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Office of the State Superintendent of Education
Office of Review and Compliance
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Confidential

Parent on Behalf Student ¹ , Petitioner, v. District of Columbia Public Schools ("DCPS") ["LEA"] Respondent. Case # 2016-0007 Date Issued: April 4, 2016	HEARING OFFICER'S DETERMINATION Hearing Date: March 4, 2016 <u>Representatives:</u> Counsel for Petitioner: Carolyn Houck, Esq. Steve Nabors, Esq. P.O Box 252 St. Michaels, Md. 21663 & Steve Nabors, Esq. 1220 L Street, N.W. Washington, D.C. 20005 Counsel for Respondent: William Jaffe, Esq. District of Columbia Office of the General Counsel 1200 First Street, NE Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

² The student's current age and grade are listed in Appendix B.

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 4, 2016, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age ____ and in grade _____² and currently attends a District of Columbia (“D.C.”) public charter school (“School A”) for which the District of Columbia Public Schools (“DCPS”) is the local education agency (“LEA”).

On January 20, 2016, the student’s mother (“Petitioner”) filed this due process complaint that alleges DCPS denied the student a free appropriate public education (“FAPE”) by: (1) failing to adequately evaluate the student, including failure to perform triennial evaluations, and/or evaluate the student in all areas of suspected disabilities; (2) failing to implement the student’s individualized educational program (“IEP”) during school year (“SY”) 2015-2016, and (3) failing to provide an appropriate placement for SY 2015-2016.

Petitioner seeks as relief that the Hearing Officer find that DCPS denied the student a FAPE and order DCPS to immediately place and fund the student at a private special education school identified by Petitioner, fund independent speech and language and comprehensive psychological evaluations and a functional behavioral assessment (“FBA”) at market rates and fund any other evaluations recommended in the independent evaluations at current market rates. Petitioner requests that DCPS convene a multi-disciplinary team (“MDT”) meeting to review all evaluations develop an IEP and determine placement/location of service. Petitioner also requests compensatory education.

On February 10, 2016, DCPS filed a timely response to Petitioner’s complaint in which it denied that it failed to provide the student with a FAPE.³ DCPS contended, inter alia, that Petitioner made the choice to place the student at School A and when notified School A could not implement the student’s IEP refused to locate another school for the student and kept the student at School A.

The Hearing Officer convened a pre-hearing conference (“PHC”) on the complaint on January 22, 2016, and issued a pre-hearing order (“PHO”) on January 22, 2016, outlining, inter alia, the issues to be adjudicated.

² The student’s current age and grade are listed in Appendix B.

³ On February 16, 2016, DCPS filed an amended response to the complaint.

ISSUES:

The issue(s) adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to adequately evaluate the student, including failure to perform triennial evaluations, and/or evaluate the student in all areas of suspected disabilities.⁴
2. Whether DCPS denied the student a FAPE by failing to implement the student's IEP during school year ("SY") 2015-2016.
3. Whether DCPS denied the student a FAPE by failing to provide an appropriate placement/location of service for SY 2015-2016.

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 13 and Respondent's Exhibits 1 through 14) that were admitted into the record and are listed in Appendix A).⁵ Witnesses are listed in Appendix B.

FINDINGS OF FACT:⁶

1. The student currently attends School A, a public charter school for which DCPS is the LEA. The student began attending School A at the start of SY 2015-2016. Prior to attending School A the student attended another public charter school located in D.C. ("School B") for which DCPS was not the LEA. (Parent's testimony, Petitioner's Exhibit 3-1)
2. The student is a child with a disability pursuant to IDEA with classification of specific learning disability ("SLD"). (Petitioner's Exhibit 3-1)
3. When the student attended a DCPS school during SY 2011-2012 DCPS conducted a psychological reevaluation of the student in November 2011.⁷ (Respondent's Exhibit 1)

⁴ Petitioner asserts DCPS did not conduct comprehensive psychological and speech and language evaluations and a FBA.

⁵ Any documents that were objected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

⁶ 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.

