

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 March 25, 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 in the District of Columbia with his parent. The student is currently attending a DCPS high school (“School A”) and in ninth grade for the third time. The student was first found eligible for special education services in October of 2011 during school year (“SY”) 2011-2012 when he was first in ninth grade at School A. The student support team (“SST”) process had begun during SY 2010-2011 while the student had been attending his DCPS middle school (“School B”).

The student’s disability classification is other health impairment (“OHI”) due to attention deficit hyperactivity disorder (“ADHD”). The student’s individualized educational program (“IEP”) was updated twice after his initial IEP was developed on November 8, 2011. It was most recently updated on October 17, 2013. Each of the student’s IEPs have prescribed the same level of services: 7 hours per week of specialized instruction outside general education, 7 hours per week inside general education and 30 minutes per week of behavioral support services outside general education.

The student’s parent filed a due process complaint in 2012 that resulted in settlement agreement in July 2012. Pursuant to that agreement, DCPS conducted functional behavioral assessment (“FBA”) in October of 2012. The FBA cites off-task and disruptive behaviors as impacting the student’s ability to succeed academically. DCPS developed a behavior intervention plan (“BIP”) for the student in November 2012.

DCPS held a meeting in November of 2013 at the request of the parent to discuss behavioral concerns the parent believed required a change in placement for the student. DCPS did not change the student’s placement. Petitioner asserts that throughout the student’s time at School A, despite being provided specialized instruction and related services, he has had poor class attendance, virtually all failing grades and been unable to pass to tenth grade.

Petitioner filed the current due process complaint on January 22, 2014 asserting, inter alia, that DCPS failed to review or revise the student’s BIP and failed to change the student’s educational placement despite his lack of progress. Petitioner acknowledged that while the student’s IEP goals, present levels, needs statements, and baselines appear to be adequate, the IEP as of October 2013 is not calculated to provide educational benefit because it does not require the student to receive all instruction and services outside general education.

Petitioner seeks as relief an order directing DCPS to revise the student's IEP to include specialized instruction to at least 27.5 hours outside general education in a full-time special education day school; fund an independent FBA and an assistive technology (“AT”) evaluation; revise the student's BIP, review the independent evaluation and to make any revisions to the student's IEP recommended by the evaluation and fund compensatory education.

DCPS filed a timely response to the complaint on January 28, 2014, and asserted there has been no denial of a free and appropriate public education (“FAPE”) to the student. DCPS asserted the student’s current IEP is reasonably calculated to provide the student educational benefit and the student’s poor classroom attendance in both general and special education classes has resulted in his failing grades; simply adding more special education classes would not be a solution for his non-attendance. The student is currently being educated, when he comes to class, in his least restrictive environment (“LRE”) and School A has put interventions in place to address student’s inability to attend or remain in class. The BIP provides strategies and rewards to assist and there is no requirement to simply add a new date to the BIP at each annual IEP meeting. DCPS also asserted there is no support for an AT evaluation nor an allegation Petitioner has ever requested AT for the student.

A resolution meeting was held on February 5, 2014. The complaint was unresolved and the parties did not mutually agree to proceed directly to hearing. The 45-day period began on February 22, 2014, and ends (and the Hearing Officer’s Determination (“HOD”) is due) on April 7, 2014.

Pre-hearing conferences were convened held on February 26, 2014, and March 18, 2014, and a pre-hearing conference was issued outlining, inter alia, the issues to be adjudicated. The parties appeared for hearing on March 25, 2014. The parties submitted written closing arguments on March 31, 2014.

ISSUES: ²

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to provide him an appropriate IEP and placement since October 2013 when the student’s most recent IEP was developed because the IEP (a) does not prescribed 27 hours of specialized instruction outside general education, (b) does not prescribe an educational placement with sufficient therapeutic supports, and (c) does not contain and revised BIP to address the student’s continued behaviors.

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 these were the issue(s) to be adjudicated. At the outset of the hearing the parties agreed that one of the two issues that had been certified in the pre-hearing order had been resolved with the issuance of the IEE and withdrawn by Petitioner.

