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Office of the State Superintendent of Education
Office of Review and Compliance
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Confidential

<p>Parents on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS") ["LEA"]</p> <p>Respondent.</p> <p>Case # 2015-0364</p> <p>Date Issued: February 5, 2016</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Hearing Dates: January 13, 2016 January 20, 2016 January 28, 2016</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Emily Maloney, Esq. James E. Brown & Associates 1220 L Street, N.W. Suite 700 Washington, D.C. 20005</p> <p>Counsel for Respondent: Maya Washington, Esq. District of Columbia Office of the General Counsel 1200 First Street, 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

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 January 13, 2016, January 20, 2016, and concluded on January 28, 2016, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003 on January 13, 2016, in Hearing Room 2006 on January 20, 2016, and in Hearing Room 2003 on January 28, 2016.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____ and in grade _____² currently attends a District of Columbia Public Schools (“DCPS”) [REDACTED] school (“School A”) where he has attended since the start of school year (“SY”) 2015-2016.

The student is currently eligible to receive special education and related services and has been receiving services with a disability classification of other health impairment (“OHI”) for Attention Deficit Hyperactivity Disorder (“ADHD”).

The student attended a DCPS [REDACTED] school during SY 2012-2013 and had an individualized education program (“IEP”) during that school year. The student attended a private school (“School B”) during SY 2013-2014 and SY 2014-2015. While attending School B the student was not provided special education services.

In the fall of 2014 the student’s parents (“Petitioners”) contacted DCPS and requested that DCPS provide the student an IEP. In January and February 2015 DCPS conducted evaluations of the student and on March 11, 2015, DCPS found the student eligible and later developed an IEP. DCPS did not find the student eligible for speech and language services although he was eligible for the related service during his time at School B. Petitioners requested and obtained an independent speech and language evaluation.

The independent evaluator recommended the student receive speech and language services and that neuropsychological and auditory processing assessments be conducted. On July 21, 2015, DCPS convened a meeting to review the independent speech and language evaluation. The DCPS speech language therapist acknowledged the student’s weaknesses but disagreed with the independent evaluator’s recommendation that the student receive services. During this meeting Petitioners requested an auditory processing (“AP”) evaluation and a neuropsychological assessment. DCPS refused to conduct the neuropsychological evaluation and stated that it would conduct the AP evaluation once a physician addressed the student’s condition contributing to his hearing loss.

² See Appendix B for student’s age and current grade.

In the fall of 2015, the student's parent attended a meeting at School A to discuss the student's behavior concerns. During that meeting DCPS advised the parent that a functional behavioral assessment ("FBA") would be performed and a behavior intervention plan ("BIP") would be developed.

On November 12, 2015, Petitioners filed the due process complaint alleging DCPS denied the student a free appropriate public education ("FAPE") by failing to comprehensively evaluate the student by not conducting the requested auditory processing and neuropsychological evaluations, failing to perform a FBA and provide the student with a BIP, and not providing the student with speech and language services in his IEP.

Petitioner seeks as relief that the Hearing Officer find that DCPS denied the student a FAPE and order DCPS to fund independent auditory processing and neuropsychological evaluations; DCPS conduct a FBA and develop a BIP within 30 days of the issuance of the decision; restore speech and language services to the student's IEP; and award reasonable compensatory education for the period when the student has not received speech and language services.

On November 25, 2015, DCPS filed a timely response to Petitioners' complaint. DCPS denied it failed to provide the student with a FAPE. DCPS asserted that is not the local education agency ("LEA") for School B. DCPS asserted that on March 11, 2015, and July 27, 2015, the team(s) correctly determined that the student does not require speech and language services. Although Petitioners requested auditory processing and neuropsychological evaluations the team determined that the neuropsychological is not necessary and recommended Petitioners contact the student's Ear, Nose and Throat ("ENT") doctor and an audiologist to address the medical condition affecting the student's hearing before DCPS could conduct an AP assessment. DCPS contended it agreed to and did perform a FBA and developed a BIP. DCPS also asserted that Petitioners provided consent for DCPS to conduct the FBA II on November 23, 2015, and DCPS is willing to meet to review the FBA II and develop a BIP II.

