

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

OSSE  
Student Hearing Office  
February 19, 2014

**Confidential**

<p>Parent on Behalf of Student<sup>1</sup>,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: January 27, 2014</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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<sup>1</sup> 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 January 27, 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 has an IEP developed in January 2012. Due to a surgery in early 2012 the student was in long-term hospital and home care and DCPS provided him visiting instruction until June 2013 when the instruction was terminated because the student was ready to return to school. However, the student has been unable to attend his local school because it is not handicap assessable.

Petitioner filed this due process complaint on December 5, 2013, alleging DCPS has failed to yet provide the student an appropriate educational placement. Petitioner also alleged DCPS was provided a February 2012 neuropsychological evaluation conducted at the Hospital for Sick Children (“HSC”) and DCPS has failed to review the evaluation and failed to provide Petitioner the student’s educational records. Petitioner seeks as relief an order directing DCPS to fund an appropriate educational placement at a private full time out of general education school to which the student has been accepted and fund independent evaluations and compensatory education.

DCPS filed a response to the complaint on December 16, 2013. DCPS denied any alleged denial of a FAPE and expressed a willingness to evaluate the student upon his return to school. DCPS asserted the independent evaluation has been reviewed and that the student’s educational records were not being denied; but the records may not exist. DCPS counsel asserted the student should be attending a different DCPS school than Petitioner alleged the student was assigned and the school to which he is assigned can provide the student appropriate services.

A resolution meeting was held December 17, 2013. No issues were resolved at the resolution meeting. The parties did not mutually agree to proceed directly to hearing. The 45-day period begins on January 5, 2014, and ends (and the Hearing Officer’s Determination (“HOD”) is due) on February 18, 2014.

A pre-hearing conference was held on December 31, 2013, and on January 13, 2014, a pre-hearing conference order was issued outlining, inter alia, the issues to be adjudicated.

## **ISSUES:<sup>2</sup>**

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<sup>2</sup> 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.

**The issues adjudicated are:**

1. Whether DCPS denied the student a free and appropriate public education (“FAPE”) by (a) failing to provide the student an appropriate IEP from January 2012 and (b) failing to implement the student’s IEP during that period.
2. Whether DCPS denied the student a FAPE by failing to evaluate/reevaluate the student in all areas of suspected disability by not conducting an updated clinical psychological, social history, educational and speech/language, physical therapy, occupational therapy hearing and assistive technology evaluations the parent requested at March 2013 IEP meeting and as recommended in the student’s February 2012 neuropsychology evaluation.
3. Whether DCPS denied the student a FAPE by failing to offer the student ESY in summer 2013.
4. Whether DCPS denied the student a FAPE by failing to provide the student an appropriate educational placement for SY 2013-2014.
5. Whether DCPS denied the student a FAPE by failing to timely review the student’s February 2012 neuropsychological evaluation.
6. Whether DCPS denied the student a FAPE by failing to provide the student’s educational records.

**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 58 and Respondent’s Exhibit 1) that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

**FINDINGS OF FACT:<sup>3</sup>**

1. The student has a medical condition \_\_\_\_\_ with history of severe deformities \_\_\_\_\_. He is currently completing treatment to correct the leg deformity and is now beginning to start walking again as much as he can tolerate. However his \_\_\_\_\_ condition present from birth. He will always need accommodations in the school setting.  
(Petitioner’s Exhibit 1)

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<sup>3</sup> 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.