⁷ The student's intellectual functioning was in the borderline range with a Full Scale IQ of 77. The student's broad reading standard score was 33. His broad math standard score was 52. His spelling and writing fluency standard scores were 52 and 59 respectively. (Respondent's Exhibit 1-7, 1-9, 1-11)

4. At School B the student had an IEP dated March 11, 2015, that prescribed all services outside general education: 24 hours per week of specialized instruction outside general education, 4 hours per month of speech-language pathology outside general education and 1 hour per week of behavioral support outside general education. The student's last eligibility date based upon this IEP was January 15, 2013. (Petitioner's Exhibit 3-1, 3-11)
 5. Although the IEP prescribed behavior support services the IEP included neither present levels of performance nor goals in that area of concern. As to speech and language present levels of performance the IEP noted that a CELF 4 assessment had been conducted. However, the date of the assessment was not noted. The student's IEP included speech and language goals. (Petitioner's Exhibit 3-9, 3-10)
 6. The student attended School B at least two school years. During SY 2014-2015 at School B the student was operating below proficiency in almost all subject areas as noted on his end of year report card. He was reading at kindergarten level and had poor behavior. Nonetheless, the student was promoted and graduated from School B. (Parent's testimony, Petitioner's Exhibits 3-5, 4-1)
 7. School A is a school for which a parent must apply. School A accepts students irrespective of their special education status unless a parent provides School A the student's IEP at the time of application and School A is aware ahead of time it cannot implement the student's IEP. Typically, the parent brings the IEP when the parent applies. If School A is not provided the IEP ahead of time and a student is accepted it may take up to 30 days for School A to gain access to the student's IEP from the OSSE database. If it is determined after 30 days that School A cannot implement the IEP the parent is informed that he or she should enroll the student in another school that can implement the IEP or should enroll in the student's local DCPS school. (Witness 3's testimony)
 8. School A has been given the directive from its LEA (DCPS) to conduct this 30-day review and if School A determines it cannot implement a student's IEP School A is to then send the least restrict environment ("LRE") package to DCPS and wait on recommendations from the LEA how to best assist the student. The recommendations can include conducting evaluations or DCPS will issue a prior written notice ("PWN") for a student to attend another school. (Witness 3's testimony)
 9. The student's mother ("parent") first registered the student at School A during the summer of 2015 but did not present the student's IEP to the school. However, she informed School A that the student had an IEP. The parent did not notify School A, and perhaps did not even know, that the student was in need of an updated evaluation. The parent received an acceptance letter for the student to attend School A and he began attending at the start of SY 2015-2016. (Parent's testimony)
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10. School A did not obtain the student's IEP until it became accessible through the OSSE database approximately 30 days after the school year started.⁸ Once School A had access to the student's educational records via the OSSE database ("SEDS") School A determined that it could not implement the student's IEP. With access to the student's records School A also became aware that the student's triennial evaluation was due based upon his last eligibility determination and he was in need of an updated evaluation. Although the student's IEP required all services outside general education, School A only provided the student specialized instruction services in general education. (Witness 3's testimony)
11. In mid to late September 2015 School A conducted a 30-day review meeting with the parent after School A obtained the student's IEP from SEDS. The participants in the September 2015 meeting included the student's math teacher, reading teacher, the School A special education coordinator ("SEC") and the school counselor. A DCPS representative did not participate in the meeting. School A staff members discussed the IEP documents and services available at School A and the student's progress as of that date. The School A counselor shared that the student avoided classes because he experienced anxiety about his classmates discovering his limited reading ability. The student had also expressed concern that he was not receiving the same level of privacy and support he received at his previous school. (Witness 3's testimony, Witness 5's testimony)
12. During the meeting when the SEC informed the parent that School A could not implement the student's IEP and she would need to find another school for the student to attend the parent complained that this should have been explained to her when she registered the student. (Parent's testimony)
13. During the September 2015 meeting the SEC informed the student's parent she could enroll the student at his DCPS neighborhood school and recommended at least one other school. The parent said she would look for other schools so the School A SEC gave the parent time to do so before informing DCPS that School A could not implement the student's IEP. The parent did not say conclusively at the September 2015 meeting that she would withdraw the student and take him to another school. The parent said she would like to explore other schools first before going through DCPS. School A agreed to follow up after the parent visited schools. However, after the meeting the parent failed to respond to the SEC's subsequent requests for clarification whether she had found another school for the student. (Witness 3's testimony, Witness 5's testimony)⁹

