he attended a DCPS elementary school and was first determined eligible in May 2001 with a speech language impairment ("SLI") classification. By the time the student was in fifth grade the student's disability classification had been changed to SLD.

After leaving his DCPS elementary school the student began attending a District of Columbia public charter school. During school year ("SY") 2009-2010 the student repeated seventh grade at the public charter school and earned low passing grades. The student's individualized educational program ("IEP") was amended on May 20, 2010, to prescribe 20 hours per week of specialized instruction outside general education and 1 hour of speech-language pathology per week outside general education.

DCPS completed a psychological reevaluation of the student in July 2010. The evaluation noted the student's retentions, academic difficulties, and reported teacher comments that he had not mastered IEP goals. The DCPS psychologist administered a cognitive screening and the student's full-scale intelligence quotient ("IQ") was scored at 73, indicating borderline intellectual functioning. The student's academic achievement scores were at approximately third to fourth grade level. The evaluator noted that the student could be expected to have a great deal of difficulty with grade level academic tasks and his instruction and assignments needed to be modified in all classes to accommodate his low reading and writing level.

For SY 2010-2011 the student's father enrolled him in a DCPS middle school ("School B") for eighth grade. DCPS convened an IEP team in September 2010 to review the

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[2] Although the student is an (he has designated his older brother his educational decision-maker, and the brother is the Petitioner in this matter on the student's behalf.

student's IEP. In drafting the September 16, 2010, IEP the team relied on the July 2010 evaluation and other assessments conducted of the student after he arrived at School B. The assessments indicated the student was operating at approximately fourth grade level in reading. The IEP team reduced the number of hours of specialized instruction for the student to 6 hours per week in general education and 180 minutes per month of speech – language pathology outside general education.

The student wound up being retained in eighth grade. In May 2011, while the student was still at School B DCPS reduced the amount of specialized instruction on the student's IEP to 4 hours per week of inclusion specialized instruction in a general education.

The student moved on to ninth grade at School A for SY 2011-2012. School A is the feeder high school for School B and located on the same campus and share some of the same administrative staff such a the special education coordinator. At School A the student received inclusion services in a general education setting as his IEP prescribed.

When the student's IEP team met in January 2012 for an annual review the team relied on the July 2010 psychological evaluation, as well as updated academic testing that indicated the student was functioning on a second to fourth grade level overall. His teachers reported that he seldom participated in class or group discussions, and that he was unable to complete class or homework assignments without supervision. The IEP developed on January 12, 2012, prescribed 5 hours per week of specialized instruction in a general education inclusion placement, and reduced speech-language therapy of 120 minutes per month.

February 2012 the student's family became concerned about his social-emotional functioning and sought therapy services at Children's National Medical Center ("CNMC"). In February 2012 the student was evaluated and diagnosed with a Depressive Disorder and referred the student for a neuropsychological evaluation at CNMC.

Despite his academic struggles the student was promoted to the tenth grade for the 2012-2013 school year. In August 2012, as the student was starting tenth grade at School A the Petitioner met with school staff at School A including the guidance counselor and school social worker to express concerns about the student's social-emotional functioning.

In October 2012 an independent neuropsychological evaluation completed by Dr. had been completed. Dr. determined that student did not have a learning disability, but instead qualified for a diagnosis of mild mental retardation and she recommended revisions to the student's IEP and placement.

The Petitioner supplied School A with the independent neuropsychological evaluation. An IEP team, including Petitioner and the student's new therapist from CNMC met on

December 6, 2012, to review the evaluation, academic testing, and a speech-language evaluation DCPS had completed.

DCPS stated that it could not qualify the student as a student with ID classification without an additional assessment of adaptive functioning. DCPS, therefore, did not discuss revisions to the student's IEP or placement, other than to add 30 minutes per day of pull out instruction. At the meeting Petitioner expressed concern regarding the student's continued placement at School A given that staff acknowledged School A could not implement a "full time" IEP or provide a vocationally-based education program.

