

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

OSSE
Office of Dispute Resolution
November 10, 2014

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Date Issued: November 7, 2014</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates: September 18, 2014 October 3, 2014 October 28, 2014</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on September 18, 2014, October 3, 2014, and concluded on October 28, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006, on the first day and second day of hearing and Hearing Room 2003 on the third day.

BACKGROUND AND PROCEDURAL HISTORY:

The student is _____ with a disability classification of Autism Spectrum Disorder (“Autism”). The student also has been diagnosed with Pervasive Developmental Disorder and congenital encephalopathy. The student is currently attending a District of Columbia public school program at (“School A”) where she has been enrolled since September 2013. During school year (“SY”) 2012-2013, prior to attending School A, the student was enrolled at another DCPS school (“School B”).

Petitioner filed this due process complaint on May 14, 2014. Petitioner alleges the student did not receive many of the services listed in her IEP, particularly related services at School B. For SY 2013-2014 DCPS moved the student to the School A. Petitioner alleges the student’s IEP was not fully implemented at School A. Petitioner asserts the student’s June 21, 2012, April 24, 2013, and February 6, 2014, IEPs were inappropriate because they contained:

- (a) Vague and immeasurable goals;
- (b) Insufficient baseline data;
- (c) Insufficient information regarding the student’s specially designed instruction;
- (d) Minimal visual accommodations;
- (d) No Behavioral Intervention Plan (“BIP”), and
- (e) Unchanged goals and present education levels

The Petitioner also alleges that in February 2014 DCPS failed to perform triennial re-evaluations including comprehensive psycho-educational, speech/language, occupational therapy, and social- emotional behavioral assessments. The Petitioner seeks an award of compensatory education from May 14, 2012, until the development of an appropriate program and placement for ongoing violations of IDEA.

DCPS filed a timely response to the complaint on May 28, 2014, and asserted there has been no denial of a free appropriate public education (“FAPE”) to the student. DCPS asserted all of the student’s IEPs have been reasonably calculated to provide educational benefit. Petitioner’s complaint fails to specifically state what components of the IEPs have not been implemented. The student received a timely triennial re-evaluation on

February 6, 2014. The student's parent attended the meeting, agreed with the IEP team, and signed the student's IEP.

A resolution meeting was held on June 2, 2014. The case was not resolved. The parties did not mutually agree to proceed to hearing. The 45-day period began on June 14, 2014. However, there were multiple continuances granted and the Hearing Officer's Determination ("HOD") is now due on, November 7, 2014. The Hearing Officer convened a prehearing conference on June 30, 2014, and issued a pre-conference order on July 7, 2014, outlining, inter alia, the issues to be adjudicated.

ISSUES:²

1. Whether DCPS denied the student FAPE by failing to implement the student's June 21, 2012, April 24, 2013 and February 6, 2014 IEPs.
2. Whether DCPS denied the student FAPE by failing to perform a timely triennial reevaluation, including comprehensive psycho-educational, speech/language, occupational therapy, and social-emotional behavioral assessments.
3. Whether DCPS denied the student FAPE by failing to provide the student with appropriate IEP; specifically, the student's June 21, 2012, April 24, 2013 and February 6, 2014 IEPs because the IEPs contained:
 - (a) Vague and immeasurable goals;
 - (b) Insufficient baseline data;
 - (c) Insufficient information regarding the Student's specially designed Instruction;
 - (d) Minimal visual accommodations;
 - (d) No BIP
 - (e) Unchanged goals and present education levels

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 46 and Respondent's Exhibits 1 through 12d) that were all admitted into the record and are listed in Appendix A.³ Witnesses are listed in Appendix B.

² 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.

³ Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

FINDINGS OF FACT:⁴

1. The student is _____ with a disability classification of Autism. The student is currently attending a School A where she has been enrolled since September 2013. During school year SY 2012-2013, prior to attending School A, the student was enrolled at School B. (Petitioner's Exhibits 7-1, 37-1)
2. While the student was attending School B in January 2011 DCPS conducted an educational assessment, a speech and language evaluation in January 2011 and a psychological reevaluation in February 2011. DCPS updated the student's IEP in September 2011. (Petitioner's Exhibits 2, 3, 4, 6)
3. The student's IEP was updated on May 21, 2012, and amended on July 2, 2012. The student's IEP prescribed 25.5 hours of specialized instruction outside general education, and the following monthly related services outside general education: 4 hours of speech language, 120 minutes of behavior support, 120 minutes of occupational therapy. (Petitioner's Exhibits 7-1, 7-11, 11)
4. During SY 2012-2013 and SY 2013-2014 the student missed a significant amount behavior support services, occupational therapy services, and speech language therapy due to school closings, the student being absent and or unavailable and because the providers were unavailable. (Respondent's Exhibit 1)
5. On April 24, 2013, the student's IEP was updated at School B, and amended on July 22, 2013, to change the assistive technology. During the updates of the student's IEP many of her goals were repeated. (Petitioner's Exhibits 27, 31)
6. On October 24, 2013, DCPS convened an IEP meeting for the student at School A. The student's parent did not attend the meeting but later signed the document. (Respondent's Exhibit 8)
7. At the start of SY 2013-2014, the student's first year at School A, the student's classroom teacher for only present the first few weeks of school and was then out for about a month. The teacher returned in _____ 2013 and stayed until _____ 2014, when the teacher left for good. From January 2014 until March 2014 the student was without a permanent special education teacher and had at least four substitute teachers during that period. The student's new permanent special education teacher arrived in March 2014. The student had a consistent educational aide in the classroom who assisted in implementing the student's IEP goals. (Witness 2's testimony, Witness 5's testimony)
8. In January 2014 DCPS conducted a limited triennial psychological evaluation of the student. The evaluation report was completed on February 7, 2014. The evaluator