⁸ The parent testified she told School A the student had a full-time IEP when she registered him; claimed she gave a copy of the IEP to the student to take to school that was lost and she resent the IEP to School A the second or third week after school started. However, the Hearing Officer found DCPS witness 3's testimony (regarding when School A first obtained the student's IEP and was first informed that he required out of general education services) more credible based on the witness's demeanor. By contrast, the parent did not remember who she spoke to at School A when she registered the student and did not state who she provided the student's IEP to at School A.

⁹ The parent testified that she did not want the student to be without a school, refused to withdraw the student and School A staff called her on several occasions attempting to persuade her to withdraw the student and threatened to

14. School A had a meeting sometime in October 2015 regarding the student's triennial evaluation and talked again with the parent about whether she was going to move the student to another school. The SEC also talked to the student's father about relocating the student. Following this October 2015 meeting School A informed DCPS for the first time that it could not implement the student's IEP. (Witness 3's testimony)
15. On December 8, 2015, School A convened a meeting to discuss the student's school placement. A DCPS representative participated and the student's parent participated by telephone. School A informed the parent that DCPS acknowledged that the student's triennial evaluation was due and the student required an evaluation before the student's LRE and placement determination was made. As a result no new school was identified and DCPS did not issue a PWN for the student to attend a new school. (Witness 3's testimony, Respondent's Exhibit 3)
16. During the December 8, 2015, meeting School A School A mentioned conducting a comprehensive psychological evaluation. No other evaluations were considered. School A requested that the student's parent sign a consent to evaluate form. The parent verbally agreed to sign the form that the SEC emailed to the parent. The evaluation consent form the SEC sent the parent did not state what assessment was going to be conducted. Once the parent received the form she did want to sign a blank evaluation form. To date the parent has not signed the form and returned it to School A. (Witness 3's testimony, Petitioner's Exhibit 5, Respondent's Exhibit 3)
17. DCPS conducted a least restrictive environment ("LRE") review for the student and gave School A support with ideas of how to address the student's needs until another placement was found. A DCPS representative came to School A to observe the student but did not create a formal LRE report because the student required a new evaluation. DCPS did not issue a PWN for the student to attend another school and still has not done so. (Witness 3's testimony)
18. Since the student has attended School A he has only been provided instruction inside general education. The student has made some progress since he first began attending School A. At first he was very avoidant of class especially English and Language Arts ("ELA") and reading because of his embarrassment about his low academic abilities. He has now established positive relationships with the staff and peers. He has the support of a special education teacher in math and ELA and occasionally has small group instruction for ELA. With the exception of classes co-taught by a general education and a special education teacher, School A has assigned an instructional aide to travel with the student from class to class to provide him assistance with classwork. (Witness 3's testimony, Witness 5's testimony)

call DCPS. The Hearing Officer did not find the parent's testimony in this regard credible. The two DCPS witnesses' (Witness 3 and Witness 5) testimony was consistent with one another that School A staff did not threaten to call DCPS if the parent did not withdraw the student.

