

<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS")</p> <p>Respondent.</p> <p>Case</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date of Hearing: July 30, 2009</p> <p>Date of Complaint: June 18, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Zachary Nahass, Esq. 1220 L Street, NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Kendra Berner, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</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 (I.D.E.A.)*, P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004 (I.D.E.I.A.)*, District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened July 30, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on June 18, 2009, alleging the issues outlined below. A pre-hearing conference was held July 22, 2009, and a prehearing order was issued on July 22, 2009.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1- 27 and DCPS Exhibits 1) which were admitted into the record. ²

ISSUE(S): ³

1. Did DCPS deny the student a free and appropriate public education ("FAPE") by failing to conduct and review evaluations in all areas of suspected disability? Specifically Petitioner alleges the FBA recommended at the April 14, 2009, meeting was not conducted and should have been in no more than 60 days.
2. Did DCPS deny the student a FAPE by failing to develop an appropriate IEP? Specifically Petitioner alleges the goals and objectives have not been changed and there is no behavior plan in the IEP and no recent present levels of performance.
3. Did DCPS deny the student a FAPE by failing to implement the student's IEP? Specifically Petitioner alleges the student was not provided the full level of specialized instruction and related services in any of his IEPs dating as far back as two years prior to the filing of the complaint.

² The disclosures are listed in Appendix A and/or are detailed in the parties' disclosure letters filed five business days prior to the due process hearing.

³ The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

4. Did DCPS deny the student a FAPE by failing to provide an appropriate placement? Specifically Petitioner alleges the current placement, School A, cannot implement the full time IEP, is not sufficiently structured, not a therapeutic placement and the student has not progressed.

FINDINGS OF FACT⁴:

1. The student is _____ years old, has been determined eligible for specialized instruction and related services as a qualified student with Other Health Impairment (“OHI”), currently attends School A, a DCPS public high school, and resides in the District of Columbia with his parent(s). (Petitioner’s Exhibit 1)
2. The student’s May 1, 2008, Individualized Educational Program (“IEP”) developed at School A prescribed 10 hours per week of specialized instruction and 1 hour per week of psychological counseling. The IEP cited present levels of academic performance from a February 7, 2008, assessment. (Petitioner’s Exhibit 6)
3. The student’s IEP was amended on December 16, 2008, to increase the hours of specialized instruction from 10 to 22 hours weekly. The 1 hour of counseling services was maintained.⁵ (Petitioner’s Exhibit 7)
4. A December 2008 Hearing Officer Determination (“HOD”) granted Petitioner, inter alia, an independent psychiatric evaluation. The independent evaluation was conducted in January 2009. The evaluator included the following warning in the evaluation report: “Given [the student’s] difficulty with impulsivity and aggression, a basic safety plan should be in place...” “Activities [for the student] at school should be structured and tasks should be broken down into simple steps to aide with executive functioning difficulties...” (Petitioner’s Exhibits 1 & 3)
5. On April 14, 2009, a multidisciplinary team (“MDT”) meeting was convened. The MDT reviewed the independent evaluation and determined that a Functional Behavioral Assessment (“FBA”) of the student was warranted. The MDT also increased the student’s specialized instruction to 26.5 hours (a full time IEP).⁶ (Petitioner’s Exhibits 9&10)
6. At the April 14, 2009, the parent’s educational advocate requested that the student be placed in another setting that provided a full time special education program. DCPS staff at the meeting acknowledged that DCPS could only provide an inclusion program at School A. (Ms. Nichol’s testimony)

⁴ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer will cite only one party’s Exhibit.

⁵ Only the cover page of the IEP was presented in the record and no academic present levels of performance were cited.

⁶ At the hearing the parties agreed the MDT updated the front page of the IEP to reflect the increase in specialized instruction and did not amend the student’s academic goals and/or objectives. Petitioner’s counsel represented that DCPS stated at the meeting it would provide proposed goals and objectives for the parent to review sometime after the MDT meeting.

