

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Office of Dispute Resolution
810 First Street, NE – Second Floor
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

Confidential

<p>Parent 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 # 2015-0348</p> <p>Date Issued: January 13, 2016</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Hearing Dates: December 15, 2015 January 4, 2016</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Roberta Gambale, Esq. James E. Brown & Associates 1220 L Street, N.W. Suite 700 Washington, D.C. 20005</p> <p>Counsel for Respondent: Justin Douds, 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>
--	---

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 December 15, 2015, and concluded on January 4, 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.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age ____² and currently attends a DCPS high school (“School A”) where she is repeating the █ grade for the third time. The student was identified as a student with an intellectual deficiency (“ID”). That classification was confirmed during the student’s January 2011 reevaluation when she was in █ grade. In that reevaluation the student’s cognitive functioning was significantly below average. Her academic functioning was at the second to third grade level.

The student attended a District of Columbia public charter school (“School B”) during school year (“SY”) 2013-2014 and SY 2014-2015. DCPS is the local education agency (“LEA”) for School B. The last individualized educational program (“IEP”) for the student was developed on November 8, 2013, at School B and prescribed the same services as the student’s prior IEP dated November 8, 2012, developed while she attended a DCPS middle school (“School C”) during SY 2012-2013.

The student enrolled at School B at the start of SY 2013-2014. However, the student was chronically absent from school from the start of the school year. The student’s parent (“Petitioner”) alleges that the student has had seizures and has been diagnosed with epilepsy and her absences from school were due to health issues and that the school was made aware.

On February 5, 2014, School B issued a prior written notice (“PWN”) that stated the student was exited from special education services as a result of her chronic absenteeism. The student continued to attend School B for the remainder of SY 2013-2014 and SY 2014-2015 and enrolled at School A for SY 2015-2016 in October 2015.

On October 23, 2015, Petitioner filed this due process complaint and alleged DCPS failed to provide the student with a free appropriate public education (“FAPE”) by (1) failing to provide the student with an appropriate IEP on November 8, 2013; (2) inappropriately exiting the student from services and/or rendering a determination that the student was ineligible for services in February 2014; and (3) failing to timely or comprehensively evaluate the student in order to address attendance issues and/or failing to reconvene the student’s IEP team to discuss intervention and/or amend the student’s programming to address attendance.

² See Appendix B for student’s age.

Petitioner seeks as relief that the Hearing Officer conclude DCPS denied the student a FAPE, order DCPS to revise the student's IEP to provide specialized instruction outside of the general education setting for all academic subjects as well as counseling and speech and language services, identify an appropriate placement and implement the student's IEP. Petitioner desires that DCPS fund a comprehensive neuropsychological, vocational, speech and language and functional behavioral assessments and convene a meeting to review the results of the evaluations and revise the student's IEP. Finally, the Petitioner requests an award of compensatory education.³

On November 2, 2015, DCPS filed a timely response to the Petitioner's complaint in which it denied that it failed to provide the student with a FAPE. DCPS contended that prior to attending School B the student attended School C where she made consistent progress on all of her IEP goals, while receiving 10 hours per week of specialized instruction outside general education, 30 minutes per week of speech language therapy and 60 minutes per week of behavioral support services.

DCPS asserted that during SY 2013-2014 the student's attendance at School B left a lot to be desired and she lacked a sufficient amount of classroom time to make any recommendation to change her placement. DCPS asserted that the student's attendance record and truancy made it impossible to obtain baseline data and present levels of performance. Although Petitioner claimed the student's attendance issues were due to health issues DCPS contended the complaint was the first time it was notified of the issue.

DCPS contended that School B was able to evaluate the student between the November 18, 2013, meeting and the February 5, 2014, eligibility determination. DCPS also asserted that the PWN issued on February 5, 2014, indicates that the IEP team based its determination on classroom data, attendance data, and an educational assessment, that School B performed on November 25, 2013. Finally, DCPS asserted that it attempted a variety of interventions to address the student's truancy issues and had no knowledge of the student's health issues and had no reason to perform a neuropsychological evaluation.