Petitioner requested that DCPS complete a Vineland and DCPS also agreed to complete an occupational therapy evaluation. An IEP team reconvened on February 21, 2013, to review the results of the Vineland and the occupational therapy evaluation, and to review and revise the student's IEP and placement.

At the February 21, 2013, IEP meeting the team did not agreed to reclassify the student as a student with an ID. However, DCPS refused to revise the IEP. The DCPS occupational therapist reviewed her report and confirmed that the student exhibited deficits in visual motor and visual perceptual difficulties and that the student would benefit from occupational therapy services if placed in a vocational education program. Petitioner requested that he student be placed in a full time special education placement. DCPS however did not make any amendments to the student's IEP or placement.

On April 2, 2013, Petitioner filed the current due process complaint alleging, inter alia, that the DCPS' July 2010 evaluation was inappropriate and had resulted in a an inappropriate disability classification for the student for number of school years and resulted in inappropriate IEPs and the student's inappropriate placement at School B and School A.

Petitioner asserted the student's IEPs should have prescribed a "full time" special education placement[3], and should have contained an appropriate post-secondary transition services plan rather than continued placement on a high school diploma track.

Petitioner asserted the student's February 21, 2013, IEP is inappropriate for the following reasons: (1) inappropriate goals and programming for the student, (2) it contains an insufficient amount of specialized instruction, (3) it contains insufficient related services, including speech-language therapy, behavioral support services and occupational therapy, parent training, and ESY services, and (5) it lacks of a full time special education placement for students with ID, (6) it lacks an appropriate post secondary transition plan, and (7) continued placement on a high school diploma track rather than a certificate track.

[3] "Full time" is defined in this instance and all instruction and related services provided outside general education throughout the school day.

Petitioner sought as relief an order directing DCPS to: (1) provide the following independent evaluations: speech-language and occupational therapy[4], (2) revise the student's IEP to include (a) math, reading, written expression and social emotional and vocational goals based on the student's needs, (b) related services including but not limited to occupational therapy, parent training, and behavioral support services, (c) an appropriate post-secondary transition services plan and (d) ESY. (3) place and fund the student at Maryland, (4) provide the student appropriate compensatory education services (vocational coaching) for the period of time that he was denied a FAPE.

DCPS filed a response the complaint on April 11, 2013. DCPS denied all alleged denials of a FAPE to the student and specifically stated: Petitioner and his advocate attended the February 21, 2013, IEP meeting, signed the IEP and had the opportunity to be involved in developing the IEP.
DCPS asserted that all allegations and claims arising before April 2, 2011, should be barred by the statute of limitations as outlined at 34 C.F.R §300.507(2), as the exceptions at §300.511(f), do not apply.

DCPS denied that it failed to provide the student with an appropriate IEP and special education placement during SY 2010-2011, SY 2011-2012 and SY 2012-2013. DCPS asserts the student's father participated in the September 16, 2010, IEP team meeting and expressly signed that he agreed with the IEP and placement and either the father or Petitioner participated in developing the subsequent IEPs and had agreed with them.

DCPS asserted that the student progressed in his IEP goals and maintained a 2.24 GPA during SY 2011-2012 while in a general education setting with 5 hours of specialized instruction. The student has maintained a 2.08 GPA as of February 2013 and is progressing in his IEP goals. DCPS denied that it has failed to implement the student's IEP during SY 2012-2013 school year. DCPS asserts that School A continues to implement the student's current IEP and is an appropriate location of services.

DCPS denies that, in reevaluating the student, it did not properly assess whether the student needed any modifications or additions to his special education and related services to ensure that he could meet his annual IEP goals.