⁴ 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.

could not determine a full scale IQ for the student because the student did not complete sufficient subtests. The student's CTONI fell in the Very Poor range. The evaluator noted the student had significant deficits in reading, math and writing skills and deficits in adaptive behaviors, attention and executive functioning. The evaluator conducted a classroom observation of the student and spoke with her educational aide and her speech language pathologist. The evaluator concluded the student continued to meet the criteria for Autism. However, the psychologist did not conduct academic testing or assess to determine the student's academic programming needs. (Witness 4's testimony, Respondent's Exhibit 4)

9. On February 6, 2014, DCPS developed the student's most recent IEP at School A. The IEP prescribes the following services: 24.5 hours of specialized instruction outside general education, 3 hours per month of speech language services and 240 minutes per month of behavioral support services and consultative services in occupational therapy and speech language. The IEP includes academic goals in the following areas: math, reading and written expression. (Petitioner's Exhibit 37-3, 37-4, 37-5, 37-6, 37-14)
10. The stated purpose of the February 6, 2014, the meeting was the student's triennial evaluation and review of her IEP. During meeting the student's parent expressed concerns about the student's not having a consistent special education teacher, the student tearing at her clothes and improving the student's communications skills. The student's speech and language and occupational therapy goals and services were discussed as well as the student's academic progress. It was noted the student was reading on third grade level but operating on a sixth grade level in other areas. (Petitioner's Exhibit 36)
11. The student had a special education instructor at School A who began working with in March 2014, and instructed the student in a self-contained classroom with three other students until June 2014. There were three adults in the classroom one who was a dedicated aide for another student. The student had some inclusion classes on her schedule: social studies and physical education. The student's special education teacher worked with the student on all her academic goals her IEP. Most of the student's IEP goals were appropriate; however, some of the student's IEP goals were beyond the student's academic abilities. Some of the baselines of the goals did not accurately reflect the student's abilities. The teacher was informed by School A staff that some of the goals that were beyond the student's ability were in the IEP at the request of the student's parent. It took the teacher a few months, near the end of the school year, to determine that some of the IEP goals were inappropriate. However, the student made progress during the months from March to June and the student was provided her related services. (Witness 1's testimony, Petitioner Exhibit 37)
12. The student's present levels of performance in the student's in the prior IEP are identical to her most recent IEP. (Petitioner's Exhibits 27, 37)
13. The student was consistently provided her behavioral support services and but on occasion services were missed. The student was able to make some progress

relative to her social emotional and behavioral goals. However, there were a number of goals on which the student did not make progress. (Witness 3's testimony)

14. The student's current speech language pathologist provides the student 3 hours per month of direct services every other week for 30 minutes and a consultation in a small group setting for 30 minutes per week. The student's speech language pathologist has not seen any speech and language evaluation for the student and the student continues to work on goals that have been in several of her IEPs. (Witness 6's testimony)
15. The student blossomed at School B. She was in the choir, glee club and performances and she is good at art and she had art exhibitions. The student's parent had no concerns while the student was attending School B and the student's teacher there was exceptional. The related services at School B were up and down the student's parent would ask for additional services and they said they were not needed. When the student moved to School A her speech and language services were changed to consultative. At the student's time there has not been good. After the student first teacher left there were continual substitute teachers until March when they hired a new teacher. (Parent's testimony)
16. After the student completed her first year at School A the student parent chose not to send the student to ESY over the summer because she felt the first year at School A was a wash and the student had not learned anything and she did not want her to go to a classroom with folks she would not know and she put her in a program that a former teacher at School B was running for the summer. The student's parent currently has concerns that the student has regressed in reading math writing and speech. Her verbalization has regressed. She is also often agitated and tearing at her clothes.

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. ⁵ *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 FAPE by failing to implement the student's June 21, 2012, April 24, 2013 and February 6, 2014 IEPs.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student was not provided some of her related services as prescribed in her IEP during both SY 2012-2013 and 2013-2014. In addition, the evidence demonstrated that the student did not have a special education teacher in her classroom at School A consistently during SY 2013-2014.

IDEA requires that an IEP be implemented once it is developed that a student's receives the prescribed services. The evidence demonstrates that the student missed significant amount of her related services due to school closings and on occasion the service provider not being available. From the Hearing Officer's review of the service tracker forms it was difficult to discern the exact number of hours missed and what services might have been made up. Petitioner did not provide any sort of calculation or accounting document to demonstrate the exact amount of services missed.

