

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
January 26, 2015

PETITIONER,
on behalf of STUDENT,¹

Date Issued: January 26, 2015

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution,
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or FATHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In his Due Process Complaint, Petitioner alleges that Student has been denied a free appropriate public education (FAPE) by the failure of Respondent District of Columbia Public Schools (DCPS) to offer him an appropriate Individualized Education Program (IEP) at an October 17, 2014 IEP meeting, convened pursuant to a June 1, 2014 hearing officer determination.

¹ Personal identification information is provided in Appendix A.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on November 20, 2014, named DCPS as respondent. The undersigned Hearing Officer was appointed on November 25, 2014. The parties met for a resolution session on December 12, 2014 and did not resolve the due process complaint. On December 15, 2014, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on January 23, 2015 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on a digital audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by COMPLIANCE CASE MANAGER and by DCPS' COUNSEL.

On January 16, 2015, DCPS' Counsel filed a motion to dismiss, in part, the Petitioner's due process claims. I denied the motion by a written decision and order issued on January 22, 2015.

Petitioner testified and called as witnesses CLINICAL PSYCHOLOGIST and NONPUBLIC SCHOOL ADMINISTRATOR. DCPS called as witnesses SPECIAL EDUCATION COORDINATOR (SEC) and Compliance Case Manager. Petitioner's Exhibits P-1 through P-28, with the exception of Exhibits P-8 and P-15, were admitted into evidence, without objection. DCPS' objections to Exhibits P-8 and P-15 were sustained. DCPS' Exhibits R-1 through R-27 were admitted into evidence without objection. Exhibit R-28 was not offered.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues to be resolved, and relief requested, were certified in the December 15, 2014 Prehearing Order:

1. Whether DCPS failed to ensure that an appropriate IEP and suitable placement was developed for Student on or about October 17, 2014, in that the proposed IEP does not contain behavior support services or goals; the IEP does not contain math fluency goals; the IEP does not contain appropriate reading or writing goals; the IEP hours of services and LRE provision are not consistent with student's needs for support in all academic areas; the IEP lacks goals to address the student's difficulty transitioning between activities in the classroom or his listening and attention weaknesses; the IEP does not include the accommodations that the student requires, including audio books, word recognition software for reading and writing, colored overlays, mine recorder, chair bands, and noise cancelling headphones; the IEP contains outdated information, such as reference to a June 2011 HOD; and the size of the classroom at the neighborhood school placement would not provide the student with the small structured environment that he needs to receive educational benefits.
2. Whether DCPS denied the student a FAPE by failing to comply with the June 1, 2014 HOD requirement to provide not less than 22.5 hours of services per week in the student's IEP and because the DCPS IEP does not effect the recommendations in the neuropsychological review such as a small classroom setting with specialized instruction and related services, individualized support and a multi-sensory program with a strong phonetic basis, and 3) frequent breaks; and because DCPS did not propose an appropriate location of services at the October 17, 2014 IEP meeting.

For relief, Petitioner requests that DCPS be ordered to reimburse the parents for Student's enrollment expenses at Nonpublic School for the 2014-2015 school year and to fund his ongoing enrollment there, and that DCPS be ordered to ensure that Student's IEP is revised to conform with the requirements of the June 1, 2014 hearing officer determination and the recommendations of the Nonpublic School educators.

PRIOR HEARING OFFICER DETERMINATIONS

Since September 2011, Student has been parentally placed at Nonpublic School. The Petitioner has filed several previous due process complaints on behalf of Student seeking DCPS funding for Student's private school enrollment. In the last case, filed March 18, 2014, the parents alleged that DCPS failed to offer Student an appropriate IEP or educational placement at IEP meetings held in November 2012 and January 2013. On June 1, 2014, following a due process hearing on May 14, 2014, former Hearing Officer Kimm Massey issued a Hearing Officer Determination (the June 1, 2014 HOD). In that decision, the hearing officer determined that the November 9, 2012 IEP, which provided Student three hours per day of special education services outside general education, was reasonably calculated to provide Student educational benefit. However the hearing officer held that DCPS had failed to offer Student assignment to the school that developed November 9, 2012 IEP, or another suitable location, to implement the IEP. In the June 1, 2014 HOD, the hearing officer ordered as follows:

