District of Columbia

Office of the State Superintendent of Education

Office of Review and Compliance
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OSSE
Student Hearing Office

Confidential

Parent on Behalf of Student[1], Petitioner, v. District of Columbia Public Schools ("DCPS") Respondent.	HEARING OFFICER'S DETERMINATION

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 April 29, 2013, and April 30, 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 twelve in fifth grade and resides in the District of Columbia with her fraternal grandparent/legal guardian (Petitioner). The student has been determined to be a child with a disability with a classification of specific learning disability ("SLD"). The student is currently attending ("School A"), a DCPS elementary school, where she began attending in September 2010.

The student was first determined eligible while she was in third grade at School A and her initial individualized educational program ("IEP") was developed on March 31, 2011. That IEP prescribed a total of 11 hours per week of specialized instruction and the related services of behavioral support and speech-language pathology.

The student's IEP was updated on several occasions and was most recently reviewed and updated on November 14, 2012. Petitioner did not attend the November 14, 2012, meeting at which the student's special education services were adjusted.

Petitioner filed the current due process complaint on February 25, 2013, and alleged, inter alia, DCPS failed to include Petitioner in the November 14, 2012, IEP meeting and alleged that when the student was first determined eligible DCPS failed to conduct a formal assessment of her social/emotional functioning and her occupational therapy needs. Petitioner also alleged that from the time the student's initial IEP was developed that both the IEP and the prescribed placement (in a combination general education and special education setting) were inappropriate and the student should have been in and continues to require a "full-time"[2] special education placement. Petitioner is seeking placement in and funding of a private special education day school, Kingsbury Day School ("Kingsbury'), compensatory education and DCPS funding of independent comprehensive psychological, speech-language, occupational therapy, and auditory processing evaluations.

DCPS filed a response to the complaint on March 7, 2013. DCPS denied any alleged denial of a free and appropriate public education ("FAPE") and specifically asserted that the student's IEPs and educational placement have been, and continue to be, appropriate and reasonably calculated

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

to provide the student educational benefit. DCPS asserted that the student has been evaluated fully and properly. DCPS further asserted that the student's initial court ordered evaluation included DSM[3] diagnosis, the speech language evaluation did not recommend auditory processing assessment and the student has no hand writing issues that would require an occupational therapy evaluation.

A resolution meeting was held March 11, 2013, and was unsuccessful in resolving the issues. The parties expressed no desire to proceed directly to hearing; rather, the parties chose to allow the full 30-day resolution period to expire before the 45-day timeline began. Thus, the 45-day period began on March 28, 2013, and originally ended (and the HOD is due) on May 11, 2013.

The Hearing Officer[4] convened a pre-hearing conference on April 3, 2013, at which the issues to be adjudicated were discussed and determined. On April 19, 2013, the Hearing Officer issued a pre-hearing order outlining, inter alia, the issues to be adjudicated.

ISSUES: [5]

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to include Petitioner in the student's November 14, 2012 IEP meeting.

2. Whether DCPS denied the student a FAPE by failing to re-evaluate the student following two verbal requests made by Petitioner in August 2011 and August 2012.

3. Whether DCPS denied the student a FAPE by failing to evaluate the student in all areas of suspected disability by failing to conduct at the time of her initial evaluation (a) a formal assessment of her social/emotional functioning, and/or (b) an occupational therapy evaluation and/or (c)failing to conduct an auditory processing evaluation within a reasonable time after DCPS' March 30, 2011, speech language evaluation was conducted.

4. Whether DCPS denied the student a FAPE by failing to develop and provide the student an appropriate IEP with regard each of the IEPs developed on the following dates: March 31, 2011, September 27 2011, December 15, 2011, and November 14, 2012.

5. Whether DCPS denied the student a FAPE by failing to implement the student's IEP during and of the time she attended School A.

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[3] The Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association

[4] This matter was initially assigned to Hearing Officer Frances Raskin and was reassigned to the current Hearing Officer on April 19, 2013, after Hearing Officer Raskin held the pre-hearing conference.

