



## **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 October 15, 2014, and October 21, 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 Rooms 2006 and 2003 respectively.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student is currently receiving special education and related services at a DCPS elementary school (“School A”). He has a disability classification of multiple disabilities (“MD”) including of Autism Spectrum Disorder (“Autism”) and Other Health Impairment (“OHI”). The student is currently in fifth grade and has attended School A since first grade. He was retained once in kindergarten.

The student’s October 11, 2013, individualized educational program (“IEP”) prescribed the following services: ten (10) hours per week of specialized instruction and related services of speech/language therapy, occupational therapy (“OT”) and behavioral support services.

A neuropsychologist prescribed that the student be provided a dedicated aide because his academic progress had slowed and Petitioners provided DCPS that written recommendation on December 4, 2013. DCPS responded by scheduling an IEP meeting originally for December 16, 2013. However, that meeting was postponed.

Petitioners thereafter provided DCPS with an independent evaluation report and requested that DCPS conduct an assistive technology (“AT”) assessment. An IEP meeting was scheduled for January 24, 2014. That meeting did not occur. On February 27, 2014, Petitioners received a DCPS standard IEP amendment form that proposed to change the student’s least restrictive environment (“LRE”) without convening an IEP meeting. Petitioner’s declined the change without a meeting and requested an IEP meeting be convened.

On March 14, 2014, Petitioners, through counsel, forwarded a written request to DCPS that an IEP meeting be convened and requested DCPS reevaluate the student with speech/language and OT assessments. The correspondence also inquired as to the status of the dedicated aide and AT requests. DCPS responded by advising that a dedicated observation was being conducted.

Petitioner’s filed a due process complaint after which DCPS performed the following assessments: speech/language, OT, and AT. The due process complaint was withdrawn based upon DCPS’ representation that an IEP meeting would be convened to review the assessments.

On July 22, 2014, DCPS convened the student’s IEP meeting at which a summer team reviewed the student’s assessments. The summer team did not include any of the student’s teachers or service providers. The IEP team reviewed the student’s assessments and agreed to increase the

student's specialized instruction, speech language and OT services and agreed to provide the student AT equipment. Petitioners requested that the student be provided a full time out of general education placement and/or a dedicated aide. DCPS members of the team declined both requests.

Petitioners filed a due process complaint in this matter on August 11, 2014, asserting, inter alia that the DCPS did not develop an appropriate IEP for the student on July 22, 2014, because it lacked either a full time out of general education placement or a dedicated aide. Petitioners are seeking as relief revision of the student's IEP to prescribe full time out of general education services with a placement at a private full time special education day school ("School B") with transportation services, or a dedicated aide, and that DCPS provide the agreed upon AT equipment that DCPS allegedly has yet to provide.

DCPS filed a timely response to the complaint on August 19, 2014. DCPS denied any alleged violation(s) or denials of a free appropriate public education ("FAPE") to the student. DCPS asserted the student's IEP as amended on July 22, 2014, provides the student with an educational program that is reasonably calculated to provide meaning educational benefit. DCPS asserted that it expedited the order for AT equipment and sought the Petitioners' signatures on the AT check out forms. However, Petitioners did not sign the forms until August 8, 2014, causing the delay in service delivery.

A resolution meeting was held on August 19, 2014. The case was not resolved. The parties did not mutually agree to proceed to hearing. The 45-day period began on September 12, 2014, and ends [and the Hearing Officer's Determination ("HOD") was due] on October 25, 2014. Petitioners submitted a motion to extend the HOD due date to allow for written closing arguments, which were submitted on October 31, 2014. The motion was granted and the HOD due date is now November 4, 2014.

The Hearing Officer convened a pre-hearing conference on September 11, 2014, and issued a pre-conference order outlining, inter alia, the issues to be adjudicated.

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

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to timely comply with the Petitioners' March 2014 request for an OT and speech language reevaluation.
2. Whether DCPS denied the student a FAPE by failing to timely reconvene the IEP meeting after Petitioners' March 2014 request to discuss the need for dedicated aide, the need for assistive technology and discuss the student's progress toward annual goals.