19. The student struggled in his ELA class. He had zero % for reading for first advisory because he would not go to class and would not complete assignments. However, he had average grades in at least three of his classes in the first advisory. There was a dip in his performance when he had concerns outside school and missed days from school during second advisory. However, the student had an increase in his reading grade in second advisory. (Witness 3's testimony, Witness 5's testimony, Respondent's Exhibits 3, 9)
20. The School A counselor developed a behavior intervention plan ("BIP") based on her classroom observations of the student to address his behaviors that included class avoidance. School A anticipated a more formal assessment of the student's behavior as a part of the comprehensive psychological evaluation that was due to be conducted. (Witness 5's testimony)
21. The student now checks in with the counselor daily and when he has any problems during the school day. The student receives more behavioral support services than his IEP prescribes. He has been introduced to group therapy and benefitted from interaction with his peers at School A. The student's group therapy includes, art therapy, games and shares and he looks forward to coming to the therapy sessions. (Witness 5's testimony)
22. The student's parent believes that the work the student is given at School A is too difficult for him based only her efforts to assist him in doing his homework. The parent has not received any progress reports or report cards since the student has been attending School A and has only communicated with one of his teachers regarding his behavior. (Parent's testimony, Petitioner's Exhibit 6)
23. Although the student still has not been evaluated, in February 2016 DCPS determined the student would be assigned to a DCPS [REDACTED] school ("School C"). DCPS has not issue a PWN for him to attend School C. The parent is not familiar with School C and has never visited the school. (Parent's testimony Respondent's Exhibit 7-1)
24. School C can implement the student's current IEP and conduct an updated evaluation for the student. At School C the student's IEP would be implemented in a self-contained classroom. School C has two self-contained classrooms of six to seven students each. The student would be assigned to the classroom appropriate for his grade. School C can support an IEP with up to 27.5 hours per week of specialized instruction and related services outside general education. School C has a school psychologist and related services providers including three social workers and can provide speech and language services. ([REDACTED])
25. The parent has applied for the student to attend a private special education school ("School D"). School D serves students grades 2 through 12 whose primary disability classification is SLD. All students have IEPs and are provided related services. School D has a total of 70 students, 25 of whom are funded by the District of Columbia. School D classrooms have 7 to 9 students per teacher. School D has a speech language therapist on staff, an occupational therapist and licensed clinical social workers to provide behavioral support. (Witness 2's testimony)

26. The student has not yet interviewed at School D and thus School D has not yet offered the student admission. The student was not able to visit School D on the day scheduled because of a family emergency. A face-to-face interview and visit are required for all potential students. After the interview the School D staff will come together and discuss whether the student is a match for its program. School D has reviewed the student's records and is aware he functioning at kindergarten and first grade level. School D can implement the student's current IEP including the specialized instruction and related services. Based upon her review of the student's records the School D administrator believes that School D can meet the student's needs. Barring any surprises, she expects that the student will be offered acceptance after interviewing. (Witness 1's testimony, Witness 2's testimony)
27. The parent's educational advocate, who was qualified as an expert witness, first met with the student in January 2016 and worked with him for four two-hour sessions at a local library to get a sense of his academic abilities. The advocate has concluded based upon working with the student that he is functioning on no more than a first grade level in reading and math. The advocate only worked with the student on basic kindergarten and first grade material. She concluded that the student puts forth effort but struggles, is significantly behind academically and is frustrated because he cannot perform the academic work he is provided at his current school. The advocate is of the opinion that at School A the student has gained exposure to the material presented to him but has not fully grasped the material. The advocate observed that there was no modification of the homework that the student brought home from School A. However, the advocate did no formal testing of the student and did not speak to anyone at School A about the instruction or work the student is being provided at School A. (Witness 1's testimony)
28. The advocate developed a compensatory education proposal for 300 hours of independent tutoring. The advocate also recommended 50 hours of independent behavior support services because she claims the student is struggling academically at School A and expressed to her that he feels that he is a failure. The proposal was developed for the Hearing Officer's consideration and "is not carved in stone." The advocate based her recommendation on the number of school days that the student has been at School A without instruction outside general education. She concluded that by the time the HOD is issued the student will have been without instruction in the setting prescribed by his IEP for at total of 140 school days at 4.8 hours per day. The advocate believes that if a day for day and hour for hour formula was used the student would be owed approximately 600 hours of instruction. (Witness 2's testimony, Petitioner's Exhibit 10)

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. 7 *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 adequately evaluate the student, including failure to perform triennial evaluations, and/or evaluate the student in all areas of suspected disabilities.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence of on this issue.

Pursuant to 34 C.F.R. § 300.303 (a) A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311— (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation. (b) Limitation. A reevaluation conducted under paragraph (a) of this section— (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

Pursuant to 34 C.F.R. § 300.304 (a) The public agency must provide notice to the parents of a child with a disability, in accordance with Sec. 300.503, that describes any evaluation procedures the agency proposes to conduct.

