

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 November 15, 2017, and November 21, 2017, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is age _____ and in grade _____.² Student resides in the District of Columbia and is a child with a disability pursuant to IDEA with disability classification of specific learning disability (“SLD”). Student currently attends a District of Columbia Public Schools (“DCPS”) middle school (“School A”). Prior to attending School A, Student attended a public charter school located in the District of Columbia (“School B”) during school year (“SY”) 2016-2017. School B is its own local education agency (“LEA”)

On May 9, 2017, School B developed an individualized educational program (“IEP”) for Student that prescribed 25.5 hours per week of specialized instruction outside general education and 240 minutes per month of behavioral support services outside general education.

Student’s parent (“Petitioner”) enrolled Student in School A in August 2017 for SY 2017-2018 and provided School A with a copy of Student’s School B IEP. Student began attending School A on August 22, 2017. School A quickly informed Petitioner after Student was enrolled that it could not implement Student’s IEP, and that DCPS would have to identify another school location for Student to attend. DCPS first proposed a program at another DCPS middle school that was later determined to be inappropriate for Student. DCPS then proposed a different program at a different DCPS middle school (“School C”). On September 25, 2017, Petitioner filed her due process complaint alleging that the program and the school location DCPS proposed for Student is inappropriate.

Relief Sought:

Petitioner seeks as relief that the Hearing Officer find that, DCPS as Student’s LEA, has denied the student a FAPE and that the Hearing Officer order DCPS to place and fund the student at a non-public special education separate school and provide Student with an award of compensatory education for the period Student’s IEP has not been implemented at School A.

LEA Response to the Complaint:

DCPS filed a response to the complaint on October 4, 2017. DCPS asserts that Student has not been denied a FAPE. DCPS asserts it had no involvement in creating Student’s current IEP,

² The student’s current age and grade are indicated in Appendix B.

which was created at the public charter school. A meeting was held for Student, within the first few weeks of this school year, at which Petitioner raised concerns about the appropriate location for the student moving forward. In the first several weeks of the current school year, DCPS gathered data on Student to determine the best program and an appropriate location. DCPS asserts it offered an appropriate school location for Student's IEP to be implemented and asserts Petitioner did not attempt to place Student in the location offered by DCPS. DCPS asserts that Petitioner's insistence on private placement is unwarranted.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on the complaint on October 6, 2017. The parties did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing in this matter. The 45-day period began on October 25, 2017, and ends [and the Hearing Officer's Determination ("HOD") is due] on December 9, 2017.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on October 18, 2017, and issued a pre-hearing order ("PHO") on October 23, 2017, outlining, inter alia, the issues to be adjudicated.

ISSUES:³

The issues adjudicated are:

1. Whether DCPS denied the student a free appropriate public education ("FAPE") by failing to implement the student's IEP from the start of SY 2017-2018 because it failed to provide the student an appropriate location of service that could implement the IEP.
2. Whether DCPS denied the student a FAPE by failing to provide the student an appropriate placement/location of service for SY 2017-2018.

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 39 and Respondent's Exhibits 1 through 11) that were admitted into the record and are listed in Appendix A.⁴ Witnesses' identifying information is listed in Appendix B.⁵

³ The Hearing Officer restated the issues at the outset of the hearing and the parties agreed that these were the issue to be adjudicated.

⁴ Any items disclosed and not admitted or admitted for limited purposes was noted on the record and is summarized in Appendix A.

⁵ Petitioner presented three witnesses: Petitioner, an educational advocate employed by the law firm representing Petitioner and designated as an expert witness, and a representative of the non-public school where Petitioner is seeking to have Student placed. Respondent presented two witnesses: the LEA representative of the DCPS school Student currently attends and the LEA representative from the school DCPS is proposing that student attend.

SUMMARY OF DECISION:

Petitioner held the burden of persuasion on issue #1 of whether DCPS failed to implement Student's IEP during SY 2017-2018. Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS denied the student a FAPE by failing to implement Student's IEP at School A. Petitioner established a prima facie case on issue #2. Respondent sustained the burden of persuasion on issue #2 and demonstrated through a preponderance of the evidence that School C can implement Student's IEP and that School C is an appropriate placement. The Hearing Officer granted Petitioner compensatory education for missed services not provided Student at School A and dismissed issue # 2 with prejudice. The Hearing Officer did not grant Petitioner's request that Student be placed in the proposed non-public special education separate school.