Nonetheless, from data available the Hearing Officer can determine that the amount missed was beyond de minimus and should be the basis at some nominal compensation. In addition, the evidence demonstrates that the student was without a special education teacher for a significant time during SY 2013-2014. Although there was indication that there were at least four substitute teachers present in the classroom from January 2014 through March 2014 when a permanent teacher arrived, the educational aide testified that she was responsible during that time for assisting in implementing the student IEP goals. Again, although the evidence did not demonstrate the exact amount of specialized instruction the student missed because of the absence of special education teacher from evidence available the Hearing Officer is able

⁵ 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.

determine that the amount missed was beyond de minimus and should be the basis at least some nominal compensation.

ISSUE 2: Whether DCPS denied the student FAPE by failing to perform a timely triennial reevaluation, including comprehensive psycho-educational, speech/language, occupational therapy, and social-emotional behavioral assessments.

Conclusion: Petitioner sustained the burden of proof that DCPS did not conduct timely comprehensive evaluations of the student.

IDEA requires that a student be reevaluated at least once every three years. In 2011 DCPS conducted an educational evaluation, a psychological evaluation, an occupational therapy evaluation and speech language evaluation. In 2014 DCPS only conducted a psychological evaluation and the evidence demonstrates it was only conducted in order to confirm whether the student continued to be classified with Autism. There was no academic achievement testing and there was no reevaluation of the student in any other areas for which there are goals in the student's IEP. The student's current speech language provider testified that she has never seen an evaluation of the student. While reevaluation requirements in IDEA do not necessarily require that identical evaluations be conducted as were previously conducted, in the facts of this case it appears that the student's present levels of academic performance as well as her functioning in the related service areas have not been adequately assessed. Consequently, the Hearing Officer concludes Petitioner sustained the burden of proof on this issue.

ISSUE 3: Whether DCPS denied the student FAPE by failing to provide the student with appropriate IEP; specifically, the student's June 21, 2012, April 24, 2013 and February 6, 2014 IEPs because the IEPs contained:

- (e) Vague and immeasurable goals;
- (f) Insufficient baseline data;
- (g) Insufficient information regarding the Student's specially designed Instruction;
- (h) Minimal visual accommodations;
- (f) No BIP
- (g) Unchanged goals and present education levels

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that at least the student's most recent IEP is inappropriate because some of the student's IEP goals are far the beyond the student's capabilities and the present levels of performance to not adequately reflect where the student is operating. However, as to the prior IEPs there was insufficient evidence presented that at the time they were developed they were not reasonably calculated to provide the student educational benefit.

"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).

Although Petitioner has asserted that all the student’s most recent IEPs were inappropriate the Hearing Officer concludes based on the testimony of the student’s special education teacher that the many of the student’s academic goals in her current IEP are far beyond her ability and that the baselines in some of the goals are incorrect. Given that at the time the most recent IEP was developed there was no recent academic testing to set the baselines and the goals, the Hearing Officer concludes there was sufficient evidence presented that at least the student’s current IEP is inappropriate and was so at the time it was developed. Thus, the Hearing Officer concludes Petitioner sustained the burden of proof on this issue by a preponderance of the evidence.

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 demonstrates that the student was not provided all her specialized instruction at School A because there was significant time the student did not have a special education teacher in her classroom. There were at least four substitute teachers and time when the student did not have a special education teacher in the classroom. However, Petitioner could not effectively demonstrate the specific number of days the student was without a special education teacher. Petitioner sought independent tutoring and related services as compensatory education for missed services. The Hearing Officer concludes compensatory services are warranted but the level of services Petitioner requested was inordinate compared to the amount of missed services that were proved. The Hearing Officer concludes that it would be inequitable to grant the student no compensatory when violations and denials of a FAPE have been found. Consequently, the Hearing Officer grants the amounts of compensatory services below as reasonable compensation for the services the student missed. The Hearing Officer directs that the student be provided the academic tutoring and related services in the order below and further directs that DCPS conduct updated evaluations of the student and convene a meeting to update the student’s IEP and review her educational placement and location of services.

ORDER:⁶

1. As compensatory education for the missed services during the time the student was without a special education teacher and missed instruction services DCPS shall provide the student 50 hours of independent tutoring at the DCPS/OSSE prescribed rate.
2. DCPS shall provide the student with the following compensatory related service for related services missed: 15 hours of occupational therapy services, 15 hours of speech and language services; and 15 hours of behavioral supports services.⁷
3. Petitioner shall use and complete this compensatory education award by June 20, 2015.
4. DCPS shall, within forty-five (45) calendar days of the issuance of this order, conduct the following evaluations of the student: comprehensive psychological including cognitive, achievement, social emotional functioning, speech language, and occupational therapy.
5. DCPS shall within ten (10) school days of the completion of the last of the evaluations listed above convene an IEP meeting to review the student's evaluations, update the student's IEP and discuss and determine the student's placement and location of services.
6. All other requested relief is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: November 7, 2014

⁶ 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.

⁷ Respondent may opt to allow Petitioner to obtain these services independently.