

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 for one day on October 4, 2013, at the Office of the State Superintendent (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student is eligible to receive specialized instruction and related services as a child with multiple disabilities (“MD”). The student has received instruction through a private online program with the support of a private educational consultant (hereinafter collectively referred to as “School A”) over the past school year pursuant to previous Hearing Officer Determinations (“HOD”).

In May 2013 another Hearing Officer ordered DCPS to provide funding for the student at School A through the end of SY 2012-2013. The Hearing Officer also ordered that DCPS convene a multidisciplinary team (“MDT”) meeting to review and revise the student’s individualized educational program (“IEP”) and assign the student to an educational placement where his IEP could be implemented for school year (“SY”) 2013-2014 and for 2013 extended school year (“ESY”) services (if appropriate) to be provided.

The student’s IEP was finalized on May 28, 2013, and prescribes 25 hours of specialized instruction and several hours of related services each week. The IEP also prescribed ESY services for 2013.

DCPS determined a school at which the student’s 2013 ESY services would be provided. Petitioner filed a due process complaint on June 7, 2013, alleging, inter alia, that the location DCPS proposed for ESY services was inappropriate. In the HOD issued July 26, 2013, another Hearing Officer concluded that the school where DCPS proposed to implement the student’s ESY services was inappropriate and ordered as compensatory education DCPS funding of 60 hours of instruction at School A.

In late July and August 2013 DCPS and the Petitioner’s counsel conducted email communication attempting to schedule an MDT meeting at which evaluations would be reviewed and a placement location for the student for SY 2013-2014 could be determined. DCPS sent referral packets to a number of private schools for the student to be considered for admission. One of the schools under consideration (“School B”) believed it could implement the student’s IEP but required that the student attend the school for two school days before they could offer him acceptance.

The student parent through counsel made written inquiries of the School B about its ability to

implement the student's IEP. Because the parent was not assured through the correspondence that School B could implement the IEP and because the student could not visit School B prior to the start of SY 2013-2014, the student did not visit the school and no final admission to School B was ever obtained.

On or about August 22, 2013, DCPS sent Petitioner's counsel correspondence proposing to the parent that student attend and his IEP be implemented at School B. However, Petitioner counsel received the correspondence after the current due process complaint was filed.

On August 26, 2013, Petitioner filed the current complaint asserting DCPS failed to provide the student any school for the student to attend for SY 2013-2014. Petitioner asserted School A is providing the student educational benefits and can provide him all of the specialized instruction, other than the "cognitive skills coaching," prescribed in his IEP.

Petitioner is seeking an order placing with public funding the student at School A, with transportation, retroactive to the start of SY 2013-2014 and for DCPS to fund the provision of the student's cognitive skills coaching and related services, with transportation, through independent providers identified by Petitioner and DCPS provide the student appropriate compensatory education.

DCPS filed a timely response to the complaint on September 5, 2013. DCPS denied any alleged denial of a FAPE. DCPS asserted that a determination of placement/location for the student had been attempted and was being frustrated by Petitioner.

A resolution meeting was held on September 9, 2013, and all matters were not resolved. The parties expressed no desire to proceed directly to hearing, thus the full 30-day resolution period expired before the 45-day timeline began. The 45-day period began on September 26, 2013, and ends (and the Hearing Officer's Determination ("HOD") was is due) on November 9, 2013.

The Hearing Officer conducted a pre-hearing conference ("PHC") in this matter on September 11, 2013, by telephone with both counsel participating² and issued a pre-hearing conference order on September 19, 2013, stating, inter alia, the issue to be adjudicated at hearing.

THE ISSUE ADJUDICATED:

Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing to provide the student an appropriate educational placement³ for SY 2013-2014.

² The parties discussed pending evaluations and an anticipated update of the student's IEP based upon the evaluations and a parental visit to the proposed school. However, a school visit never occurred and although there were representations made at the hearing that a meeting was scheduled the parent did attend. Matters from that meeting were excluded from the hearing because there was no disclosed document or witness to attest to the meeting.

³ Placement in this instance is defined as the school where the student's IEP can be appropriately implemented. The student's IEP has not been challenged in this case and is determined to be the document finalized on May 28, 2013.

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 44 and DCPS Exhibit 1 through 21) that were admitted into the record and are listed in Appendix A.⁴ Witnesses are listed in Appendix B.