The parties participated in a resolution meeting on November 6, 2015. The parties did not resolve the issues and did not mutually agree to proceed to a hearing. The 45-day period began on November 23, 2015, and originally ended [and the Hearing Officer's Determination ("HOD") was due] on January 6, 2015.

The Hearing Officer convened a pre-hearing conference ("PHC") on the complaint November 9, 2015, and issued a pre-hearing order ("PHO") on November 12, 2015, outlining, inter alia, the issues to be adjudicated. The hearing was convened on December 15, 2015, and concluded on January 4, 2016. At the conclusion the hearing the parties agreed to an extension of the HOD due date for eight calendar days to submit written closing arguments. The record was closed with the filing of closing arguments by the parties on January 11, 2015.

³ At the hearing Petitioner sought the student's placement in a non-public special education day school as well as tutoring and counseling as compensatory education. Respondent objected to the consideration of the non-public placement because that remedy was not mentioned prior to the 5-day disclosures that contained information about the placement Petitioner desires.

ISSUES:

The issue(s) to be adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP on November 8, 2013, because the IEP lacked (a) specialized instruction in all academic areas, and/or (b) a transition plan and/or (c) base line data in the present levels of performance.
2. Whether DCPS denied the student a FAPE by inappropriately exiting the student from services and/or rendering a determination that the student was ineligible for services in February 2014.
3. Whether DCPS denied the student a FAPE by failing to timely or comprehensively evaluate the student in order to address attendance issues and/or failing to reconvene the student's IEP team to discuss intervention and/or amend the student's programming to address attendance.

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 31 and Respondent's Exhibits 1 through 19) that were admitted into the record and are listed in Appendix A).⁴ Witnesses are listed in Appendix B.

FINDINGS OF FACT: 5

1. The student attends School A, a DCPS high school where she is repeating the ■ grade for the third time. (Parent's testimony, Respondent's Exhibit 16-1)
2. The student was identified as a student with an ID disability classification that was confirmed during the student's January 2011 reevaluation when she was in ■ grade. In that reevaluation the student's cognitive functioning was significantly below average. Her academic functioning was at the second to third grade level.⁵ (Petitioner's Exhibit 6-1, 6-6, 6-7)
3. The student was retained in two lower grades and has had an IEP since third or fourth grade. The student was eventually skipped from ■ grade to ■ grade because of her age. (Parent's testimony)

⁴ 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.

⁵ The evaluation report noted that at the time evaluation was conducted the student was receiving 18 hours per week of specialized instruction. (Petitioner's Exhibit 6-2)

4. The student attended School B, a District of Columbia public charter school for SY 2013-2014 and SY 2014-2015. DCPS is the LEA for School B. (Parent's testimony, Petitioner's Exhibit 2-1)
5. The last IEP for the student was developed on November 8, 2013, at School B and required that the student receive 10 hours per week of specialized instruction outside general education, 120 minutes per month of speech language therapy and 240 minutes per month of behavioral support services. These services were the same as the student's prior IEP dated November 8, 2012, developed while she attended School C, a DCPS middle school during SY 2012-2013. (Petitioner's Exhibit Petitioner's Exhibits 2-1, 2-11, 3-1, 3-10)
6. While attending School C the student was often disciplined for fighting, cursing teachers and not doing work. However, she always had one teacher who would sit with her to help her. Consequently she made some progress while at School C. (Parent's testimony)
7. Both the student's November 2012 and November 2013 IEPs included goals in math, reading, written expression, communication/speech and language, and emotional/social/behavioral development. The goals in all areas were the same in both IEPs. (Petitioner's Exhibit Petitioner's Exhibits 2-1, 2-11, 3-1, 3-10)
8. The November 8, 2012, IEP's present levels of performance noted that the student was operating on second grade level in math but keeping up with [REDACTED] grade math standards and in reading, although her comprehension skills were higher. During SY 2012-2013 while at School C the student made progress on the majority of her IEP goals as indicated in the IEP progress reports for the for that school year. (Respondent's Exhibits 3-2, 3-3, 3-4, 4)
9. The student enrolled at School B at the start of SY 2013-2014. However, the student was chronically absent from school from the start of the school year through at least the first and second advisories as reflected in her attendance records.⁶ In October 2013 School B reported the student's truancy to the District of Columbia Department of Child and Family Services ("CFSA").⁷ The student's IEP progress report noted that the student made no progress at School B because of her truancy. (Respondent's Exhibits 5, 6, 7)
10. The student has been diagnosed with a seizure disorder. The student's absences from school while at School B were based on the student's health issues. (Parent's testimony, Petitioner's Exhibits 7-2)