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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.

3. Whether DCPS denied the student a FAPE by failing to timely review and consider the student's independent developmental pediatric evaluation and psychological evaluation within a reasonable time after the evaluation was provided on December 26, 2014.<sup>4</sup>
4. Whether DCPS denied the student a FAPE by failing to convene an appropriate IEP team at the July 22, 2014, IEP meeting by not having the student's teachers present.
5. Whether DCPS denied the student a FAPE by failing to provide the student with an IEP reasonably calculated to provide educational benefit by not providing the student either a full time out of general education program or part time<sup>5</sup> special education and a dedicated aide.<sup>6</sup>
6. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate placement/location of services that is less than a full time special education placement. Petitioner asserts the student's placement in his current classroom at School A is inappropriate.
7. Whether DCPS denied the student a FAPE by failing to implement the student's IEP by failing to, inter alia, provide the student with the AT equipment agreed upon by the July 22, 2014, IEP meeting.<sup>7</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 30 and Respondent's Exhibits 1 through 16) that were all admitted into the record and are listed in Appendix A.<sup>8</sup> Witnesses a listed in Appendix B.

#### **FINDINGS OF FACT:<sup>9</sup>**

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<sup>4</sup> Petitioners assert the evaluation should have been conducted within 60 calendar days after the start of the second semester of SY 2013-2014.

<sup>5</sup> The current specialized instruction proposed by DCPS is 15 hours per week and Petitioners assert that the July 2014, team determined the student should have 18 hours per week of specialized instruction.

<sup>6</sup> The claim with regard to related services was withdrawn as moot based upon increase in related service hours from an October 2, 2014, IEP meeting.

<sup>7</sup> The available remedy is limited to directing DCPS to provide the AT equipment as Petitioners are not seeking an award of compensatory education from this Hearing Officer. Petitioners asserted that the AT equipment that has not yet been provided is a compression vest and noise cancelling headphones.

<sup>8</sup> Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

<sup>9</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

1. The student is \_\_\_\_\_ currently receiving special education and related services at School A. He has a MD disability classification including Autism and OHI. The student is currently in fifth grade and has attended School A \_\_\_\_\_. He was retained once in kindergarten. (Mother's testimony, Petitioner's Exhibit 26-1)
2. The student's October 11, 2013, IEP prescribed the following services: five (5) hours per week of specialized instruction outside the general education setting; five (5) hours per week of specialized instruction in the general education setting; two (2) hours per month of speech/language services; four (4) hours per month of occupational therapy services, and four (4) hours per month of behavioral support services. (Petitioners' Exhibit 13-11)
3. In September and October 2010 DCPS conducted reevaluations of the student including OT and speech/language. The speech/language evaluator recommended that a behavioral plan be provided for the student to address his attention to task. (Petitioners' Exhibit 5-7)
4. In August 2013, a DCPS psychologist conducted a triennial reevaluation of the student. Because the student's low comprehensive intelligence scores the psychologist administered a non-verbal intelligence assessment on which the student gained an average score. The student had adequate adaptive scores that ruled out an intellectual disability. The student had low scores in all academic areas except in reading where he had low average score. The evaluator concluded the student has below average intelligence and would have difficulties in a general education classroom. The student's disabilities impact him in all academic areas. During the psychologist's observation of the student, the student needed to be redirected and apparently needed the assistance of a classroom aide. (Witness 6's testimony, Respondent's Exhibit 16)
5. In November 2013 the student's parent's obtained from the Kennedy Krieger Center for Autism and Related Disorders (C.A.R.D.) a recommendation requesting that a dedicated aide be reinstated for the student at school to assist him with redirection as needed. The recommendation was written as a prescription and noted the student had been without a dedicated aide for the past 18 months and his progress had slowed as a result. (Petitioners' Exhibit 16-1)
6. Petitioners provided School A with the recommendation to restore the dedicated aide on December 4, 2013, and made a request that the School A special education coordinator ("SEC") convene an IEP meeting in order to consider the request for a dedicated aide. (Petitioners' Exhibit 12-2)
7. The SEC responded to the Petitioners' request and a December 16, 2013, meeting date was selected by Petitioners and confirmed by the SEC. Although the Petitioners arrived at School A for the IEP meeting on December 16, 2013, the meeting did not take place and Petitioners were not able to locate the SEC. (Mother's testimony, Petitioners' Exhibit 12-1)

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one party's exhibit.