A resolution meeting occurred on November 23, 2015. However, the parties did not reach any agreement on the issues. The parties did not agree to move directly to hearing. The 45-day period began on December 19, 2015, and originally ended [and the Hearing Officer's Determination ("HOD") was originally due] on January 26, 2016.

The Hearing Officer convened a pre-hearing conference ("PHC") on December 16, 2015, and issued a pre-hearing order ("PHO") on December 21, 2015, outlining, inter alia, the issues to be adjudicated.

The hearing was due to convene on January 12, 2016. However, due to the Hearing Officer's illness the hearing did not convene until January 13, 2016. The hearing resumed on January 20, 2016, and Petitioners concluded their case on that day. Respondent presented its case on January 28, 2016. Petitioners requested the opportunity to file a written closing argument and filed an unopposed motion to extend the HOD due date by ten calendar days. The motion was granted extending the HOD due date to February 5, 2016. The Hearing concluded on January 28, 2016, and the record closed with the submission of written closing arguments by the parties on February 1, 2016.

ISSUES:³

The issue(s) to be adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to comprehensively evaluate the student after the parents requested auditory processing and neuropsychological evaluations first made at the July 27, 2015, meeting and reiterated at subsequent meetings.
2. Whether DCPS denied the student a FAPE by failing to comprehensively evaluate the student by performing a FBA and providing the student with a BIP.
3. Whether DCPS denied the student a FAPE by removing speech and language services from the student's IEP at the July 27, 2015, meeting.⁴

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 28 and Respondent's Exhibits 1 through 21) that were admitted into the record and are listed in Appendix A).⁵ Witnesses are listed in Appendix B.

FINDINGS OF FACT:⁵

1. The student currently attends School A, a DCPS [REDACTED] school, where he has attended since the start of school year SY 2015-2016. (Parent's testimony, Petitioner's Exhibit 10-1)
2. The student is currently eligible to receive special education and related services with a disability classification of OHI for ADHD. (Petitioner's Exhibit 4-1)
3. The student attended a private school, School B, during SY 2013-2014 and SY 2014-2015 where he was not provided special education services although during SY 2012-2013 the student attended a DCPS [REDACTED] school ("School C") and had an IEP dated April 17, 2013. (Parent's testimony, Petitioner's Exhibits 6-1, 11, 12)
4. Initially, at School B the student seemed to be doing well but in his second year his performance declined drastically. He was in a classroom with a teacher who was not

³ The alleged violation(s) and/or issue(s) listed in the complaint or in the PHO do 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 the issues as listed in this HOD are the issue(s) to be adjudicated.

⁴ The claim is for missed services from the beginning of SY 2015-2016.

⁵ Any documents that were objected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

special education certified and he was not receiving specialized instruction or speech and language services. The parent removed the student from School B because of his academic difficulties. (Parent’s testimony)

5. The student earned the following grades for each quarter in the following subjects during SY 2013-2014 at School B:

<u>Subjects</u>	<u>Adv.1</u>	<u>Adv. 2</u>	<u>Adv. 3</u>	<u>Adv. 4</u>	<u>Final Grade</u>
Language Arts	88 B+	80 B-	92 A-	83 B	86 B
Math	100 A+	96 A	92 A-	86 B	93 A
Reading	96 A+	82 B-	87 B	87 B+	89 B+
Elem. Science	94 A	96 A	77 C+	90 A-	89 B+
Elem Soc. Studies	100 A+	96 A	-	-	96 A+
Art	82 B-	84 B	73 C-	79 C+	79 C+
Phys Ed	E	E	E	E-	E
Music	76 C	85 B	80 B-	79 C+	80 B-
Social Studies	-	-	85 B	83 B-	83 B

(Petitioner’s Exhibits 7-3, 12)

6. The student earned the following grades for the first two quarters in the following subjects during SY 2014-2015 at School B:

<u>Subjects</u>	<u>Adv.1</u>	<u>Adv. 2</u>
Elem Soc. Studies	81 B	37 FA (Failing Advisory)
Language Arts	95 A	90 A-
Math	82 B	100 A+
Reading	100 A+	33 FA (Failing Advisory)
Elem. Spanish	75 C	70 C-
Music	75 C	75 C
Art	75 C	(Parent’s testimony, Petitioner’s Exhibit 11-1, 11-3)