DCPS asserted that Petitioner participated in the December 6, 2012, and February 21, 2013, IEP team meetings concerning eligibility and the student's IEP. The IEP team determined that the student's IEP did not require additions or modifications to his special education and related services based on the reevaluation and subsequent eligibility determination due to the student's documented academic performance. DCPS also asserts that there is no requirement to classify students into a specific disability category nor is it critical in evaluating a FAPE. Rather, FAPE is providing services, goals and objectives that are appropriate for the student regardless of his classification.

[4] DCPS had previously agreed to fund the independent evaluations, thus this remedy is no longer being sought from the Hearing Officer.

A resolution meeting was held April 18, 2013. The resolution meeting was not successful in resolving the disputes. The parties agreed to waive the remainder of the resolution period. Thus, the 45-day timeline began to run on April 19, 2013, and ends, and the Hearing Officer's Determination ("HOD") is due on June 2, 2013.

The Hearing Officer conducted pre-hearing conferences on April 26, 2013, and May 10, 2013, during which the issues to be adjudicated were discussed and determined. On May 13, 2013, the Hearing Officer issued the final pre-hearing order outlining, inter alia, the issues to be adjudicated.

ISSUES ADJUDICATED[5] :

1) Whether the violation(s) alleged by Petitioner that precede the two year period prior to the date the complaint was filed (April 2, 2010) can be adjudicated and whether Petitioner has presented sufficient proof that the one or more of the exceptions listed in 300.511(f) apply.[6]

2) Whether DCPS denied the student a FAPE by failing to evaluate student in all areas of suspected disability, specifically, failing to conduct an appropriate psychological evaluation[7] (back to October 2010 or April 2, 2011) that: (a) sufficiently identified the student's disability classification, and/or (b) used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about him, and included information provided by the parent and/or (c) identified all of the student's special education and related services needs.

3) Whether DCPS violated 34 CFR 300.305 and denied the student a FAPE in evaluating the student in July 2010 and in October 2012 by failing review existing evaluation data to determine whether the student needed any additions or modifications to his special education and related services to ensure he could meet his annual IEP goals and participate in the general education curriculum.

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[5] The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order do not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) in the pre-hearing conference order and at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

[6] Petitioner alleges that he became aware in October 2012 that the July 2010 psychological evaluation was flawed and thus asserts that the IEPs that were based on that evaluation were inappropriate. Therefore, Petitioner asserts claims two years prior to Petitioner becoming aware that a violation existed (back to October 2010). Petitioner alleges DCPS made specific misrepresentations regarding its ability to provide the student with an appropriate special education placement at School A and B and that DCPS withheld material information that it was required to provide to the Petitioner including, but not limited to, information regarding the student's disability, and academic and social-emotional functioning.

[7] Petitioner is challenging the appropriateness of July 2010 evaluation

4) Whether DCPS denied the student a FAPE by failing to provide the student an appropriate IEP and/or special education placement during SY 2010-2011[8] and/or SY 2011-2012 and/or SY 2012-2013 by not providing the student a full-time out of general education IEP and placement.

5) Whether DCPS denied the student a FAPE by failing to implement the student's IEP during SY 2012-2013 by failing to provide the student consistent pull-out specialized instruction and speech and language services and the following classroom accommodations/modifications: extended time, breaks, translation of words and phrases.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-24, Joint Exhibits 25- 41[9] and LEA Exhibits 1-29) which were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: [10]

1. The student is age in grade and resides in the District of Columbia. The student has been determined to be student with a disability under IDEA with a disability classification of ID. The student currently attends School A, District of Columbia public high school (Joint Exhibit 29-1)

2. Although the student is an adult (he has designated his older brother his educational decision-maker, and the brother is the Petitioner in this matter on the student's behalf. (LEA Exhibit 12)

3. Previously, the student's disability classification had been SLD. (Joint Exhibit 31-1)

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[8] Petitioner challenged the appropriateness of the IEP(s), services and placement provided the student that were based on the July 2010 evaluation. The IEP developed on September 16, 2010, is the first IEP at issue and is the IEP for SY 2010-2011 (and the IEP in effect both in October 2010, which is how far back Petitioner asserts the claim should go, and the IEP in effect on April 2, 2011, the date within which claims are allowed under the 2-year period of limitation). Thus, the practical effect of whether Petitioner demonstrates that exception(s) to the 2-year limitation apply is a difference of 6 months in the period that the student may be due compensation for inappropriate IEP/services/placement, if the denial(s) of FAPE is/are proved.