2. The student attended a local DCPS elementary school (“School A”) from kindergarten to fifth grade and first began receiving special education services at School A. (Parent’s testimony, Petitioner’s Exhibit 36)
3. DCPS conducted a psychological reevaluation of the student in February 2011 when the student was in fourth grade attending School A. His cognitive functioning was assessed to be in the below average range with a intelligence index score of 78. His academic functioning was assessed to be at the second grade level in reading, third grade level in written language and fourth grade level in math. DCPS also conducted a speech language reevaluation in February 2011 that confirmed his expression language deficits and recommended he continue to receive speech language therapy. (Petitioner’s Exhibits 3-1, 3-4, 3-6, 4-4, 4-8)
4. The student’s most recent individualized educational plan (“IEP”) was developed on January 19, 2012, at School A. The IEP noted the student has a disability classification of SLI and includes goals in the following areas: Reading, Adaptive/Daily Living Skills, Communication/Speech and Language, Motor Skills/Physical Development. The IEP prescribes the following services: 2 hours per month of Adaptive Physical Education outside general education and 4 hours of specialized instruction per week inside general education and the following related services per month: 2 hours of occupational therapy, 2 hours of speech/language pathology. The IEP does not include extended school year (“ESY”) services. (Petitioner’s Exhibit 22-1, 22-7, 22-10)
5. In January 2012 when the student was in fifth grade at School A the parent was informed that the student needed leg surgery right away. Thereafter he could not attend school. He had a brace and there was concern about him being hit or knocked down so he remained hospitalized recuperating; however, while hospitalized he was available for education. Following his hospitalization the student returned home but was not ready to attend school again regularly until June 2013. (Parent’s testimony)
6. On February 17, 2012, an independent neuropsychological evaluation was conducted following the student’s hospitalization. The evaluation was to determine the student’s neuro-cognitive strengths and weaknesses upon discharge for help with school and home planning. The evaluation recommended the student should receive occupation therapy services at school, have an updated hearing examination and that he continue speech therapy services once per week to improve his reading, comprehension and auditory processing skills. The student had a Full Scale IQ of 78 and his cognitive functioning was measured at the borderline range compared to same age peers. The student’s academic achievement was significantly below grade level, measured to be in the low average range in math and borderline range for reading. (Petitioner’s Exhibit 2-1, 2-2, 2-5, 2-6)
7. DCPS supplied the student 2 hours of instruction from a DCPS visiting instructor during the time he was hospitalized and at home and unable to attend school. There were some weeks he did not have the 2 hours because of his medical appointments or when the DCPS instruction was not available. When the instruction was provided to the student, to the parent there seemed to be no structure to the curriculum. The parent would take the

student to HSC on Monday and Wednesday to coincide with therapy he received there. The DCPS instructor preferred to see him at HSC because she saw other clients there. (Parent's testimony)

8. During summer 2012 DCPS speech and occupational therapists also came to the student's home in addition to him receiving the two hours of instruction per week. In the fall 2012 he received the two hours per week of instruction but no longer received the speech and occupational therapy services at home. The parent is not sure why these service providers stopped coming to the home to deliver the services. (Parent's testimony).
9. The parent asked for more services from the visiting instructor and the head of DCPS visiting instruction. However, the parent got no response regarding her request. The student was eventually given access by DCPS to a computer based learning application: "Plato." A person came to the home brought a computer and showed the student how to access the program. He was supposed to do one hour per area on the computer . However, the work was too advanced for the student and he consequently became frustrated. (Parent's testimony)
10. The parent had been concerned about the student not functioning on his grade level. She did not understand why he was reading so far below grade level. She thought that his IEP was not reflective of his needs and wanted to have him evaluated to update his IEP. (Parent's testimony)
11. On March 26, 2013, DCPS convened an IEP meeting for the student at his local DCPS middle school ("School B"). The parent requested that DCPS help find a new school placement for the student and requested that he be reevaluated to determine is present levels of functioning. The student's special education teacher who had been providing him visiting instruction participated in the meeting and stated the student was receiving two hours of instruction per week and the remainder of the time he was to use the computer based program, Plato, for tutorials and testing. The teacher indicated the student was progressing in math and was ready for Algebra and was reading on grade level but had problems with comprehension. The data, however, showed the student was not spending much time on the Plato program. The team agreed that the student should attend summer school and that the school would help search for the student's educational records - cumulative file that could at that point not be located. The team agreed to reconvene after the student's upcoming surgery to discuss assessments and to determine the student's disability and needed services. (Petitioner's Exhibit 21)
12. During the March 26, 2013, meeting the parent requested an assistive technology assessment due to the student's difficulty in grasping. Although DCPS agreed to reevaluate the student and the parent requested it, no one contacted her from DCPS to schedule evaluations or a meeting although she would have been willing to take the student to a DCPS school to be evaluated. DCPS was never able to provide the parent the student's educational records.

