District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
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Confidential

Parent on Behalf of Student[1], Petitioner, v. District of Columbia Public Schools ("DCPS") Respondent.	HEARING OFFICER'S DETERMINATION Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on January 10, 2014, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student resides in the District of Columbia with his parents. The student's primary language is English although Spanish is the primary language spoken in the student's home. The student is a child with a disability pursuant to IDEA with a classification of intellectual disability ("ID").

In 2008 the student began attending a private full-time special education program for ID students (School A). In October 2010 School A conducted the student's triennial evaluations. During school year ("SY") 2012-2013 the student was enrolled in School A's special education inclusion program and the student's attendance there was funded by DCPS.

Because the student was aging out of School A and would begin attending high school at the start of SY 2013-2014, the student's individualized educational program ("IEP") was updated on May 10, 2013, and prescribes a combination of services with 10 hours of specialized instruction per week inside general education and10 hours per week outside general education and related services that were mostly provide outside general education. The IEP prescribes that the student is on the high school diploma tack.

At the start of SY 2013-2014 the student began attending his neighborhood DCPS high school ("School B"). On September 19, 2013, School B held a review meeting to determine the student's progress and the appropriateness of his placement at School B. The student's teachers stated in the meeting that student was struggling academically. DCPS prepared a draft IEP for the student sometime after the September 19, 2013, review meeting. The draft IEP is dated November 19, 2013. However, the student's IEP was never officially revised at School B.

On November 12, 2013, Petitioner filed this due process complaint asserted that the student's IEP was inappropriate and that DCPS had failed to conduct the student's triennial evaluations. Petitioner is seeking prospective placement at a non-pubic school and compensatory education.

DCPS filed a response to the complaint on November 19, 2013. DCPS asserted there has been no denial of a FAPE and specifically asserted that any possible remedy involving prospective placement or changes to the IEP are premature because it has proposed a reevaluation that has not yet been conducted. Respondent also asserted the student may not be able to earn a high school diploma due to his low cognitive ability.

A resolution meeting was held on November 19, 2013. The parties did not resolve the issues and did not mutually agree to proceed directly to hearing. The 45-day period began on December 13, 2013, and ends (and the Hearing Officer's Determination ("HOD") is due) on January 26, 2014.

A pre-hearing conference was held on November 26, 2013, and a pre-hearing conference order was issued on that date outlining, inter alia, the issues to be adjudicated. The case was reassigned to the current Hearing Officer at the outset of the hearing and with the agreement of the parties revised the issues to be adjudicated as stated below.

ISSUES: [2]

The issues adjudicated are:

1) Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing to provide the student appropriate IEP (May 10, 2013) reasonably calculated to provide the student educational benefit because it does not prescribe at least 25 hours of specialized instruction per week outside general education.

2) Whether DCPS denied the student a FAPE by failing to timely conduct triennial evaluation of the student (a comprehensive psychological evaluation) by October 31, 2013.

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 15 and Respondent's Exhibits 1 through 4) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: [3]

1. The student d resides in the District of Columbia with his parents. The student's primary language is English although Spanish is the primary language spoken in the student's home. The student is a child with a disability pursuant to IDEA with a classification of ID. (Parent's testimony, Petitioner's Exhibit 3-1)

[2] The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

[3] The evidence that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

2. In 2008 the student began attending School A. During SY 2012-2013 the student was enrolled in School A's special education inclusion program and the student's attendance there was funded by DCPS. (Petitioner's Exhibits 7-1, 12-1, 12-13, 12-14, 12-15)

3. In October 2010 School A conducted the student's triennial evaluations. The student's 2010 psychological evaluations noted the student's previous psychological testing in March 2007 that assessed his cognitive functioning at a Full Scale IQ of 55. The 2010 evaluation used the Stanford-Binet Intelligence Scale 5th Edition and scored his Full Scale IQ at 50 with what the assessor concluded was a minimal difference in the various scales and comparable to his 2007 assessment. The 2010 adaptive testing placed the student in the Moderately Low range of adaptive behavior also commensurate with the results of his 2007 assessment. (Petitioner's Exhibit 7-1, 7-2, 7-3, 7-4)

4. School A also conducted Woodcock Johnson III in October 2010 that found the student's academic functioning to be more than two standard deviations below the mean The student in sixth grade but was operating and first to second grade level in reading, math and written expression. However, the student's academic scores were consistently above those that might be expected based upon his cognitive testing alone. The behavior assessment indicated the student had some behavior/emotional issues. The evaluator recommended that the student continue with the ID classification. (Petitioner's Exhibit (8-1, 8-2, 8-3)

5. As a part of the student's evaluations School A also conducted an occupational therapy evaluation and a speech language evaluation. The student qualified for direct services in both areas. (Petitioner's Exhibits 9-1, 9-3, 10-1, 10-11)