1. Within 15 calendar days of the issuance of this Order, DCPS shall reconvene Student's IEP meeting to either (1) assign Student to attend the DCPS school where the IEP team that developed the November 9, 2012 teaches, or (2) revise the IEP to include the supports recommended by DCPS's [May 18, 2012] review of the independent neuropsychological evaluation and determine an appropriate location of services to implement that IEP.
2. DCPS shall reimburse Parent for 1/2 the cost of his actual expenses for Student's tuition and OT services at [Nonpublic School] from November 9, 2012 through the date on which DCPS complies with the mandates of Paragraph 1 of this Order.

Exhibit P-16.

FINDINGS OF FACT

The parties, by counsel, agreed that I may adopt the factual findings made in the June 1, 2014 HOD, Exhibit P-16, as I deem them relevant to this present case. I adopt the following factual findings from the prior HOD:

A. Student was diagnosed with a seizure disorder at age 2-3. He suffers from epilepsy and takes two different medications that contribute to his disability.

B. On or about September 30, 2011, Student's parents withdrew Student from the DCPS elementary school he was attending and enrolled him in the Nonpublic School.

C. On December 18, 2011, a hearing officer issued an HOD, which stated, in part, as follows:

After only six weeks of schooling at a public elementary school in the District of Columbia at the beginning of the 2010-2011 school year, Petitioners withdrew Student from school and unilaterally placed him at the separate special education private school that Petitioners had sought funding for as far back as March 2011. The evidence in the record not only supported but mandated Student's placement in an inclusion program with accommodations where Student would have access to his non-disabled peers; not the separate full-time special education school [Nonpublic School] that Petitioners again seek DCPS funding for. Student's [then] current IEP cannot be implemented at [Nonpublic School] and the record does not support a finding that Student requires a full-time separate special education school in order to receive educational benefit. Student received educational benefit from the educational services he received for the six weeks that he attended the public school.

D. The December 18, 2011 [HOD] also ordered DCPS to provide Petitioner with a letter of funding for an independent neuropsychological evaluation.

E. In January 2012, Student received his independent neuropsychological evaluation. Cognitively, Student's verbal comprehension skills were in the Average range, his working memory skills were in the Extremely Low range, and his perceptual reasoning skills and processing speed were in the Borderline range. Neuro-psychologically, Student scored in the Average range for phonological awareness, in the

Below Average range for phonological memory, and his standard score could not be tabulated for rapid naming skills due to excessive errors; Student displayed very unevenly developed abilities in encoding and retrieving orally presented verbal information; Student's visual-motor integration scores ranged from the Very Low range to the Below Average range; and although ADD scales indicated that Student has significant memory problems, they did not indicate significant inattentive or hyperactive and impulsive symptoms. Academically, Student's reading, math and written language skills were within the kindergarten to below first grade level. Social-emotionally, Student did not have behavioral issues but there were ongoing concerns about his slow learning/ learning problems. The evaluator recommended, *inter alia*, a full-time special education program, a small-sized classroom consisting of 8-10 students with one teacher and one aide, individual tutoring with a learning disability specialist to address Student's reading disorder and support in the area of written expression, as well as continued placement in [Nonpublic School].

F. On March 16, 2012, Petitioner appealed the December 18, 2011 HOD to the U.S. District Court for the District of Columbia. [By Order entered September 19, 2014, U.S. District Judge James Boasberg granted summary judgment in favor of DCPS "because [the Parents] have not demonstrated a material failure by DCPS to implement [Student's] IEP." *See* Exhibit R-21.]