[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) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated as outlined in the complaint.

6. Whether DCPS denied the student a FAPE by failing to provide her an appropriate placement in a full time special education setting from the time the student was determined eligible up to an including the date the complaint was filed.

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 and Respondent's Exhibit 1-24) that were admitted into the record and are listed in Appendix A.[6] Witnesses are listed in Appendix B.

FINDINGS OF FACT: [7]

1. The student is age twelve in fifth grade and resides in the District of Columbia with her fraternal grandparent/legal guardian (Petitioner). The student has been determined to be a child with a disability under IDEA with a classification of SLD. The student is currently attending School A, a DCPS elementary school, where she began attending in September 2010 in third grade. (Petitioner's Exhibit 7-1)

2. The student was placed by court order in Petitioner's custody June 18, 2010, prior to the student attending School A. (Petitioner's testimony)

3. Although the student was residing with Petitioner when she began attending School A in September 2010, Petitioner was not granted educational rights for the student by DC Superior Court until on August 20, 2012. Prior to that date Petitioner participated in and attended school meetings and parent teacher conferences and talked with her teachers when she brought the student to and from school. However, the student's father was the person legally responsible for the student's education. (Petitioner's testimony, Respondent's Exhibit 3)

4. In December 2010, a D.C. Superior Court judge ordered that a psycho-educational evaluation be conducted of the student including determining the student's level of cognitive functioning and whether she had a learning disability. The student was nearing age ten at the time of the evaluation. A licensed psychologist, Sheryl J. Frank, Ph.D.,

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[6] Respondent submitted no objections to any of Petitioner's disclosed documents. Petitioner objected to the following documents disclosed by Respondent for the following reasons: R2—based on confidential settlement negotiations, hearsay, and authentication; R3—based on relevance, hearsay, authentication, and is also confidential by statute; R4—based on hearsay and authentication; R9—based on relevance, hearsay, and authentication; R12—based on hearsay and authentication; R13—based on hearsay and authentication; R14—based on hearsay and authentication; R24—based on relevance, hearsay, and authentication. The Hearing Officer admitted all Respondent's disclosed documents over Petitioner's objections.

[7] 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.

conducted the evaluation. The student's cognitive abilities were determined to be in the borderline range at the 5th percentile with full-scale IQ score of 73. The student's academic functioning was in the low range compared with other children in her grade. She scored in most academic areas at approximately second grade level. Dr. Frank concluded: "Her reading skills are impeded by insufficient phonological processing which is an integral skill needed for reading. These skill deficits necessitate the diagnosis of reading disability." Dr. Frank noted that the student had repeated second grade and although she was in third grade at the time of the evaluation she had not yet mastered second grade work. (Petitioner's Exhibit 8-7, 8-8, 8-11, 8-12, 8-13, 8-14, 8-15)

5. Dr. Frank conducted the following assessments as a part of her evaluation: WISC-IV, Woodcock Johnson-III, Comprehensive Test of Phonological Processing, Developmental Test of Visual Motor Integration, Children's Depression Inventory, incomplete Sentences, Drawings, Interview with the student's social worker, caregiver, and review of the student's records. She conducted a clinical interview and behavioral observations of the student as a "screening tool for her mental health functioning". (Petitioner's Exhibit 8-5, 8-6)

6. Dr. Frank determined based on a screening of emotional functioning that the student struggles with sadness in reaction to stressful and traumatic life experiences as well as academic struggles and that her sadness was manifesting as withdrawn behavior and low self-esteem. Dr. Frank recommended the student continue participation in therapy. As for academics she recommended the student be found eligible with a learning disability and be provided small group instruction in reading remediation and math. She diagnosed the student with a Reading Disorder, Mathematics Disorder, Adjustment Disorder with Depressed Mood and Depressive Disorder. (Petitioner's Exhibit 8-7, 8-8, 8-11, 8-12, 8-13, 8-14, 8-15)