6. In August 2012 a Woodcock Johnson III was conducted and found the student had basic reading skills at a grade equivalency of 2.7 and broad reading of 2.4 and broad math of 1.4, math calculations skills of 1.8 and math reasoning of 2.1. Thus, the student had made little progress academically since his academic functioning was assessed in October 2010. (Respondent's Exhibit 3-5, 3-8)

7. On May 10, 2013, when the student in eighth grade and aging out of School A, his most recent IEP was developed in preparation for the student attending high school at the start of SY 2013-2014. That IEP prescribed the following weekly services: 10 hours per week of specialized instruction outside general education, 10 of specialized instruction inside general education and the following related services outside general education: 2 hours per month of speech-language pathology, 1 hour per week of behavior support services, 1 hour per week of occupational therapy and 2 hours per month of speech-language pathology in general education. The IEP prescribes that the student is on the high school diploma track. (Petitioner's Exhibit 3-1, 3-10, 3-13)

8. At the start of SY 2013-2014 the student began attending School B. Prior to the start of SY 2013-2014 the parent and the student attended an open house at School B where the School B assistant principal/special education coordinator met with the parent and student informally. Based upon the student's IEP from School A, School B enrolled the

student in the following courses for the first semester: Physical Education, Algebra I, Reading Foundations, Biology I, English as Second Language ("ESL"), English I and World History and Geography. The student qualified for ESL services under DCPS guidelines based upon an assessment conducted when he began attending School B. With the exceptions of Physical Education and ESL, all of the student's classes were outside general education and provided by special education staff. (Witness 4's testimony, Petitioner's Exhibit 6)

9. The student found the classes at School B difficult and he felt that he did not receive sufficient help from the teachers and staff to be successful academically. The student's favorite course is Physical Education. He also enjoys his ESL class and his English class because he feels he is really being taught in these subject areas. (Student's testimony)

10. On September 19, 2013, School B held a review meeting to determine the student's progress and the appropriateness of his placement at School B. The student's teachers stated in the meeting that student was struggling academically. The teachers expressed an opinion that the student should not be on diploma track due to his low cognitive functioning and poor academic performance. (Witness 4's testimony, Petitioner's Exhibit 11, Respondent's Exhibit 3)

11. The parent has visited School B on three occasions since the student began attending. Based upon those observations the parent was left with the impression that School B was inappropriate for the student because he often doesn't understand what the teacher is explaining in class. He often just sits with a blank face and often tells his parents that he gets insufficient help in his classes. His teachers have expressed to the parent that the student doesn't pay sufficient attention in class. His older sister helps him with his homework every day for about 90 minutes per day. (Parent's testimony)

12. DCPS convened an IEP meeting for the student in November 2013. Based upon the review of the student's previous evaluations and the feedback from the student's teachers regarding the student's academic functioning and performance, DCPS proposed to the parent that the student's IEP be amended and that he be placed in School B's "self-contained" program for ID students. However, in that program the student would not be eligible to obtain a high school diploma. The parent attended the meeting along with her educational advocate. The parent was open to a change in the student's educational programming but disagreed with the student not being on diploma track. (Parent's testimony, Witness 4's testimony)

13. At the November 2013 IEP meeting the team discussed the student's evaluations and that his triennials were overdue. The student's parents requested authorization for independent evaluations and DCPS refused. (Witness 1's testimony)

14. DCPS prepared a draft IEP. However, the student's IEP was never officially revised at School B. The student has continued since the November 2013 meeting in the same classes to which he had been assigned when he began attending School B. (Witness 4's testimony, Petitioner's Exhibit 2)

15. On November 19, 2013, the student's parent signed a consent form to allow DCPS to conduct a comprehensive a psychological evaluation and a Vineland. DCPS attempted to conduct the reevaluation in December 2013 but the student was not available due to illness and hospitalization. (Witness 4's testimony, Parent's testimony, Respondent's Exhibit 4)

16. The student has been interviewed by and accepted for attendance at a private full time special education school ("School C"). The parent visited School C just prior to the due process hearing along with the student. (Parent's testimony)

17. The admissions director of School C described the school's program as follows: it is full time therapeutic day school that serves students of various disability classifications including ID. There are a total of 110 students in grades 1 through 12 and there are approximately 15 to 20 ninth graders. There are some ID students who are on diploma track and others on a certificate track. The teachers are certified special education teacher and the student to staff ratio is 5 to 1. (Witness 3's testimony)

18. The School C admission director testified that he is unsure without more current assessments whether the student has the intellectual capability to meet the requirements for a high school diploma and acknowledged that the student is not currently functioning at the level that he could graduate on time. A determination would be made once the student began attending and is assessed as to which track is most appropriate. Such a decision would made in a meeting that would include the school's assigned DCPS representative. (Witness 3's testimony)

19. The parent's educational consultant proposed a compensatory education program to compensate the student for the alleged denials of FAPE that included the student not having a full time out of general education IEP from the start of SY 2013-2014 to present. The consultant recommended the student be provided 250 hours of independent tutoring and 50 hours of behavioral support. (Witness' 2's testimony, Petitioner's Exhibits 13-4)

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. [4] *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 provide the student appropriate IEP (May 10, 2013) reasonably calculated to provide the student educational benefit because it does not prescribe at least 25 hours of specialized instruction per week outside general education.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student's May 10, 2013, IEP is inappropriate. The evidence demonstrates that the there was no November 19, 2013, IEP, only a draft version that contained the same services that were prescribed in the May 10, 2013, IEP.[5]

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.