FINDINGS OF FACT:⁵

1. The student is _____ is eligible to receive specialized instruction and related services as a child with MD classification. (Petitioner's Exhibit 2-1)
2. The student has received instruction through School A over the past school year and for ESY pursuant to previous Hearing Officer Determination ("HOD")s. (May 1, 2013, HOD, July 26, 2013, HOD)
3. In May 2013 another hearing officer (Case # 2013-0090) ordered DCPS to provide funding for the student at School A through the end of SY 2012-2013. The HOD also ordered that DCPS convene a MDT meeting to review and revise the student's IEP and assign the student to an educational placement where his IEP could be implemented and for SY 2013-2014 and for 2013 ESY (if appropriate) to be provided. (May 1, 2013, HOD)
4. The May 1, 2013, HOD also ordered DCPS to conduct reevaluation(s) of the student and convene a meeting to review the evaluation and update the student's IEP as appropriate. These evaluations (occupational therapy, physical therapy, speech/language and psychological) were completed in May and June 2013, with the last completed June 18, 2013. An independent vision assessment was scheduled for August 8, 2013. Some of the evaluations have not yet been completed because the student was not free in August 2013 because of medical appointments. (Parent's testimony, DCPS Exhibits 11, 12, 13, 14, 18)
5. The student's IEP was finalized by DCPS and the parent on May 28, 2013, and prescribes 25 hours of specialized instruction⁶ and several hours of related services each week. The

⁴ All of Petitioner's and Respondent's disclosed documents were admitted into the record.

⁵ The evidence that is the source of the finding of fact 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 both parties separately the Hearing Officer may only cite one party's exhibit.

⁶ The specialized instruction is 20 hours in reading, math and written language and 5 hours in cognitive skills. The present levels of performance ("PLOP") of the IEP state that the student requires accommodations for math, reading and writing expression that includes, inter alia, immediate feedback and paraphrasing every 10 minutes and that teacher orally preview text with the student for meaning and content. The July 26, 2013, HOD indicates that the Hearing Officer considered the accommodations in the PLOP section to be equally binding as other classroom

IEP also prescribed ESY services for 2013.⁷ (Petitioner's Exhibit 2-14)

6. DCPS determined a school at which the student's 2013 ESY services would be provided. Petitioner's filed a due process complaint on June 7, 2013, alleging, inter alia, that the location DCPS proposed for ESY services was inappropriate. In the HOD issued July 26, 2013, another Hearing Officer concluded that the school where DCPS proposed to implement the student's ESY was inappropriate and ordered as compensatory education DCPS funding of 60 hours of instruction at School A. (July 26, 2013, HOD)
7. In late July and August 2013 DCPS and the Petitioner's counsel conducted email communication attempting to schedule and MDT meeting at which evaluations would be reviewed and a placement location for the student for SY 2013-2014 could be determined. (DCPS Exhibits 21-4)
8. DCPS sent referral packets to a number of private schools for the student to be considered for admission. One of the schools under consideration, School B, believed it could implement the student's IEP but required that the student attend the school for two school days before they could offer him acceptance. (Parent's testimony)
9. The student parent through counsel made written inquiries of the school about its ability to implement the student's IEP. Because the parent was not assured through the correspondence that School B could implement the IEP and because of the parent's concerns about the student's grave medical conditions and whether they would exacerbated during such a visit and because the student could not visit School B prior to the start of SY 2013-2014, the student did not visit the school and no final admission to School B was ever obtained. (Parent's testimony, DCPS Exhibit 21-9, 21-11, 21-12, 21-13)
10. On or about August 22, 2013, DCPS sent Petitioner's counsel correspondence proposing to the parent that student attend and his IEP be implemented at School B. However, Petitioner counsel received the correspondence after the current due process complaint was filed. (Petitioner's Exhibit 5)
11. On August 26, 2013, Petitioner filed the current complaint asserting DCPS failed to provide the student any proposed any school for the student to attend for school year SY 2013-2014. (Due Process Complaint)
12. Although an IEP meeting was attempted after the due process complaint was filed the parent did not attend the meeting and sought to cancel it because all the evaluations she believed that were required pursuant to the previous HOD had not been completed and

accommodations listed in the IEP. (July 26, 2013, HOD page 3)

⁷ The present levels of performance ("PLOP") of the May 28, 2013, IEP state that the student requires accommodations for math, reading and writing expression that includes, inter alia, immediate feedback and paraphrasing every 10 minutes and that teacher orally preview text with the student for meaning and content. The July 26, 2013, HOD indicates that he Hearing Officer considered the accommodations in the PLOP section to be equally binding as other classroom accommodations listed in the IEP. (July 26, 2013, HOD page 3)

she believed that current IEP should stay in effect until those evaluations were completed. (Parent's testimony)