G. On May 18, 2012, DCPS prepared a Review of Student's [February 6, 2012] independent neuropsychological evaluation. The DCPS certified school psychologist restated the major findings of the evaluation, but stated that the multidisciplinary team (MDT) should make the final determination regarding Student's eligibility. Although the school psychologist recommended strong academic support for Student with a low

student and teacher ratio, explicit instruction with modeling and practicing, repeated instructions and the breaking down of tasks into smaller components, and frequent breaks, the school psychologist did not recommend a full-time special education program for Student or continued placement at Nonpublic School.

H. On October 10, 2012, a second hearing officer issued an HOD, which addressed, in part, whether DCPS denied Student a FAPE by "failing to review and revise the Student's June 14, 2011 individualized education program ("IEP") as appropriate based on the findings of an independent neuropsychological evaluation. In [the October 10, 2012] HOD, the hearing officer ordered DCPS to convene an MDT IEP meeting for Student by no later than November 9, 2012 to review the February 6, 2012 neuropsychological evaluation and May 18, 2012 Review of same; review Student's educational needs based on the updated information; review and revise, as appropriate, Student's IEP; and determine an appropriate school or program for Student.

I. DCPS scheduled an IEP meeting for Student for November 9, 2012. However, on the morning of November 9th, Petitioner's counsel advised DCPS by email that Student's mother had an unexpected emergency and would not be able to attend, so the meeting would have to be rescheduled and parent would agree to an extension of the timeline. DCPS moved forward with the meeting anyway to comply with the October 2012 HOD.

J. At the November 9, 2012 meeting, the IEP team increased Student's special education services to 3 hours per day outside general education, consisting of 90 minutes per day of specialized instruction in reading, 30 minutes per day of specialized instruction in written expression, and 60 minutes per day of specialized instruction in mathematics. The team further determined that Student would receive ESY services for

SY 2012/13, but all of his related services would remain the same, which means Student was to receive 30 minutes per week of physical therapy outside general education, 60 minutes per week of speech-language therapy outside general education, and 60 minutes per week of occupational therapy outside general education. The team also determined that the IEP could be implemented at Student's neighborhood DCPS school. The team based the IEP on Student's February 2012 neuropsychological evaluation, DCPS's May 2012 review of same, and Student's June 4, 2011 IEP. Although DCPS requested permission to conduct an observation of Student at Nonpublic School prior to the meeting, that request was denied. DCPS also requested updated information, such as progress reports, related service trackers and the like, from Petitioner's counsel, but Petitioner's counsel did not respond to the request.

K. DCPS reconvened Student's IEP meeting on January 8, 2013 to allow Parents an opportunity to participate. Parents and their counsel stated that they were not in agreement with the November 9, 2012 IEP or the location of services determination. Parents requested that DCPS fund Student at the requested private school, but DCPS declined and stated that the revised IEP could be implemented at the neighborhood school. DCPS asked parent to enroll Student at the neighborhood school.

L. By email dated October 25, 2013, Petitioner's counsel advised DCPS that parents had elected to keep Student at Nonpublic School SY 2013/14 "as a result of DCPS's failure to develop an appropriate IEP and/or make an appropriate placement available to the student." Counsel stated that parent continued to request that DCPS develop an appropriate IEP and make an appropriate placement available, and would be willing to participate in a meeting should DCPS wish to convene one.

M. At Nonpublic School, Student is receiving full-time special education services,

as well as related services.

Additional Findings of Fact

After considering all of the evidence, as well as the argument of counsel, this Hearing Officer's additional Findings of Fact, based upon the evidence introduced at the January 23 2015 due process hearing, are as follows:

1. Student is an AGE resident of the District of Columbia, where he resides with Father. Testimony of Father.

2. Student is eligible for special education and related services as a child with Multiple Disabilities (MD), based upon the concomitant underlying disabilities, Specific Learning Disability (SLD) and Other Health Impairment (OHI). Exhibit P-4.