⁶ The attendance records indicate the student was present only 34 days out of 85 from the start of SY 2013-2014 through February 10, 2014, and for the first time that school year was present five consecutive days from February 4, 2014 to February 10, 2014. She was present in school only one day the previous month, January 2014. (Respondent's Exhibit 7)

⁷ The CFSA report indicates that School B made telephone calls and sent letters to the parent regarding the student's lack of attendance that the reasons the parent gave for the absences included: "financial, sick, overslept." (Respondent's Exhibit 5-4, 5-5)

11. The student had seizure episodes off and on but her parent is not sure how frequently. The seizures impacted the student's school attendance. While at School B if the student arrived to school too late she would be sent home and reported as absent. When the student had a medical concern and did not attend school her parent usually telephoned the school and informed the school of the student's condition. The parent told School B that the student had seizures and the school wanted documentation but the parent was not able to obtain the documentation and provide it to the school. (Parent's testimony)
12. The student's November 8, 2013, IEP developed at School B noted there were no present levels of performance in any of the academic areas due to the student's consistent absences. However, there was baseline data in the academic areas and there were present levels of performance in the remaining two areas of concern: communication/speech and language, and emotional/social/behavioral development, one of which had been updated from the student's previous IEP. (Petitioner's Exhibits 2-2, 2-3, 2-4, 2-5, 2-6, 2-7, 2-8, 2-9)
13. On February 5, 2014, DCPS issued a prior written notice that stated the student was exited from special education services "due to a lack of appropriate instruction in math and reading due to a 42% attendance rate for 2013-2014 school year thus far." The notice indicated that the action was proposed due to the triennial year of re-evaluation for continued eligibility for special education services and was based on school based data including attendance, classroom data and educational testing. (Petitioner's Exhibit 1)
14. The student continued to attend School B for the remainder of SY 2013-2014 and SY 2014-2015 and enrolled at School A for SY 2015-2016. The student failed the majority of her classes during SY 2013-2014 and repeated █████ grade during SY 2014-2015. The student earned failing grades during SY 2014-2015 and is thus repeating █████ grade for a third time at School A. The student has earned a total of 4 credits toward high school completion. (Respondent's Exhibit 16-1, 16-2)
15. The parent had a meeting with the School B about the student's and her sister's attendance. However, the parent does not recall having ever been invited to a meeting to discuss the student exiting special education or about evaluating the student. (Parent's testimony)
16. The student enrolled at School A for SY 2015-2016 in October 2015. The student has been provided an academic schedule with general education classes. From October 15, 2015, through December 3, 2015, the student has accumulated 20 unexcused absences since she began attending School A. School A has now initiated an attendance support plan for the student and obtained consent from the student's parent to conduct evaluations of the student. (Respondent's Exhibits 10, 12, 13, 17-1)
17. On December 2, 2015, DCPS issued a PWN informing the student's parent that it would conduct a comprehensive psychological evaluation including and adaptive measure and speech/language evaluation and a functional behavior assessment ("FBA"). DCPS in the notice stated that a neuropsychological evaluation would not be conducted because it

would not yield required data to illustrate academic performance in a school setting. (Respondent's Exhibit 14-1)