8. On December 18, 2013, Petitioners wrote to the SEC to request that the IEP meeting be convened to discuss the dedicated aid and requested that DCPS conduct an AT assessment. (Petitioners' Exhibit 12-3)
9. On December 26, 2013, the special education coordinator requested a copy of an independent evaluation report that also recommended a dedicate aide and inquired as to whether the Petitioners would be available for an IEP meeting on January 24, 2014. (Petitioners' Exhibit 12-4, 15-7)
10. Petitioners responded by providing the requested evaluation report and confirmed their availability for a January 24, 2014, meeting. However, the January 24, 2013, meeting did not occur. (Mother's testimony, Petitioners' Exhibit 12-5)
11. On February 27, 2014, Petitioners received a DCPS standard IEP amendment form that proposed to change the student's LRE. The amendment proposed 27.27 hours of education outside of the general education setting. On March 7, 2014, Petitioners responded by advising DCPS that they did not agree to amend the student's IEP without convening an IEP meeting. (Mother's testimony, Petitioners' Exhibits 7, 8)
12. In March 2014 a neuropsychologist evaluated the student to identify his strengths in relation to weakness and assess his learning needs. The student received below average scores on the cognitive assessments the neuropsychologist conducted. She determined that the student's cognitive performance on assessments was lower than she would have expected based on the student's demonstrated awareness of technology and brightness of affect. In addition, because in a prior cognitive assessment conducted by DCPS the student was assessed as having average cognitive abilities the neuropsychologist concluded the student has average non-verbal abilities that were not being reflected in the assessments she conducted. (Witness 1's testimony, Petitioner's Exhibit 19-2)
13. The neuropsychologist did not access the student's academic achievement as she expected that to be conducted by DCPS. She assessed the student's adaptive functioning and executive functioning and determined that in both areas the student's performance was below average. Because of the student's executive functioning difficulties, difficulty shifting from one task to the other, distractibility and lack of focus, the neuropsychologist recommended the student be in a small group-learning environment. The student shared with the neuropsychologist that he is often overwhelmed and over-stimulated in large group settings. In addition, the neuropsychologist recommended the student have an educational setting with decreased auditory and visual stimuli. The neuropsychologist concluded that with the appropriate supports including one-to-one attention in the classroom to assist with his distractibility the student would preform better academically and one would be better able to gauge his true cognitive and academic abilities. (Witness 1's testimony, Petitioners' Exhibit 19-2, 19-3, 19-4)
14. On March 14, 2014, and again on March 26, 2014, Petitioners, through counsel, forwarded a written request to DCPS that an IEP meeting be convened and proposed

dates and requested that DCPS reevaluate the student by conducting speech/language and OT assessments. In the correspondence Petitioners' counsel also inquired as to the status of the student's dedicated aide and AT requests. DCPS responded by advising Petitioners that the dedicated aide observation was being conducted. (Mother's testimony, Petitioners' Exhibit 9-3)

