

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 6, 2014, and concluded on March 11, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student _____ resides with his parent in the District of Columbia. The student is a child with a disability with a classification of Autism. The student began attending a D.C. public charter school (“School A” and/or “LEA”) in third grade during school year (“SY”) 2012-2013. The student is now in fourth grade at School A.

The student had an individualized educational program (“IEP”) dated August 23, 2012, that classified him as Other Health Impaired (“OHI”) and prescribed three hours per week of specialized instruction outside generation and five hours per week of specialized instruction within the general education. The student had IEP goals in math and reading.

On September 9, 2013, School A convened an IEP meeting and reviewed the student’s academic progress and added speech language services to his IEP based on a recent evaluation. The IEP team also increased the student’s specialized instruction. The student’s parent mentioned at that meeting that she was awaiting a pending independent neuropsychological evaluation.

The student’s independent neuropsychological evaluation was conducted in August 2013 and the report was completed on September 18, 2013. The evaluator recommended that the student’s disability classification be changed to Autism and that the student continue to receive instruction in a regular classroom setting with pull-out and push-in instruction as needed and that he be provided significant behavior supports that were, in the evaluator’s opinion, critical to the student’s continued inclusion in general education.

On October 1, 2013, School A convened an IEP meeting to review the results of the independent neuropsychological evaluation. The student’s parent and her educational advocate attended the meeting. The student’s IEP was updated as result to change his disability classification from OHI to Autism and to add behavior support services as recommended by the evaluation.

Petitioner filed the complaint in this matter on December 20, 2013.² Petitioner alleged that the student’s October 1, 2013, IEP is inappropriate as well as his resulting educational placement. Petitioner asserted the student was in need of an IEP with more specialized instruction than currently prescribed, either inside or outside of the general education setting. Petitioner sought as relief that the Hearing Officer order that the student be provided specialized instruction

² However, the due process complaint was not properly served on School A (the LEA) until January 6, 2014. Thus, the date of filing for the complaint is January 6, 2014, and the resolution period was measured from that date.

throughout the school day and that the LEA fund compensatory education for the student from October 1, 2013.

The LEA filed a response to the complaint on January 16, 2014, and asserted the student's IEP and placement were appropriate and reasonably calculated confer educational benefit.

A resolution meeting was held on January 17, 2014. The complaint was unresolved. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on February 6, 2014, and ends (and the Hearing Officer's Determination ("HOD") is due) on March 22, 2014.

On February 14, 2014, the Hearing Officer convened a pre-hearing conference and later issued a pre-hearing order outlining, inter alia, the issues to be adjudicated. The parties appeared for hearing on March 6, 2014, and agreed at the outset that one of the two issues listed in the pre-hearing order was resolved and withdrawn by Petitioner leaving a single issue to be adjudicated at hearing. Petitioner concluded her case on March 6, 2014, and Respondent's presented and concluded its case on March 11, 2014.

ISSUE:³

The issue adjudicated is:

Whether the LEA denied the student a FAPE by failing to provide an appropriate IEP as of October 1, 2013, because the IEP does not prescribe more than 6 hours of specialized instruction outside general education.

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 15 and Respondent's Exhibits 1 through 21)⁴ that were all admitted into the record and are listed in Appendix A. Witnesses a listed in Appendix B.

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 this was the issue(s) to be adjudicated.

⁴ Respondent objected to admission to some of the documents disclosed by Petitioner. The objections were addressed at the outset of the hearing. All disclosed documents were ultimately admitted into the record but not all were relied upon for findings of fact.