13. By June 2013 no one had gotten back to the parent about evaluations, IEP or placement for the student, yet the student's visiting instruction ended on June 21, 2013 and the parent was notified the student was to return to school on August 26, 2013. For summer 2013 the parent attempted to find an ESY program. She was shocked ESY was not on his IEP and tried to find somewhere for him to go to school that summer but could not. (Parent's testimony, Petitioner's Exhibit 14)
14. On September 6, 2013, DCPS convened an IEP meeting for the student at School B. The parent attended. The DCPS personnel who participated included the School B special education coordinator, a special education teacher, two occupational therapists and a psychologist. The parent expressed her concerns of what she believed the student needed and that she was interested in the student attending one of two specific DCPS middle schools or a private full time out of general education school that she named. The DCPS team members agreed the student needed to be in a school that was handicap assessable given his mobility concerns. School B was not an option. The DCPS team made notes on the student's IEP form but made no changes to the IEP or the services it prescribed for the student. (Petitioner's Exhibits 19, 20)
15. The student's parent prepared a written letter noting her concerns following the September 6, 2013, meeting and what she believed the student was in need of including extra support with academic instruction and an educational placement that was handicap assessable and assistive technology. (Petitioner's Exhibit 18)
16. The parent also provided DCPS a letter dated September 11, 2013, from the student's orthopedic surgeon urging that the student be provided a school that accommodated his physical limitations. The letter stated that "the student must attend a fully handicapped accessible school because of his very short and bowed legs it is very difficult for him to climb stairs and therefore recommend a school with elevator access and wheelchair accessibility as needed for period in which he may have reduced mobility. And he may be in need of additional for or leg surgery that would be followed by a period of immobilization with restrictions on walking. And that he should have adaptive PE or be allowed to self limit activities which he will physically incapable or less able than his peers to participate such as contact sports and activities involving running, jumping and climbing." (Petitioner's Exhibit 1)
17. On October 23, 2013 DCPS central office determined the student would attend another DCPS middle school other than School B. However, the principal of that school objected to the student being assigned without his input. Consequently, the student was not assigned to that school and another DCPS school was not identified until just prior to the due process hearing date. (Petitioner's Exhibit 51)
18. Petitioner filed this due process complaint on December 5, 2013, alleging DCPS has failed to yet provide the student an appropriate educational placement. The student has not attended school and DCPS has not provided any home instruction since June 2013. The lack of education and related services over the past two years has caused the student harm socially, emotionally and academically. He is maturing but does not have access to peers

and has suffered because he hasn't gotten any instruction and he was already behind academically when he last attended school in 2012. (Parent's testimony)