FINDINGS OF FACT:⁶

1. The student resides in the District of Columbia and is a child with a disability pursuant to the IDEA with a disability classification of SLD. (Petitioner's Exhibit 2-1)
2. Student currently attends School A, a DCPS middle school. Prior to attending School A, during SY 2016-2017, Student attended, School B, a public charter school located in the District of Columbia that is its own LEA. (Petitioner's testimony)
3. On May 9, 2017, School B developed an IEP for Student that prescribed 25.5 hours per week of specialized instruction outside general education, and 240 minutes per month of behavioral support services outside general education. (Petitioner's Exhibits 2-1, 2-8, 3-1)
4. Because Petitioner did not believe Student was making sufficient progress at School B, Petitioner applied for out of boundary placement with DCPS. Petitioner completed the application on line and in the application indicated Student had an IEP. School A is one of the two schools to which she applied. Student was accepted at School A for SY 2017-2018. Once Petitioner received notice from School A that Student had been accepted, she took enrollment documents to School A along with Student's IEP. (Petitioner's testimony)
5. Petitioner enrolled Student in School A in August 2017 for SY 2017-2018. Student began attending School A on August 22, 2017. (Petitioner's testimony, Witness 4's testimony)

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit (or the page number of the entire disclosure document) 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.

6. Within days of the student beginning to attend School A, the School A LEA representative informed Petitioner that School A could not implement Student's IEP and that he would contact DCPS for DCPS to identify a school location for Student where the IEP could be implemented. The School A LEA representative followed DCPS guidelines to obtain an expedited location of service for Student. DCPS' identification of a location of service was delayed and DCPS' central office advised School A that in the meantime it should implement Student's IEP as best it could. (Witness 4's testimony)
7. On September 8, 2017, DCPS issued a letter to Petitioner informing her that the Behavior & Education Support ("BES") program at another middle school had been identified as Student's location of service. (Respondent's Exhibit 11)
8. At Petitioner's request, a meeting was held at School A on September 14, 2017. The team concluded School A could not implement Student's IEP, and discussed what appropriate programs were available in DCPS for Student. The team agreed the student did not need a BES program. Another program discussed was the Specialized Learning Support ("SLS") program at School C. There was no one at the meeting who could speak to the services provided in the SLS program at School C. School A staff requested that Petitioner visit the School C program, and assured Petitioner that School A would continue to support Student at School A until an appropriate program was located. (Witness 1's testimony, Petitioner's Exhibit 1)
9. Petitioner's educational advocate later visited School C and observed the SLS class, spoke briefly with the SLS teacher, and then spoke with the School C special education coordinator ("SEC") about the program. (Witness 1's testimony)
10. On October 10, 2017, DCPS issued a letter to Petitioner informing her that the SLS program at School C had been identified as Student's location of service ("LOS") and could implement Student's IEP. (Respondent's Exhibit 4)
11. The School C special LEA representative received Student's LOS assignment to School C, and spoke with Petitioner's educational advocate by telephone about the SLS program. The advocate, however, never discussed any specific details about the Student or Student's IEP during that telephone conversation, but the SEC informed the advocate that School C could meet the requirements of an IEP with over 20 hours per week of specialized instruction. (Witness 3's testimony)
12. School C currently has special education students who are provided a range of services from 2 hours per week of specialized instruction inside general education to 27.5 hours per week of specialized instruction outside general education. In the School C SLS program there are a maximum of 12 students with a teacher and an instructional aide. There are no students in the SLS program who receive elective courses with general education students. There are students in the SLS program who have IEPs that prescribe 25.5 hours of specialized instruction per week. Those IEP are being implemented appropriately at School C. None of the students with 25.5 hours, however, take a foreign language class. School C can implement Student's IEP. (Witness 3's testimony)