15. The original School A SEC went on medical leave and another School A staff member assumed her duties in March 2014. After receiving the request for evaluations from Petitioners' counsel in March 2014 the new School A SEC ("LEA Rep") instructed the student's case manager to order the requested assessments. The student's case manager also submitted a request for an observation to be conducted to review Petitioners' request for dedicated aide. (Witness 7's testimony)
16. A staff member from the DCPS autism team came to School A to observe the student on April 28, 2014, and May 19, 2014, in the special education setting and the general education settings. During the observation in the inclusion classroom the student needed redirection to attend to task. The observer concluded based on her observation that the student would benefit from increased specialized instruction, additional scaffolding of material by his teachers, more frequent and specific reinforcement throughout all lessons, concrete instruction in social skills and pragmatic language specifically those skills that will enable the student to be fully engaged during group instruction and small group reading lessons. (Respondent's Exhibit 4-1, 4-2, Petitioner's Exhibit 26-2)
17. Petitioner's filed a due process complaint that was ultimately withdrawn after DCPS performed the student's speech/language, OT and AT assessments in May 2014 and completed the evaluation reports in June 2014. (Respondents' Exhibits 7, 8, 13)
18. DCPS convened the student's IEP meeting on July 22, 2014, to review the neuropsychological evaluation, the recommendation for a dedicated aide, review the AT, OT and speech language assessments, make changes to the student's IEP and discuss placement. This summer IEP team did not include any of the student's special education teachers or service providers. However, it did include a special education and general education teacher. The evaluators recommended the student's speech & language services increase by 2 hours per month and 30 minutes of OT consultative services be added. All AT recommendations were adopted and the team agreed the student would be provided an iPad, headphones,<sup>10</sup> a reading pen and a compression vest for use in school and at home. (Witness 2's testimony, Petitioner's Exhibit 24-3, 26-1, 26-3, 26-13)
19. DCPS advised Petitioners at the July 22, 2014, meeting that the student would receive the AT equipment within two weeks of the meeting date and that the student would receive training on the use of the assistive technology during the student's extended school year

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<sup>10</sup> The Hearing Officer concluded based on the credible testimony of Witness 4 and review of the AT assessment (Respondent's Exhibit 13) that despite what was written in the meeting notes the intention of the AT assessment and the IEP team was not to provide noise cancelling headphones but simply headphones that have been provided to the student.

(ESY). The IEP meeting, however, was held during the last week of ESY. DCPS delivered the student's headphones to School A during his summer program. (Witness 2's testimony, Petitioners' Exhibit 25, 26-3, Witness 5's testimony)

20. During the July 22, 2014, IEP meeting the student's parents expressed their desire for the student to be placed in full time out of general education program. They made no request that any particular number of hours of specialized instruction to be placed in the IEP. The full IEP team agreed that the student could benefit from more time outside general education but the DCPS members of the team did not agree with the parents' request for a full time out of general education IEP. The member from the DCPS autism team who conducted the observation of the student also participated in the July 22, 2014, meeting and did not support the student being totally removed from general education. The DCPS team members also did not agree the student was in need of a dedicated aide based on the observation from the member of the autism team. (Witness 5's testimony)
21. During the July 22, 2014, MDT meeting, DCPS stated that the previous proposed amendment to the student's IEP which provided 27.27 hours per week of instruction outside of the general education setting was in error and that DCPS would not provide the student with full time special education support. (Mother's testimony)
22. Ultimately the student was given an IEP that contained thirteen (13) hours of specialized instruction outside of the general education setting<sup>11</sup> and two (2) hours of specialized instruction within the general education setting. The team talked about classroom size in light of the review of the student's independent evaluation. The DCPS team members believed School A remained an appropriate location for the student. The meeting ended at an impasse between DCPS and Petitioners regarding the student's placement. (Witness 2's testimony, Mother's testimony, Petitioner's Exhibit 23, 24-3, 26-13)
23. The author of the official DCPS meeting IEP notes wrote in the LRE section of the notes that the student would be provided: "Specialized instruction: 18 hours outside of general ed. 2 hours inside general ed." <sup>12</sup> Her notes could have been clearer as to what she intended to write and what she believed the team concluded the student would be provided in special education services. She intended that related service hours be counted in arriving at the total number of hours of special education services that would be provided to the student: 18 hours. (Witness 5's testimony, Petitioner's Exhibit 24-3)
24. The student attended ESY at School A but did not get the AT devices during ESY. He has been provided them now. The pen and iPad were provided in mid September. The student's parent could not state any harm that resulted in the student not having the AT

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<sup>11</sup> The Hearing Officer concluded based Witness 5's credible testimony that DCPS proposed the student be provided a total of 15 hours of specialized instruction: 13 hours per week outside general education and 2 hours per week inside general education.