7. DCPS intended that the FBA would be conducted and the MDT would be reconvened prior to the end of the school year to determine the student's placement. (Petitioner's Exhibit 10 – MDT meeting notes)
8. DCPS did not reconvene a MDT meeting prior to the end of the school year to review a FBA and/or determine the student's placement. DCPS presented Petitioner the FBA and a draft behavior intervention plan ("BIP") for the first time at the due process hearing. (Ms. Nichol's testimony, Acknowledgment by the parties during the hearing)
9. The student's grades during the 2008-09 school year were primarily "Ds" and "Fs." The student's grades in the last two school years in academic subjects were also primarily "Ds" and "Fs." (Petitioner's Exhibits 11 & 22)
10. During the student's 2007-08 school year the student kept experiencing changes in his special education teachers and the student became increasingly disruptive in his general education classes. The student's parent received telephone calls from school staff about the student's behavior and she often came to the school to help ensure the student made it from class to class. During the 2008-09 school year the student was often suspended from school for failure to attend class and being in the school hallway. (Parent's testimony)
11. The student often skipped class and avoided going to many of his classes because he found the work too challenging and believed he would be ridiculed by some of his instructors. As a result, the student's academic progress and grades at School A suffered. The student received no counseling during the first semester of the 2008-09 school year. (Student's testimony, Parent's testimony)
12. The student has been interviewed by and admitted to the _____ is a full time special education school that can implement the student's IEP and provide the student a therapeutic placement. The school has approximately forty students who are all students with disabilities. There are never more than ten students in a classroom with two staff members per class. The school has a transition services program and a school wide behavioral modification program. All the teachers are certified special education teachers and the professionals who provide counseling services are licensed or seeking licensure. _____ also ensures its student meet DCPS graduation requirements. (Ms. Hartswick's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §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 IDEIA §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.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.⁷ 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.

1. Did DCPS deny the student a FAPE by failing to conduct and review evaluations in all areas of suspected disability? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

DCPS is required to conduct and review evaluations and reevaluations of each child with a disability to determine appropriate educational programming. 20 U.S.C. § 1414(a)(1)(C) and (a)(2)(A). In this case, the student's multidisciplinary team determined on April 14, 2009, that a FBA was warranted. An FBA is essential to the development of appropriate educational programming for students with behavior problems. *Harris v. District of Columbia*, 561 F. Supp.2d 63, 67 (D.D.C. 2008) ("The FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP . . . The FBA's fundamental connection to the quality of a disabled child's education compels this Court's determination that an FBA is an 'educational evaluation'").

In this case, despite the student's history of behavior problems and class attendance problems that have impeded his academic progress, DCPS did not conduct the FBA prior to the end of the 2009 school year and has not convened a meeting to address the for a MDT to review the FBA and the proposed BIP.

The student testified that he routinely avoided going to many of his classes because he was fearful of being ridiculed by some of his instructors. This avoidance behavior could have been addressed by a FBA and BIP being developed during the remainder of the 2008-09 school year.

The failure to promptly conduct the assessment and develop the BIP resulted in the student not being afforded the benefit of an IEP which addresses his individual behavior needs and the Petitioner has been denied the necessary tools for meaningful participation in the decision-making process with regard to developing the student's IEP.

2. Did DCPS deny the student a FAPE by failing to develop an appropriate IEP? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

The IDEA requires the LEA to develop an IEP for each child with a disability that includes, *inter alia*, "a statement of the child's present levels of academic achievement and functional performance" and "a statement of measurable annual goals." 20 U.S.C. § 1414(d)(1)(A)(i)(I) and (II). Moreover, the LEA must review a qualified child's IEP, not less frequently than annually,

⁷ 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 that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

to determine whether the annual goals are being achieved, and revise the IEP to address any lack of expected progress. Id. at § 1414(d)(4)(A). Moreover, in the case of a child whose behavior impedes his learning or the learning of others, the LEA must consider the use of positive behavior interventions to address that behavior. Id. at § 1414(d)(3)(B)(i).

At the April 14, 2009 MDT meeting, there was apparently no objective measure of the student's present levels of academic achievement. And, while DCPS considered the use of positive behavior interventions for the student, and determined that a BIP should be developed, DCPS did not follow through with its pledge to create one prior to the filing of the complaint and the due process hearing.

