

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on April 7, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student resides with her parent in the District of Columbia (“D.C.”). The student is a child with a disability pursuant to IDEA with a disability classification of multiple disabilities (“MD”) including speech language impairment (“SLI”) and other health impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”). The student was in first grade in District of Columbia Public Schools (“DCPS”) when she was first determined eligible for special education.

The student has attended a D.C. public charter school (“School A”) since the beginning of school year (“SY”) 2011-2012 when she was in fourth grade. School A is that is its own location educational agency (“LEA”) for special education purposes. IEP team meetings were convened at School A in July and August 2012 at which the student’s parent requested a full-time out of general education placement for the student. The School A team did not agree but nonetheless referred the student to OSSE for a possible change in placement. OSSE completed the placement review process and in October 2012 and determined no change in placement was warranted. The student remained at School A.

The student was retained in fourth grade at the end of SY 2011-2012 and repeated fourth grade at School A during SY 2012-2013. The student performed well academically during SY 2012-2013 and was promoted to fifth grade. As result of her progress School A reduced the number of hours the student received outside of general education. Her most recent individualized educational program (“IEP”) was developed June 18, 2013, and prescribes the following weekly services: 5 hours of specialized instruction outside general education, 10 hours of specialized instruction inside general education, and related services outside general education.

Petitioner filed the due process complaint in this matter on January 2, 2014. Petitioner alleged that the student’s June 18, 2013, IEP is inappropriate as well as her resulting educational placement. Petitioner asserted the student was in need of an IEP with more specialized instruction than currently prescribed. The student’s parent asserted that starting in SY 2013-2014 School A began calling her repeatedly to address the student’s problematic in school behavior and that by November 2013 the calls from School A were so frequent that a pattern had developed. Petitioner asserts that as a result the student’s IEP was no longer calculated to confer the student educational benefit by November 2013.

Petitioner sought as relief that the Hearing Officer order the student be provided an IEP that prescribes specialized instruction throughout the school day, the student's placement at a full time private special education school ("School B") and that the School A fund compensatory education for the student from November 1, 2013.

School A filed a response to the complaint on January 13, 2014, and denied any violation. School A maintained that the student's IEP and placement are appropriate and the student's out of general education services were adjusted in the most recent IEP because the student had made significant progress academically and behaviorally. Nonetheless, School A filed another placement request with OSSE and a meeting was scheduled and held prior to the due process hearing.

A resolution meeting was held on January 27, 2014. The complaint was unresolved. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on February 2, 2014, and ended (and the Hearing Officer's Determination ("HOD") was originally due) on March 18, 2014.

On February 14, 2014, the Hearing Officer convened a pre-hearing conference and issued a pre-hearing order on February 25, 2014, outlining, inter alia, the issues to be adjudicated. Petitioner filed a motion to continue and extend the HOD due date by twenty-one (21) calendar days due to inclement weather. The motion was granted thus the hearing was convened on April 7, 2014, and the HOD is now due on April 18, 2014.

ISSUE: ²

The issue adjudicated is:

Whether the LEA denied the student a free and appropriate public education ("FAPE") by failing to provide an appropriate IEP reasonably calculated to confer educational benefit because the IEP does not prescribe more services outside general education than it currently does (up to and including a full time outside general education placement).

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 12 and Respondent's Exhibits 1 through 37)³ that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that this was the issue(s) to be adjudicated. At the outset of the hearing Petitioner withdrew the second issue that was listed in the pre-hearing order leaving a single issue to be adjudicated at hearing.

³ Respondent objected to admission to some of the documents disclosed by Petitioner (P-2, P-10, P-12). The objections were addressed at the outset of the hearing. The parties agreed that the Hearing Officer would rely on Respondent's copies of two of these documents: (R-19 for P-2 & R-12 for P-10). All disclosed documents by both parties were ultimately admitted into the record (including P-12) but not all were relied upon for findings of fact.

FINDINGS OF FACT:⁴

1. The student _____ resides with her parent in D.C. The student is a child with a disability pursuant to IDEA with a disability classification of MD including SLI and OHI for ADHD. The student _____ in a DCPS school when she was first determined eligible. She has attended School A since the beginning of SY 2011-2012 when she started fourth grade. The student had come into School A far behind academically and repeated fourth grade at School A during SY 2012-2013. (Grandmother’s testimony, Respondent’s Exhibit 19-1, Petitioner’s Exhibits 6-1, 7-12)
2. The student’s October 11, 2011, School A IEP prescribed 8 hours of specialized instruction outside general education per week and 8 hours inside general educational per week and 1 hour speech-language pathology per week and cited a classification of SLD. The student’s IEP was amended in May 2012 to prescribe extended school year services. (Respondent’s Exhibits 3-1, 3-9, 4, Grandparent’s testimony)
3. In Spring 2012 School A recommended the student be reevaluated. In June 2012 both a comprehensive psychological evaluation and a neuropsychological evaluation were conducted. The student’s cognitive abilities were borderline with a full scale IQ of 78 and her academic achievement was assessed as low average. The evaluator diagnosed the student with a mixed receptive-expressive language disorder and a learning disability. The evaluator recommended a functional behavior assessment (“FBA”) for the student. (Petitioner’s Exhibits 6-1, 7-1, 7-3, 7-6, 7-12)
4. In June 2012 the student was administered the Woodcock Johnson III Tests of Achievement when she was age eleven-one month (11-1) and in fourth grade. The student had the following scores: _____ (Petitioner’s Exhibits 7-6)