<sup>12</sup> Despite what was written in the notes regarding the amount of specialized instruction DCPS proposed for the student at the July 22, 2014, meeting the Hearing Officer based on the credible testimony of Witness 5, the author of the notes, that the team agreed to provide the student a total of 15 hours of specialized instruction rather than 18 hours.

equipment during ESY or until provided in September 2014 except that the student did not have the equipment sooner. (Mother's testimony)

25. Currently, there are no AT devices that were agreed to by the student's IEP team that have not now been provided to the student. When the equipment was given to the School A LEA Rep she had the student's parent sign the home use form. As soon as the AT training was completed the student's parent brought in the signed forms to School A and the AT equipment was provided soon after the current school year started. (Witness 7's testimony, Respondent's Exhibit 13, Petitioner's Exhibit 26-13)
26. The student's parent believes that current number of hours of specialized instruction in the student's IEP is insufficient based upon his current academic functioning that appears to be at second grade level. Based on working with him on his homework the student's parent knows that the student is struggling with the curriculum at School A. His parent believes School A is not the appropriate setting for the student, that he needs a smaller class-room size and more one to one attention based upon his lack of academic progression as reflected in his two most recent IEPs. There are approximately 27 to 28 students in his current general education classroom. The student can attend and participate in activities with typically developing peers depending on whether there is a controlled level of auditory and visual stimulation around him. (Mother's testimony, Petitioner's Exhibit 7, 13-4, 13-6, 26-4, 26-7)
27. The student visited, was interviewed by, and was accepted to a full-time special education day school ("School B"). School B serves students ages 4 to 22. The school has students with various disabilities including students on the autistic spectrum. The student has been accepted to School B's lower school that serves students from pre-kindergarten through fifth grade. There are six classrooms in the lower school with not more than eight students per class. There are 42 students in lower school and of those, 18 to 20 are funded by the District of Columbia. School B has an OSSE certificate of approval. (Witness 3's testimony)
28. School B has identified a fifth grade class for the student that currently has 7 students, with a dually certified teacher in elementary education and special education. In the identified classroom there are four other students on the autistic spectrum and two students who have multiple disabilities with OHI. The self-contained classroom has the same teacher for all content. School B has a behavior modification system that can be tailored to individual classrooms or students. School B can implement the student's current IEP and provide all related services with certified providers. (Witness 3's testimony)

#### **CONCLUSIONS OF LAW:**

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--  
(a) Are provided at public expense, under public supervision and direction, and without charge;  
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. <sup>13</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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

**ISSUE 1:** Whether DCPS denied the student a FAPE by failing to timely comply with the Petitioners' March 2014 request for an OT and speech language reevaluation.

**ISSUE 2:** Whether DCPS denied the student a FAPE by failing to timely reconvene the IEP meeting after Petitioner's March 2014 request to discuss the need for dedicated aide, the need for assistive technology and discuss the student's progress toward annual goals.

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS in its completion of the evaluations requested in March 2014 (described in issues 1 & 2) by June 2014 was an inordinate delay such that the student was denied a FAPE.

According to 34 C.F.R. Sec. 300.303 (a)(2) of the Individuals with Disabilities Education Act (IDEA) "a public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304-300.311 if the public agency determines that the

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<sup>13</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.

educational or related service needs, including improved academic achievements and functional performance, of the child warrant a reevaluation, or child's parent or teacher requests a reevaluation, but at least once every three years.

Although Petitioners asserted that a reevaluation should have been conducted within 60 days of the request there is no clear mandate as to such a timeline. The Hearing Officer takes administrative notice that initial evaluations are to be conducted within 120 days of a request but no such strict time line applies to requests for reevaluations, yet they must be conducted within a reasonable time. Given the facts of this case that the evaluations were conducted within three months of the request the Hearing Officer does not conclude this to be an inordinate delay that rose to the level of a denial of a FAPE to the student. Although when an IEP team reviewed the evaluations the student's related services were increased, there was no testimony as to harm to the student for any delay from the period of the request and when the evaluations were completed and available to be reviewed by an IEP team. Therefore, the Hearing Officer concludes Petitioners did not sustain the burden of proof on this issue.

