



## **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 5, 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 2007.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student \_\_\_\_\_ attended a Prince George’s County, Maryland school during school year (“SY”) 2012-2013. The student had been identified as a child with a disability and had a Prince George’s County individualized educational program (“IEP”) that was developed on November 26, 2012. The student and his parent relocated to the District of Columbia in August 2013 and the student’s parent first attempted to enroll the student at his neighborhood District of Columbia public school (“School A”) after the start of SY 2013-2014.

Petitioner asserts the School A staff informed her she could not enroll the student and she next attempted to enroll the student at another DCPS school (“School B”) and was still denied admission. After seeking outside assistance DCPS admitted the student to School B and he started attending on November 18, 2013.

On January 10, 2013, Petitioner filed the due process complaint. Petitioner’s complaint alleged, inter alia, DCPS failed to promptly provide the student an educational placement for SY 2013-2014. Petitioner seeks an award of compensatory education and reimbursement of transportation costs Petitioner incurred during the first weeks that the student attended School B.<sup>2</sup>

DCPS filed a timely response to the complaint on January 17, 2014. DCPS denied any violation and asserted DCPS was not aware of the student until October 9, 2013, and since becoming aware DCPS acted within a reasonable time to locate an appropriate educational placement and provide appropriate services to the student.

A resolution meeting was held February 20, 2014. The issues were not resolved. The parties expressed no desire to proceed directly to hearing. The 45-day period began on February 10, 2014, and ends (and the Hearing Officer’s Determination (“HOD”) is due) on March 26, 2014.

On February 19, 2014, the Hearing Officer convened a pre-hearing conference and on February 25, 2014, issued a pre-hearing order outlining, inter alia, the issues to be adjudicated.

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<sup>2</sup> Petitioner originally sought funding of an educational placement and independent evaluations. By the date of the hearing the parties had agreed that DCPS would conduct evaluations and Petitioner withdrew this request for relief along with the request for private placement. Petitioner is now only seeking compensatory education from September 12, 2013, the date Petitioner alleged she first attempted to enroll the student at School A until November 18, 2013, when the student began attending School B, and reimbursement of transportation costs for the first 10 days the student attended School B.

## **ISSUES:** <sup>3</sup>

### **The issues adjudicated are:**

1. Whether DCPS denied the student a free and appropriate public education (“FAPE”) by failing to provide the student an educational placement and special education services for SY 2013-2014 (by September 12, 2013, or promptly thereafter) after being notified that the student was District of Columbia resident and being provided a copy of the student’s current IEP.
2. Whether DCPS denied the student a FAPE by failing to timely evaluate the student after the parent sought a FAPE for the student from DCPS and provided DCPS the student’s November 26, 2012, Maryland IEP. <sup>4</sup>

### **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 7 and Respondent’s Exhibits 1 through 12) that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

### **FINDINGS OF FACT:** <sup>5</sup>

1. The student \_\_\_\_\_ attended a Prince George’s County, Maryland school during SY 2012-2013. The student had been identified as a child with a disability and had a Prince George’s County IEP that was developed on November 26, 2012. The student has been identified with a classification of other health impairment (“OHI”). (Respondent’s Exhibit 4-2, 4-2)
2. The student was evaluated by Prince George’s County Public Schools in February 2008 when he was age 7 years, 10 months. At the time his cognitive functioning was measured to be in the extremely low range with a full scale IQ of 63. The student was assessed as

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<sup>3</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.

<sup>4</sup> Petitioner asserts two alternative arguments for the claim that DCPS should have evaluated the student: (1) The IEP team at the student’s previous Maryland school had determined the student needed to be evaluated and noted it on the student’s IEP and DCPS should have been on notice from the date the parent attempted to enroll him in DCPS and/or (2) Once the student began attending School B the school knew it did not have enough data on the student and should have evaluated him.