[9] Exhibits 39, 40 and 41 were designated Petitioner's Exhibits and admitted at the hearing with DCPS counsel agreement.

[10] 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 both parties separately the Hearing Officer may only cite one party's exhibit.

4. The student was referred for special education evaluations while in kindergarten when he attended a DCPS elementary school and was first determined eligible in May 2001 with a SLI disability classification. The student was retained in fist grade. (Petitioner's Exhibits 2-2, 16-1)

5. By the time the student was in fifth grade the student's disability classification had been changed to SLD. (Petitioner's Exhibit 15-1)

6. After leaving his DCPS elementary school the student began attending a District of Columbia public charter school. The student struggled academically and was retained in seventh grade for SY 2009 to 2010. (Petitioner's Exhibit 2-2)

7. During SY 2009-2010 the student repeated seventh grade at the public charter school and earned low passing grades. The student's IEP was amended on May 20, 2010 to prescribe 20 hours per week of specialized instruction outside general education and 1 hour of speech-language pathology per week outside general education. (Petitioner's Exhibits 13, 14-5)

8. DCPS completed a psychological reevaluation of the student in July 2010. The evaluation noted the student's retentions, academic difficulties, and reported teacher comments that he had not mastered IEP goals. The DCPS psychologist administered a cognitive screening and the student's full-scale IQ was scored at 73, indicating borderline intellectual functioning. The student's academic achievement scores were at approximately third to fourth grade level. The evaluator noted that the student could be expected to have a great deal of difficulty with grade level academic tasks and his instruction and assignment need to be modified in all classes to accommodate his low reading and writing level. "[the student's cognitive process issues impede his ability to learn and significantly impact his school peers. Nevertheless, results indicate that [the student] is able to learn and make progress if allowed to work at his own pace and given the necessary instructional interventions." (Joint Exhibit 28-4, 28-5, 28-6, 28-7)

9. The DCPS psychologist that conducted the 2010 evaluation administered a Wechsler Abbreviated Scales of Intelligence ("WASI") test and a Woodcock-Johnson III test of achievement. She also relied on behavioral observations and a student interview. It was a reasonable clinical judgment for the psychologist to have ruled out the administration of an adaptive behavior assessment at that time, based on the Student's full-scale IQ score of 73 in the WASI. Such an additional assessment is not conducted unless the IQ score is 70 or below. (Ms. 's testimony, Joint Exhibit 28)

10. For SY 2010-2011 the student's father enrolled him in a DCPS middle school ("School B") for eighth grade.[11] DCPS convened an IEP team in September 2010

[11] There was some representation that the father believed School B and School A were vocational schools; however, there was no credible evidence supporting this finding or that the any misunderstanding of this point was not

to review the student's IEP. In drafting the September 16, 2010, IEP the team relied on the July 2010 evaluation and other assessments conducted of the student after he arrived at School B. The assessments indicated the student was operating at approximately fourth grade level in reading. The IEP team reduced the number of hours of specialized instruction for the student to 6 hours per week in general education and 180 minutes per month of speech–language pathology outside general education. (Joint Exhibit 33-1, 33-3, 33-7, 33-15)

11. The student wound up being retained in eighth grade. (Petitioner's Exhibit 2-2)

12. In May 2011, DCPS reduced the amount of specialized instruction on the student's IEP to 4 hours per week of inclusion specialized instruction in a general education placement. (Petitioner's Exhibit 32-7)

