

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Office of Dispute Resolution
810 First Street, NE – Second Floor
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

OSSE
Office of Dispute Resolution
December 16, 2014

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Date Issued: December 15, 2014</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: November 25, 2014</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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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.

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 November 25, 2014, 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. At the conclusion of the hearing Petitioner requested an extension of the HOD due date to allow for written closing arguments. Respondent’s closing argument was submitted on December 1, 2014. Petitioner’s written closing was submitted on December 2, 2014.²

BACKGROUND AND PROCEDURAL HISTORY:

The student is attending a DCPS high school (“School A”). The student was found eligible to receive special education and related services on March 24, 2014, and his initial individualized educational program (“IEP”) was developed on April 7, 2014.

The student’s parent requested that the student be evaluated for special education soon after the student arrived at School A during school year (“SY”) 2011-2012. The evaluation timeline passed and as result the parent obtained an independent neuropsychological evaluation and the student’s eligibility was considered by a summer team during July 2012. The team determined the student was functioning too high academically for a specific learning disability (“SLD”) classification and the data was inconclusive about the an other health impairment (“OHI”) classification for Attention Deficit Hyperactivity Disorder (“AHD”). The parent did not agree with that ineligibility determination.

When school resumed for SY 2013-2013 the School A principal provided the student’s teacher assessment forms and the independent evaluator was able to complete an addendum to the independent neuropsychological evaluation diagnosing the student with ADHD and recommending the student be found eligible under OHI for ADHD. The parent submitted the evaluation addendum to DCPS and a student support team (“SST”) team met in October 2014. DCPS chose to implement a 504 plan rather than reconsider the student’s eligibility. The parent did not agree with the decision.

Soon after the start of SY 2013-2014 the student’s new teachers were not immediately provided the student’s 504 plan and the student was having academic struggles. As result, in December 2013 the student’s parent requested the student be re-evaluated and the student was found eligible in March 2014 and on April 7, 2014, DCPS developed the student’s IEP. The parent did not immediately agree for the IEP to be implemented but later did so when the IEP was amended in June 2014.

² Although the submissions were to be made by December 1, 2014, Respondent did not object to Petitioner’s closing argument being admitted and it was admitted.

On September 17, 2014, DCPS convened an IEP meeting to review the student's functional behavioral assessment ("FBA") and behavior intervention plan ("BIP"). The team revised the student's BIP and the student's IEP was amended to add new accommodations and revise the behavior support goals.

Petitioner filed this due process complaint on September 25, 2014, asserting that DCPS denied the student a free appropriate public education ("FAPE") by failing to make an eligibility determination and/or determine the student to be eligible for special education and related services in October 11, 2012, based upon the neuropsychological addendum recommendation. Petitioner seeks as relief an order requiring DCPS to fund a credit recovery program and a laptop or iPad to assist in credit recovery and an award of compensatory education.

DCPS filed a timely response to the complaint on October 3, 2014. DCPS denied any alleged violation(s) or denial of a FAPE to the student. DCPS asserted on July 11, 2012, a meeting was convened to review the independent neuropsychological and the team determined the student was not eligible for special education and related services and that eligibility determination is beyond the two year period of limitations. On March 11, 2014, a referral was made for evaluation and on March 27, 2014, a prior written notice was issued based upon the student's classification of OHI. On April 7, 2014, DCPS developed an IEP and offered the student tutoring services that Petitioner accepted. The student's IEP was amended on September 24, 2014, and the student began SY 2014-2014 on September 25, 2014, and the student's IEP is being implemented.

A resolution meeting was held on October 7, 2014. Nothing was resolved. The parties did not mutually agree to proceed to hearing. The 45-day period began on October 26, 2014, and ended [and the (Hearing Officer's Determination "HOD") was due] on December 9, 2014. At the conclusion of the hearing Petitioner requested an extension of the HOD due date to allow for written closing arguments. Petitioner's motion was granted and HOD due date was extended to December 15, 2014.

The Hearing Officer convened a pre-hearing conference on October 21, 2014, and issued a pre-hearing order, on October 29, 2014, outlining, inter alia, the issue to be adjudicated.

ISSUE:³

The issue adjudicated is:

Whether DCPS denied the student a FAPE by failing to reconsider the student's eligibility for special education and related services and develop an IEP (from October 2012 through April 7, 2014) after Petitioner provided DCPS the neuropsychological addendum on or about October 11, 2012.