**ISSUE 3:** Whether DCPS denied the student a FAPE by failing to timely review and consider the student's independent developmental pediatric evaluation and psychological evaluation within a reasonable time after the evaluation was provided on December 26, 2014.

**Conclusion:** Petitioner sustained the burden of proof that the delay in reviewing the student's independent evaluation and request for a dedicated aide was inordinate and the student was, as a result, denied a FAPE.

According to 34 C.F.R. § 300.502 (3)(c), If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation--(1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and (2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part.

The evidence reveals that the student's parents in December 2013 provided DCPS a request from a health care professional for a dedicated aide to be reinstated due to the student's lack of academic progress. In addition, the parents provided DCPS a requested copy of an independent evaluation in December 2013 that also recommended a dedicated aide. There were two scheduled IEP meetings to review these documents but the meetings did not occur. Although it later became apparent that the School A SEC with whom the parents had been communicating went out on medical leave, still the parents' requests for a meeting to review the information the parents provided went unheeded and a meeting was not convened until July 22, 2014, seven months later although the duties of the SEC were reassigned in March 2014.

Albeit there were additional evaluations requested by the student's parents there was no legitimate reason adduced at hearing as to why an IEP meeting was not held to review the data and the request for a dedicated aide long before the July 2014 meeting. The evidence demonstrates that an observation by DCPS regarding the dedicated aide request was conducted in April 2014 and DCPS already had the independent evaluation. The Hearing Officer

concludes that that the delay in convening the IEP meeting and reviewing the evaluation and dedicated aide request was unreasonable and resulted in significantly impeding the parents' opportunity to participate in the decision making process regarding provision of FAPE.

**ISSUE 4:** Whether DCPS denied the student a FAPE by failing to convene an appropriate IEP team at the July 22, 2014, IEP meeting by not having the student's teachers present.

**Conclusion:** Petitioner's did not sustain the burden of proof that the lack of the student's teacher being present at the July 22, 2014, meeting denied the student a FAPE.

34 C.F.R § 300.321(a)<sup>14</sup> requires that an IEP team include a general education teacher and a special education teacher. There is no requirement that the teachers that participate in the team be the teacher of the particular student that is the subject of the meeting. In this instance a summer team met because School A teachers were not available. Although it may have perhaps been ideal to have teachers who were familiar with the student participate in the meeting there is no such requirement and therefore no violation or denial of a FAPE to the student as a result.

**ISSUE 5:** Whether DCPS denied the student a FAPE by failing to provide the student with an IEP reasonably calculated to provide educational benefit by not providing the student either a full time out of general education program or part time special education and a dedicated aide.

**Conclusion:** Petitioner sustained the burden of proof that the student's IEP is not reasonably calculated to provide him educational benefit because it does not provide him a dedicated aide. However, the Hearing Officer concludes there was insufficient evidence from which to conclude the student is yet in need of a full time out of general education program where is he totally removed for his non-disabled typically developing peers.

“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).

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<sup>14</sup> 34 C.F.R §300.321 (a): The public agency must ensure that the IEP Team for each child with a disability includes--

(1) The parents of the child;

(2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);

(3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;

(4) A representative of the public agency who--

(i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(ii) Is knowledgeable about the general education curriculum; and

(iii) Is knowledgeable about the availability of resources of the public agency.

(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;

(6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(7) Whenever appropriate, the child with a disability.

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.

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).

The evidence demonstrates that the student has below average cognitive abilities and is functioning as much a three grade levels below his current grade and his disabilities impact him in all academic areas. The evidence also demonstrates that an independent evaluation and a referral by a health care professional noted the student's progress had slowed since the student's dedicated aide was removed. In addition, the observations of both the DCPS psychologist and the autism team member reveal that in a general education setting the student needs significant redirection and benefits from the assistance of a classroom aide.<sup>15</sup> Thus, this Hearing Officer concludes there was sufficient evidence that data was available to the team at July 22, 2014, meeting that demonstrated the student should have been provided a dedicated aide.