13. The student moved on to ninth grade at School A for SY 2011-2012. School A is the feeder high school for School B and located on the same campus and shares some of the same administrative staff such as the special education coordinator. (Ms. 's testimony, Joint Exhibit 31)

14. At School A the student received inclusion services in a general education setting as his IEP prescribed. On January 12, 2012, DCPS convened an IEP meeting for the student in which the IEP team noted in the IEP: [the student] does not participate in class discussion unless he is directly asked simplistic questions. [the student] does not complete classroom or homework assignments in its entirety without some supervision and explicit directions from the teachers. At time he will not attempt a task without a teacher prompt and constant reminders. … [The student] attends school regularly and has been tardy only a few times this year." The IEP went onto note that the student was operating academically at third to fourth grade level in written language skills. (Joint Exhibit 31-6)

15. When the student's IEP team met in January 2012 for an annual review the team relied on the July 2010 psychological evaluation, as well as updated academic testing that indicated the student was functioning on a second to fourth grade level overall. His teachers reported that he seldom participated in class or group discussions, and that he was unable to complete class or homework assignments without supervision. The IEP developed on January 12, 2012, prescribed 5 hours per week of specialized instruction in a general education inclusion placement, and reduced speech-language therapy of 120 minutes per month. Despite his academic struggles the student was promoted to the tenth grade for the 2012-2013 school year. (Joint Exhibit 31)

16. February 2012 the student's family became concerned about his social-emotional functioning and sought therapy services at CNMC. In February 2012 the student was evaluated and diagnosed with a Depressive Disorder and referred the student

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clarified upon the student's enrollment at School B. In addition Petitioner having attended School A himself presumably was familiar with the school and its curriculum.

for a neuropsychological evaluation at CNMC. (Brother's testimony, Petitioner's Exhibit 5)

17. In August 2012, as the student was starting tenth grade at School A the Petitioner met with school staff at School A including the guidance counselor and school social worker to express concerns about the student's social-emotional functioning. (Brother's testimony)

18. In October 2012 an independent neuropsychological evaluation completed by Dr. s of CNMC had been completed. Dr. determined that student did not have a learning disability, but instead qualified for a diagnosis of mild mental retardation and she recommended revisions to the student's IEP and placement including his placement in a full-time special education placement and that with his intellectual and academic deficits that he not be placed on a diploma tract program. (Dr. testimony, Petitioner's Exhibit 2-1, 2-2, 2-3, 2-4, 2-7)

19. The Petitioner supplied School A with the independent neuropsychological evaluation. An IEP team, including Petitioner and the student's new therapist from CNMC met on December 6, 2012, to review the evaluation, academic testing, and a speech-language evaluation DCPS had completed. The student had been making some progress in meeting his annual IEP goals and had been making passing grades. (Petitioner's Exhibit 9, Joint Exhibits 25, 35).

20. When the IEP Team met on December 6, 2012, it reviewed the student's speech and language assessment, his educational assessment, and his independent neurological evaluation. Based on the student's continued low levels of academic achievement the team added 2.5 hours of specialized instruction outside of a general education setting to the student's IEP. The team also added 30 minutes per month of speech consultation services for the student after reviewing the October 2012 speech and language evaluation. (Joint Exhibits 27, 30)

21. DCPS stated that it could not qualify the student as a student with ID classification without an additional assessment of adaptive functioning. DCPS, therefore, did not discuss revisions to the student's IEP or placement, other than to add 30 minutes per day of pull out instruction. At the meeting Petitioner expressed concern regarding the student's continued placement at School A given that staff acknowledged School A could not implement a "full time" IEP or provide a vocationally-based education program. DCPS explained that the placement would not be discussed at that meeting. (Petitioner's Exhibit 9, Joint Exhibit 30-1, 30-9)