7. In March 2011 DCPS conducted a speech language evaluation to determine her eligibility for speech and language services. The evaluator determined the student had average articulation and vocabulary skills, a moderate language expressive and receptive delay impacted by her memory weaknesses. The evaluator made a number of recommendations that the student's language difficulties be assisted within the classroom. The evaluator did not recommend an auditory processing evaluation. DCPS obtained consent from the student's father when it conducted the March 2011 speech language evaluation. (Dr. Vargas' testimony, Respondent's Exhibit 3, Petitioner's Exhibit 9-4, 9-6, 9-7, 9-8, 9-14, 9-15)

8. DCPS reviewed the Dr. Frank's evaluation and the speech language evaluation and determined the student eligible in March 2011, while she was still in third grade. Her initial IEP was developed on March 31, 2011. That IEP prescribed the following services: 3 hours per week of specialized instruction in general education, 8 hours per week of specialized instruction outside general education, and the following related services: behavioral support,[8] speech-language pathology. The IEP included goals in math,

[8] The IEP, however, did not prescribe a certain number of hours of behavior support although it included behavioral support goals.

reading, communication/speech language and behavior support. The IEP did not prescribe extended school year ("ESY") services. Petitioner participated in the student's initial eligibility meeting. (Petitioner's testimony, Petitioner's Exhibit 4-1, 4-8)

9. On September 27, 2011, the student's IEP was amended to include behavioral support services of 30 minutes per week. That IEP prescribed the following services: 3 hours per week of specialized instruction in general education, 8 hours per week of specialized instruction outside general education, and the following related services: 30 minutes per week behavioral support, 120 minutes per month of speech-language pathology outside general education and 120 minutes inside general education. The IEP included goals in math, reading, communication/speech language and behavior support. The IEP did not prescribe ESY services. (Petitioner's Exhibit 5-1, 5-6, 5-7 5-8)

10. At the September 27, 2011, IEP meeting the biggest change made to the student's IEP was the setting in which the services would be rendered. The team believed the student's difficulty with reading required more intensity in reading instruction. Petitioner and the student's father participated in the meeting and the father did not express any concerns about the IEP and did not request that the student be reevaluated. (Dr. Vargas' testimony, Respondent's Exhibit 7)

11. On December 15, 2011, DCPS convened an IEP meeting at School A and the student's IEP was amended to change the setting of her specialized instruction from a total of 11 hours to a total of 10 hours per week but with all hours delivered outside general education. That IEP prescribed the following services: 10 hours per week of specialized instruction outside general education, and the following related services: 120 minutes per month of behavioral support, 120 minutes per month of speech-language pathology outside general education and 120 minutes inside general education. The IEP included goals in math, reading, communication/speech language, behavior support and no ESY services. (Petitioner's Exhibit 5-1, 5-6, 5-7 5-8)

12. In August 2012, around the beginning of the school year, Petitioner spoke with School A's special education coordinator ("SEC") and requested that that the student be re-evaluated for special education and related services. Petitioner could not state the exact date of the request or whether it was before or after she had been granted education rights. Following the August 2012 request no reevaluations have yet to be conducted. However, Petitioner did not request that any specific evaluations be conducted.[9] Petitioner made prior requests but at the time she did so she did not have educational rights and could not consent to an evaluation. (Petitioner's testimony)

13. DCPS scheduled the student's annual IEP meeting for November 14, 2012, and Petitioner confirmed with the School A's SEC that she would attend the meeting. The day of the meeting Petitioner sent a letter to school with the student advising that she could not attend the meeting and asked that it be rescheduled. The school IEP team members were

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[9] Although Dr. Vagas testified there was no such request, the Hearing Officer found the Petitioner credible as to the August 2012 request based on her demeanor and straightforward and impassioned statements.

assembled and ready to convene when the student's teacher informed the team members that the student had a note from Petitioner about her stating her inability to attend. The SEC contacted Petitioner by telephone and she explained to Petitioner that because the team was already assembled they would proceed with the meeting and provide her a copy of the IEP and they could convene another meeting when Petitioner was available. The team proceeded with the meeting; however, a meeting was never reconvened prior to the due process complaint being filed. (Dr. Vargas' testimony)