Pursuant to 34 C.F.R. § 300.304 (c)(4): Each public agency must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

The evidence demonstrates that the student's last psychological evaluation was conducted when the student attended a DCPS school in 2011. The student's last eligibility date based upon his IEP was January 15, 2013. Petitioner asserts and DCPS acknowledged at the December 8, 2015, meeting that the student's triennial evaluation was due to be conducted. However, there was no clear evidence presented by either party as to the exact date from which the triennial evaluation should be measured. The Hearing Officer concludes that it is more likely than not that the student's reevaluation should have been conducted three years after the last DCPS psychological evaluation in November 2011 since that is the only evaluation of the student in the record.¹⁰ Thus, his reevaluation was due November 2014.

If this is the date that the student's reevaluation was due, on that date the student was enrolled in a LEA other than DCPS. Consequently, School A and thus DCPS could not have been expected to have timely conducted the student's triennial evaluation until they became aware that the evaluation was due. School A did not become aware of this until late September 2015. After it was clear to School A that the parent did not intend to withdraw the student from School A, DCPS convened a meeting with the parent. This meeting occurred on December 8, 2015. At this meeting School A discussed conducting an evaluation of the student. School A and DCPS concluded that a comprehensive psychological evaluation would be conducted.

The evidence indicates that the parent granted verbal approval for DCPS to proceed with the comprehensive psychological evaluation as of the December 8, 2015, meeting. School A emailed her a consent form that has not yet been returned to DCPS. Although, the consent form did not indicate the evaluation that would be conducted, there is no dispute by the parties as to what evaluation was intended. Without a signed consent form DCPS could not and did not proceed with the evaluation.

Nonetheless, when School A became aware that the student's triennial evaluation was due it could have, but did not, immediately take action to evaluate the student. There was a three-month delay until after the December 8, 2015, meeting until the parent was provided a consent form to authorize the evaluation. Because the form did not indicate the evaluation to be conducted the parent did not sign the form resulting in even further delay. The Hearing Officer concludes that the three month delay in School A and thus DCPS providing the parent the consent to evaluate form was an inordinate delay in evaluating the student and significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE.

¹⁰ The Hearing Officer notes, however, that the School A SEC (Witness 3) testified that the OSSE database indicates the triennial evaluation is to be conducted based upon the eligibility date which would have made the reevaluation due in January 2016. Nonetheless, she acknowledged in her testimony that the student's triennial evaluation was due when School A convened the October 2015 meeting.

Petitioner also asserted DCPS did not conduct a speech and language evaluation and a FBA. However, the evidence does not indicate that any other evaluation other than the comprehensive psychological was requested or warranted. There was no prior speech language evaluation or prior FBA presented and there was no testimony regarding the need for these evaluations. The only indication in the record regarding a speech and language evaluation was a reference in the student's IEP to a CELF 4 assessment but the date of the assessment is uncertain. This evidence is insufficient to conclude that the student was in need of a new speech language evaluation.¹¹

The behavior support put in place by School A related to the student's class avoidance and this was addressed with a BIP. There were no behavior goals in the student's IEP from which to determine what other behavior issues were to be addressed.¹² The mere fact that the student has the related services of speech language and behavior support in his IEP does not in and of itself mandate that a speech and language evaluation and a FBA be conducted as a part of a student's triennial evaluation or otherwise. There is no evidence of a request by Petitioner for these two additional assessments prior to the filing the complaint.

Given the facts of this case the Hearing Officer does not conclude that School A and DCPS should be held responsible for the student's triennial evaluation not being conducted when the student did not attend the LEA. However, because of the delay in requesting consent from the student's parent to conduct the comprehensive psychological evaluation, the Hearing Officer grants in the order below Petitioner's request for an independent comprehensive psychological evaluation.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to implement the student's IEP during SY 2015-2016.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence of on this issue.

34 C.F.R. § 300.323(c)(2) requires that, as soon as possible following the development of an IEP, special education and related services are made available to the child in accordance with the child's IEP.