<sup>5</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.

having an extremely low working memory score below the first percentile. (Petitioner's Exhibit 7-5, 7-6)

3. The student's most recent Prince Georges' County IEP, dated November 26, 2012, prescribes that the student be provided the following instruction: 23 hours 45 minutes per week outside general education and 6 hours 15 minutes per week inside general education. Pursuant to this IEP the student is to be provided specialized instruction in the areas of reading, math and written expression and 1.5 hours per month of speech language services. The IEP does prescribe that the student be provided a scribe and extended school year ("ESY") services. (Petitioner's Exhibit 4-11, 4-15, 4-18, 4-19, 4-20, 4-21, 4-22)
4. The student's November 26, 2012, IEP indicates the student's most recent evaluation date was 2/9/2011 and his projected reevaluation date was 2/8/14. The IEP contains the following statements:

"Specify the area(s) identified for reevaluation: Academics – Reading, writing, math performance, (DRA, word identification), existing data, curriculum based assessments (unit test) and progress (progress reports) toward meeting annual goals of the IEP, the IEP team concluded that assessments are necessary in order to update information to revise the IEP. The IEP team concluded that [the student] continues to be eligible to receive special education services... Evaluation date: 02/09/2011

Does the student continue to have a disability and such educational needs that require the continued provision of special education and related services? Yes"

(Petitioner's Exhibit 4-1, 4-2)

5. In August 2013 the student's parent and the student began to reside in the District of Columbia. The parent officially withdrew the student from Prince George's County Schools on September 11, 2013. (Parent's testimony, Petitioner's Exhibit 5-1)
6. On September 12, 2013, the parent telephoned what she believed to be the neighborhood school, School A, in an attempt to enroll the student. The parent spoke with the vice principal and made him aware that the student had an IEP. The vice principal informed the parent that School A had no space for the student and he suggested she inquire about other schools. The parent then obtained the number for DCPS and telephoned and spoke with a DCPS staff member attempting to enroll the student. The DCPS staff member said she would investigate what school had space that could meet the student's needs and later told the parent she could go to School B and enroll the student. The parent then went to School B with the student's IEP and attempted to enroll him there but was told by School B there was no space for the student.<sup>6</sup> A few days later the parent obtained legal counsel to assist her in enrolling the student in school. (Parent's testimony)

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<sup>6</sup> The parent could not state a specific date that she went to School B for the first time in an attempt to enroll the student there but stated it was a few days prior to the date she obtained legal counsel.

7. On October 8, 2013, Petitioner engaged legal counsel and a member of the attorney's staff attempted to contact the DCPS staff member who had assisted the parent. The DCPS staff member returned the call the next day and began assisting in getting the student enrolled in school. Petitioner's counsel's staff sent the DCPS staff member a copy of the student's IEP. On October 23, 2013, DCPS informed Petitioner's counsel's office that DCPS would issue a location of services letter for the student to attend School B. (Witness 1's testimony, Petitioner's Exhibit 2-1, 2-9)
8. The student began attending School B on November 18, 2013. (Stipulation)
9. The student was not attending school at all until he began attending School B on November 18, 2013. (Parent's testimony)
10. The parent gave School B the student's IEP, his transfer papers and his last report card. Once the student began attending School B no one from DCPS mentioned to the parent about conducting evaluations of the student prior to the complaint being filed. (Parent's testimony)
11. Once the student began attending School B DCPS did not immediately provide the student transportation to and from school. The parent took the student to school on the Metro bus until DCPS transportation began. The cost to the parent for the bus transportation was \$1.60 per person for her and the student each way (\$3.20 per person per day for a total of \$6.40 per day for ten school days for a total \$64.00). (Parent's testimony)
12. The student began receiving transportation services to school from DPCS on December 5, 2013. (Stipulation)
13. The student cannot read, add or subtract. The student had a dedicated aide to assist him with academic work when attended school in Prince George's County. During the time the student was not attending school until he began attending School B the parent believes the student has shown some skill regression. (Parent's testimony)
14. DCPS convened an IEP meeting for the student in February 2014 and determined that evaluations needed to be conducted of the student. The parent and her educational advocate participated in the meeting, as did the student's classroom teacher. At this meeting the School B staff acknowledged that the student's skill level appeared to be lower than indicated in the Prince George's County IEP and expressed concern that the student's disability classification was not accurate and/or complete. Based upon what the student's teacher expressed during the meeting about the student's level of functioning the advocate was not sure where the student was functioning when he began attending School B or how much progress he has made since he arrived. There is no information pointing to regression in any academic skills or in speech language due to the student being out of school prior to attending School B. However, there is some indication that