18. Petitioner presented an expert witness who opined that the student is in need of a neuropsychological evaluation in order to determine whether the student's history of seizures is having any impact on her educational functioning and anytime there is question of whether a student academic and behavioral difficulties are due to a brain functioning such an evaluation is appropriate. The witness opined that that the student should be assessed with a neuropsychological because she has never been tested in this way and anytime a student has a seizure there is some degree of brain injury and disruption of the cognitive functioning. (Witness 1's testimony, Petitioner's Exhibit 30)
19. The parent's educational advocated provided expert testimony regarding the student's IEP and administered academic achievement to the student on November 23, 2015. The student scored on the second grade level in reading, third grade in math and near second grade in writing. The advocate expressed her opinion about the student's November 2013 IEP and after a review of her prior IEP concluded the IEP reflected the common core standards at the 7th grade level although the student was in ■ grade. Petitioner's expert witness opined that the student's IEP at School B did not provide sufficient level of support and she was in need of more specialized instruction particularly given that the student in now repeating ■ grade for the third time. (Witness 4's testimony, Petitioner's Exhibit 4-1)
20. With regard to the student's history of absences the advocate opined that due to the student's attendance problems a MDT should have been called together to look at the causes for the student's excessive absences and there should have been interventions or goals in the student's IEP or a behavior intervention plan ("BIP") and her absences should have been reported to the appropriate agencies. When the student was excessively absent School B's report to CFSA was appropriate. If a student is having attendance issues the possible evaluation to explore the reasons may include a comprehensive psychological and a neuropsychological. (Witness 4's testimony)
21. The student has confided to the parent educational advocate that at School A she felt lost and did not know what was going on in her classes. The student has been suspended a few times because she could not read her schedule. This witness opined that placing the student in a full time special education program is appropriate because she is well below grade level across the board. (Witness 4's testimony)
22. Petitioner presented a witness to opine on the compensatory education the student would be due if a denial of FAPE is determined. The witness asserted the student demonstrated academic regression that she claimed was demonstrated by assessments. The student had an 18-hour IEP at School C that was reduced to 10 hours at School B. She is claiming the student should have had more hours rather than less. As result of the student allegedly having an inappropriate IEP at School B and being inappropriately exited from special education the consultant opined that the student missed 2,040 hours of instruction and 80 hours each of speech and language services and behavior support and should be

provided 320 hours of independent tutoring at 2 hours twice weekly for 80 weeks and 80 hours of behavior support of 1 hour per week for 80 weeks, and 80 hours of speech language services 1 hour per week for 80 weeks. The consultant is a provider of the types of services she recommended that the student be provided. (Witness 2's testimony, Petitioner's Exhibit 25)

23. Petitioner sought the student's acceptance and non-public special education program located in a Prince Georges County, Maryland public school ("School D") and School D has offered the student enrollment. School D has capacity for 30 students mostly with the disability classification of emotional disability ("ED"). School D currently has 15 students now and 10 of them are ED disability. School D provides its student's related services and has a student/teacher ratio of 6 to 1. Both of the School's special education teachers for math and English are licensed and certified special education teachers. There is also a crisis intervention staff person with bachelors' degree. School D provides vocational opportunities including barbering, cosmetology, heating and conditioning auto mechanics and construction. Students are able to earn Carnegie units. School D has a cost of \$260 per day or \$48,000 per year. Its hourly rate for related services are \$99/hr. for speech and language and \$121/hr. for occupational therapy. The school building in which School C is located is a mainstream public school and the vocational programs are located and offered by the public school. School D students enter the building through separate entrance or thorough the main public school building entrance. (Witness 3's testimony, Petitioner's Exhibits 26, 31)
24. The student has been suspended since she began attending School A for being out of class and waking the halls. Her attendance issues at School A have been related to various causes including the student's headaches and school uniform issues. (Parent's testimony)
25. When the student first enrolled at School A her courses were in general education because School A had not had a formal meeting with the student's mother to put the student in a restrictive setting and the student did not have a IEP in place that indicated that she was a special education student. After the student's parent brought concerns to the School A special education coordinator ("SEC") about the student's prior services the SEC attempted to reach out to the parent to schedule and meeting. School A initially proposed meeting dates to discuss the student's history and the parent's concerns. Several meeting dates were proposed and the student's parent was unable to come in and meet. Because the parent could not come the team looked at the level of services the student had been receiving in her prior IEP and School A created a schedule that would allow the student to receive comparable services until she was evaluated and an IEP meeting convened. (Witness 5's testimony)
26. At the resolution meeting ("RSM") on November 6, 2015, the parties agreed to the following services for the student: 10 hours per week of special education outside general education. The student's current schedule was developed directly following the RSM meeting. (Witness 5's testimony, Respondent's Exhibits 8-2, 12-1)