22. Petitioner requested that DCPS complete the Vineland and DCPS also agreed to complete an occupational therapy evaluation. An IEP team reconvened on February 21, 2013, to review the results of the Vineland and the occupational

therapy evaluation, and to review and revise the student's IEP and placement. (Joint Exhibit 29)

23. At the February 21, 2013 IEP meeting the team agreed to reclassify the student as a student with an ID. However, DCPS refused to revise the IEP. The DCPS occupational therapist reviewed her report and confirmed that the student exhibited deficits in visual motor and visual perceptual difficulties and that the student would benefit from occupational therapy services if placed in a vocational education program. Petitioner requested that he student be placed in a full time special education placement with a vocational program. DCPS however did not make any amendments to the student's IEP or placement. (Joint Exhibit 29, 29-8)

24. On March 7, 2013, an educational consultant conducted an observation of the student at School A in two of his academic classes. The consultant observed that the student was relatively disengaged in the classroom activities and participated only when prompted by the teacher. Although the curriculum that was being presented was of high caliber and engaging for most students in was far over this student's head. (Dr. 's testimony, Petitioner's Exhibit 1)

25. The student has struggled academically since he began attending School A and no longer wants to attend the school. He understands little of what is being taught and feels reluctant to participate in classes a result. Rather than be in a college preparatory school where he feels overwhelmed and unable to succeed, the student prefers to be in a school where he can learn and accomplish practice skills along with his education so that he can feel that he is succeeding and has a future in life. Although the student has acquired credits toward a high school diploma he does not feel he really understands what is going on in his classes at School A. (Student's testimony, LEA Exhibit 3)

26. The student has been interviewed by and accepted to School (. is non-public special education school that serves students from eleven different jurisdictions. There are currently 225 students ages 5 through 21 with various disability classification including ID. The class size is no more than ten students. is licensed by and has a certificate of approval from OSSE and tuition rates are approved by OSSE. All teachers are certified and all related service providers have licenses. There are currently 58 students funded by the District of Columbia. Along with the educational curriculum mandated by DCPS students are provided training in household management, money manage, self-advocacy, disability awareness. Student's who are ages 18 to 21 work in the community part time. (Ms. d '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. [12] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). 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 the violation(s) alleged by Petitioner that precede the two year period prior to the date the complaint was filed (April 2, 2010) can be adjudicated and whether Petitioner has presented sufficient proof that the one or more of the exceptions listed in 300.511(f) apply.

Conclusion: Petitioner failed to sustain the burden of proof that exceptions to the two-year period of limitation apply. Therefore, Petitioner claim of relief is limited to two years prior to the date that the due process complaint was filed.

Pursuant to 34 C.F.R.§ 300.511(e):

> A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the

[12] 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.

> alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

And 34 C.F.R.§ 300.511(f): states:

> The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to--
> (1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or
> (2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

First, Petitioner asserts that he became aware when the October 2012 independent neuropsychological evaluation was completed that the student's disability classification up to that point had been inappropriate and Petitioner contends that DCPS either withheld the information about the student's true disability classification or misrepresented it, and therefore, he should be allowed to assert claims two years prior to October 2012.

The Hearing Officer disagrees with this interpretation of 34 C.F.R.§ 300.511(e). The plain the language of the regulation allow claims to be brought prospectively from the date the Petitioner knew or should have known that the claim existed. Thus, if Petitioner became aware of a potential claim in October 2012 he has until October 2014 to assert that claim.

As discussed below the Hearing Officer does not conclude that that DCPS' reliance on that evaluation in developing the student's IEP in September 2010 was a misrepresentation or a withholding of information by DCPS such that Petitioner is allowed to assert a claim more than two years prior to the date the complaint was filed. Therefore, although Petitioner is seeking relief for claims back to October 2010, Petitioner's claims for relief are limited to April 2011.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to evaluate student in all areas of suspected disability, specifically, failing to conduct an appropriate psychological evaluation that: (a) sufficiently identified the student's disability classification, and/or (b) used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about him, and included information provided by the parent and/or (c) identified all of the student's special education and related services needs.[13]

Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of the evidence.