³ 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.

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 114 and Respondent's Exhibits 1 through 15) that were all admitted into the record and are listed in Appendix A.⁴ Witnesses are listed in Appendix B.

FINDINGS OF FACT:⁵

1. The student was found eligible to receive special education and related services on March 24, 2014, and his initial IEP was developed on April 7, 2014. This initial IEP prescribed the student be provided 4 hours per week of specialized instruction inside general education and 60 minutes of behavioral support in side general education. (Petitioner's Exhibit 101-1, 101-6)
2. The evaluation noted the student had average cognitive functioning and average to high average academic functioning. The evaluator noted the student had attention issues often exhibited by students with ADHD. (Petitioner's Exhibits 83-2, 105-5, 107-1)
3. The parent removed the student from DCPS and the student attended a number of different schools outside DCPS until he eventually returned to a DCPS middle school and successfully completed 8th grade. The student's parent was pleased with the services that were provided the student at his DCPS middle school. (Parent's testimony)
4. The student began attending School A in SY 2011-2012 and failed three classes during first quarter. The student parent requested the student be evaluated for special education. (Parent's testimony, Petitioner's Exhibits 45, 55)
5. The student was referred to the student support team ("SST") for academic and behavior concerns. The SST devised an intervention plan for the student to address his impulsivity, behavior problems and difficulty staying on task and completing work. (Petitioner's Exhibit 9-1, 83-3, 83-4)
6. On May 21, 2012, the student was referred for a 504 plan by the School A counselor and the student's parent was invited to attend a 504 team meeting. (Petitioner's Exhibit 82)

⁴Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

⁵ 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. On May 31, 2012, DCPS convened follow up meeting of the SST process at which a 504 plan was completed. The student's parent attended. (Petitioner's Exhibits 61, 62)
8. Despite SST process the student's parent had requested that the student be evaluated for special education soon after he arrived at School A. The evaluation timeline passed and as result DCPS provided the student tutoring and the parent obtained an independent neuropsychological evaluation. (Parent's testimony)
9. In May 2012 an independent neuropsychological evaluation was conducted of the student. The student's full scale I.Q. score was 96 in the average range. The student's academic functioning was in the average range with the student having age expectancy performance in reading, math and written language. The evaluator noted the student's behavior and attention concerns and concluded the student met the classification of a student with a specific learning disability due to his processing speed and language processing deficits. (Petitioner's Exhibit 105-7, 1-5-10, 105-11, 105-12, 105-18, 105-21, 105-23)
10. In July 2012 DCPS convened a multidisciplinary team ("MDT") to review the student independent neuropsychological evaluation. The student's eligibility was considered by a summer team. The MDT concluded the student did meet the qualification of a student in need of special education services. The team determined the student was functioning too high academically for a SLD classification and the data was inconclusive about the an OHI classification for ADHD. The parent did not agree with that determination. (Parent's testimony, Respondent's Exhibit 2)
11. On July 15, 2012, the the parent sent an email to DCPS requesting that her name be removed as consenting to the student not being found eligible for special education. (Petitioner's Exhibit 15-1)
12. The student's parent tried to get School A to obtain the additional data and when school resumed for SY 2013-2014 the School A principal provided the student's teacher the assessment forms and the evaluator was able to complete the addendum to the evaluation. (Parent's testimony, Petitioner's Exhibit 104)
13. On August 27, 2012, the psychologist who conducted the student's neuropsychological evaluation completed an addendum to her evaluation. After the teacher questionnaires were completed and returned to the evaluator she diagnosed the student with ADHD and recommended the student be determined eligible for special education under the OHI classification for ADHD. (Petitioner's Exhibit 104)
14. The parent submitted the evaluation addendum to DCPS and student support team ("SST") team met in October 2014 and chose to implement a 504 plan rather than find the student eligible. The student's parent and some of the student's teacher participated in meeting along with the School A psychologist. The parent did not agree with the decision for 504 plan but willing to give them the opportunity to eliminate the possibility that it might be more than just those behaviors that was causing the student's academic difficulties. The student's parent believed the evaluation addendum was clear

that the student was diagnosed with ADHD and should be found eligible. (Parent's testimony, Petitioner's Exhibits 60, 105-4, 105)