he has not progressed from the performance levels previously noted in his Prince George's County IEP. (Witness 2' testimony)

15. 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 500 hours of independent tutoring per week to make up for 230 hours of instruction and 45 hours of speech language services the consultant considered that he missed by not having any placement and not having his IEP implemented for 2 ½ months. (Witness 2's testimony, Petitioner's Exhibits 1-2)

### **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.<sup>7</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

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<sup>7</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.

(i)(2)(C)(iii).

**ISSUE 1:** Whether DCPS denied the student a free and appropriate public education (“FAPE”) by failing to provide the student an educational placement and special education services for SY 2013-2014 (by September 12, 2013, or promptly thereafter) after being notified that the student was District of Columbia resident and being provided a copy of the student’s current IEP.

**Conclusion:** Petitioner did sustain the burden of proof by preponderance of the evidence that DCPS did not promptly provide the student an educational placement after she sought a placement for the student at School B in October 2013.

34 C.F.R. § 300.323(f)<sup>8</sup> requires that when a child with a disability transfers from another state with an IEP from the previous state and **enrolls** in a new school within the same school year the new LEA must provide the student with a FAPE with services comparable to those described in the child’s IEP. [Emphasis added]

The evidence in this case demonstrates that the student was not provided a DCPS school placement for a significant period of time and thus missed a significant amount of services.<sup>9</sup> Although Petitioner asserts DCPS was under an obligation to provide the student a FAPE from the time the parent telephoned School A, Petitioner has presented no authority that supports the proposition that a telephone call to a school as the parent did in this case to School A constitutes enrollment in a school as the regulation cited above requires.

Based upon the parent’s testimony she did not go to School B to attempt to enroll the student until sometime in October 2013. It is not clear from her testimony that prior to October 9, 2013, DCPS had been provided the student’s Maryland IEP. Consequently, the Hearing Officer concludes DCPS was not required to provide the student a FAPE until the parent attempted to enroll the student at School B days prior to her engaging legal counsel on October 8, 2013.

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<sup>8</sup> 34 C.F.R. § 300.323 (f) IEPs for children who transfer from another State. If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child’s IEP from the previous public agency), until the new public agency--

- (1) Conducts an evaluation pursuant to Sec. Sec. 300.304 through 300.306 (if determined to be necessary by the new public agency); and
  - (2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in Sec. Sec. 300.320 through 300.324.
- (g) Transmittal of records. To facilitate the transition for a child described in paragraphs (e) and (f) of this section--
- (1) The new public agency in which the child enrolls must take reasonable steps to promptly obtain the child’s records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled, pursuant to 34 CFR 99.31(a)(2); and
  - (2) The previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency.

<sup>9</sup> FOF #s 3, 6, 7, 8

Clearly, as of October 9, 2013, DCPS was obligated to provide the student a FAPE and the student did not attend School B until November 18, 2013. Although DCPS alleged that there was official notification other than by email to the parent that the student could attend School B prior to that date, any earlier date was not clear from the evidence.

The Hearing Officer concludes that the period the student was without a placement and special education services was from a few days prior to October 8, 2013, to November 18, 2013. Thus, the student missed approximately six weeks of school (180 hours of instruction and 2.25 hours of speech language services)<sup>10</sup> due to DCPS not promptly providing the student an educational placement. This failure to provide a placement and special education services was a denial of a FAPE to the student.

**ISSUE 2:** Whether DCPS denied the student a FAPE by failing to timely evaluate the student after the parent sought a FAPE for the student from DCPS and provided DCPS the student's November 26, 2012, Maryland IEP.