27. The DCPS psychologist who was designated as an expert witness opined that it is premature prior to the student being fully evaluated to conclude the student is in need of a full time out of general education IEP. (Witness 6's testimony)

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 Free Appropriate Public Education ("FAPE") by failing to provide the student with an appropriate Individualized Educational Program ("IEP") on November 8, 2013, because the IEP lacked (a) specialized instruction in all academic areas, and/or (b) a transition plan and/or (c) base line data in the present levels of performance.

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

The IEP's first alleged deficiency is that it does not provide the student with enough hours of specialized instruction outside of general education.

“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).

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.

Schaefer v. Weast, 554 F.3d 470 (U.S. App. 2009) “The court is required to 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.” *Blackmon v Springfield R-XII Sch. Dist.* 198 F.3d 648, at 653 (8th Cir. 1999) Requirements of the IDEA are satisfied when a school district provides individualized education and services sufficient to provide disabled children with some educational benefit.

Judicial and hearing officer review of IEPs is “meant to be largely prospective and to focus on a child’s needs looking forward; courts thus ask whether, at the time an IEP was created, it was ‘reasonably calculated to enable the child to receive educational benefits.’” *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207); see also *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008) (IEP viewed “as a snapshot, not a retrospective”).

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.” Furthermore, an IEP should not be “automatically set aside . . . for failing to include a specific disability diagnosis or containing an incorrect diagnosis.” *Fort Osage R-1 School District v. Sims*, 641 F.3d 996, 1004 (8th Cir. 2011). Classification of the precise impairment listed within 20 U.S.C. § 1401(3)(A)(i) is “not critical in evaluating FAPE” and IDEA charges schools to develop an “appropriate education, not with coming up with the proper label.” *Pohorecki v. Anthony Wayne Local School District*, 637 F. Supp. 2d 547, 557 (N.D. Ohio 2009) (quoting *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997)

The “primary vehicle” for implementing the goals of the IDEA is the IEP, which the statute “mandates for each child.” *Harris v. District of Columbia*, 561 F.Supp. 2d 63, 65 (D.D.C. 2008)

(citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). See 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. "The IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.' *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005), quoting *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). The "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.'" *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009).

34 CFR § 300.320 (a) & (b) requires that an IEP includes present levels of performance and that a transition plan to be in place on the IEP in effect when a student turns age 16.⁸

The evidence demonstrates that while the student attended School C she was making progress relative to her IEP goals and supports a conclusion that the IEP was appropriate at that time.⁹ That is the IEP the student brought with her to School B and that was due to be updated in November 2013.

The School B team that convened on November 8, 2013, had limited interaction with the student at the beginning of SY 2013-2014 due to the student's truancy. Soon after that started the student had accumulated such a significant amount of unexcused absences that School B filed a truancy report with CFSA. The student's progress reports while she attended School B reflect her lack of progress due her truancy. The student's attendance records indicate she was excessively late from the start and throughout much of the school year. And the November 8, 2013, IEP states multiple times that student's lack of attendance prevented School B from gathering present levels of academic performance data.¹⁰

To the extent School B had documentation on the student it demonstrated that student was able to make progress in her previous least restrictive environment ("LRE") at School C. Save the parent's hearing testimony about the student's behaviors at School C the student apparently performed well under her prior IEP. The fact that the student had apparently performed adequately pursuant to her most recent IEP supports a conclusion that the November 8, 2013, IEP when it was developed was appropriate.