3. Student is currently enrolled in the GRADE at Nonpublic School.
Testimony of Father.

4. On June 17, 2014, following the issuance of the June 1, 2014 HOD, DCPS convened an IEP meeting for Student at NEIGHBORHOOD ELEMENTARY SCHOOL. Father and Petitioner's Counsel attended the meeting and Nonpublic School Administrator participated by telephone. At the IEP meeting, the DCPS representatives presented a draft IEP for Student prepared by SEC. The draft IEP was based upon the DCPS review of the 2012 neuropsychological evaluation of Student and Student's most recent DCPS IEP. Testimony of SEC, Exhibit R-3.

5. During the June 17, 2014 IEP meeting, Administrator provided the DCPS representatives, by email, an Individualized Learning Program developed for Student by Nonpublic School on May 8, 2014 (the May 8, 2014 ILP). Testimony of Compliance Case Manager. An ILP is a document provided for students enrolled at Nonpublic School who do not receive public funding. The ILP uses different language from an IEP, but has

pretty much the same components. Testimony of Administrator. The ILP addressed content areas for Student in Reading, Writing, Mathematics, Classroom Adaptations, OT, and SL. In notes to the ILP, the document addressed Student's Social Emotional issues and goals. As Related Services, the ILP provided Student 60 minutes per week of Individual Psychology, 45 minutes per week of Occupational Therapy (OT) and 30 minutes for week of Speech services. Exhibit P-12.

6. The June 17, 2014 IEP team decided that it needed updated physical therapy (PT) and Speech-Language (SL) assessments of Student. The team members, including Father, agreed that in order for the team to review Student's ILP from Nonpublic School and for Student's PT and SL reassessments to be conducted, completion of Student's IEP would be tabled and the team would reconvene after the updated assessments were received. Testimony of SEC.

7. DCPS did not conduct the PT or SL reassessments of Student during the 2014 summer break and did not reconvene Student's IEP team to complete the revision of Student's IEP before the start of the 2014-2015 school year. Beginning September 3, 2014, DCPS "reached out" to the parents to schedule an IEP meeting for Student. The meeting was originally scheduled for later in September, but was postponed until October 17, 2014 at the request of Petitioner's Counsel. Father requested that Student's PT and SL reassessments not be conducted until after the IEP meeting. The reassessments had still not been completed as of the due process hearing date.

Testimony of Compliance Case Manager.

8. Student's IEP team convened at Neighborhood Elementary School on October 17, 2014. Father and Petitioner's Counsel attended the meeting. Nonpublic School Administrator participated by telephone. Exhibit P-1, Testimony of

Administrator. At the meeting, DCPS provided a draft IEP for Student drafted by SEC. The draft IEP was based upon the Nonpublic School May 8, 2014 ILP. At the October 17, 2014 meeting, SEC revised the draft IEP during the meeting and added whatever additional goals for mathematics, reading and written expression were requested by Administrator. The IEP proposed by DCPS did not include social-emotional goals because the DCPS drafters did not see social-emotional goals on the May 8, 2014 ILP. The DCPS speech-language pathologist requested Nonpublic School to provide “hard data” for social-emotional goals. Testimony of SEC.

9. SEC asked Administrator how much special education instruction Student was receiving at Nonpublic School. She understood that he was receiving special education instruction for five hours per week in reading, five hours per week in mathematics and about 30 minutes per day in written expression. Based upon that information, the DCPS October 17, 2014 IEP would provide Student 12 hours per week of Specialized Instruction, all outside the general education setting, allocated to Reading (five hours), Written Expression (two hours) and Mathematics (five hours). The IEP also provided that Student would receive 30 minutes per week of PT, 30 minutes per week of SL and 60 minutes per week of OT. The IEP did not provide for Behavioral Support Services. Exhibit P-4, Testimony of SEC.

10. By letter of October 24, 2014, DCPS notified Father that for the remainder of the 2014-2015 school year, Student’s new location of special education services would be Neighborhood Elementary School. Exhibit R-16.