13. After the location of service letter was issued by DCPS for School C, the advocate sent an email to DCPS dissenting to Student's placement at School C, and asserting the program could not implement the full measure of services required in Student's IEP. The advocate requested DCPS place and fund Student at a non-public special education separate school. The advocate does not recall hearing anything back from DCPS in response to her email. (Witness 1's testimony, Petitioner's Exhibit 27)
14. Since attending School A, Student is receiving special education services in four daily classes: self-advocacy, learning lab, math and English. Student has just over 15 hours per week of specialized instruction outside general education. Student has received these services since August 22, 2017. Student has missed approximately 10.5 hours per week of specialized instruction since attending School A. (Witness 4's testimony)
15. At School A, student is in a reading class with a total of nine students. Student is below grade level in reading, but has made some progress in reading fluency and comprehension. Student has not been receiving special education support in history and science. However, Student takes these subjects in the classes with the fewest number of students of the classes School A offers. It is difficult to assess whether Student has made progress in the history and science classes. (Witness 4's testimony, Respondent's Exhibit 8)
16. Since Student has been attending School A, Student's IEP progress report indicates that one math goal was not introduced and Student made no progress on the other math goal. Student made progress on one reading goal and no progress on the other reading goals. Student's written expression goal had not been introduced. Student has been provided behavioral support services by the School A social worker. Student made no progress on emotional, social, and behavioral development goals. (Respondent's Exhibit 8)
17. Student is still struggling at School A, and has had some behavioral problems since being at School A. Student has had one in-school suspension and one out-of-school suspension. (Petitioner's testimony, Petitioner's Exhibit 17)
18. Student has been interviewed by, and accepted to, a non-public special education separate school ("School D"). School D currently has 23 students who all have been diagnosed with some form of learning disability. Most students are operating academically at least two-grade levels below their current grade. School D has an OSSE certificate of approval ("C of A") and its annual cost is \$55,899.00. School D is able to implement Student's IEP, and offers special programs in reading and writing. School D's middle school is composed of two groups of 4 students each. All teachers are certified in special education and some are certified in content areas. School D can provide related services by licensed providers. School D has a behavior specialist and two certified social workers. All staff have bachelor degrees and some experience with students with special needs. The related services offered include occupational therapy, speech language and behavior support in individual therapy sessions once per week. (Witness 2's testimony, Petitioner's Exhibit 35)

19. Petitioner's educational advocate proposed compensatory education for the alleged denials of FAPE to Student from August 21, 2017, to October 26, 2017, for the specialized instruction and behavior support services she believed Student was not provided at School A. The advocate requested 267 hours of compensatory education to be used in the form Petitioner deemed appropriate for tutoring, sports activity and an enrichment program. However, the advocate did not know how much specialized instruction Student has or has not received at School A. In addition, the evidence demonstrates Student was provided all behavioral support services due. The advocate did not speak to any teachers at School A and did not meet Student. In the proposal, the advocate asserted Student had regressed, but the assessments used were from March 2017 to August 2017, which was a period prior to Student attending School A. (Witness 1's testimony, Petitioner's Exhibit 38)

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").

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

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. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

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)

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, Petitioner held the

burden of persuasion on issue #1. Respondent held the burden of persuasion on issue #2. ⁷ The normal standard is preponderance of the evidence. See *N.G. v. District of Columbia* 556 F. Supp. 2d (D.D.C. 2008); See also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether the DCPS denied the student a FAPE by failing to implement the student’s IEP from the start of SY 2017-2018 because it failed to provide the student an appropriate location of service that could implement the IEP.

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence on this issue.

5E DCMR 3002.3 provides that:

- (c) The LEA shall ensure that an IEP is developed and implemented for each eligible with a disability served by the LEA.
- (d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP...
- (f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

“To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the IEP “*Savoy v. District of Columbia* (DC Dist. Court) February 2012 adopted *Houston Indep. School District v. Bobby R.* 200 F3d 341 (5th Circ. 2000)

The evidence demonstrates that Petitioner applied to DCPS for out-of-boundary placement for

⁷ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

Student and Student was accepted to School A. It appears that Student was accepted by School A without thorough review by School A of Student's IEP. This may be a fundamental flaw of the DCPS lottery program that Student was accepted to, and allowed to enroll in, a school that could not implement Student's IEP. Nonetheless, DCPS is responsible to provide Student a FAPE once Student is enrolled.

The School A LEA representative apparently acted promptly to seek and obtain an appropriate school location for Student to attend. That process was delayed and DCPS did not officially propose an appropriate program until October 10, 2017. Between August 22, 2017, when Student first began attending School A, and October 10, 2017, when DCPS issued the location of service letter to Petitioner, School A has apparently done its best to implement Student's IEP, but the reality is School A has only been able to provide student a portion of the weekly specialized instruction Student is due pursuant to Student's IEP. School A has provided Student the behavioral support services the IEP prescribes.