**Conclusion:** Petitioner did not sustain the burden of proof by preponderance of the evidence that DCPS failed to timely evaluate the student.

Petitioner asserted two alternative arguments for the claim that DCPS should have evaluated the student: (1) The IEP team at the student's previous Maryland school had determined the student needed to be evaluated and noted it on the student's IEP and DCPS should have been on notice from the date the parent attempted to enroll him in DCPS and/or (2) Once the student began attending School B the school knew it did not have enough data on the student and should have evaluated him. The Hearing Officer is unconvinced by Petitioner's argument in both regards.

The evidence in the student's IEP does not sufficiently support a finding that the student's previous IEP team in Prince George's County concluded the student was in need evaluations. The IEP clearly states the student's projected evaluation date is February 8, 2014.<sup>11</sup> In addition, the IEP indicates that the team concluded that the student continued to be a student in need of special education. Absent supporting evidence for Petitioner's interpretation of a single phrase from the student's IEP regarding evaluation, when other phrases seem to contradict Petitioner's interpretation of the phrase, the Hearing Officer is unconvinced that DCPS should have been put on notice at the time it obtained the student's IEP that he should have been evaluated.

In addition, there is insufficient evidence that DCPS lacked sufficient data or otherwise should have evaluated the student sooner than when it agreed to do so at the February 2014, IEP meeting.

34 C.F.R. § 300.323 (f) requires that when a child with a disability transfers from another state with an IEP the new LEA must implement the student's existing IEP until it conducts an evaluation (if determined to be necessary by the new LEA) and develops, adopts and implements a new IEP.

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<sup>10</sup> FOF # 3

<sup>11</sup> FOF #4

There is no mandate that a transfer student immediately be evaluated unless the new LEA deems it necessary and even if it does, the provision does not mandate the time frame in which those evaluations have to be conducted. The testimony offered by Petitioner's witnesses that the School B staff should have reevaluated student any sooner than when it agreed to do so at the February 2014 meeting was unconvincing. A new LEA with a new student is certainly entitled to a reasonable time in which after a transfer student arrives to assess whether evaluations are necessary. There was insufficient evidence that the period between when the student arrived and evaluations were initiated was unreasonable. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of proof on this issue.

### **Compensatory Education**

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid, 401 F.3d 522 & 524*. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

The evidence indicates the student missed approximately 180 hours of instruction and 2.25 hours of speech language services during the time the student did not have a DCPS placement. Petitioner has requested compensatory education in the amount of 500 hours of independent tutoring and 45 hours of speech language services. The request is not based on current evaluations and the recommendations overstate the amount of services DCPS should have provided. Petitioner's witnesses' testimony did not demonstrate that student has regressed because of the period he was not provided services. However, there was testimony that he has perhaps not progressed. However, even that testimony was unconvincing that the number of hours requested were warranted. The Hearing Officer concludes that without current evaluations a clear indication of what services the student should be provided to compensate him for the missed services is speculative. Even though the proposed compensatory plan is inappropriate the Hearing Officer concludes that to award the student nothing would be inequitable. Thus, the Hearing Officer concludes that the student should have access to immediate independent tutoring to assist him in making some progress until a more accurate assessment of his abilities and skills is made through evaluations. Thus, the Hearing Officer grants what he considers to be a reasonable amount of compensatory services for the actual services missed that will allow the student to recoup some, if not all, of any lack of progression.

### **ORDER:**

1. DCPS shall provide the student 100 hours of independent tutoring at the DCPS/OSSE prescribed rate to be used by Petitioner by December 31, 2014.

2. DCPS shall provide the student 3 hours of independent speech language services at the DCPS/OSSE prescribed rate to be used by Petitioner by December 31, 2014.
3. DCPS shall, within 60 calendar day of being provided documentation of the travel expenses, reimburse Petitioner transportation costs in the amount of \$64.00
4. 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*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: March 26, 2014**