14. At November 14, 2012, IEP meeting the team members amended the student's IEP to add 1 hour per week of specialized instruction inside general education and the student speech language services were reduced from 4 hours per month to 2 hours per month with 1 hour each outside and inside general education. The IEP prescribes the following services: 1 hour per week of specialized instruction in general education, 10 hours per week of specialized instruction outside general education, and the following related services: 120 minutes per month of behavioral support, 2 hours per month speech-language pathology – 1 hour inside general education, 1 hour outside. The IEP included goals in math, reading, communication/speech language and behavioral support. (Petitioner's Exhibit 7-9)

15. The student was significantly behind academically when she arrived at School A. The student has made slow progress relative to her IEP goals over the past two years. However, she has consistently been provided the specialized instruction and related services that her IEP prescribes. The student's special education services were gradually increased with each revision of her IEP to include more services outside general education in order to address her needs with more intensity in an attempt to have her demonstrate more academic progress. (Dr. Vargas' testimony, Ms. Flanagan's testimony)

16. On her most recent report card, the student has been measured as being on the beginning level in all areas assessed. In the prior school year she was on the beginning or developing level in all areas assessed. She did not reach the level of being secure in any of the skills sets measured on the report throughout each grading period in her fourth grade year. (Petitioner's Exhibit 13-1, 14-1)

17. The student has had no behavior difficulties at school outside those of a typical fifth grade student. The student's handwriting at school is legible, appropriate and the student's teacher has no difficulty understanding what the student writes. (Ms. Flanagan's testimony)

18. Petitioner has asked the student on occasion whether she is seeing her special education teacher regularly. The student has reported to her that the special education teacher is sometimes absent and that the speech language provider and social worker, who also provide the student services, are on occasion not at school. However, Petitioner could not state any specifics as to dates or the services that the student was not provided. (Petitioner's testimony)

19. When Petitioner assists the student' with homework it is frustrating to Petitioner and the student. The student easily forgets skills she has learned. The parent doesn't always know how to assist the student with the homework. However, Petitioner recognizes that the student performs better when she has one to one assistance and as a result can make progress. Petitioner believes the student has progressed little if at all since she began attending School A and believes the student is not ready to enter sixth grade next school year. Petitioner does not believe School A is an appropriate placement for the student because in her opinion there are too many students in her classes and the student has made little academic progress. Petitioner has visited Kingsbury and believes the student's needs could be better met at Kingsbury. (Petitioner's testimony)

20. Petitioner engaged services of an educational consultant six weeks prior to the due process hearing. The consultant reviewed the student's IEPs, evaluations, and other educational records and did some informal testing of the student. The consultant concluded the student was not at the grade level noted in the IEP goals. In her opinion many of the goals were beyond the skills the student could reasonably perform both in reading and math. The consultant also expressed concern that there were no written expression goals in any of the student's IEPs. In reviewing the student's evaluations and IEPs, the consultant concluded based on the student's low level of academic functioning relative to her age, that in her opinion, the student should have had all instruction provided to her outside general education from the time she was first found eligible. (Ms. Millis' testimony)[10]

21. Petitioner educational consultant also offered an opinion as to what services would be appropriate to put the student in the place she would have had she been provided appropriate IEPs and services from the time she was eligible and recommended as compensatory education that the student be provided 3 hours per week of tutoring and a 1 hour per week of a therapeutic invention like art therapy for one school year. (Ms. Millis' testimony)

22. Petitioner engaged Dr. Lucker, as a consultant to offer an opinion on whether the student was in need of an auditory processing evaluation. Dr. Lucker had not met the student but reviewed her evaluations and other educational records. Based upon the evaluations and the student's documented memory and reading difficulties Dr. Lucker was of the opinion that it would have been reasonable to have evaluated the student for an auditory processing disorder at least when the student's speech language evaluation was conducted on March 2011 to determine what if any auditory processing issues might be contributing to the student's academic difficulties. (Dr. Lucker's testimony)[11]

23. The student interviewed, visited and was accepted to Kingsbury. Kingsbury is a special education school that serves students with special needs including students with learning disabilities, students on the autistic spectrum and students with limited physical disabilities. There are no non-disabled students at Kingsbury.