7. During the first semester of SY 2014-2015, while the student was still attending School B, his parent contacted the DCPS Private and Religious Office (“PRO”) and re-initiate the student’s special education eligibility and services. (Petitioner’s Exhibit 13)
8. On January 5, 2015, DCPS conducted an audiological re-evaluation of the student. The evaluation report notes that the student has borderline normal hearing acuity sloping to a mild conductive hearing loss in the left ear and a mild to moderate conductive hearing loss in the right ear. The evaluator noted: “Educationally, [the student] can hear but misses fragments of speech leading to misunderstanding. In the classroom, he would have difficulty accessing the general education curriculum via audition especially in the presence of background noise. Given, the mild to moderate conductive hearing loss in the right ear and the white substance noted bilaterally it was suggested that [the student] should follow up with an Ear, Nose and Throat physician (“ENT”). Following medical consult, audiological re-evaluation should be conducted.” (Petitioner’s Exhibit 9-1, 9-2)
9. On January 16, 2015, a DCPS speech language pathologist conducted an evaluation of the student.⁶ The evaluator determined the student’s overall articulation fell in the normal range although he had mild distortion of “ch” and “dj” sounds. The student’s receptive vocabulary comprehension was average for his age. His expressive vocabulary was low average for his age. The student’s language abilities as measured by the CELF-5 were average compared to his same age peers. (Petitioner’s Exhibit 3-3, 3-4)
10. In January and February 2015 DCPS conducted a comprehensive psychological evaluation of the student. The student’s cognitive functioning was measured as average at the 63rd percentile.⁷ The student’s academic functioning was low average.⁸ The evaluator assessed for and confirmed the student’s difficulties in attention, focus and executive functioning.⁹ The evaluator concluded the student continued to meet the IDEA and DCPS eligibility criteria of OHI for ADHD. The evaluator did not recommend any additional evaluations be conducted. (Petitioner’s Exhibit 7-1, 7-9, 7-10, 7-12, 7-13, 7-14, 7-17)

⁶ The evaluator conducted the following assessment tools: Goldman-Fristoe Test of Articulation (GFTA-2) Receptive One-Word Picture Vocabulary test 4 (ROWPVT-4) Expressive One-Word Picture Vocabulary Test 4 (EOWPVT-4) Clinical Evaluation of Language Fundamentals-5 (CELF-5). The evaluator also reviewed records and conducted an observation of the student.

⁷ The evaluator administered both the Reynolds Intellectual Assessments Scales (“RIAS”) and the Comprehensive Test of Nonverbal Intelligence – Second Edition (“CTONI-2). The student’s cognitive functioning was higher on the CTONI-2. The evaluator noted: “when the demands of listening and language are removed, the student’s performance increases. Therefore, the CTONI-2 should be regarded as the most accurate and valid snapshot of [the student’s] cognitive functioning at this time.”

⁸ The evaluator administered the Woodcock-Johnson-III Normative Update Test of Achievement (“WJ-III ACH”). The student was at the 12th percentile in broad reading, the 3rd percentile in broad math, and the 28th percentile in broad written language.

⁹ The evaluator administered the Conners-3 rating scales, the Behavioral Rating Inventory of Executive Functioning (“BRIEF”).