FINDINGS OF FACT:⁵

1. The student is a child with a disability with a classification of Autism. The student began attending School A in third grade during SY 2012-2013. The student is now in fourth grade at School A. (Parent's testimony, Respondent's Exhibit 3-2, Petitioner's Exhibit 7-2)
2. In May 2012 School A conducted a psychological evaluation of the student that measured his cognitive functioning, academic achievement and social emotional functioning. The student's cognitive scores were average with a full scale IQ of 91. The student's academic functioning in reading, math and written expression were also average. The student's social-emotional functioning indicated a high probability for Asperger's Disorder and Attention Deficit Hyperactivity Disorder ("ADHD") as the evaluator made a "Rule Out" diagnosis for both. (Petitioner's Exhibit 7-1, 7-4, 7-6, 7-7, 7-8, 7-9, 7-10)
3. The student had an IEP dated August 23, 2012, that classified him as OHI and prescribed that he be provided three hours of specialized instruction per week outside generation and five hours per week within the general education. The student had IEP goals in math and reading. During SY 2012-2013 the student mastered the majority of his IEP goals. (Respondent's Exhibit 3-2, 3-3, 13)
4. In September 9, 2013, School A convened an IEP meeting for the student and reviewed the student's academic progress and added speech language services to his IEP based on a then recent evaluation. The IEP team also increased the student's specialized instruction to prescribe that the student receive six hours of specialized instruction per week outside general education, seven hours per week inside general education and four hours per month of speech-language pathology. The student's parent mentioned at that meeting that she was awaiting a pending independent neuropsychological evaluation and would share it with School A once the she received the evaluation report. (Respondent's Exhibit 1-9, 2-1, 2-2, 2-3)
5. The student's independent neuropsychological evaluation report was completed on September 18, 2013. The evaluation results indicated the student's cognitive and achievement scores were not as high as in his 2012 School A evaluation. The evaluator speculated that the student's inattention during testing and his lack of sleep the night before the testing might be the reason. Nonetheless, the evaluator concluded the student's performance pattern was consistent with his previous assessment, i.e. his verbal skills better than visual and reading better than math. (Respondent's Exhibit 3-1, 3-7)

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 an exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

6. The evaluator concluded the student met the criteria for Autism and recommended a change in his IEP disability classification to Autism. The evaluator determined that the student had clear deficits in executive functioning that may be contributing to his lower demonstration of abilities compared to his previous evaluation. The evaluator concluded the student has the reasoning ability to have made further academic and adaptive progress than he has achieved and that his behavioral and emotional difficulties are significantly interfering with his application of his abilities. She recommended a behavior intervention plan be developed based on a functional behavior assessment (“FBA”). (Respondent’s Exhibit 3-1, 3-7, 3-8, 3-9)
7. The evaluator stated the following: “While [the student] clearly has the cognitive capacity to learn at a rate more consistent with his peers, his behaviors are interfering with his ability to access the curriculum in the same way as his more typically developing peers. As such, he should continue to receive instruction in a regular classroom setting with pullout and push-in instruction as needed. However, increased support for his behaviors will be critical to his continued inclusion in regular education.” (Respondent’s Exhibit 3-9)
8. On October 1, 2013, School A convened an IEP meeting to review the results of the independent neuropsychological evaluation. The student’s parent and her educational advocate attended the meeting. The student’s IEP was updated as result to change his disability classification from OHI to Autism and to add behavior support services as recommended by the evaluation of thirty minutes per week or two hours per month and a modified prep note with breaks to support him staying in class and focusing on work completion. The level of specialized instruction remained the same as was prescribed at the September 9, 2013, meeting. (Witness 4’s testimony, Respondent’s Exhibits 4-2, 4-3, 4-4, 4-5,4-8, 5-1, 5-10, 6-1, 6-2, 6-3)
9. At the October 1, 2013, IEP meeting the student’s parent was concerned that the student was receiving detention for advocating for himself in the school and as result was experiencing anxiety about attending school. The parent was also concerned that the hours of specialized instruction in the student’s IEP were, in her opinion, insufficient. The parent believed that student needed more one-on-one services to keep him focused and in the classroom as the student had gotten a poor academic report. (Parent’s testimony)
10. On January 17, 2014, School A amended the student’s IEP to add additional behavior support services of two hours per month inside general education that incorporates a specific program focused on Autism. The student’s parent agreed to the amendment. (Witness 4’s testimony, Respondent’s Exhibits 8-10, 9-2, 11-2)
11. On January 17, 2014, School A also obtained consent from the student’s parent to conduct a FBA and occupational therapy evaluation. The FBA has been completed and a team meeting will be held to review the FBA. (Witness 4’s testimony, Respondent’s Exhibit 11-3)