⁸ 34 CFR §300.320(a) As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with Sec. 300.320 through 300.324, and that must include-- (1) A statement of the child's present levels of academic achievement and functional performance...

34 CFR §300.320(b) Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include-- (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

⁹ FOF # 5, 6, 7, 8

¹⁰ FOF #s 9, 12

The IEP team at the November 8, 2013, meeting made a reasonable determination to make no changes to the amount of specialized instruction hours at that time. This action by the team in light of the evidence available at the time seems reasonable. To have arbitrarily determined the student was in need of a more restrictive setting would have in the Hearing Officer's opinion been premature. The fact that the student had an ID disability classification did not justify the student being automatically provided an IEP with all academic courses outside general education despite the fact that she may have had more specialized instruction in lower grades.

There was a legitimate reason for the IEP to not yet contain present levels of performance in the academic areas due to the student's chronic absences. However, there was baseline data in the academic areas and present levels of performance as well as baseline data in the other areas of concern in the IEP.¹¹ As to a transition plan, the student had not yet turned age sixteen so the IEP did not at the time it was created necessitate a transition plan. A transition plan could have perhaps been included later if or when the student had been available for instruction and assessment. Thus, the Hearing Officer concludes when the student's November 8, 2013, IEP was developed it was reasonably calculated to provide the student educational benefit. Petitioner did not sustain the burden of proof to establish that the student's November 8, 2013, IEP was inappropriate.

ISSUE 2: Whether DCPS denied the student a FAPE by inappropriately exiting the student from services and/or rendering a determination that the student was ineligible for services in February 2014.

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

34 CFR § 300.305(e)¹² required School B to evaluate the student before determining that the student was no longer a child with a disability. DCPS issued a PWN on February 5, 2014, informing the student's parent that the student had been exited from special education and determined ineligible "due to a lack of appropriate instruction in math and reading" due to her poor attendance. The notice indicates that the action was proposed due to the triennial year of re-evaluation for continued eligibility for special education services and was based on school based data including attendance, classroom data and educational testing. However, the student's

¹¹ FOF # 12

¹² 34 CFR §300.305(e) _Evaluations before change in eligibility. (1) Except as provided in paragraph (e)(2) of this section, a public agency must evaluate a child with a disability in accordance with Sec. Sec. 300.304 through 300.311 before determining that the child is no longer a child with a disability. (2) The evaluation described in paragraph (e)(1) of this section is not required before the termination of a child's eligibility under this part due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for FAPE under State law. (3) For a child whose eligibility terminates under circumstances described in paragraph (e)(2) of this section, a public agency must provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals.

attendance record indicated that the student was absent from school every day, save one, for the entire month prior to this notice being issued.¹³

Although there was no testimony offered from anyone who participated in the determination to exit the student from special education, the Hearing Officer is incredulous that School B could in November 2013 determine there was not enough information for present levels of performance, yet less than three months later conclude that the student was no longer eligible.

The February 5, 2014, notice of non-eligibility states that the decision was based on “attendance, classroom data and educational testing.” The Hearing Officer finds it reasonable to conclude on the evidence that is available that if School B had insufficient data to ascertain the student’s present level of performance it likewise had insufficient data to conclude the student’s should be exited from special education. Given her attendance record it seems quite unlikely, without some counter evidence from Respondent, that the school would have had classroom data and assessments to make such a decision when the student did not attend school the entire month prior to this decision being made.

The evidence demonstrates that the student repeated █ grade and was unsuccessful academically after she was exited from special education. This may have been due to continued absences or it may have been from the lack of special education. The record is not clear in that regard. But the Hearing Officer concludes based upon the evidence that the student was inappropriately exited from special education and infers that the student’s continued failure after she was exited was due at least in part from her failure to be provided special education and she was thus denied a FAPE.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to timely or comprehensively evaluate the student in order to address attendance issues and/or failing to reconvene the student’s IEP team to discuss intervention and/or amend the student’s programming to address attendance.