[10] Designated an expert witness in development of IEPs and programming for children with disabilities.

[11] Designated an expert in auditory processing.

Students are funded through either private payment or through local educational agencies. DCPS funds approximately 75% of the students at Kingsbury. Kingsbury's program of instruction is guided by the DCPS academic standards and specialized instruction is designed using programs and best practices to address academic deficits in reading, written language and math. Kingsbury has a student to teacher ratio of no more than 10 students to one certified teacher and assistant teacher per classroom. The school offers "pull-out" and "push-in" related services. The standard admissions process was followed for this student and the Kingsbury staff believes the school can meet the student's educational needs. Kingsbury offers behavioral support by licensed social work social skills and speech pathology by licensed speech pathologists. Tuition at Kingsbury is $38,148 annually and related services are billed hourly separately at the OSSE approved rates. Kingsbury has a certificate of approval ("COA') from OSSE. (Ms. Gustafson's testimony)

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).

[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.

ISSUE 1: Whether DCPS denied the student a FAPE by failing to include Petitioner in the student's November 14, 2012 IEP meeting.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence. On November 14, 2012, DCPS convened the student's annual IEP team meeting without the Petitioner as required by 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a), and significantly impeded Petitioner's opportunity to participate in the decision-making process.

The evidence demonstrates that Petitioner informed School A's SEC on the day of the scheduled meeting that she could not attend.[13] Although the team was already assembled and it may have been reasonable for the meeting to proceed to discuss the student's IEP and services in Petitioner's absence given the late notice, it was not reasonable for the team to have reduced the student's special education services at that meeting and then not reconvene the meeting to address with Petitioner any issues she had and the recommendations of the team. These facts clearly demonstrated that the team by convening and taking the action it did on November 14, 2012, in Petitioner's absence, significantly impeded her opportunity to participate in the decision making process regarding FAPE to the student.

Courts in this jurisdiction have found that procedural inadequacies that seriously infringe upon the parent's opportunity to participate in the IEP formulation process, clearly result in a denial of FAPE. *See A.I. ex rel. Iapalucci v. Dist. of Columbia*, 402 F. Supp. 2d 152, 164 (D.D.C. 2005); *J.N. v. Dist. of Columbia*, 677 F. Supp. 2d 314, 320-21 (D.D.C. 2010); *Eley v. Dist. of Columbia*, Civ. Act. No. 11-309 (BAH/MFR) (D.D.C. 2012).

ISSUE 2: Whether DCPS denied the student a FAPE by failing to re-evaluate the student following two verbal requests by Petitioner made in August 2011 and August 2012.

Conclusion: Petitioner did not sustain the burden proof by a preponderance of the evidence on this issue.

34 C.F.R. § 300.303(a)(2) make clear that, "A local education agency ("LEA") *shall ensure* that a re-evaluation of each child with a disability is conducted…if the child's parents or teacher requests a re-evaluation." (emphasis added). 34 C.F.R. § 300.305(d)(2) also clarifies that the parent must be advised by the LEA of the right to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs. *See also Letter to Copenhaver*, 108 LRP 16368 (OSEP 2007).

The evidence demonstrates that Petitioner requested that the student be reevaluated she requested reevaluation in August 2012. However, she was not able to state the exact date and whether it was before she had educational rights.[14] Therefore the hearing Officer does not conclude that

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[13] FOF #13

[14] FOF #12

there was a violation. If Petitioner had requested that a reevaluation be done in August 2011 that was at a time when she did not have educational rights or the ability to consent to an evaluation. The Hearing Officer thus concludes that Petitioner failed to sustain the burden of proof that there was a violation by DCPS in this regard. However, given that Petitioner has clearly made the request for reevaluation in the due process complaint the Hearing Officer will direct in the Order below that DCPS conduct a reevaluation of the student.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to evaluate the student in all areas of suspected disability by failing to conduct at the time of her initial evaluation (a) a formal assessment of her social/emotional functioning, and/or (b) an occupational therapy evaluation and/or (c)failing to conduct an auditory processing evaluation within a reasonable time after DCPS' March 30, 2011, speech language evaluation was conducted.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence as to failure to fully evaluate the student.