19. The student has distinct learning problems and problems focusing and acute anxiety and appeared depressed and withdrawn. That has changed with some psychotherapy. There has been so much time that he has been out of school and that with his physical disabilities has contributed to a fearfulness about going back that reinforces his fear that he won't be successful. (Witness 1's testimony)
20. It would not be appropriate for the student to go back to a mainstream setting because he does not have the organizational skills that he could tolerate the large number of students and the physical demands and he needs small group and individual approaches to instruction. He needs to be in a setting that is quiet without a lot of distraction because he is disorganize and distracted easily. (Witness 1's testimony)
21. The student would benefit from an updated speech and language and physical therapy evaluation. And he needs an updated physical therapy evaluation to get a baseline in all the areas and establish appropriate goals. An assistive technology evaluation would also be appropriate. He needs at least a psycho-educational evaluation including assessing for Attention Deficit Disorder ("ADD"). (Witness 1's testimony)
22. Current evaluations may result in a change in the student's disability classification to perhaps other health impairment ("OHI") for attention and/or specific learning disability ("SLD") due to a language-based learning disability. The IEPs that DCPS developed for the student thus far have not been intensive enough to address his severe academic and other deficits. When the student was evaluated by DCPS he was significantly behind academically and the lack of consistent instruction and related services while he has not been in school has resulted in no progress and perhaps regression. (Witness 2's testimony)
23. The parent's educational consultant proposed a compensatory education program to compensate the student for the alleged denials of FAPE that included the student not having appropriate IEP and educational placement. The consultant recommended the following in addition to a prospective educational placement: tutoring for the instruction he missed over a two-year period of 500 hours or 2 years of tutoring in order to recoup the 2 to 3 years of grade level progress he might have made had he received appropriate instruction and services. She also recommended the student be provided an occupational therapy evaluation and two years of speech language services, a lap top computer with two pieces of software: Kurzweil 2000 and Co-Writer. (Witness' 2's testimony, Petitioner's Exhibit 58)
24. The student has been interviewed at and accepted to a private full-time out of general education school ("School C"). School C serves students from preschool to eighth grade with language learning, sensory deficits and motor disabilities. There are two seventh grade classes and one eighth grade class with ten students in each class with a special education teacher and assistant teacher in each classroom. All the teachers are dually certified. School C follows the District of Columbia learning standards especially for

reading and math and has students currently funded by the District of Columbia. (Witness 3's testimony)

25. School C school integrates related services in the classroom and has a cross curriculum of music and drama. Adaptive physical education can be provided and the school uses assistive technology including smart boards. There are three to four computers in each classroom and well as a portable computer lab. The school can provide a positive behavior intervention program and provide the related services of speech language, physical therapy and occupational therapy by licensed providers. The school is handicap assessable. (Witness 3's testimony)
26. The student visited School C for two days. He seemed comfortable and engaged with other students, took part in the discussion and seemed to get the concepts that were being presented. The School C reviewed the student's records that were available and the student is appropriate for the school. He would be placed in seventh grade. He has been accepted and he has a spot so he could start immediately. The annual cost for the school is \$25,576.00 with additional charges of approximately \$110 per hour for related services. The school can meet the student's educational needs. (Witness 3's testimony)
27. DCPS central office notified the assistant principal at a DCPS high school ("School D") that the student's IEP is to be implement there and School D can preform the evaluations the student needs and that the parent requested. (Witness 4'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.<sup>4</sup> *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 free and appropriate public education (“FAPE”) by (a) failing to provide the student an appropriate IEP from January 2012 and (b) failing to implement the student’s IEP during that period.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that the DCPS failed to provide the student an appropriate IEP and failed to implement the IEP that was in place from January 2012 to present.

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

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

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

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

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<sup>4</sup> 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.

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

5E DCMR 3002.3 provides that:

(c) The LEA shall ensure that an IEP is developed and implemented for each eligible 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 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 (5<sup>th</sup> Circ. 2000)

The evidence in this case indicates that DCPS evaluated the student in 2011 while he was attending his DCPS elementary school and in fourth grade. At the time the student’s evaluations indicated that he was operating significantly below grade level in reading and written expression. The IEP only includes reading goals and only provided four hours of specialized instruction per week in the general education setting. It is apparent from the evidence the student was in need of more specialized instruction than he was provided in the IEP.<sup>5</sup>

After the student’s hospitalization the two hours per week of visiting instruction was sometimes inconsistently provided and the related services continued for a while but then stopped. The student was not even being provided the services that were prescribed in the IEP and the lack of consistent services caused the student significant harm.<sup>6</sup> Petitioner’s expert witness testified that the student was perhaps inappropriately classified and perhaps has a language based learning disability. This should be determined by conducting new evaluations. DCPS provided no evidence to refute Petitioner’s and her expert’s testimony that the student’s IEP services were insufficient and not consistently provided. Consequently, the Hearing Officer concludes the student was denied a FAPE by DCPS failing to provide him an appropriate IEP and failing consistently provide him the services that were in the IEP during the period from January 2012 to present.