13. School A is providing the student educational benefits and can provide him all of the specialized instruction, other than the "cognitive skills coaching," prescribed in his IEP. The enrollment fee at School A is \$5,000 for the regular school year and the educational advisor charges an addition \$75.00 per hour for her instruction services as a facilitator for the on-line school. (Parent's testimony, Witness 2's testimony)
14. Petitioner proposed that the student's IEP be implemented by School A along with a variety of related service providers including a licensed physical therapist to be employed for one hour per week to provide the student adaptive physical education at \$100.00 per hour. (Witness 1's testimony)
15. Petitioner presented a clinical psychologist to provide cognitive skill training in the student's IEP. The cost of the service is \$1500 for the package of 25 hours. (Witness 3's testimony, Petitioner's Exhibit 2-16)
16. Petitioner presented an occupational therapist to provide the OT hours in the IEP at \$120 per hour. (Witness 4's testimony, Petitioner's Exhibit 2-14)

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.⁸ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). 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 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 DCPS was to propose and educational placement for the student for SY 2013-2014 and failed to do and thereby denied the student a FAPE.

The Individuals with Disabilities Education Improvement Act (“IDEA”) of 2004 requires that all students be provided with a Free Appropriate Public Education (“FAPE”). FAPE means: [S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...”20 U.S.C. § 1401(9), 34 C.F.R. § 300.17, 30 DCMR Sec. § 3001.1.

Special education is defined as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.” 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1. The FAPE requirement is satisfied when the State provides personalized instruction that is reasonable calculated to permit the child to benefit educationally. See *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982).

“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).

Additionally, pursuant to D.C. MUN. REGS. tit. 5, § 3010.2 (2003), DCPS “shall implement an IEP as soon as possible after the meeting where the IEP is developed...” Pursuant to 34 C.F.R. § 300.115(a), DCPS “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

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.

⁸ 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.

DCPS asserted that it fulfilled its obligation to the student when it sent a letter at or near the start of SY 2013-2014 to Petitioner stating that School B was the student's school location for SY 2013-2014. However, DCPS did not present any definitive document or witness who could credibly testify that it had designated School B as the student's school placement for SY 2013-2014. Although there was evidence that Petitioner, particularly through counsel, made direct inquiries to School B, in Petitioner's opinion the responses did not conclusively answer for her whether School B could implement the student's IEP.

In addition, there was no evidence that student was accepted at School B. The parent offered legitimate safety and medical concerns as to her reluctance to simply send the student to School B for the required two-day visit which could not occur until after SY 2013-2014 began.

DCPS has the ability if it believes that a parent is truly frustrating the IEP and placement process to file a complaint of its own. That was not done and DCPS did not put forth a sufficient case with witnesses to counter Petitioner's cogent testimony of her legitimate concerns for the student's safety and her legitimate questions of whether School B was an appropriate placement for the student.

Consequently, the Hearing Officer will direct in order below that DCPS fund the student participation at School A at the monthly rate that it has funded the student pursuant to the previous HOD for a period of two months for the two months the student has been without a school placement during SY 2013-2014. There was sufficient evidence presented including the two prior HODs that School A can provide the student educational benefit and the services offered can serve as appropriate compensatory education to the student. As to the other services proposed by the parent the Hearing Officer did not conclude that there was sufficient evidence presented that the services were appropriate compensatory education.

DCPS is also ordered to promptly convene an IEP meeting for the student at which the pending evaluations will be reviewed and the student's IEP shall be updated and a placement and location for the remainder of SY 2013-2014 shall be determined.

ORDER:⁹

1. As compensatory relief for DCPS' denial of a FAPE of not providing an educational placement for SY 2013-2014 that could conclusively implement the student's IEP DCPS is ordered to provide the student at public expense up to 160 hours of instruction at School A that shall be completed by the January 31, 2014, at the rate that DCPS was funding the student's attendance at School A for ESY 2013. DCPS shall also provide the student transportation services to and from School A until the student is provided another placement and location of services by DCPS pursuant to this Order or until January 31, 2014, whichever is sooner.

⁹ 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.

2. DCPS shall, within ten school days of the issuance of this Order, convene and the parent shall attend an IEP meeting to review the student's most recent evaluation(s) and review and update the student's IEP as appropriate and propose a placement and location to implement the IEP for the remainder of SY 2013-2014.
3. If any school is proposed the parent shall make all reasonable and prompt efforts to comply with any request(s) that the student visit the proposed location of services.

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: November 9, 2013