11. The February 25, 2015, psychological evaluation report noted the student's developmental history based upon the evaluators review of previous records. The report notes the following: The student experienced breathing difficulties at birth, weighed 5 lbs. 2 oz., received supplemental oxygen for one week and remained in the hospital two weeks following delivery. He suffered frequent ear infections and high fevers during his first three years of age. He suffered a fall from a kitchen counter top at six months of age but did not lose consciousness. The evaluation report also noted the following about the student's medical history: The student is undergoing medical management for ADHD and has been taking medication since second grade. He also received behavioral counseling from a psychiatrist. The student's most recent hearing exam was conducted January 28, 2015. He has a well-documented history of hearing difficulties and hearing loss. (Petitioner's Exhibit 7-1, 7-2)
12. The evaluations DCPS performed were reviewed at a March 11, 2015, meeting. The student's parent participated in the meeting. The team determined the student was eligible for special education and related services and met the criteria for the OHI disability classification as result of ADHD. (Petitioner's Exhibit 26-1, 26-3)
13. At the March 11, 2015, meeting the DCPS speech pathologist who evaluated the student reviewed her evaluation with the team and concluded the student presents with articulation, receptive vocabulary, expressive vocabulary and overall language abilities that fall within expectations for the general education setting. She noted that all formal and informal test results indicated the student's speech and language abilities were similar to his same-age peers and that his communication skills were inconsistently impacted by his hearing loss. As a result, the DCPS evaluator concluded the student no longer met the eligibility criteria for speech language services. (Petitioner's Exhibit 26-2)
14. On April 21, 2015, DCPS convened a meeting to, inter alia, review a draft IEP for the student. The student's parent attended with her attorney. During this meeting the student's parent requested an AP evaluation. The DCPS audiologist explained that because of the student's hearing loss he was not a candidate for an AP evaluation. The student's parent disagreed with the elimination of speech and language services and requested and later obtained DCPS authorization for an independent speech and language evaluation. (Witness 7's testimony, Petitioner's Exhibits 5-1, Respondent's Exhibits 3-1, 3-2, 3-3, 3-4, 12)
15. On June 3, 2015, the independent speech and language assessment was completed. The independent evaluator found that the student had articulation distortion, problems with vocabulary and word knowledge as well as auditory phonological processing deficits and deficits in metalinguistic processing. The evaluator noted that during the evaluation the student was constantly moving and touching things. This caused the evaluator to recommend a neuropsychological assessment in order to test the student's self-regulation, attention, and executive functioning. (Witness 4's testimony, Petitioner's Exhibit 1-1 1-7, 1-8)

16. The independent speech and language evaluator also recommended additional testing of the student's auditory processing and determined that the student should continue to receive speech and language services because of his articulation and language processing deficits. (Witness 4's testimony, Petitioner's Exhibit 1)
17. On July 15, 2015, a DCPS speech language pathologist conducted a review of the independent speech language evaluation. The DCPS speech language pathologist noted that the independent evaluation noted the student's performance on the standardized assessments in the evaluation indicated the student's overall language skills fall in the average range of functioning and that the weaknesses noted on the subtest assessing inferences was a higher level linguistic skill that can be addressed in the student's classroom without direct speech and language services. (Witness 6's testimony, Respondent's Exhibit 9-1, 9-4, 9-5)
18. On July 27, 2015, DCPS convened a meeting with the student's parent and her attorney present to review to the independent evaluation and finalize the student's IEP. At the meeting the DCPS speech and language therapist acknowledged the student's weaknesses but disagreed with the independent evaluator's recommendation that the student continue to receive speech language services because the assessments indicated the student's overall language skills were average. The independent evaluator was not present at the meeting. The student's parent disagreed with that determination. During this meeting the student's parent requested an AP evaluation and a neuropsychological assessment. DCPS indicated it would research the request and recommended Petitioners contact the student's ENT and an audiologist to address the medical condition affecting the student's hearing before DCPS proceeded with an AP assessment. (Witness 6's testimony, Respondent Exhibits 2-3, 2-4, 2-5 2-6, 8)
19. At the July 27, 2015, meeting DCPS developed an IEP that prescribed the following services: specialized instruction outside general education for 30 minutes per day in reading, 2 hours per week in math and 1 hour per week in written expression and 30 minutes per week of specialized instruction in general education in written expression. (Petitioner's Exhibit 4-1, 4-9)
20. The student has had some behavioral difficulties since attending School A at the start of SY 2015-2016 including fighting, class disruptions and physical and verbal aggression. The student's parent attended at least two additional meetings with School A in August, and September 2015 and reiterated her request for the evaluations. The student's parent believes further testing of the student would help to obtain a clear picture of what is going on with the student, his diagnosis and develop an IEP that will benefit him. During the September 2015 meeting DPCS advised the student's parent that a FBA would be performed and a BIP would be developed to address the student's behavioral concerns. (Parent's testimony Petitioner's Exhibit 6-15, 10, 13, 14, 28)
21. On October 19, 2015, DCPS conducted an informal behavioral assessment and developed a BIP for the student. However, no meeting has been held to review the FBA or BIP to date. (Parent's testimony, Respondent's Exhibits 7)