15. The 504 plan addressed ADHD and LD related to phonemic awareness and processing speed with classroom based accommodations. The disability noted included ADHD. The plan developed noted the student had a BIP in place since August 2012. The 504 plan was signed by DCPS on October 17, 2012. (Petitioner's Exhibit 59)
16. The student's 504 plan was not implemented until January 2013. Thereafter, the student's teachers changed the student's classroom seating and gave him extra time on tests and assignments. (Parent's testimony)
17. During SY 2012-2013 the student had passing final grades in five of the seven classes he took. He failed three courses: Spanish II, Algebra II & Trigonometry and Computer Graphic Design. (Petitioner's Exhibit 17)
18. After the student started eleventh grade in SY 2013-2014 the student's teachers did not get the student's 504 plan until November 2013. During SY 2013-2014 the student's teachers conducted written reviews of the student's performance accommodations review assessing the effectiveness of the 504 accommodations and BIP interventions. The reviews generally indicate that the interventions were effective in improving the student's behavior, attention and performance in his classes. (Parent's testimony, Petitioner's Exhibit 63 through 78)
19. Despite the 504 plan the student was continuing to fail classes and in December 2013 the student's parent requested DCPS reconsider the student for special education eligibility which happened by March 2014. DCPS did not conduct any new evaluations. In the March 2014 eligibility meeting the team first determined the student was not eligible and then the team read the addendum and the student was found eligible. (Parent's testimony, Petitioner's Exhibit 105-4, 105)
20. On March 27, 2014, DCPS acknowledged in a letter to the parent that student had been referred for initial evaluation for special education. (Respondent's Exhibits 3, 4)
21. On March 24, 2014, the student was found eligible for special education. On April 7, 2014, DCPS convened an IEP meeting and developed an IEP for the student. The student's current IEP prescribes the following services: 4 hours per week of specialized instruction inside general education, 8 hours per week of specialized instruction outside general education and 60 minutes per month of behavioral support services. (Respondent's Exhibit 10-1, 10-5)
22. On June 16, 2014, DCPS convened an IEP meeting for the student. The parent and her education advocate participated. The team agreed to conduct a FBA and develop a BIP. DCPS offered tutoring to compensate for missed services and the parent declined to the offer. (Petitioner's Exhibit 102)

23. On June 16, 2014, the student's parent consented special education services being provided to the student. (Respondent's Exhibit 7)
24. On September 17, 2014, DCPS convened an IEP meeting to review the student's FBA and BIP. The parent, the student and their educational advocate participated. The team revised the student's BIP and the student's IEP was amended to add new accommodations and revise the behavior support goals. A goal was added and an intervention and a goal was tweaked. (Witness 1's testimony, Respondent's Exhibits 8-1, 8-2, 11)
25. The parent's educational advocate proposed a compensatory education plan to compensate the student for the services he missed from ESY during summer 2014. The advocate recommended 69 hours of independent tutoring of 3 hours for the 23 days that Petitioner asserts the student would have attended ESY. The advocate in developing the compensatory education proposal reasoned that the student's missing ESY was a significant cause toward his failing the first quarter of SY 2014-2015. ⁶ (Witness 2's testimony, Petitioner's Exhibit 22)
26. During the time the student was not eligible for special education services the student's parent has paid for the student to attend tutoring and arranged for tutoring with other students in order for the student to pass the classes he has been able to pass. The parent instituted a grade appeal because the student's eleventh grade teachers did not have his 504 plan until November but the grade appeal was declined. The parent is seeking approximately \$1,800 reimbursement for independent tutoring the parent expended. (Parent's testimony, Petitioner's Exhibit 3, 4)
27. The student is currently enrolled in Junior ROTC at School A. He is making attempts to complete his high school requirements by the end of SY 2014-2015. The student tends to struggle when he has a large class size and is currently having difficulty in two of his classes: Marine Science and Spanish II. The student does not hesitate to ask for help at school and usually his teachers usually provide the requested help. The student, however, believes he needs tutoring for Marine Science, English IV (Literature) and Math in order to pass those classes. (Student's testimony)
28. The student is also currently taking credit recovery courses after school four days per week and receiving tutoring during his lunch period. The student works a part-time job on weekends but is willing to forego working to benefit from tutoring to assist him in meeting his graduation requirements. The student plans to attend college and has already applied to a few. The student acknowledges that it takes him longer to grasp concepts and realizing he has to work harder. The student has found tutoring in the past helpful in him completing assignments and passing tests. (Student's testimony)