20 U.S.C. §1414(b)(3)(B) and 34 C.F.R. § 300.304(c)(4) make clear that an "LEA *shall ensure* that a child is assessed in all areas of suspected disability, including, if appropriate, health, vision, *hearing*, *social and emotional status...and motor abilities*." (emphasis added).

Petitioner has not met her burden of proof on this issue in regard to an occupational therapy evaluation or a clinical component in the independent psycho-educational evaluation. Petitioner educational advocate although qualified as an expert is not a psychologist or clinical psychologist and is in no position to speak on this issue as it is outside her area of expertise. A read of the independent evaluation shows that the student's initial court ordered evaluation included assessment in the area of social/emotional needs. Albeit the assessment could have included other or additional instruments, Petitioner did not put forth any evidence as any specific assessments that could have been performed. The testing was sufficient to allow the evaluator to give the student a diagnosis of Adjustment Disorder with Depressed Mood and Depressive Disorder.[15] Petitioner presented no testimony from a psychologist or clinical psychologist that would contradict the independent evaluation. Further, the student's special education teacher testified that the student has presented no behavior issues in school outside those of a typical fifth grade student.

Petitioner presented insufficient evidence that the student was in need of an occupational therapy evaluation. Although Petitioner and the educational advocate testified the student has bad handwriting, the student's teacher of two years more credibly[16] testified the student has no issue with handwriting.[17] There was no recommendation in any of the student's prior evaluations performed that would suggest occupational therapy as an area of concern for the student. Further,

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[15] FOF #s 5, 6

[16] The Hearing Officer found the witness' testimony more credible due her daily interaction with the student in a school setting.

[17] FOF #17

Petitioner provided no testimony from an occupational therapist to the contrary. Therefore, Petitioner has not sustained her burden of proof for this issue in regard to an occupational therapy evaluation.

As to the auditory processing evaluation, although Petitioner presented an expert witness who testified that based upon the student's evaluations and her reading and memory deficits it would have been reasonable to conduct an assessment to determine if the student had auditory processing issues. However, the witness could not, prior to conducting such an assessment determine that the student in fact has such deficits and whether the student has been harmed by the assessment cannot be determined unless and until the assessment is completed. Consequently, the Hearing Officer based upon this witness' opinion alone cannot conclude that the student was denied a FAPE because the assessment was not completed. However, the Hearing Officer will direct in the Order below that the reevaluation of the student include an assessment of auditory processing.

ISSUE 4: Whether DCPS denied the student a FAPE by failing to develop and provide the student an appropriate IEP with regard each of the IEPs developed on the following dates: March 31, 2011, September 27 2011, December 15, 2011 and November 14, 2012.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence as to the student's November 14, 2012, IEP only.

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also *Scott v. District of Columbia*, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

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.

The evidence demonstrates that the student initial IEP based on her initial evaluations demonstrated that the student was one grade level behind her actual grade.[18] Thus, it was not unreasonable for the IEP team to prescribe a level of services designed to meet the student's needs in the least restrictive environment by prescribing that the student receive some special education services outside general education. As the School A SEC credibly testified the

[18] FOF # 4

student's special education services were gradually increased with each revision of the IEP to include more services outside general education in an attempt to demonstrate academic progress.

The first IEPs developed for the student were reasonably calculated to provide the Student with educational benefit at the time they were developed. The Hearing Officer was unconvinced by the educational consultant's testimony that the student's IEP goals were inappropriate based upon informal assessments she conducted weeks ago. The IEPs cannot be reasonably judged retrospectively based on such scant testimony.[19] However, as to the student's most recent IEP the Hearing Officer concludes that her testimony is more applicable as to what the student's IEP should include prospectively.