22. On November 12, 2015, Petitioners filed the due process complaint. On November 23, 2015, DCPS convened a resolution meeting with the student's parents and their attorney. At that meeting DCPS authorized an independent AP evaluation for a total maximum cost of \$442.12. Petitioner contended that the dollar amount authorized was insufficient to obtain the evaluation. (Witness 4's testimony, Respondent's Exhibits 1, 5)
23. The student earned the following grades for first advisory in the following subjects during SY 2015-2016 at School A:

<u>Subjects</u>	<u>Adv.1</u>
Language Arts 6	D
Math	C-
Projects & Prob Solving	D
World Geography & Cultures	F
Math Concepts MS 7	P
Mixed Model Reading MS 6	P
Projects & Problem Solving MS	D

(Petitioner's Exhibit 10-1, 10-2)

24. On December 18, 2015, DCPS conducted a FBA of the student. (Respondent's Exhibit 6)
25. On December 21, the student's parent received a notice the student is at risk of retention. (Parent's testimony Petitioner's Exhibit 28)
26. Petitioners offered an expert witness to express opinion on the student's need for a neuropsychological evaluation. This witness opined that any of the student medical issues as noted in the February 25, 2015, comprehensive psychological could have impacted the student's development and a neuropsychological evaluation would be a means to determine how to the teach him, address his deficits and move him along. In the witness' opinion the differences in the student's cognitive scores on the C-TONI and the gap between his strengths and weaknesses in verbal functioning or language abilities is another basis for the need for a neuropsychological evaluation. When asked what assessment tools would she recommend be included in a neuropsychological evaluation for the student the witness stated that the NEPSY (Developmental Neuropsychological Assessment), conferring with the audiologist and trying different teaching methods with the student to determine what methods are most effective to help the student progress. (Witness 1's testimony, Petitioner's Exhibit 7-2)

27. The DCPS psychologist who was also qualified as an expert witness offered her opinion that a neuropsychological evaluation is usually needed to assess cognitive functioning and educational needs of a student pre-injury and post injury. In her opinion there would not be any additional information that would be helpful from a neuropsychological to determine educational concerns or programming for this student because he has suffered no such recent injury and his cognitive functioning has remained average over years in subsequent evaluations. The DCPS psychologist does not believe additional testing of the student's memory is warranted based on any of his prior assessments and his difficulties regarding hearing is a significant area of concern that should be primarily addressed. Additional updated observations and behavioral rating scales could be given; however, they may be superfluous given that the student has already been determined eligible. The NEPSY, which Petitioner's expert witness recommended be conducted, is a measure of executive functioning and can be conducted by DCPS. (Witness 5's testimony)
28. Petitioners' consultant recommended 12 weeks of 1 hour per week of speech language services be provided to the student to compensate for him not being provided speech language services since the start of SY 2015-2016. (Witness's 3's testimony, Petitioner's Exhibit 16-3)

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. 7 *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 comprehensively evaluate the student after the parents requested auditory processing and neuropsychological evaluations first made at the July 27, 2015, meeting and reiterated by the student’s parent at subsequent meetings.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student was denied a FAPE by the failure to conduct an audio processing evaluation. In addition, based upon the evidence that additional testing would assist in determining how to more appropriately program for the student and meet his needs the Hearing Officer determines that that DCPS should conduct additional assessments of the student.

34 C.F.R. § 300.303(a) makes clear that, “A local education agency (“LEA”) shall ensure that a re-evaluation of each child with a disability is conducted...if the child’s parents or teacher requests a re-evaluation.” and that the reevaluation must be conducted at least once every three years. Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp 2d. 254, 259, 261 (D.C.C. 2005).

The parent of a child or the public agency may initiate an evaluation to determine if the child is eligible to receive special education and related services.¹⁰ As a part of an evaluation, the IEP team must “review existing evaluation data” and “identify what if any additional data if any is necessary to make decisions regarding eligibility and the needs of a child.”¹¹ The team must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about a student.¹² The student must be evaluated in all areas of suspected disability.¹³ However, the public agency is not required to conduct every assessment the parent requests.