2. Whether DCPS denied the student a FAPE by failing to comprehensively evaluate the student in all areas of suspected disability by failing to conduct an assistive technology evaluation that DCPS recommended.

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 42 and Respondent's Exhibits 1 through 3) that were all admitted into the record and are listed in Appendix A. Witnesses a listed in Appendix B.

FINDINGS OF FACT:³

1. The student _____ resides in the District of Columbia with his parent. The student is currently attending School A and in ninth grade for the third time. The student was first found eligible for special education services in October of 2011, during SY 2011-2012 when he was first in ninth grade at School A. The SST process had begun during SY 2010-2011 while the student had been attending his DCPS middle school, School B. (Petitioner's Exhibits 6, 10)
2. The student's disability classification is OHI due to ADHD. The student's IEP has been updated twice since his initial IEP was developed on November 8, 2011: on October 25, 2012, and on October 17, 2013. Each of the student's IEPs have prescribed the same level of services: 7 hours per week of specialized instruction outside general education, 7 hours per week inside general education and 30 minutes per week of behavioral support services outside general education. (Petitioner's Exhibits 10-9, 15-9, 20-11)
3. The student's parent filed a due process complaint in 2012 that resulted in a settlement agreement in July 2012. Pursuant to that agreement, DCPS conducted a FBA in October of 2012 that cites off-task and disruptive behaviors as impacting the student's ability to succeed academically. The behaviors of concern were "defiance, noncompliance, off task, making excuses, poor motivation, distracting others." DCPS developed a BIP for the student in November 2012. The BIP included actions for the school staff to implement to assist the student to control his temper, focus and participate in class and complete work assignments. (Petitioner's Exhibits 13, 14, 29, 35-1, 35-3 35-7)
4. Sometime after June 2013 DCPS prepared a document entitled "Classroom Observation Tool." The document recounts the student's history of poor focus in class and poor class attendance; it notes the student's parent's desire for another educational setting for the student due to his lack of progress. The document notes the student's having over 100 days absent during SY 2012-2013 and noted the student's September 2012 BIP. The

³ The evidence that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

document included the following conclusion that the student's IEP team incorporate: "attendance plan, file DCPS attendance policy requirements, incorporate assistive technology, incorporate services [of] a core agency to provide coping skills in the home and school." (Petitioner's Exhibit 34-1, 34-4, 34-5)

5. Throughout the student's time at School A, despite being prescribed specialized instruction and related services, virtually all his grades have been failing and he has had poor class attendance. His most recent transcript shows he has only earned a total of 2.5 credits. He has not been promoted to tenth grade because he has not passed English 9. He has passed 3 of the 19 classes he took during SY 2011-2012 and 2012-2013. His grade point average ("GPA") is currently 0.17. (Student's testimony, Petitioner's Exhibit 24-5)
6. The student states that he has remained in ninth grade for three years because he has failed to learn anything. He now often gets frustrated in his classes because the students are so much younger than him and immature. He finds the level of noise in his classes caused by other students to be distracting. He feels much of the instruction he is provided is useless to him because he is handed work to do that he does not understand and is not provided sufficient assistance to complete the work. He finds that his level of popularity in the school and being familiar with so many of the students there also contributes his distractedness and inability to regularly attend class and contributes to his lack of progress. (Student's testimony)
7. When the student leaves the classroom he goes to see his school therapist who is one of the few people at School A who consistently provide the student needed assistance. School A gave the student an opportunity for credit recovery; however, he only attended twice because of his difficulty sitting for long periods even with the medication he has to assist with his attention. The student believes he needs a smaller environment so he can better focus and where he can get more help. (Student's testimony)
8. In November of 2013 DCPS held a meeting at the parent's request to discuss the student's behavior and her desire for a change in placement for the student. DCPS did not change the student's placement following that meeting. The student's parent believes School C is chaotic and this along with the behavior of the younger students in his classes contributes to the student being distracted. She believes he needs to be in an environment where there are fewer students in the classroom. The student is not likely to pass ninth grade this current year. (Parent's testimony, Petitioner's Exhibit 21)
9. The student has been accepted to attend School C, a full time special education day school that focuses on vocational training as well as academics. The school offers programs in barbering, cosmetology, carpentry and automotive. It offers all core classes for the 24 credits and electives students need to obtain a high school diploma. Students with intellectual disability who attend School C are on certificate track. School C currently has 26 total students. The school does not serve students with severe emotional disturbance or who are physically aggressive and need significant restraints or redirection. School C has a licensed clinical therapist who provides psychological counseling; there are three behavior techs in the school. Transition plans are customized