5E DCMR 3002.3 provides that:

- (c) The LEA shall ensure that an IEP is developed and implemented for each eligible child with a disability served by the LEA.
- (d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP...
- (f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

“To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show

¹¹ FOF # 5

¹² FOF #s 5, 20

more than a de minimus failure to implement all elements of that IEP, and, instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the IEP “Savoy v. District of Columbia (DC Dist. Court) February 2012 adopted Houston Indep. School District v. Bobby R. 200 F3d 341 (5th Circ. 2000)

The evidence demonstrates that School A was unable to implement the student’s IEP during SY 2015-2016 and became aware of this fact approximately 30 days after the school year started and promptly brought that fact to the parent’s attention in a meeting convened in September 2015. School A encouraged the parent to find another school for the student and made suggestions of schools including the student’s DCPS neighborhood school. However, School A did not immediately contact the LEA to indicate that it had accepted and enrolled a special education student for whom the School could not provide all IEP services. This notification to DCPS did not take place until after an October 2015 meeting when it became clear to School A that the parent was not going to withdraw the student.¹³

Despite the parent’s efforts to find another school for the student to attend, School A should have immediately notified DCPS in September 2015 that it could not implement the student’s IEP. When DCPS was notified in October 2015 that the student could not implement the IEP DCPS had an affirmative duty to immediately provide the student an appropriate school placement and did not do so. That is when a denial of FAPE to the student occurred.

On December 8, 2015, School A convened a meeting with a DCPS representative present. But DCPS still did not propose a school for the student but addressed the student’s needed evaluation. DCPS even conducted an LRE review of the student but did not make any recommendation about an appropriate school for the student after that review. It was not until the due process complaint was filed that DCPS, in February 2016, proposed a school for the student to attend and for the parent to visit.¹⁴

During all this time the student only received specialized instruction inside general education and did not receive all instruction outside general education as the student’s IEP prescribes. The evidence demonstrates that student struggled his first advisory and avoided classes due to his embarrassment about his academic abilities. Although School A put supports in place to help the student, and there is evidence that he may have even been provided small group instruction, the evidence indicates that the instruction the student received at School A was woefully short of the instruction required by his IEP.

The student’s showed some progress based on the testimony of the School A staff. However, School A was clearly ill-equipped to implement an IEP that required the restrictive setting that the student’s IEP requires. The Hearing Officer concludes that the failure to provide the student with the required specialized instruction outside general education by October 2015 when DCPS was informed the student’s IEP could not be implemented at School A was more than a de

¹³ FOF # 14

¹⁴ FOF #s 15, 16, 17, 23

minimus failure to implement all elements of his IEP and was substantial and significant.¹⁵

Consequently, the Hearing Officer concludes that the student was deprived of educational benefit and denied a FAPE by School A (and thus DCPS) failing to promptly provide the student the required instruction in the appropriate setting.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to provide an appropriate placement/location of service for SY 2015-2016.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence of on this issue.

The term “educational placement” is defined in IDEA as any one of the placements on the “continuum of alternative placements.” 34 C.F.R. § 300.115 lists this continuum as including: “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” See also, 34 C.F.R. § 300.39(a)(1)(i). The group determining the placement must select the placement option on the continuum in which it determines that the child’s IEP can be implemented in the LRE.” 71 Fed. Reg. 46587 (August 14, 2006), See also, 34 C.F.R. §§ 300.114 and 300.116. While educational placement is some point on the continuum of placement options, “location” is described “as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services.” Id. at 46588. “[T]he physical school alone does not constitute an ‘educational placement’” D.K. v. District of Columbia, Civ. 13-110, p. 11 (D.D.C. 2013). In fact, according to 20 U.S.C.A. § 1414(d)(1)(A)(i)(VII), an IEP must include “the...location...of those services and modifications.”

IDEA requires that “consistent with § 300.501(c), each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.” 34 C.F.R. §300.327. This requirement is also contained in 34 C.F.R. § 300.501(b) (“the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to – (1) the identification, evaluation, and the educational placement of the child.”). In this case the placement decision should include the student.

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.

¹⁵ There was no evidence presented that the student was not provided his related services in an appropriate setting. To the contrary, the evidence indicates that the student was provided significant behavioral support services outside general education. There was no evidence by Petitioner as to speech language services not being provided. (FOF #s 20, 21)

As previously pointed out, the evidence demonstrates that School A was unable to implement the student's IEP during SY 2015-2016 and became aware of this fact approximately 30 days after the school year started and promptly brought that fact to the parent's attention in a meeting convened in September 2015. School A encouraged the parent to find another school for the student and made suggestions of schools including the student's DCPS neighborhood school. However, School A did not immediately contact the LEA to determine another school placement for the student. This notification to DCPS did not take place until after an October 2015 meeting when it became clear to School A that the parent was not going to withdraw the student.