The evidence demonstrates that July 2010 evaluation by which the student was determined to have borderline cognitive abilities was not flawed in and of itself and that there was no requirement based on the evaluation at that time for DCPS to have conducted an adaptive assessment of the student and it would be speculative to conclude that an adaptive conducted in

[13] Applicable regulation(s): 34 C.F.R. §§300.301, &/or 300.303, &/or 300.304 &/or 300.305

July 2010 would have confirmed an ID classification for the student since the assessment is objective and is usually conducted by others observing the student's abilities.

The student's objective functional abilities at age fifteen might have assessed differently by either teachers or family in July 2010. Although generally a person's cognitive abilities remain unchanged, this was not instance where the student was assessed as having an IQ score below the threshold at which the adaptive assessments are mandated. Therefore, the Hearing Officer concludes that Petitioner failed to sustain the burden of proof that the student's July 2010 psychological evaluation was flawed and inappropriate, or that the DCPS should have conducted at that time additional evaluations of the student.

Petitioner has not met his burden on this issue, as the evidence at hearing established that the psychological reevaluation conducted by DCPS in 2010 was appropriate at the time it was conducted. The DCPS psychologist that conducted the 2010 evaluation administered a cognitive assessment and a test of achievement. Although Dr. testified at hearing that an adaptive behavior assessment and parent information may have also been warranted the Hearing Officer was not persuaded that it was unreasonable for DCPS to have not conducted the assessment(s) at the time.

As far as the identification of the student's disability classification is concerned, "the particular disability diagnosis affixed to a child in an IEP, will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs." *Fort Osage R-1 School District v. Sims*, 641 F.3d 996, 1004 (8th Cir. 2011).

Indeed, the federal regulations state that, "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*." 34 C.F.R. § 300.304(c)(6) (emphasis added). The 2010 evaluation ultimately provided an accurate picture of the Student's academic and cognitive functioning and thereby allowed DCPS to identify all of Student's special education and related service needs at that time.

ISSUE 3: Whether DCPS violated 34 CFR 300.305 and denied the student a FAPE in evaluating the student in July 2010 and in October 2012 by failing review existing evaluation data to determine whether the student needed any additions or modifications to his special education and related services to ensure he could meet his annual IEP goals and participate in the general education curriculum.

Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of the evidence on this issue.

With regard to the 2010 evaluation, Petitioner did not present any existing evaluation data that the DCPS psychologist did not review in her 2010 evaluation. In the fall of 2012, the record indicates that the student had been making progress in meeting his annual IEP goals and had been making passing grades.

When the IEP team met in December 2012 it reviewed the student's speech and language assessment, his educational assessment, and the independent neurological evaluation. Based on the student's continued low levels of academic achievement the team added 2.5 hours of specialized instruction outside of a general education setting to the student's IEP. The team also added 30 minutes per month of speech consultation services for the student after reviewing the October 2012 speech and language evaluation.

It is undisputed that the IEP team did not accept the recommendation from October 2012 neuropsychological evaluation to classify the student as ID as it had to conduct an adaptive assessment to confirm the recommendation and did not revise the student's IEP to provide for a full-time specialized instruction program. Accordingly, at that point it was not unreasonable for DCPS not yet make changes to the student's IEP or program.

ISSUE 4: Whether DCPS denied the student a FAPE by failing to provide the student an appropriate IEP and/or special education placement during SY 2010-2011 and/or SY 2011-2012 and/or SY 2012-2013 by not providing the student a full-time out of general education IEP and placement.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that as of the February 21, 2013, IEP meeting the student's disability classification was changed to ID and the evidence makes clear particularly from the student's own testimony that his IEP prescribing services in an inclusion setting in an academically rigorous college preparatory school was inappropriate given his continued stagnation in achievement assessment at low elementary levels. The failure at that point to alter the student's IEP and place him in a full time special education placement was a denial of a FAPE.