The evidence demonstrates that Student was provided 15 hours per week of specialized instruction at School A, and has been provided weekly behavioral support services. Based upon the evidence the Hearing Officer finds that Student was not provided 10.5 hours per week of specialized instruction from August 22, 2017, to October 10, 2017, when DCPS issued a location of service letter for Student to attend School C. Student experienced a total of approximately 7 weeks of insufficient specialized instruction for a total of approximately 75 hours of missed specialized instruction during this period. The Hearing Officer concludes that this shortfall of specialized instruction is significant and results in a denial of FAPE to Student.

The Hearing Officer concludes that student should be compensated for that loss. There is an evidentiary basis that student would benefit from tutoring, and in the order below the Hearing Officer has directed DCPS to fund 100 hours of independent tutoring for the services Student was not provided.

ISSUE 2: Whether the DCPS denied the student a FAPE by failing to provide the student an appropriate placement/location of service for SY 2017-2018.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34C.F.R. § 300.550; see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision (1) is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; (2) is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA that mandate that to the maximum extent possible, disabled children are to be educated with their nondisabled peers and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the

nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; (3) is determined annually; (4) is based on the child's IEP; and (5) is as close as possible to the child's home. 34 C.F.R. §300.114, 34 C.F.R. §300.116.

Pursuant to D.C. Code § 38:2561.02(c) (c) Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

Petitioner asserts that DCPS has failed to provide Student with an appropriate placement/location of service for SY 2017-2018. Petitioner asserts that School C, where DCPS has proposed Student attend, is inappropriate because it cannot implement Student's IEP. Petitioner's educational advocate testified she was told that students in the School C SLS program are provided core courses in the program, elective classes would be provided in general education and that the maximum number of specialized instruction hours per week that could be implemented at School C would be 19 to 20 hours. She testified that the School C SEC told her this, but at several points in relaying her conversation with the SEC the advocate had difficulty remembering exact details. The Hearing Officer did not find this portion of the advocate's testimony to be credible and found the testimony of the School C LEA representative more credible as to School C's ability to implement Student's IEP. The School C LEA representative was far more knowledgeable of the course offerings at School C and both certain and specific in her testimony.

Other than the alleged inability to implement Student's IEP, there was no other reasonable basis asserted by Petitioner as to why School C was inappropriate. Petitioner did express concern about School C based on her familiarity with the school in prior school years and conveyed alleged negative comments made by other individuals not affiliated with School C. The Hearing Officer did not find Petitioner's testimony in this regard probative in determining whether School C can, in the current school year, implement Student's IEP and whether it is an appropriate school placement for Student.

The Hearing Officer concludes that based on the evidence, School C can implement Student's IEP. Student would be provided all specialized instruction only with special education students at School C. Consequently, the Hearing Officer concludes that Respondent sustained the burden of persuasion by a preponderance of the evidence that it has proposed an appropriate placement and location of service to the student for SY 2017-2018.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.)

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 Hearing Officer concluded Student was not provided approximately 75 hours of specialized instruction. Petitioner asserts that Student was not provided an appropriate program from the start of SY 2017-2018, and had Student been provided a self-contained program, Student would have made academic progress and social emotional progress. Petitioner has requested Student be provided 267 hours of compensatory education. However, Petitioner's proposal overstates the level of specialized instruction Student missed and proposed compensation for behavior support services Student did not miss. Nonetheless, the proposal does support Student being provided tutoring services to compensate for the missed services. Based upon this evidence, the Hearing Officer concludes that Student should be provided compensatory services in the amount of 100 hours of independent tutoring, an amount the Hearing Officer deems reasonable to compensate Student for the missed services and to target placing Student in the place Student would have been but for the missed services.

ORDER: ⁸

1. Petitioner's claim that DCPS failed to provide Student an appropriate placement and location of service for SY 2017-2018 is dismissed with prejudice.
2. Student's school placement for SY 2017-2018 as determined by DCPS is the SLS program at School C
3. DCPS, shall within ten (10) school days of the issuance of this order, provide Petitioner authorization for one-hundred (100) hours of independent tutoring at the OSSE prescribed rate, for the specialized instruction Student missed while attending School A since the start of SY 2017-2018.
4. All other relief requested by Petitioner is denied.

⁸ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

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 ninety (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: December 9, 2017

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