11. By email of October 24, 2014, Petitioner’s Counsel provided notice to DCPS that Petitioner did not consider the October 17, 2014 IEP to be appropriate for Student for many reasons, including, *inter alia*, insufficient hours of Specialized Instruction and

Related Services, lack of requirement for a small classroom setting for all academic classes, and the failure to provide an appropriate location of services. Petitioner's Counsel wrote that Father reserved the right to file a due process complaint and to seek DCPS reimbursement for Student's expenses to attend Nonpublic School. Exhibit P-1.

12. At the October 17, 2014 IEP meeting, the participants agreed that Student continued to be eligible for special education and related services as an MD student. This determination was made "based on the fact [that] there is no current information negating the student's eligibility for all his IEP services, however new evaluations do need to be completed." The participants agreed to complete SL and PT evaluations of Student. The DCPS social worker requested that Nonpublic School provide updated information on Student's need for behavioral services. Exhibit R-13.

13. Nonpublic School is a private, full-time, special education day school in the District of Columbia for children with disabilities in pre-kindergarten through 12th grade. The school serves students with SL, SLD, OHI, MD and other disabilities. Nonpublic School holds a current certificate of approval issued by the D.C. Office of the State Superintendent of Education. The tuition is approximately \$41,000 per year.

Testimony of Administrator.

14. At Nonpublic School, Student is placed in a classroom of seven students taught by a teacher certified in Special education and a part-time assistant. In addition to special education services, Student receives SL, OT and behavioral support related services. Student is making progress in all content areas. Testimony of Administrator.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are

as follows:

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.14. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

– Did DCPS fail to ensure that an appropriate IEP and suitable placement was developed for Student on or about October 17, 2014, in that the proposed IEP does not contain behavior support services or goals; the IEP does not contain math fluency goals; the IEP does not contain appropriate reading or writing goals; the IEP hours of services and LRE provision are not consistent with student's needs for support in all academic areas; the IEP lacks goals to address the student's difficulty transitioning between activities in the classroom or his listening and attention weaknesses; the IEP does not include the accommodations that the student requires, including audio books, word recognition software for reading and writing, colored overlays, mine recorder, chair bands, and noise cancelling headphones; the IEP contains outdated information, such as reference to a June 2011 HOD; and the size of the classroom at the neighborhood school placement would not provide the student with the small structured environment that he needs to receive educational benefits?

– Did DCPS deny Student a FAPE by failing to comply with the June 1, 2014 HOD requirement to provide not less than 22.5 hours of services per week in the student's IEP and because the DCPS IEP does not effect the recommendations in the neuropsychological review such as a small classroom setting with specialized instruction and related services, individualized support and a multi-sensory program with a strong phonetic basis, and 3) frequent breaks; and because DCPS did not propose an appropriate location of services at the October 17, 2014 IEP meeting?

This case is the latest in several litigation efforts by Petitioner to secure DCPS funding for Student to attend Nonpublic School, where he was placed by his parents in September 2011. In the last hearing officer decision, issued June 1, 2014, the hearing officer ordered DCPS to pay one-half the costs of Student's enrollment at Nonpublic School until DCPS either assigned Student to ELEMENTARY SCHOOL 1 or revised his

IEP in accordance with DCPS' May 2012 review of Student's 2012 neuropsychological evaluation. DCPS elected to pursue revising Student's IEP and convened an IEP meeting for that purpose on June 17, 2014. However, it became evident at the meeting that the IEP team needed more data to determine Student's needs. The revised IEP was not finalized until October 17, 2014.

In his due process complaint in the present case, Petitioner alleged numerous deficiencies with the October 17, 2014 IEP as well as a failure by DCPS to comply with Petitioner's understanding of the requirements of the June 1, 2014, HOD. DCPS responded that the October 17, 2014 IEP was developed based on the information that was provided by Nonpublic School and that the IEP is appropriate because it was based on information that DCPS had at the time it was developed.