12. On February 13, 2014, School A conducted an occupational therapy evaluation. The evaluator concluded the student would benefit from occupational therapy services. (Respondent's Exhibit 12-1, 12-8)
13. The student's SY 2013-2014 first quarter report card indicated that he was failing two of his four classes. However, he passed his reading and social studies class. Despite the student's grades in the first quarter he has made academic progress, has made progress on his IEP goals, and performed proficiently on his standardized testing. (Witness 4's testimony, Petitioner's Exhibit 13, Respondent's Exhibits 14, 15, 16-1)
14. At first the student struggled with the transition to fourth grade (which begins middle school at School A) and he was exhibiting work avoidance. The School A staff has observed an improvement in student's behavior in completing work and staying in the classroom over the past couple of months and he is responding well to redirection. (Witness 4's testimony, Witness 5's testimony)
15. The School A psychologist provides the student group counseling inside and outside the classroom and collaborates with his teachers to ascertain his progress. The psychologist sees the student twice per week for "push in" and for group counseling for a total of one hour per week. The psychologist is seeing improvement; the student is staying in class and not asking to leave as often. (Witness 5's testimony)
16. The student's parent does not believe the student academics and behaviors have improved with the changes to his IEP. However, the parent has not participated in any parent teacher conferences at the school nor spoken with the student's teachers. The student's parent did not know that the student leaves the general education classroom and receives instruction pull-out services in special education classroom. However, she is aware that he attends group counseling to work on social skills. (Parent's testimony)
17. The parent's educational consultant proposed a compensatory education program to compensate the student for the alleged denial of FAPE. The consultant recommended the student be provided four hours of independent tutoring per week for 50 weeks, two hours of independent behavioral support per week for 50 weeks, and an I-pad with structural software. (Witness 3's testimony, Petitioner's Exhibits 14-2)

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. ⁶ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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

ISSUE: Whether the LEA denied the student a FAPE by failing to provide an appropriate IEP as of October 1, 2013, because the IEP does not prescribe more than 6 hours of specialized instruction outside general education.

Conclusion: Petitioner did not sustain the burden of proof by preponderance of the evidence that the student's October 1, 2013, IEP is inappropriate.

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.*

⁶ 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.

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).

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

The evidence demonstrates that the student has average cognitive abilities and average academic performance.⁷ However, the neuropsychological evaluation conducted in August 2013 raised concerns that the student’s behavioral difficulties that had begun to emerge associated with his Autism and ADHD were interfering with his academic performance and would need to be addressed.⁸ The evaluator recommended increased behavioral support but also recommended that the student remain in a general education inclusion setting with both pullout and push in services.⁹ School A increased the student’s specialized instruction at the September 9, 2013, IEP meeting. As a result of the diagnosis of Autism and the recommendation for behavioral support services School A added behavior support services to the student’s IEP at the October 1, 2013, meeting and later agreed to conduct a FBA. The FBA has now been conducted and the student’s IEP has now been amended to include additional behavior support and an Autism curriculum.¹⁰

The evidence indicates that the student has made academic progress, has progressed relative to his IEP goals and has scored proficient in standardized testing.¹¹ The only evidence to indicate that the student was not functioning well academically this school was his first quarter report card that preceded the changes made to his IEP on October 1, 2013. Although the student’s parent testified of her concern regarding the student’s behaviors and academic performance, her testimony that the student was not performing well under the current IEP was not as credible as the testimony of Respondent’s witnesses in this regard. The parent had not attended any parent-teacher conferences or spoken to the student’s teachers and did not even know that the student was receiving pullout specialized instruction.

On the other hand, Respondent’s witnesses and the vast majority of the documentary evidence effectively demonstrated the student is performing well under the IEP as it was developed on October 1, 2013, and the behavior support services that have gradually been increased have been successful. School A has demonstrated a willingness to adjust the student’s services to

⁷ FOF #2

⁸ FOF # 6

⁹ FOF # 7

¹⁰ FOF #s 10, 11

¹¹ FOF #s 13, 14, 15

address his concerns in a gradual way that will help ensure he is educated in his least restrictive environment.

Petitioner offered insufficient evidence that the October 1, 2013 IEP was inappropriate. Accordingly, the Hearing Officer concludes that Petitioner failed to demonstrate by a preponderance of the evidence that the student's current IEP as amended was not reasonably calculated to confer educational benefit.

ORDER:

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

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: March 22, 2014