<u>Cluster/Test</u>	<u>Standard Score</u>	<u>Age Equivalent</u>	<u>Grade Equivalent</u>
Broad Reading	89	10-5	3.1
Broad Math	88	9-8	4.3
Broad Written Language	82	8-9	3.4
Academic Skills	88	9-5	4.1
Academic Fluency	97	10-9	5.4

5. An IEP team met at School A on July 17, 2012. The student’s parent attended the meeting. The team reviewed the student’s evaluations and began to discuss the student’s IEP but the parent had to leave before the IEP was completed. (Petitioner’s Exhibit 3)

⁴ The evidence that is the source of the Finding of Fact (“FOF”) is noted within a parenthesis following the finding. The second number following an exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party’s exhibit.

6. School A reconvened the IEP meeting on August 1, 2012. The team updated the student's IEP and added behavioral supports. The parent requested a FBA be conducted and requested a full time out of general education placement. The School A team did not agree with the change but agreed to refer the student to OSSE for a possible change in placement. OSSE completed the placement review process and on October 12, 2012, determined no change in placement was warranted. The student remained at School A and entered fourth grade again for SY 2012-2013. (Petitioner's Exhibits 4-1, 4-3, Respondent's Exhibits 13, 14, 15)
7. The student's DC CAS scores for fourth grade during SY 2011-2012 indicated she scored basic in reading and math. On DC CAS the following year, during SY 2012-2013, she scored proficient in math and basic in reading. During SY 2012-2013 the student earned average to above average grades. (Respondent's Exhibit 16, 17)
8. By the time of the student's June 18, 2013, IEP meeting the student was on honor roll and the student's grandparent thought everything was finally going great for the student. (Grandparent's testimony)
9. At the June 18, 2013, IEP meeting School A updated the student's IEP goals. The team determined the student did not need as much service and her specialized instruction outside general education was reduced and her general education instruction was increased. The student's mother participated in the meeting but not her grandmother. (Witness 4's testimony)
10. The student's June 18, 2013, IEP prescribes the following weekly services: 5 hours of specialized instruction outside general education, 10 hours of specialized instruction inside general education, and the following related services outside general education: 60 minutes of speech/language pathology, 1 hour of behavioral support. (Respondent's Exhibit 19-1, 19-8)
11. By October 2013 after school had been in session four or five weeks the student's grandparent received a few phone calls from the student's School A teachers about the student's behaviors. The student was being disrespectful to peers and staff and needed to be redirected. The student's grandparent had to pick the student up from school because of her behavior at least twice during the first semester of 2013-2014. The student's grandparent believes the student does not focus and has difficulty sitting still based on her observation of the student in her classroom at School A. (Grandparent's testimony)
12. In November or December 2013 someone from School A telephoned the student's grandparent and told her the student hit a teacher. The student later claimed the teacher hit her. The student went home for a day because of this incident and eventually apologized at the parent's direction for slapping the teacher. (Grandparent's testimony)
13. The student at some point related to a School A staff member an incident of being molested by a relative. As a result School A called child protective services. The student also later stated to a School A staff member that she wanted to harm herself. The staff

member reported this incident to the student's parent and grandparent. However, because the student related to her grandparent that she was bothered by the counseling sessions the grandparent requested that the School A counseling services be stopped. (Grandparent's testimony)

14. The student's grandparent now acknowledges that she is not receiving the telephone calls about the student's behavior as she was earlier in the school year. The student's grandparent has received the student's IEP progress reports and does not believe the student is making the progress the reports indicate. She has also seen the student's second quarter report card that indicates the student passed all her classes. The student's grandparent does not believe these grades. The student's grandparent believes the student needs to be in a more restrictive placement and she needs to be at School B where she can be provided more one to one services and be in a smaller setting. (Grandmother's testimony, Respondent's Exhibit 21)

15. School A has a code of student conduct and an incentive program of rewards and penalties to promote positive behaviors among its students. During SY 2013-2104 the student's behavioral conduct has tended to be better than most of her peers. After the current complaint was filed School A agreed to conduct a FBA and formalize a behavior intervention plan ("BIP") and submit a change of placement justification to OSSE. (Witness 3's testimony, Respondent's Exhibits 28, 31)

16. School A issued a progress report for the student that indicates she is making progress toward meeting her IEP goals in math, reading and written expression. The student is showing progress in all goals and moving toward mastery. However, the student is struggling on quizzes. She often moves too quickly through assignments. She gets frustrated in class when she gets something incorrect.