An IEP is the vehicle used by an IEP team to assess a student's needs and assign a commensurate learning environment. *See, e.g., Gill v. District of Columbia*, 751 F.Supp.2d 104, 108 (D.D.C.2010). To determine whether a FAPE has been provided, a hearing officer must determine "[f]irst, has the State complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." *A.M. v. District of Columbia*, 2013 WL 1248999, 11 (D.D.C.2013), quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). At a minimum, the IEP and the corresponding FAPE must "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203.

Procedurally, the IDEA requires that in developing an IEP, the IEP team must review the “existing evaluation data,” which can include “evaluations and information provided by the parents of the child, current classroom-based, local, or State assessments, and classroom-based observations, and observations by teachers and related service providers.” 20 U.S.C. § 1414(c)(1) (A). The IEP team must then identify any additional data necessary to assess the child’s educational levels and determine whether modifications to the IEP are needed to enable the child to meet the IEP’s annual goals. *Id. See, e.g., L.G. v. Wissahickon School Dist.* 2011 WL 13572, 8 (E.D.Pa.2011).

In this case, as DCPS acknowledged in its response to the due process complaint, for want of current data on Student, the October 17, 2014 IEP team had to rely almost exclusively on the information contained in the May 8, 2014 Nonpublic School ILP. DCPS personnel never observed Student at Nonpublic School and its most recent classroom observation of Student was in September 2012 when he attended Elementary School 1. The only formal assessment considered by the IEP team was the 2012 neuropsychological assessment report, which was based upon testing conducted in January 2012 when Student was six years old – almost three years before the October 2014 IEP meeting. At the June 17, 2014 IEP team meeting, convened pursuant to the June 1, 2014 HOD, the DCPS IEP team decided that Student required PT and SL reassessments before his IEP could be revised, but these reassessments were not conducted before the October 17, 2014 IEP team meeting. Further, although the Nonpublic School ILP for Student provided 50 minutes per week of individual psychology related services, no Behavioral Support Services were included in the October 17, 2014 IEP, because DCPS was waiting for Nonpublic School to provide “hard data” on Student’s social-behavioral needs. Hence, the only current data on Student available to

the October 17, 2014 IEP team was the May 2014 Nonpublic School ILP and oral input from Administrator. However, that input was undoubtedly influenced by a predilection for full-time special education services, which previous hearing officer decisions had determined was not a requirement for Student.

An IEP must be “individually designed” to suit a particular child, *Rowley, supra*, 458 U.S. at 201, 102 S.Ct. 3034. I conclude that by proceeding with finalizing Student’s IEP at the October 17, 2014 IEP meeting, with inadequate current data on Student and without conducting the reassessments determined necessary by the July 17, 2014 IEP team, DCPS violated the IDEA’s procedural requirement to ensure that the IEP team had the data needed to develop a program calculated to meet each of Student’s educational needs based upon his disabilities. *See* 34 CFR § 300.320(a)(2)(i)(B); *Monterey Peninsula Unified School Dist. v. Giammanco* 1995 WL 476610, 7 (N.D.Cal.1995) (without a proper assessment, the district could not and did not provide the child with specialized instruction and related services that were individually designed to provide him with the educational benefit required by the IDEA.)

“‘[P]rocedural flaws do not automatically render an IEP legally defective.’ *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir.1990) (*en banc*). Rather, ‘an IDEA claim is viable only if . . . procedural violations affected the student’s substantive rights.’ *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006). ‘Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of education benefits.’ *Roland M.*, 910 F.2d at 994.” *N.S. ex rel. Stein v. District of Columbia* 709 F.Supp.2d 57, 67 (D.D.C.2010). In the present case, because of

the extent of the data not available to October 17, 2014 IEP team, including necessary reassessments not performed, absence of classroom observations, lack of behavioral “hard data”, and outdated formal psychological/educational assessments, I conclude that DCPS’ procedural inadequacies in developing the October 17, 2014 IEP undoubtedly compromised Student’s right to an appropriate education. I find, therefore, that the October 17, 2014 IEP must be set aside. Having determined that DCPS’ procedural violation affected Student’s substantive rights, I do not reach the second prong of the *Rowley* test – whether the October 17, 2014 IEP was reasonably calculated to enable Student to receive educational benefits. I make no finding as to the substantive appropriateness of the October 17, 2014 IEP or of DCPS’ proposed placement of Student at Neighborhood Elementary School.