Although the student's parents desire for the student to be in a full time out of general education setting, the evidence demonstrates that the student functioning does warrant total removal from his non-disabled typically functioning peers. The student's parent acknowledged that the student can attend and participate in activities with such peers and presumably gain academic as well as social benefits from being with them. IDEA requires that to greatest extent possible students be educated with their non-disabled peers.

Although there was testimony by a neuropsychologist that the student would benefit from a small class setting, that witness also testified that the student would benefit from one-to-one support in the classroom to assist with his distractibility so he can perform better academically and so that is his true cognitive and academic abilities can be determined.<sup>16</sup> In considering the continuum of restriction in placements the Hearing Officer concludes that given the student's most recent IEP includes an increase in specialized instruction and an increase in weekly services outside general education and the use of AT equipment, it is far more prudent and appropriate to first determine how the student will perform both academically and socially with a dedicated aide prior to concluding the student should be totally removed from general education. Consequently, the Hearing Officer directs in the order below that the student's IEP is amended to include a dedicated aide and that DCPS provide such an aide promptly.

**ISSUE 6:** Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate placement/location for services that is less than a full time special education

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<sup>15</sup> FOF # 4

<sup>16</sup> FOF # 14

placement. Petitioner asserts the student's placement in his current classroom at School A is inappropriate.

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student classroom at School A, or School A is an inappropriate placement and/or location of services.

Based upon the reasoning in issue #5 above the Hearing Officer concludes that the student's current placement at School A is appropriate with the modifications made to his IEP. Although there was testimony from the student's parent that the school building has significant visual and auditory stimulation for the student that testimony was insufficient for the Hearing Officer to conclude that School A is an inappropriate location for the student. As stated above the student apparently benefits from being with his non-disabled typically functioning peers and the student's current IEP with the recent amendments made and with the dedicate aide that is to be provided pursuant to the order below should be implemented in the student's current school setting before any other changes are considered.

**ISSUE 7:** Whether DCPS denied the student a FAPE by failing to implement the student's IEP by failing to, inter alia, provide the student with the assistive technology agreed upon by the July 22, 2014, IEP meeting.

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS has not provided the student all the prescribed AT equipment.

According to 20 U.S.C. 1414(d)(3)(B)(v) the IEP Team for a child with a disability, is to make decisions about assistive technology devices and services based on a student's unique needs so that he can be more confident and independent. The IDEIA also requires schools to use assistive technology devices and services "to maximize accessibility for children with disabilities." (20 U.S.C. 1400(c)(5)(H)).

The evidence demonstrates that on July 22, 2014, the IEP team concluded the student would benefit from specific AT equipment and that the equipment, or at least training would be provided during ESY. However, the evidence also indicates that the meeting was held in the last week of ESY. Although it may have been a target to provide the student the agreed upon AT equipment that quickly, the Hearing Officer does not conclude that the equipment not being provided within a week's time resulted in a denial of FAPE. The evidence demonstrates that the student was provided the equipment soon after the start of the current school year once training and the required forms were completed by his parents. The evidence demonstrates that all the requied equipment has now been delivered. The remedy in any case would have been limited to an order directing DCPS to provide the equipment. There is now no need for such an order. The Hearing Officer concludes that any delay in providing the student the equipment was not inordinate and there was no demonstration of harm to the student.

**ORDER:<sup>17</sup>**

1. The student's IEP is hereby amended to include a dedicated aide.
2. DCPS shall, within fifteen (15) school days of the issuance this order, provide the student a dedicated aide.
3. As an additional remedy for the denials of FAPE determined herein DCPS shall fund at the OSSE/DCPS prescribed rate an independent comprehensive psychological evaluation that assesses the student's cognitive, academic achievement and social emotional functioning.
4. DCPS shall, within sixty (60) school days of the issuance of this order convene an IEP meeting to review the student's progress with the dedicated aide and the additional IEP services that are in his IEP and review the student's independent evaluation ordered herein if it is complete within that time frame, make any appropriate adjustments to the student's IEP and educational programming that the team deems warranted and make a determination regarding the student's educational placement for the remainder of SY 2014-2015.
5. 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: November 4, 2014**

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<sup>17</sup> Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.