to incent students to attend school. Every teacher is certified in the content area and in special education. There are no more than ten students to each teacher. School C staff took a look at the student's transcript and has determined the student would have a freshman caseload if he attended. The school staff has not interviewed the student and he has not visited the school. School C has an OSSE certificate of approval ("COA"). The tuition is \$216 per day and \$65 per hour for therapy. (Witness 1's testimony)

10. DCPS' non-public unit team has conducted recent site visits to School C. DCPS has a progress monitor assigned to the school to monitor the implementation of services to DCPS students enrolled there. Currently DCPS prefers not to refer students to School C although School C has an OSSE COA because DCPS is not certain that all the teachers are certified in special education and concerned that the vocational programs are insufficient and that the physical facilities of the school are unsafe. As with many non-public day schools School C has had a truancy problem with many of its DCPS students. DCPS has urged School C to make improvements before any DCPS students are referred. DCPS has proposed another private full time special education day school for this student, School D. The student has not visited or been interviewed by the staff of School D. (Witness 4's testimony)
11. The parent's educational consultant proposed a compensatory education program to compensate the student for the alleged denial of FAPE. The consultant recommended the student be provided five (5) credit bearing classes that will apply towards his high school diploma and that are credits he might have earned in the current school year had he had the appropriate IEP and services. The proposal was that the credit recovery classes be provided by Seeds of Tomorrow at their facility with their computers and the student be provided 40 hours of tutoring assistance for each the courses for a total of 200 hours of tutoring and receive transportation to and from Seeds of Tomorrow for the classes. (Witness 2's testimony, Petitioner's Exhibits 1-2)
12. The student was previously awarded credit recovery services along with independent tutoring to assist with the credit recovery. The student was not able to take advantage of the awarded services because the independent provider, Seeds of Tomorrow, was unable to get DCPS' ultimate approval of the program. The credit recovery program is usually purchased as an online course and Seeds of Tomorrow can work with the student to provide tutoring to assist in his completion of the courses. (Witness 3'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. ⁴ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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

ISSUE 1: Whether DCPS denied the student a FAPE by failing to provide him an appropriate IEP and placement since October 17, 2013 when the student's most recent IEP was developed because the IEP (a) does not prescribed 27 hours of specialized instruction outside general education, (b) does not prescribe an educational placement with sufficient therapeutic supports, and (c) does not contain and revised BIP to address the student's continued behaviors.

Conclusion: Petitioner sustained the burden of proof by preponderance of the evidence that the student's IEP as of October 17, 2013, was inappropriate and was not designed to confer educational benefit because it does not prescribe sufficient services outside general education.

"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).

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.

⁴ 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.

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

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits." *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009).

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

The evidence in this case demonstrates that the student has made little if any academic progress and passed few classes since he began attending School A.⁵ In November 2013 DCPS amended the student's IEP and maintained the same level of services the student has had for the previous two years and DCPS took no additional action to adjust or increase the student's services despite his failures. The student testified that he does not understand the work presented to him and has difficulty remaining focused and easily gets frustrated and leaves his classes. He does, however, benefit from his access to the behavior support staff at School A. Nonetheless, this support has been unable to turn the tide on the student's academic failure. Although DCPS has a BIP in place there is no indication that the BIP or any other services being provided have been effective. DCPS presented no evidence to refute the evidence Petitioner provided in this regard.