29. The parent's educational advocate proposed a compensatory education plan to compensate the student for the services he missed from not being found eligible timely and proposed 200 hours of one to one tutoring and 20 hours of behavior counseling. (Witness 2's testimony, Petitioner's Exhibit 109)

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: Whether DCPS denied the student a FAPE by failing to reconsider the student's eligibility for special education and related services and develop an IEP (from October 2012

⁷ 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.

through April 7, 2014) after Petitioner provided DCPS the neuropsychological addendum on or about October 11, 2012.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS failed to reconsider the student’s eligibility for special education and related services and develop an IEP (from October 2012 through April 7, 2014) after Petitioner provided DCPS the neuropsychological addendum on or about October 11, 2012.

To be eligible for special education services a child must be evaluated as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 CFR § 300.8 (emphasis supplied.) See *Parker v. Friendship Edison Public Charter School*, 577 F.Supp.2d 68, 74 (D.D.C.2008).⁸

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

20 U.S.C. §1414(b)(3)(B) and 34 C.F.R. § 300.304(c)(4) make clear that an “LEA shall ensure that a child is assessed in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status...and motor abilities.” (emphasis added). The evidence in this case demonstrates that when the student’s ineligibility was determined in July 2012 by a summer team, there was inconclusive data to support the student having an OHI disability classification for ADHD. However, when school resumed at the start of SY 2012-2013

⁸ 34 C.F.R. §300.8 provides:

Child with a disability.

(a) General.

(1) Child with a disability means a child evaluated in accordance with Sec. Sec. 300.304 through 300.311 as having ... [listed disabilities] and who, by reason thereof, needs special education and related services.

(2) (i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under Sec. Sec. 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.

(ii) If, consistent with Sec. 300.39(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.

the School A principal ensured that the student's teachers completed the necessary questionnaires to complete the assessment and DCPS was thereafter provided an addendum to the student's independent evaluation that diagnosed him with ADHD and recommended he be found eligible for special education under the OHI classification.

The evidence demonstrates that the addendum was never really considered by DCPS until the student's eligibility was reconsidered in March 2014. At that time DCPS did not conduct any new evaluations⁹ and even at that meeting based on the parent's credible testimony the team was not going to find the student eligible until after it was suggested that the addendum be read and considered. Based on this evidence, the Hearing Officer finds it reasonable to conclude that had DCPS considered this additional evaluative data the student would have been found eligible as early as October 2012. Thus, the Hearing Officer concludes that DCPS' failure to consider this additional evaluation data and find the student eligible was a denial of FAPE and the student should be award compensatory education and the parent should be provided reimbursement for the independent tutoring she obtained during the time the student was ineligible.

Compensatory Education

An award of compensatory education is an equitable remedy that should aim to place disabled children in the same position they would have occupied but for the school district's violation of the IDEA. Moreover "Compensatory education involves discretionary, prospective, injunctive relief crafted by a court [and/or hearing officer] to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student."

Based upon the student's own testimony he would benefit from tutoring services to assist him in completing his graduation requirements. The Hearing Officer concludes that tutoring services proposed in Petitioner's compensatory education plan are a reasonable means of providing the student compensation for the education loss he has suffered and allow him needed assistance to graduate high school promptly which the evidence indicates is would likely have been able to do had special education services been provided to him timely.

ORDER:

1. DCPS shall within ten (10) school days of the issuance of this order provide to the student the following as compensatory education: 200 hours of independent tutoring and 20 hours of behavior counseling at the DCPS/OSSE prescribed rates. Petitioner must use this award by August 31, 2015.
2. DCPS shall, within thirty (30) calendar days of being provided receipts from Petitioner for independent tutoring she incurred out of pocket, reimburse the parent for that tutoring up to amount not to exceed \$1,800.

⁹ The Hearing Officer did not credit the DCPS witness testimony that there was some one or two page assessment that was considered by the March 2014 team because no such assessment was disclosed by DCPS.

3. 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: December 15, 2014