DCPS has not objectively assessed the student's present academic levels since February 2008 or yet revised his academic goals and objectives. DCPS presented no evidence to counter the documentary evidence that the IEP was not amended at the April 2009 meeting to revise the goals and objectives and/or provide for current assessment of the student's present levels of academic performance.

3. Did DCPS deny the student a FAPE by failing to implement a qualified child's IEP?

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

The LEA is required to have an IEP in effect for each child with a disability, at the start of each school year. 20 U.S.C. § 1414(d)(2)(A). In this case, the IEP in effect for the student at the start of the 2007-2008 school year prescribed 10 hours of specialized instruction and 1 hour of psychological services. On December 16, 2008, DCPS increased the student's prescribed specialized instruction from to 22 hours per week, and again prescribed 1 hour per week of psychological counseling. On April 14, 2009, DCPS increased the student's prescribed specialized instruction to 26.5 hours per week and again prescribed 1 hour per week of counseling. The student's special education services were repeatedly increased over the past two school years.

In the first semester of the 2008-09 school year the student was not provided counseling services and since the April 14, 2009, MDT meeting DCPS has not provided the student the full level of specialized instruction his IEP prescribes. There credible testimony of the student and parent that the student has been in general education classes and was not provided the counseling as prescribed. This testimony was not refuted by any evidence from DCPS. At present, the student attends a school which can only provide inclusion services and there was no evidence the full level of specialized instruction can be provided at School A. As a result of DCPS's failure to implement the student's IEP the student has not progressed academically and there has been a denial of a FAPE.

If a disabled student is denied special education services, he or she is entitled to compensatory education, "i.e., replacement of educational services the child should have received in the first place." *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005); see also *Walker v. Dist. of Columbia*, 157 F.Supp.2d 11, 30 (D.D.C.2001). An award of compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Reid*, 401 F.3d at 518.

In *Reid*, when the D.C. Circuit rejected the student's cookie-cutter formula for compensatory education but determined that he was entitled "to an informed and reasonable exercise of discretion regarding what services he needs to elevate him to the position he would have occupied absent the school district's failures," the court remanded the matter for further proceedings. 401 F.3d at 527. The D.C. Circuit stated that on remand each party must have some opportunity to present evidence to aid in the computation of an appropriate compensatory education award. *Id.* at 526.

There was no presentation of evidence on the issue of compensatory education presented in the due process hearing. Consequently, the Hearing Officer can grant no relief this regard.

4. Did DCPS deny the student a free and appropriate public education by failing to provide an appropriate placement? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

Currently, the student is enrolled in a placement that cannot implement his IEP. At the April 14, 2009 MDT meeting, DCPS increased the student's IEP to a full time special education placement. The credible testimony of the student is that he is not being provided full time services at School A and there was no evidence presented by DCPS to refute this. Consequently, the Hearing Officer concludes the student is in an inappropriate placement and is being denied a FAPE as a result.

The U.S. Supreme Court held in *Burlington and Florence County School Dist. Four v. Carter*, 510 U. S. 7, that §1415(i)(2)(C)(iii) authorizes the cost of private-school tuition when a school district fails to provide a child a FAPE and the private-school placement is appropriate.

There was sufficient evidence presented that _____ can implement the student's IEP and the school is an appropriate placement for the student. Therefore, the Hearing Officer grants the requested remedy that the student be placed and funded by DCPS at the

ORDER:

1. DCPS shall place and fund the student at the _____ for the 2009-2010 school year and provide transportation services.
2. DCPS shall fund and the parent shall obtain an independent psycho-educational evaluation to determine the student's current levels of performance.⁸
3. Within thirty days of its receipt of the independent evaluation report DCPS shall convene a MDT/IEP meeting to review the evaluation and update the student's IEP as appropriate.
4. The MDT meeting shall be scheduled through counsel for the student and parent.
5. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

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. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: August 7, 2009

⁸ The independent assessment should be conducted pursuant to any DCPS cost guidelines that apply.