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

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 School B should have conducted an evaluation of the student to address her attendance issues and/or should have reconvene the student’s IEP team to discuss intervention and/or amend the student’s programming to address attendance. Although Petitioner cited cases to support her position that an LEA has a duty to address a student’s lack of attendance, the evidence in this case demonstrates that School B took the requisite action to address the student’s

¹³ FOF # 9 footnote #6

lack of attendance by calling the parent repeatedly and sending letters and eventually filing the appropriate documentation with CFSA.¹⁴

Although the student's parent indicated the student's absences and tardiness at School B was sometimes related to her seizures, she noted other reasons and stated that School B asked for medical documentation regarding the seizure conditions but she never provided it. In addition, it appeared the absenteeism was problem for both the student and her sibling, which indicates that the student's absences were not simply related her disability. There was no evidence that the parent or any School B staff member ever requested that the student be reevaluated to address the student's lack of attendance. Consequently, because there was no request for the student to be evaluated and School B took reasonable action to address the student's attendance the Hearing Officer concludes that Petitioner did not sustain the burden of proof by a preponderance of the evidence 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 Hearing Officer has concluded that the student was denied a FAPE by being inappropriately exited from special education in February 2014. The student was not provided the specialized instruction and related services that were in her November 8, 2013, IEP after that date. Although it is speculative to assume that the student's services would have remained at the same level had she not been exited from special education there is no other measure of missed services from which to reasonably calculate other than that IEP.

Petitioner presented a witness and a proposed compensatory education plan that requested the student be provided 320 hours of independent tutoring and 80 hours each of behavior support speech language services. In addition, Petitioner requested the student be prospectively placed in a full time out of general education school. However, the evidence does not demonstrate that such a placement is yet appropriate and is her LRE, particularly prior the student being comprehensively evaluated.

The compensatory education proposed is based on missed services far exceeding what would have been provided to the student in reality. Petitioner's witness based her calculation on the student having been provided a full time out of general education IEP and placement, which was not the case. Consequently, the Hearing Officer cannot accept and award compensatory

¹⁴ FOF # 9 footnote 7

education services at the level requested. However, the evidence does demonstrate that the student would benefit from the tutoring and related services that were in her most recent IEP as a means of compensating for the loss and bring her to the position she would have presumably been had she not been exited from special education.

Although the evidence was insufficient for the Hearing Officer to determine an exact amount of services that would compensate the student for the missed services, there was sufficient evidence that the student would benefit from the type of services requested. Consequently, the Hearing Officer provides the student in the order below what the Hearing Officer considers a reasonable amount of tutoring and related services based upon the evidence in the record that the student would benefit from these services.¹⁵

ORDER: ¹⁶

1. DCPS shall, within ten (10) school days of the issuance of this order, provide Petitioner written authorization for the student to be provided two hundred (200) hours of independent tutoring and fifty (50) hours of independent counseling/behavioral support services and fifty (50) hours independent speech and language services at the OSSE/DCPS prescribed rates to be used by Petitioner no later than December 31, 2016.
2. DCPS shall within ten (10) school days of the issuance of this order convene a multidisciplinary team meeting and the parent shall attend in person to discuss the student's medical condition(s) and issues that relate to her chronic absenteeism and determine what medical documentation is needed to ascertain if any medical conditions warrant additional evaluations of the student to effectively and appropriately program for her educational needs. If medical documentation is presented at that meeting and there is a question as to whether the student's prior diagnosis of a seizure disorder warrants evaluation or assessments to determine the educational impacts of that condition on the student then DCPS shall conduct such assessments/or evaluation(s) or authorize at DCPS' option that such assessments/or evaluation(s) be conducted independently.
3. All other relief requested by Petitioner is denied.

¹⁵ The Hearing Officer concludes that despite Petitioner's inability to establish appropriate compensatory education, to award nothing would be inequitable. (A party need not have a perfect case to be entitled to compensatory education. *Stanton v. D.C.* 680 F Supp. 201 (D.D.C. 2011). If a student is denied a FAPE a hearing officer may not "simply refuse" to grant a compensatory education award. *Henry v. D.C.* 55 IDELR (D.D.C. 2010))

¹⁶ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 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: January 13, 2016