On December 8, 2015, School A convened a meeting with a DCPS representative present but did not propose a school for the student. DCPS even conducted an LRE review of the student but did not make any recommendation about an appropriate school for the student after that review. It was not until the due process complaint was filed that DCPS, in February 2016, proposed a school for the parent to visit.

As previously stated during all this time the student only received specialized instruction in general education and did receive what his IEP prescribed: 24 hours of instruction outside general education. The evidence demonstrates that student struggled his first advisory and avoided classes due to his embarrassed about his academic abilities. Although School A put support in place to help the student, the evidence indicates that the instruction the student received at School A was woefully short of the instruction required by his IEP. School A was clearly ill equipped to implement an IEP in the restrictive setting that the student's IEP requires. As the DCPS witness pointed out DPCS did not issue a PWN for the student to attend another school and still has not done so.

Consequently, the Hearing Officer concludes that DCPS' failure to provide the student with an appropriate placement promptly after School A determined it could not implement the student's IEP and DCPS was informed that the student was in need of a more restrictive setting, deprived the student of educational benefit and was a denial of a FAPE to the student.¹⁶ Although DCPS has now proposed a school placement that the evidence indicates can implement the student's IEP, the student has already been harmed. Consequently, the Hearing Officer concludes that the student was denied a FAPE for the failure by DCPS to promptly provide the student the placement his IEP required.

Remedy:

When school districts deny students a FAPE courts have wide discretion to insure that students receive a FAPE going forward. As the Supreme Court stated: IDEA directs the court to "grant such relief as [it] determines is appropriate." The ordinary meaning of these words confer broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act. This is principally to provide handicapped children with "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs. School Committee of the Town of

¹⁶ Lofton v. D.C., 7 F. Supp. 3d 117, 123 (D.D.C. 2013) ("the educational agency must place the student in a setting that is capable of fulfilling the student's IEP.")

Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985).

Petitioner asserts that appropriate relief is the student's placement at School D, independent evaluations and compensatory education.

"[C]ourts have identified a set of considerations 'relevant' to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment." Branham v. District of Columbia, 427 F. 3d at 12

The testimony of the witness as to School D demonstrates that School D can provide the student specialized instruction and related services, address his severe academic deficits and meet his unique needs. Although there was no evidence that School D has an OSSE certification of approval ("COA") or that its tuition and costs meet OSSE guidelines, there is evidence that School D currently has 25 student's funded by the District of Columbia and based upon that fact the Hearing Officer will infer that School D has a COA and its tuition and costs are reasonable.

However, the student has not yet been accepted at School D although the school's administrator is confident the student will be accepted after he interviews at the school. In addition, the student's current IEP does not indicate that his LRE is a separate school although the IEP prescribes that that student be provided all services outside general education.

DCPS has proposed a public school that can apparently implement the student's IEP (School C) and there may be other public schools available and appropriate to implement the student's IEP in accordance with the provision of D.C. Code § 38-2561.02. (c) that requires that a public school be considered before a student is placed in a private separate school. Nonetheless, the Hearing Officer concludes that although it appears that School C can implement the student's IEP, the equities in the case warrant the remedy Petitioner seeks for the student to be placed in a separate school where he can be provided intense focused services that will assist in recouping the loss he has suffered from the denials of FAPE determined herein.

The Hearing Officer concludes that under the facts of this case the student's placement at School D is warranted based on a balancing of the equities. DCPS delayed four months in proposing a school for the student after it was notified that the student was in need of a new school; DCPS has not issued a PWN to the school it has proposed; and the parent has not had full opportunity to visit the proposed school to make her own assessment of whether the student's needs can be met there. In addition, given the fact that student has gone nearly seventh months in an inappropriate placement, his placement in a separate special education school seems to the Hearing Officer an effective means of helping to ensure the student receives intense services to assist in making up for the services he missed at School A.