**ISSUE 2:** Whether DCPS denied the student a FAPE by failing to evaluate/reevaluate the student in all areas of suspected disability by not conducting an updated clinical psychological, social history, educational and speech/language, physical therapy, and assistive technology

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<sup>5</sup> FOF # 22

<sup>6</sup> FOF #s 7, 8, 9, 10, 18

evaluations the parent requested at March 2013 IEP meeting and as recommended in the student's February 2012 neuropsychology evaluation.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that the DCPS failed to reevaluate the student based upon the request the parent made in March 2013.

34 C.F.R. § 300.303(a) makes 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." and that the reevaluation must be conducted at least once every three years.

Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp 2d. 254 , 259, 261 (D.C.C. 2005).

The evidence demonstrates that the parent requested at the March 2013 IEP meeting that DCPS reevaluate the student and that it conduct an assistive technology evaluation.<sup>7</sup> Yet DCPS has failed to conduct the evaluations in nearly a year. DCPS did not offer any explanation to refute Petitioner's evidence in this regard except to indicate that DCPS could now conduct the evaluations. The Hearing Officer concludes that DCPS' failure to timely conduct the requested evaluations has denied the student a FAPE and the Hearing Officer will order that DCPS promptly conduct the evaluations that were recommended and requested by Petitioner's experts and the independent neuropsychological evaluation.

**ISSUE 3:** Whether DCPS denied the student a FAPE by failing to offer the student ESY in summer 2013.

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student was denied a FAPE by DCPS failing to provide to the student ESY during summer 2013.

34 C.F.R. 300.106 (a) provides:

- (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.
- (2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with Sec. Sec. 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.

Although the evidence indicated that the parent requested that the student be provided ESY services during Summer 2013, the student's previous IEP did not prescribe ESY services and there was insufficient evidence presented that the student would have met the requirements for ESY.<sup>8</sup> There was indication that DCPS expected the student to attend summer school and the

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<sup>7</sup> FOF #s 11, 12, 13, 21

<sup>8</sup> FOF # 4

parent requested but was not provided information about when and where the student should attend summer school but summer school is distinct from ESY services. Consequently, the Hearing Officer concludes that the burden on this issue was not met.

**ISSUE 4:** Whether DCPS denied the student a FAPE by failing to provide the student an appropriate educational placement for SY 2013-2014.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that the DCPS failed to provide the student an appropriate education placement for SY 2013-2014.

The evidence indicates that DCPS in September 2013 held a meeting at School B with the parent and the parent specifically requested that student be provided a school location and educational placement that would meet the student's physical as well as academic needs.<sup>9</sup> As late as October 23, 2013, DCPS was attempting to locate a school for the student to attend and only prior to this due process hearing did DCPS propose a school at which it asserted the student's January 2012 IEP could be implemented and that could meet the student's physical needs. DCPS had an obligation to ensure that the student was promptly provided an appropriate placement and it knew the student would require this when the home visitation letter was sent in June 2013 and when the parent requested a placement and an IEP team met at School A in September 2013. DCPS' delay in providing the student an appropriate placement for the current school year as well as failing to implement the student's IEP over the past few years was a denial of a FAPE to the student and is sufficient basis for the Hearing Officer to grant the Petitioner's requested relief of prospective placement at the requested school placement.

**ISSUE 5:** Whether DCPS denied the student a FAPE by failing to timely review the student's February 2012 neuropsychological evaluation.

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence that the DCPS failed to review the student's February 2012 neuropsychological evaluation.