Consequently, the Hearing Officer concludes that the student's current IEP and placement in a part time special education program at School A has been inappropriate since it was developed in October 2013 and consequently has denied the student a FAPE. The evidence sufficiently supports Petitioner's contention that the student is in need of a full time special education placement at that such a placement is his least restrictive environment.⁶

Both DCPS and Petitioner proposed non-public day schools for the student to attend. Although Petitioner has sought to place the student at School C and DCPS has sought to place the student at School D the Hearing Officer is considers based upon the student's history of extreme non-attendance that his buy-in is crucial to any hope for success in his next educational placement.

⁵ FOF #s 5, 6

⁶ Having found the student's IEP was inappropriate because of a lack of sufficient services and that the student is in need of full time out of general education placement the Hearing Officer concluded that the issue elements alleged about the BIP and lack therapeutic supports were encompassed in the conclusion of the denial of FAPE rendered.

Although he indicated his desire to attend School C, the student has not been interviewed by or visited either school proposed by the parties. In light of this critical factor that the Hearing Officer considers directly related to the appropriateness of the student's next school placement the Hearing Officer concludes it is inappropriate to place the student at either of these two proposed schools. Rather, the Hearing Officer directs that DCPS and Petitioner meet to consider proposed schools and that the student visit and be interviewed by school staff prior to any school placement determination.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to comprehensively evaluate the student in all areas of suspected disability by failing to conduct an assistive technology evaluation that DCPS recommended.

Pursuant to 34 C.F.R. § 300.304 (c) a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that a "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas "related to the suspected disability" should be assessed, including: academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title. 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2006).

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student is need of an assistive technology evaluation or assistive technology services.

The evidence indicates that DCPS prepared a document sometime after June 2013 that contained a list of recommendations one of which stated: "incorporate assistive technology." There was no evidence as to why the document was created and any evidence of details regarding any of the listed recommendations in this document from which the Hearing Officer could conclude that student is in need of AT and/or an AT evaluation or whether and IEP team ever reviewed the document or considered it contents. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

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.

Petitioner has requested compensatory education that Petitioner's witness testified will assist the student in earning at least the credits that he might have earned in the current school year had he had the appropriate IEP and services. Based upon the student's testimony of his difficulty in focusing and maintaining attention, and the recommendation in the proposed plan of 40 hours of independent tutoring assistance to the student for each of the five courses, the Hearing Officer concludes the proposal is a reasonable estimation of the services needed to place the student in the stead he would have been had he received appropriate services.⁷

ORDER:⁸

1. DCPS shall within five (5) school days of the issuance of this Order amend the student's IEP to prescribe that all the student's instruction and related services be provided outside general education, i.e. full-time out of general education services.
2. DCPS shall place and fund the student at a non-public day school to be determined by a placement team as prescribed below where the student can be provided full time out of general education services for the remainder of the SY 2013-2014 including the extended school year ("ESY") period if it is determined by an IEP team the student warrants ESY services.
3. DCPS shall within five (5) school days of the issuance of this Order convene a placement meeting with the student and his parent to consider and propose possible school placement(s) pursuant to this Order. Within ten (10) school days following the placement meeting the student and his parent shall visit and be interviewed by the school staff of any proposed school(s) and once an acceptance has been offered to the student obtained as a result of the interview(s) and visit(s) DCPS shall issue a prior

⁷ Because Petitioner's prior inability to obtain awarded services from the requested provider the Hearing Officer will not grant the requested relief as to a specific provider.

⁸ Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis. The parties may mutually agree to an extension of the timelines herein and may mutually agree that any compensatory that DCPS is to provide may be also be provided independently.

notice of placement to the appropriate non-public day school for the student to attend for the remainder of SY 2013-2014 including any ESY period.

4. As compensatory education for the student being without an appropriate IEP and placement in the current school year DCPS shall provide the student five (5) credit recovery courses to be provided by DCPS and DCPS shall provide the student 200 hours of independent tutoring at the prescribed OSSE/DCPS rate. Petitioner shall use and complete this award by December 31, 2014.
5. All other requested relief is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: April 7, 2014