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[4] 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.

[5] FOF #14

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (*quoting Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch .Dist. of the City of Newark,* 336 F.3d 260, 264 (3d Cir. 2003).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits." *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009).

Requirements of the IDEA are satisfied when a school district provides individualized education and services sufficient to provide disabled children with some educational benefit. *Blackmon v Springfield R-XII Sch. Dist.* 198 F.3d 648, at 653 (8th Cir. 1999)

Petitioner asserts the student's IEP and the November 2013 draft are not appropriate because they both call for the student to have some instruction and some related services inside general education.

The evidence demonstrates that at School A where the student previously attended and where the IEP was drafted the student was in an inclusion program that the student had attended for a number of years. It was reasonable therefore for DCPS to utilize that IEP until a review meeting was held. In September 2013 DCPS convened a review meeting to assess the student's progress. At that meeting the student's teachers expressed concern about the student academic performance and questioned whether he should truly be on diploma tack.

The student was enrolled in all special education classes except two and those two the student testified he likes and does well in.[6] Despite the fact that the IEP called for less specialized instruction outside general education, DCPS provided the student more services outside general education than the IEP prescribed.

There was insufficient evidence presented that the student was harmed by the additional services provided and which Petitioner is arguing that the student should have.[7] There was no evidence presented by Petitioner regarding the student's related services from which the Hearing Officer could determine if the related services prescribed in the IEP are or are not appropriate.

Because there is no evidence of harm to the student from the manner in which the student's IEP was implemented at School B, the Hearing Officer cannot conclude that Petitioner met the burden of proving the IEP is inappropriate. The Hearing Officer concludes that the student's current IEP was reasonably calculated when it was developed at School A in May 2013 to confer the student educational benefit and it was reasonable for DCPS to implement the IEP the way it did and to conduct what the Hearing Officer considers prompt reviews of the IEP and the

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[6] FOF #9

[7] 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)

student's performance in September 2013 and November 2013.

The evidence is clear that both the School B and School C are uncertain whether the student should remain on diploma track. The pending evaluations need to be conducted first prior to any final decision being made as to how the student's IEP should be changed and whether he should remain on diploma track or be on certificate track.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to timely conduct triennial evaluation of the student (a comprehensive psychological evaluation) by October 31, 2013.

Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of the evidence.

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.

Petitioner asserts that DCPS did not conduct a psychological evaluation by October 31, 2013. Although the student's IEP team did not discuss the student's re-evaluations until the November 2013 IEP meeting when the parent granted written consent, under the circumstances there is insufficient evidence that the delay in completing the evaluations resulted in a denial of a FAPE to the student.

Although the student's last comprehensive psychological evaluation was conducted in October 2010 there have been more recent assessments of the students academic functioning. The evidence indicates that the student's cognitive abilities in his last two psychological evaluations 2007 and 2010 have remained unchanged and in 2012 School A conducted a Woodcock Johnson III assessment of the student's academic achievement.[8]

In addition, the evidence demonstrates that student was not available to be evaluated after the consent forms were signed by the parent due to illness and his hospitalization.[9] There is a justifiable basis for DCPS not completing the evaluations. Accordingly, the Hearing Officer concludes that at the time the due process complaint was filed DCPS had failed to timely conduct the student's triennial evaluations, but based upon the facts the delay does not rise to the level of denial of FAPE to the student.

In *Herbin v. Dist. of Columbia*, the court held that requests for evaluations/reevaluations are to be conducted in a timely manner. However, the Court noted "Here, the delay in response was not aggravated by any allegation of an injury or harm that occurred specifically because of the delay. Though the brevity of an academic school year counsels against protracted delays in responding to requests for reevaluation, a delay may be reasonable and therefore not deprive the student of a free appropriate public education. Even a delay in the explicitly prescribed 45-day limit for due process hearing determinations may be overlooked as excusable, *see Blackman,* 277 F.Supp.2d at 79, and a delay in responding to a reevaluation request can be reasonable when no

[8] FOF #s 4, 6
[9] FOF #15

exigencies are present." *Herbin v. Dist. of Columbia*, 362 F. Supp 2d. 254 , 259, 261 (D.C.C. 2005).

The parties have agreed to conduct the evaluations and should do so promptly. Should any further and/or unreasonable delay occur due to DPCS action or inaction then Petitioner may have additional claims to assert but in this instance the claims made in the current complaint are dismissed.

ORDER:

The complaint is hereby dismissed and all 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: January 26, 2014