his can happen once or twice a week. Her teacher stays calm with her reminding her to get back to work and giving her time to cool off. Within one to two minutes she is back to work. For quizzes she has a new accommodation that allows her to use a timer and she gets to redo problems she did not do correct the first time. On her report card for the first and second quarter of SY 2013-2014 the student earned a C or B in all classes except she received a "F" in Reading in the first quarter and a "F" in History in the second quarter. (Witness 5's testimony, Respondent's Exhibits 21, 23)

17. School A third quarter grades are complete and the student has earned nothing lower than an A in writing and a C in math in reading. The student's counseling services are soon to be resumed with a different school counselor. School A is prepared to implement the BIP that addresses the student staying focused and on task. (Witness 3's testimony, Witness 4's testimony)

18. The School A social worker counseled the student providing her group and individual counseling. The student has made progress on her social emotional goals despite a couple of setbacks. The student had a spike in the need for redirection October 2013 and in February 2014. In the

recently drafted BIP the student gets unscheduled breaks, a tracking sheet for off task behaviors and the use of calming strategies. (Witness 6's testimony, Respondent's Exhibits 28, 29)

19. The parent's educational advocated drafted the compensatory education plan proposing services to compensate the student for the alleged denial of her IEP not prescribing at least the 20 hours of instruction, if not full time from end of September 2013. The advocate considered that harm to the student was reflected in her struggling academically and being at least 3 grade levels behind. He recommended 2 hours of independent tutoring per week for 24 and behavior support of 1 hour per week for 24 weeks. (Witness 1's testimony, Petitioner's Exhibit 12)
20. The student has been interviewed by School B during the latter part of September 2013 and spent a day at the school B in October 2013. The student has been accepted into the school's low teen division in fifth grade. School B is a full time day school with a OSSE certificate of approval ("COA"). School B serves students with various disability classifications including: SLD, OHI and high functioning autism. The tuition rates have been approved by OSSE. The school has a capacity of 180 students and currently has 115 students who range in age from 7 to 21. School B follows mandates for D.C. elementary, middle and high school and Carnegie units are granted. Students are grouped by age and cognitive ability. The student would be grouped according to her ability in reading and math. She would have 2 to 3 different teachers per day. All teachers are certified in special education. The class to which the student would be assigned currently has 6 students. (Witness 2's testimony, Petitioner's Exhibit 8)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved;

and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.⁵ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE: Whether the LEA denied the student a FAPE by failing to provide an appropriate IEP reasonably calculated to confer educational benefit because the IEP does not prescribe more services outside general education than it currently does (up to and including a full time outside general education placement).

Conclusion: Petitioner did not sustain the burden of proof by preponderance of the evidence that the student's June 18, 2013, IEP is inappropriate or that the student is in need of more services than the IEP currently prescribes.

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.

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

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (*quoting Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

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

⁵ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

that time to enable the student to receive educational benefits.” *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009).

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

The evidence demonstrates that the student has borderline cognitive abilities and low average to average academic performance.⁶ The student arrived at School A significantly behind academically and as a result repeated fourth grade. However, School A increased the student’s special education services and in her second time in fourth grade the student was successful. Her grades and DC CAS performance improved.⁷ School A then reduced her number of hours of specialized instruction outside general education in June 2013. Since the change in the IEP the student has continued to make progress in her IEP goals and the majority of her grades have been average to above average, except for a couple classes during the first and second quarter of the current school year.⁸

Although the student’s grandparent reported the student had behavioral difficulties in the first semester of SY 2013-2014 these behaviors have abated and the student’s in class frustrations related to her work are now being addressed with a BIP.⁹ Although the evidence indicates the student had a spike in behaviors in October and February those issues are also being addressed with resumption of counseling services.

Although the student’s grandmother and mother believe the student is not making progress at School A and had significant behavioral difficulties by November 2013 that in their opinion warrant the student having either more special education services or a full time out of general education placement, the evidence does not support this contention.

Respondent’s witnesses and the vast majority of the documentary evidence effectively demonstrated the student is performing well under her IEP as it was developed on June 18, 2013, and the behavior support services that have been instituted are addressing her behavioral concerns. The student’s progress indicates the appropriateness of the IEP and placement.

School A has twice initiated action at the parent’s behest even though they were not in agreement that the student needs could not be met at School A.¹⁰ OSSE held the placement meeting two weeks prior to the due process hearing and determined that School A is the student’s least restrictive environment.

Petitioner offered insufficient evidence that the June 18, 2013 IEP was inappropriate. Accordingly, the Hearing Officer concludes that Petitioner failed to demonstrate by a

⁶ FOF #s 3, 4

⁷ FOF #s 7, 8

⁸ FOF #s 16, 17

⁹ FOF # 15, 16, 17, 18

¹⁰ FOF #s 6, 15

preponderance of the evidence that the student's current IEP is not reasonably calculated to confer educational benefit or that she has been denied a FAPE.

ORDER:

1. The complaint is hereby dismissed with prejudice.
2. All requested relief is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: April 18, 2014