The evidence demonstrates that on July 27, 2015, DCPS convened a meeting to review the independent speech language evaluation. That evaluation report recommended the student receive an AP evaluation. The student has a history of hearing loss that results from a build-up in his ear. The DCPS audiologist explained to the parent that the student should visit his doctor to have the condition addressed prior to completing the AP assessment to ensure valid test

¹⁰ 34 C.F.R. §300.301(b)

¹¹ 34 C.F.R. §300.305(a);

¹² 34 C.F.R. §300.304(b)(1)

¹³ 34 C.F.R. §300.304(c)(4)

results. The audiologist agreed to conduct the testing once the student's ears were cleaned and a hearing test administered establishing that his hearing is normal.

The Hearing Officer concludes that DCPS' action in requesting that the student first visit the doctor was reasonable. Nonetheless, there was an acknowledgement by DCPS that the AP evaluation was necessary. DCPS could have prior to the complaint being filed offered the parent the authorization to complete the evaluation independently with an instruction to the evaluator to ensure that the student's hearing was examined and his ears treated appropriately prior to the evaluation. After the complaint was filed DCPS provided the parent authorization for an independent evaluation.¹⁴ However, this was after the fact and after Petitioners found the need to file a complaint to obtain an evaluation that they had repeatedly requested. Consequently, the Hearing Officer concludes that DCPS' failure to conduct the evaluation promptly following the July 2015 request or provide an authorization prior the complaint being filed significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE.

As to the parents' request that DCPS conduct a neuropsychological evaluation, that evaluation was requested following the review of the independent speech language evaluation. In that evaluation the evaluator noted the student's behaviors of constantly moving and touching things caused the evaluator to recommend a neuropsychological assessment in order to test the student's self-regulation.¹⁵ Prior to this statement in that evaluation report there was no other apparent basis for the requested neuropsychological evaluation.

Petitioner's expert witness who testified that a neuropsychological should be conducted had never personally observed the student or talked with his teacher to determine the extent of the student's in-school behaviors as a basis for the student's need for a neuropsychological evaluation. In addition, that expert witness could only state one assessment tool that she would recommend be administered: the NEPSY.

The DCPS expert witness acknowledged that this is an assessment tool that DCPS can conduct but is usually done when there has been history of brain injury. The record indicates that any injury the student had occurred when he was an infant and that his cognitive functioning has over the years been measured as average. Therefore, the Hearing Officer concludes that based upon the evidence it was reasonable for DCPS to have declined to conduct the neuropsychological evaluation of the student and its refusal to do so was not a denial of a FAPE to the student.

However, given the fact that DCPS can conduct the specific assessment tool that has been mentioned and the it is used to measure a student's executive functioning which is an area that may be related to the student's educational needs, the Hearing Officer in the order below will direct that DCPS convene a meeting to discuss with the parent DCPS administering the NEPSY

¹⁴ Although Petitioners asserted that they could not obtain an AP evaluation for the rate DCPS authorized, the Hearing Officer was not convinced solely by the testimony of Petitioner's witness that the OSSE prescribed and published rate was unreasonable absent evidence of additional providers who Petitioners attempted to seek to conduct the evaluation at the OSSE approved rate.

¹⁵ FOF # 15

to the student and any other behavior rating scales that might better address the student's behavior concerns that are apparently impacting him since he began attending School A. If the parent is in agreement that the NEPSY is the assessment tool to be conducted DCPS shall conduct that assessment within 30 calendar days of the meeting. DCPS may at its option choose to authorize the parent to obtain the assessment independently at the DCPS/OSSE prescribed rate.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to comprehensively evaluate the student by performing a functional behavioral assessment ("FBA") and providing the student with a behavioral intervention plan ("BIP").

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence of on this issue.

Petitioner has not shown by a preponderance of the evidence that DCPS failed to conduct a functional behavioral assessment ("FBA") and develop a behavior intervention plan ("BIP") for the student. IDEA prescribes that an IEP team must conduct an FBA and develop a BIP where a student has been removed from their educational placement for a code of conduct violation and the team determines that the incident was a manifestation of their disability.¹⁶ The IDEA makes no other mention of a FBA and BIP.