Therefore, the Hearing Officer concludes that in each IEP prior to the November 14, 2013, IEP the increase in the student's services outside of general education was a reasonable attempt to fashion at IEP calculated to provide the student educational benefit. Despite the educational consultant testimony that she would have recommended for time special education services outside general education in the student's initial IEP, the Hearing Officer does not find that testimony convincing and found the SEC's testimony as a member of the student's IEP team to have far greater weight.

However, by the time of the November 14, 2012, IEP meeting, with Petitioner not present at the meeting the IEP team reduced the student's related services. In addition by this IEP which represented the program for the student third year at School A the student continued functioning on a second grade level and her report cards for the past two years indicating that she did not move beyond the beginning level in an area assessed, the Hearing Officer concludes there was sufficient evidence that the student should have had an IEP with all her instructional hours, except perhaps a special course such as physical education, in a out of general education setting. For DCPS to have not amended the student's IEP to reflect that level of service by that date was a denial of a FAPE to this student.

ISSUE 5: Whether DCPS denied the student a FAPE by failing to implement the student's IEP during and of the time she attended School A.

Conclusion: Petitioner failed to present sufficient evidence to sustain the burden of proof that the student's IEPs have not been implemented at School A.

Petitioner presented insufficient evidence to support the contention that the student's IEPs were not implemented. Petitioner could only testify that the student said to her that the special education teacher and related services providers were sometimes absent. She could not testify as to any dates, any frequency of absence or anything beyond what might be an occasional absence by any school personnel, and she offered no testimony that would prove that if any absences occurred that the services the student might have missed were not made up by additional services.[20] On the other hand the School A SEC and special education teacher credibly testified

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[19] The Hearing Officer did not find sufficient evidence that the student should have been provided ESY services. However ESY services are to be included as a remedy in the student's IEP prospectively.

[20] FOF # 18

that the student has been provided the special education services that are prescribed by her IEP.[21] Therefore, the Hearing Officer concludes there was no denial of a FAPE to the student in this regard.

ISSUE 6: Whether DCPS denied the student a FAPE by failing to provide her an appropriate placement in a full time special education setting from the time the student was determined eligible up to an including the date the complaint was filed.

Conclusion: The evidence demonstrates the student was denied a FAPE because the student's November 14, 2012, IEP is inappropriate as it does not prescribe sufficient specialized instruction in all academic areas and thus does not prescribe an appropriate educational placement. However, the Hearing Officer is not convinced that evidence demonstrates the student must be totally removed from all general education peers and thus concludes that the Petitioner requested remedy of placement at Kingsbury is inappropriate because the school is not the least restrictive environment for the student.

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; 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 in this case clearly demonstrates that when the student arrived at School A within that school year the student was determined eligible and provided an IEP and special education services. Despite the services the student's progress has been stalled. Her reading has remained below grade level and her academic performance seems to be at second grade although she is about to enter sixth grade.

The evidence demonstrates, based upon the testimony of the student's special education teacher and School A's SEC, DCPS made adjustments to the student's IEP to increase intensity of services, but the educational gap the student began with when she arrived at School A has not been shrinking. The Hearing Officer is convinced by evidence that by November 14, 2013, it was clear that that the student was not benefiting academically from general education classes and is in need of small group instruction outside general education in the all academic subjects.

The Hearing Officer concluded the student's November 12, 2012, IEP is inappropriate because it does not prescribe that all the student's instructional hours are in the out of general education setting and thus the educational placement prescribed by the IEP is also inappropriate.

However, there was no evidence the student could not be with general education peers for lunch and recess and needed to be in a school building with only special education students.

[21] The Hearing Officer in review of the service tracker logs, absent a presentation and explanation of this documents at the hearing and what they demonstrate and/or don't demonstrate, could not reasonably conclude that the student missed related services.

Consequently, the Hearing Officer will order that the student's DCPS IEP be amended to prescribe 25 hours[22] of specialized instruction in out of general education setting and that DCPS meet to amend the IEP and to determine an appropriate placement/location of services for the student for ESY and or SY 2013-2014.