Nonetheless, the Hearing Officer can do no more than make the student's placement at School D contingent upon his acceptance after he has visited and interviewed at the school. The Hearing Officer concludes that if this contingency is met, the school proposed by the parent would meet

the factors that the Hearing Officer is to consider in determining a placement for the student. Therefore, the Hearing Officer will grant the student's placement at School D, a non-public separate school, for the remainder of SY 2015-2016 as the remedy for the denial of FAPE and as part of the compensatory education to the student, on the condition expressed in the order below.

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.

A Petitioner need not "have a perfect case" to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011) Under the IDEA, if a Student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010) Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

The Hearing Officer concludes that the compensatory education proposed by Petitioner was not tied to the student recouping what the student missed as result of denials of FAPE. The proposal simply halved the number of hours the student missed outside general education. In addition Petitioner's expert witness in arriving at the proposal did not formally assess the student and did not talk with anyone at School A regarding the instruction and services he was provided at School A and what progress he actually made. Her analysis was based solely on her work with him outside school in an informal setting.¹⁷ Her proposal for compensatory education was not directly tied to any of the student abilities or skill levels. There was insufficient evidence presented from which the Hearing Officer can conclude what amount of the compensatory services is appropriate.

In addition, the evidence demonstrates that the student was operating on the kindergarten level in reading when he arrived at School A and that since attending School A he has gained some academic benefit despite not being provided instruction outside general education.¹⁸

Although the compensatory education plan Petitioner presented is problematic, to award no compensatory education when a denial of a FAPE has been established would be inequitable. Consequently, the Hearing Officer also will grant Petitioner what the Hearing Officer believes is

¹⁷ FOF #s 27, 28

¹⁸ FOF #s 18, 19, 21

a reasonable amount of independent tutoring in addition to the student's placement at School D for the remainder of SY 2015-2016 as compensatory education for the denials of FAPE determined in this HOD.

ORDER: ¹⁹

1. Petitioner shall, if she has not already done so, have the student visit and interview at School D and will have twenty (20) calendar days from the day this order is issued to notify DCPS whether the student has been accepted to School D.
2. DCPS shall, within ten (10) school days of Petitioner's notification that the student has been accepted to School D, place and fund the student at School D ([REDACTED]) for the remainder of SY 2015-2016.
3. If the student is not accepted to School D within twenty (20) calendar days of the issuance of this order, DCPS shall, within ten (10) school days of being notified by Petitioner that the student has not been accepted, convene a MDT placement meeting with the parent present and the MDT shall determine an appropriate school placement for the student for the remainder of SY 2015-2016.
4. If Petitioner fails to notify DCPS of the student's acceptance or non-acceptance to School D within twenty-one (21) calendar days of the issuance of this order, DCPS shall, within ten (10) school days thereafter convene a MDT placement meeting with the parent present and the MDT shall determine an appropriate school placement for the student for the remainder of SY 2015-2016.
5. DCPS shall, within ten (10) school days of the issuance of this order authorize Petitioner to obtain an independent comprehensive psychological evaluation at the DCPS/OSSE prescribed rate.
6. DCPS shall, within twenty (20) school days of its receipt of the independent evaluation from Petitioner, convene a MDT meeting to review the evaluation and determine if any other evaluations are warranted and review and revise the student's IEP as appropriate and determine an appropriate school placement for the student for SY 2016-2017.
7. If Petitioner has not provided DCPS the independent comprehensive evaluation report by August 1, 2016, DCPS shall convene a MDT meeting by August 15, 2016, to review current data for the student and review and revise the student's IEP as appropriate and determine an appropriate school placement for the student for SY 2016-2017.
8. DCPS shall, within ten (10) school days of the issuance of this order, provide Petitioner authorization for fifty (50) hours of independent tutoring at the DCPS/OSSE prescribed

¹⁹ 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.

rate to be used by Petitioner by December 31, 2016. The tutoring provided for here shall not be delivered by any witness or entity associated with any witness in this proceeding.²⁰

9. 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 4, 2016

²⁰ This was a request made by DCPS counsel on the record and agreed to by the Hearing Officer because of non-disclosure of financial interest by a Witness 1 prior to her testimony.