The evidence demonstrates that DCPS initiated the FBA and BIP at a meeting with the parent to discuss the student's behavior and stated it would conduct a FBA and develop a BIP. Shortly after the meeting the DCPS conducted a behavior assessment and on October 19, 2015, DCPS developed a BIP. This action by DCPS was within a reasonable time following the meeting with the parent and its statements to the parent that the items would be developed. Consequently, the Hearing Officer concludes that there was no denial of a FAPE to the student with regard to the FBA or BIP, and Petitioners did not sustain the burden of proof on this issue.

ISSUE 3: Whether DCPS denied the student a FAPE by removing the student from speech and language services at the July 27, 2015, meeting.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence of on this issue.

A public agency is required to provide related services that are necessary for a student to receive "a basic floor opportunity" to access their education.¹⁷ A student's need for related services is determined on an individual basis as a part of the IEP process.¹⁸ "Speech language impairment means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance."¹⁹

¹⁶ 34 C.F.R. §300.530(f)

¹⁷ *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769 (D.C. Cir. 2012); *A.M. v. District of Columbia*, 933 F. Supp. 2d 193 (D.D.C. 2013).

¹⁸ 34 C.F.R. §300.320(a)(4)

¹⁹ 34 C.F.R. §300.8(c)(11)

DCPS completed a speech language evaluation on February 9, 2015. The results of the evaluation indicate that the student's articulation, voice, fluency, receptive vocabulary, expressive vocabulary, receptive and expressive language, and pragmatic language skills are average as compared to age-expectations. Based on these results the team determined the student does not have a speech language impairment that impacts his education and does not qualify for speech and language services. Petitioners disagreed with the DCPS assessment and requested DCPS fund an independent evaluation.

Petitioner's expert evaluated the student and recommended he be provided services. The independent evaluator identified slight concerns with the student articulation. However, the DCPS assessment indicates the student scored average in the area of articulation and his speech was intelligible. The independent evaluation recommended the student receive services based on the inferences subtest. However, the DCPS expert witness credibly testified that making inferences is a higher order thinking skill that would be addressed in the classroom.²⁰

The Hearing Officer did not find Petitioner's expert witness' testimony more persuasive than that of the DCPS expert witness who had participated in the student's IEP meeting and conferred with his teachers and from which the Hearing Officer concludes had a better grasp of the student's speech and language abilities. Therefore, the Hearing Officer concludes the DCPS team appropriately determined the student was not eligible to receive speech and language as a related service after reviewing the independent assessment on July 27, 2015. The student was not denied a FAPE in this regard and Petitioners did not sustain the burden of proof on this issue.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Reid, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

The compensatory education plan Petitioners presented proposed that student be provided 12 hours of speech language services. Because the Hearing Officer has concluded that DCPS' decision that the student does not warrant speech language services was correct, the Hearing Officer will not award any compensatory education. There was no other basis for compensatory education demonstrated.

²⁰ FOF #s 17, 18

ORDER: 21

1. Petitioners are hereby directed, within thirty (30) calendar days of the issuance of this order, to provide DCPS medical documentation that the student's ears have been cleared of any blockage that might impact the accuracy of an audio processing evaluation.
2. DCPS shall, within five (5) school days of being provided that medical documentation from the parent mentioned above, shall conduct an audio processing evaluation of the student. DCPS may at its option choose to the authorize (or maintain the authorization already provided) the parent to obtain the evaluation independently at the DCPS/OSSE prescribed rate or at the rate most recently authorized by DCPS.
3. DCPS shall, within fifteen (15) school day of the issuance of this order convene a meeting to discuss with the parent DCPS administering the NEPSY to the student and any behavior rating scales that might better address the student's behavior concerns that are apparently impacting him since he began attending School A. If the parent is in agreement that the NEPSY is the assessment tool to be conducted DCPS shall conduct that assessment within 30 calendar days of this meeting. DCPS may at its option choose to authorize the parent to obtain the assessment independently at the DCPS/OSSE prescribed rate.
4. At the meeting to be held pursuant to the paragraph above DCPS shall also review the student's BIP and thereafter begin its implementation.
5. DCPS shall with fifteen (15) school days of its completion or receipt of the student's audio processing evaluation report convene a multidisciplinary team meeting to review the results of the evaluation and review and revise the student's IEP as appropriate.
6. All other requested relief is denied.

²¹ Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioners 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 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: February 5, 2015