Petitioner asserted that the student's IEPs violated the IDEA because it did not provide for full time out of general education level of services. Full time out of general education services does not necessarily mean and a student is totally removed from the general education setting and has no contact with non-disabled peers.

The evidence demonstrates that Kingsbury can provide the student special education and related services in all subject areas. However, the Hearing Officer is not convinced by the evidence that student should be totally removed from a setting that will allow her contact with any non-disabled peers. The evidence demonstrates that Kingsbury does not afford the student an opportunity to interact with non-disabled peers.

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; 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.")

In addition, a school district is not required to implement a program that will maximize the handicapped child's potential. *Rowley, 458 U.S. at 198-99*. Rather, a handicapped child has a right to "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley, 458 U.S. at 203*. Rowley explained that implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.. . .We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley, 458 U.S. at 200-02.*

A Hearing Officer can determine whether Kingsbury is the least restrictive environment in evaluating whether private placement was the proper remedy. See, e.g., *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005); *Kerkham v. Superintendent, D.C. Public Schools*, 931 F.2d 84, 87 (D.C. Cir.)

34 C.F.R. § 300.114 provides:

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[22] This number of hours is an approximation of the number of hours of specialized instruction given an average number of hours per week available in a setting where all instruction and related services are provided outside general education throughout the school day.

> LRE requirements.(a) General. (1) Except as provided in Sec. 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and Sec. Sec. 300.115 through 300.120.
> (2) Each public agency must ensure that--
> (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
> (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

In addition, pursuant to D.C. Code § 38-2561.02 (c)

> Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter:
>
> (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
> (2) Private or residential District of Columbia facilities; and
> (3) Facilities outside of the District of Columbia.

Although the District must pay for private school placement "[i]f no suitable public school is available[,] ... if there is an appropriate public school program available ... the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991) (citations and quotations omitted).

Compensatory Education

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

The Hearing Officer concludes that Petitioner's proposed compensatory education of three hours of tutoring per week and one hour of art therapy per week for one school year did not have a sufficient nexus to the denials of FAPE that the Hearing Officer found herein. However, the Hearing Officer concludes, based upon the evidence that the student has had an inappropriate IEP and educational placement since November 14, 2012, that a reasonable compensation to the student given that she continues to be operating years below level is an award of three hours of

independent tutoring from the first school week following the issuance of this Order for the duration of SY 2012-2013, including the period of ESY that is prescribed to be included in her IEP in the Order below.[23]

ORDER:

1. DCPS shall conduct the following evaluations of the student within 45 calendar days of the issuance of this Order: occupational therapy, comprehensive psychological including emotional and behavioral assessments, and auditory processing. DCPS may at its option issue to Petitioner authorizations for these evaluations to be conducted independently at DCPS/OSSE approved rates.

2. The student's IEP is hereby amended to provide for 25 hours of specialized instruction per week to be provided outside general education and to prescribe ESY for the SY 2012-2013.

3. DCPS shall, within fifteen (15) school days of the issuance of this Order convene a meeting to amend the student's IEP consistent with this Order and to determine an appropriate location of services for the student.

4. DCPS shall, within 30 calendar days of the completion or receipt of the last of the evaluations that are to be conducted under paragraph #1 above, convene an IEP meeting to review the evaluations results and review and revise the student's IEP as appropriate.

5. DCPS shall provide the student three hours of independent tutoring per week at the DCPS/OSSE approved rate from the first school week following the issuance of this Order for the duration of SY 2012-2013, up to an including the period of ESY for the current school year that is prescribed to be included in her IEP by this Order.

APPEAL PROCESS:

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

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.
Hearing Officer **Date: May 11, 2011**

[23] The educational consultant's testimony regarding this level of tutoring services and the frequency in order to address the student's academic deficits was a reasonable, yet the duration of the services did not provide a sufficient relationship to the denials of FAPE and what was needed to put the student in the place she would have been had the services been provided.