Because of my disposition of the procedural violation in this case, it is not necessary to address Petitioner’s second allegation, that the October 17, 2014 IEP did not comply with a supposed June 1, 2014 HOD requirement to provide not less than 22.5 hours of services per week in Student’s IEP² or to effect the recommendations in the May 2012 DCPS neuropsychological review. *See* Exhibit P-16.

Remedy

In his due process complaint, Petitioner requested, *inter alia*, that DCPS be ordered to develop a revised IEP for Student. DCPS must honor that request and offer an appropriate IEP. *Cf. District of Columbia v. Wolfire*, 10 F.Supp.3d 89, 94 (D.D.C.2014) (when parents requested that plaintiff reevaluate student and develop on IEP for him, DCPS was required to honor that request and make available a FAPE regardless of his

² I note that the June 1, 2014 HOD did not mandate that Student’s IEP provide 22.5 hours, or any other specified amount, of special education services.

current parental enrollment in a private school.) To address the lack of current data on Student's educational and related services needs, I will order DCPS to conduct a reevaluation of Student in accordance with the evaluation requirements of the IDEA regulations, 34 CFR § 300.305, and upon completion, to convene Student's IEP team to review and revise his IEP.

In previous hearing officer decisions, it was determined that Student does not require a full-time special education placement. Notwithstanding, the evidence is uncontested that Student is benefitting from his current placement at Nonpublic School and to change his school at this stage of the current school year would be inappropriate. *Cf. Holmes v. District of Columbia*, 1988 WL 21696, 1 (D.D.C.1988) (In light of student's complete adjustment to the environment of current school, to send him to different school to complete the last semester of his schooling would not only be inappropriate, but would also be insensitive and indefensible.) The June 1, 2014 HOD required DCPS to fund one-half the cost of the actual expenses for Student's tuition and OT services at Nonpublic School from November 9, 2012 through the date that DCPS appropriately revised Student's IEP – which has yet to occur. My decision in this case supercedes the June 1, 2014 HOD. I will, therefore, order DCPS to fund one-half the cost of Student's expenses at Nonpublic School through the date of this decision and to pay the full cost of Student's private school enrollment for the remainder of the 2014-2015 regular school year.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. Subject to obtaining consent as may be required from the parents, DCPS

shall ensure that a reevaluation of Student is promptly conducted in accordance with 34 CFR § 300.305(2)(a). As part of the reevaluation, DCPS shall ensure, at minimum, that there are classroom-based observations of Student made by qualified DCPS personnel, that formal SL, PT and social-behavioral reassessments are administered, as well as such other assessments and other evaluation measures as may be needed by Student's IEP team to determine his need for special education and related services and his educational placement requirements. Upon receipt of this data, DCPS shall promptly reconvene Student's IEP team to review and revise, as appropriate, his IEP in accordance with 34 CFR § 300.324(b). DCPS shall ensure that Student's reevaluation and the revision to his IEP are completed no later than 90 calendar days from the date of entry of this order;

2. Upon receipt of satisfactory evidence of payment by the parents, DCPS shall reimburse Petitioner for one-half the costs of the actual expenses for Student's tuition and OT services at Nonpublic School from November 9, 2012 through the date of entry of this order – to the extent that payment has not already been made by DCPS. This requirement supercedes the tuition payment requirement of the June 1, 2014 HOD and, in no event shall the parents be entitled to duplicate reimbursement;

3. DCPS shall fund in full the costs of Student's tuition and related expenses at Nonpublic School for the remainder of the 2014-2015 regular school year, by payment directly to the school, or to the extent already paid by the parents, by reimbursement to Petitioner; and

All other relief requested by the Petitioner herein is denied.

Date: January 26, 2015

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).