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). Furthermore, an IEP should not be "automatically set aside . . . for failing to include a specific disability diagnosis or containing an incorrect diagnosis." *Fort Osage R-1 School District v. Sims*, 641 F.3d 996, 1004 (8th Cir. 2011). Classification of the precise impairment listed within 20 U.S.C.§ 1401(3)(A)(i) is "not critical in evaluating FAPE" and IDEA charges schools to develop an "'appropriate education, not with coming up with the proper label.'" *Pohorecki v. Anthony Wayne Local School District*, 637 F. Supp. 2d 547, 557 (N.D. Ohio 2009) (quoting *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997)).

While DCPS recently reclassified the student as a student with an intellectual disability, this does not retroactively render all of his prior IEPs to be substantively inappropriate. The student was able to pass his general education classes and earn credits toward his high school diploma and progress in his IEP goals. While Petitioner's witness Mr. testified that the student's IEPs have all been inappropriate, based on the student's intellectual disability, the Hearing Officer also heard testimony from Mr. Ms. and Dr. who engage with student at school who all stated that the student certainly needs academic supports in the classroom but with the supports he is able to complete his assignments and pass classes.

However, in the face of the student's own testimony which was compelling as to the level at which he struggles and still does not understand what is going on in his classes, the Hearing Officer is convinced that now in the face of the evidence that the student's cognitive abilities have fallen below the ID threshold and his adaptive functioning is also low, that from this point the student is clearly in need of a different program placement than is being offered him at School A.

The Hearing Officer concludes that based upon this evidence the student's continued placement at School A is inappropriate and at this placement the student is not provided a FAPE. Hearing Officer directs in the Order below that the student be placed and funded by DCPS at the and the evidence demonstrates that the student has been accepted to it can provide the student an appropriate full time special education placement and vocational supports that the student needs and warrants, the school has a valid COA, and otherwise meets the criteria that the Hearing Officer is to consider in placing a student. Branham, 427 F3d 7 (U.S. App. 2005)

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.

Although Petitioner has requested compensatory education for all the alleged denials of FAPE, the Hearing Officer having found that the denial of FAPE is in the student's continued IEP and placement that DCPS offered following the February 21, 2013, IEP meeting, the Hearing Officer does not conclude that the requested compensatory education is appropriate. The prospective placement in a full time private special education setting adequately compensates the student for the denial of a FAPE that has been determined herein.

ISSUE 5: Whether DCPS denied the student a FAPE by failing to implement the student's IEP during SY 2012-2013 by failing to provide the student consistent pull-out specialized instruction and speech and language services and the following classroom accommodations/modifications: extended time, breaks, translation of words and phrases.

Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of evidence on this issue.

Petitioner did not meet his burden on this issue. "To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the …authorities failed

to implement substantial or significant portions of the IEP." *Houston Indep. School District v. Bobby R.* 200 F3d 341 (5th Circ. 2000). Petitioner did not provide evidence that the student has not consistently received pull-out instruction.

The only evidence put forth by Petitioner on this issue came from Mr. , who observed the student for two class periods on one school day and testified that he did not observe classroom accommodations, aside from teacher redirection. However, Dr. testified to the pull-out instruction that the student receives and Mr. testified to the accommodations the student receives in his Biology class, including extended time for assignments and exams.

Finally, Ms. testified that the student did not receive speech and language services for a time period during the 2012-2013 school year, but DCPS has already provided authorization for forty hours of speech and language services to address this gap in services. Thus, there was no evidentiary basis for Petitioner to prevail on this issue.

ORDER:

DCPS shall, within thirty (30) calendar days of the issuance of this Order, place and fund the student at the Ivymount School for SY 2013-2014 and provide transportation services. All other requested relief is hereby 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: June 2 2013