Although the student's February 2012 neuropsychological evaluation was prepared following the student's 2012 hospitalization for home and school purposes, there was insufficient evidence that DCPS was provided this evaluation prior to this complaint being filed. There was only testimony by one of Petitioner's expert witnesses that the evaluation was prepared and purpose for being prepared. DCPS indicated in its response to the complaint that the evaluation was reviewed. Absent sufficient evidence that DCPS either was provided the evaluation and/or failed to review it there is no basis for the Hearing Officer determine that there was a denial of a FAPE to the student in this regard.

**ISSUE 6:** Whether DCPS denied the student a FAPE by failing to provide the student's educational records.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that the DCPS failed to provide the parent the student's educational records.

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<sup>9</sup> FOF #s 14, 15, 16

34 C.F.R. 300.501 provides:

(a) The parents of a child with a disability must be afforded, in accordance with the procedures of Sec. Sec. 300.613 through 300.621, an opportunity to inspect and review all education records with respect to--

- (1) The identification, evaluation, and educational placement of the child; and
- (2) The provision of FAPE to the child.

The evidence indicates that the parent has repeatedly made request for DCPS to provide the student's educational records and DCPS has been unable to locate the student's cumulative file.<sup>10</sup> This failure by DCPS has significantly impeded the parent's ability to participate in the decision making process regarding the provision of a FAPE to the student.

DCPS has now proposed to place the student at School D. However, there was insufficient evidence that School D is a viable program that can meet the student's needs. On the other Petitioner has presented expert testimony that the student is need of full-time out of general education placement given his severe deficits. The evidence demonstrates that School C can provide the student with educational benefit and meets the requirements that the Hearing Officer must weigh in considering an educational placement proposed by a parent.<sup>11</sup> *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) Thus, the Hearing Officer orders as remedy for the student having not been provided a FAPE that DCPS place and fund the student's attendance at the school Petitioner has proposed.

### **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 was not sufficiently based on current evaluations and the recommendations that seemed based more on the services missed than what is needed to adequately compensate the student. Thus, the hearing will order that evaluations of the student be conducted to more accurately assess the student's current functioning and that student be immediately provided independent tutoring in the amount of 2 hours per week through the remainder of the current school year. Even though the proposed compensatory plan is

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<sup>10</sup> FOF #s 11, 12

<sup>11</sup> FOF #s 24, 25, 26

inappropriate the Hearing Officer concludes that to award the student nothing would be inequitable.

**ORDER:** <sup>12</sup>

1. DCPS shall within five (5) school days of the issuance of this Order place and fund the student's attendance at the Katherine Thomas School and provide him transportation services.
2. DCPS shall conduct the following evaluations of the student within 45 calendar days of the issuance of this Order: comprehensive psychological including cognitive, academic and social emotional/behavior components, speech-language, occupational therapy, physical therapy, hearing and assistive technology.
3. DCPS shall within thirty (30) calendar days after the student has begun attending the Katherine Thomas School review of the student's progress and update the student's IEP as the team deems appropriate and based upon the recommendations of any evaluations that have been completed and are available to be reviewed by that date.
4. DCPS shall within thirty (30) calendar days of the issuance of this Order conduct a thorough search of its records to locate the student's DCPS cumulative educational file and all his special education records and provide the same to Petitioner or if the records cannot be located an appropriate DCPS official certify in writing that such a thorough search has been made and the records cannot be located.
5. DCPS shall fund for the student as compensatory education two (2) hours per week of independent tutoring from the date of this Order through the end of SY 2013-2014.
6. All other requested relief is denied.

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<sup>12</sup> 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 that any or all of the evaluations listed in this Order will be conducted independently and the parties may mutually agree to delay the meeting ordered in this Order beyond the time prescribed.

**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*

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**Coles B. Ruff, Esq.**

**Hearing Officer**

**Date: February 18, 2014**