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Office of Review and Compliance
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OSSE
Student Hearing Office
June 23, 2014

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: May 22, 2014</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to 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 May 22, 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 with his parent in the District of Columbia and is a child with a disability pursuant to IDEA with a classification of emotional disability (“ED”). He has previously been classified with other health impairment (“OHI”) for Attention Deficit Hyperactivity Disorder (“ADHD”).

The student is currently in fifth grade and last attended a DCPS elementary school (“School A”). During school year (“SY”) 2012-2013 the student attended a public charter school located in the District of Columbia (“School B”) where he was repeating fourth grade. DCPS is the local educational agency (“LEA”) for School B.

The student’s parent enrolled him in School A for the start of SY 2013-2014 and consented to reevaluations of the student. In September 2013 DCPS conducted a speech and language evaluation and a comprehensive psychological evaluation and in October 2013 conducted an occupational therapy (“OT”) evaluation.

On October 10, 2013, DCPS convened a meeting to review the evaluations and developed an individualized educational program (“IEP”) for the student that prescribed the following services: 12.5 hours per week of specialized instruction outside general education, 120 minutes per month of behavioral support services and 30 minutes per month of consultative OT services.

On January 11, 2014, DCPS authorized the parent to obtain independent evaluations that were conducted in January 2014 and the parent provided the evaluation reports to DCPS in February 2014. In February 2014 DCPS agreed to conduct a functional behavioral assessment (“FBA”) and to develop a behavior intervention plan (“BIP”) to address the student’s in-school behaviors.

On March 31, 2014, DCPS convened an IEP meeting to review the independent evaluations and the FBA and update the student’s IEP. As a result of discussions during the meeting the student’s IEP was updated to prescribe 26.5 hours per week of specialized instruction outside general education, 240 minutes per month of behavioral support and 30 minutes per month of OT services.

Following the March 31, 2014, IEP meeting the team discussed the student’s school placement. DCPS proposed that the student be moved from School A to a DCPS Behavior and Educational Support Program (“BES”) in another DCPS school. The student’s parent and her representative

at the meeting disagreed with that proposal and asserted that the team had determined the student should be placed in a full time out of general education therapeutic day program.

On April 7, 2014, Petitioner filed the current due process complaint alleging, inter alia, that DCPS did not include the parent in the student's placement determination and that DCPS inappropriately determined the student would be placed in a DCPS BES program rather than a therapeutic day school as his IEP team allegedly concluded was appropriate. The complaint also alleged that DCPS failed to conduct a _____ evaluation recommended by the independent comprehensive psychological evaluation and requested by the student's parent failed to implement the student's IEP and failed to develop an appropriate IEP at the March 31, 2014, meeting.

Petitioner seeks the student's placement at private full time out of general education day school ("School C") for remainder of SY 2013-2014 and for SY 2014-2015 and funding of an independent neuropsychological evaluation and a meeting to review the evaluation and to revise the student's IEP to prescribe appropriate related services and an award to the student of compensatory education.

DCPS filed a response to the complaint on April 9, 2014. DCPS asserted there had been no denial of a free and appropriate public education ("FAPE"). DCPS stated in its response that the neuropsychological evaluation was neither warranted nor requested by Petitioner; the IEP developed on March 31, 2014, provides for an appropriate set of service hours and an appropriate placement. Any claim as to the proposed school location was not ripe when the complaint was filed because DCPS had not yet determined a school location. The parent and her representative(s) were fully involved in the IEP process and placement discussion. As to the alleged failure to implement the IEP DCPS asserted no specific missed services were alleged.

The parties convened a resolution meeting on April 23, 2014. Nothing was resolved. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on May 4, 2014, and ends (and the Hearing Officer's Determination ("HOD") is due) on June 21, 2014.² The parties appeared for hearing on May 22, 2014. At the conclusion of the hearing the parties requested that they be allowed to submit written closing arguments that were submitted on May 23, 2014.

² This matter was initially assigned to a different hearing officer and reassigned to the current hearing officer on May 15, 2014. The former hearing officer did not issue a pre-hearing order. As a result of the proximity of the reassignment of the case to the scheduled hearing date the current hearing officer did not convene a pre-hearing conference or issue a pre-hearing order. Petitioner filed a stay-put motion for the student to remain at School A pending a decision in this case. The former hearing officer did not address stay-put motion and Petitioner noted at the outset of the hearing that motion was moot because it was not acted on prior the hearing. The motion was, however, discussed at the outset of the hearing. This hearing officer concluded that he would not order that the student return to School A as it was undisputed that School A could not implement the student's current IEP.

ISSUES: ³

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to evaluate the student with a neuropsychological to determine if the student suffers from non-verbal learning disability or attention deficit disorder as recommended by the student's comprehensive psychological evaluation provided to DCPS.
2. Whether DCPS denied the student a FAPE by failing to provide an appropriate IEP on March 31, 2014, that is reasonably calculated to provide educational benefit because the IEP does not prescribe: (1) appropriate behavioral support services ⁴, (2) direct OT services, (2) direct speech services.
3. Whether DCPS denied the student a FAPE by failing to implement the student's IEP during SY 2013-2014 because the student was often out of the classroom up to 5 hours per school day and missing instruction because the student was allowed by school staff to wander the school building and hallways.
4. Whether DCPS denied the student a FAPE by failing provide an appropriate placement/location of services because the student needs a self-contained, therapeutic separate special education day school as agreed by the March 31, 2014, IEP.⁵
5. Whether DCPS denied the student a FAPE by failing to comply with procedural requirements (34. C.F.R. § 300.116 (a)(1)) in determining the student's placement to be one of DCPS' BES classrooms.

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 33 and Respondent's Exhibits 1 through 14) that were all admitted into the record and are listed in Appendix A. Witnesses a listed in Appendix B.

³ 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. At the outset of the hearing the parties agreed that one of the two issues that had been certified in the pre-hearing order had been resolved with the issuance of the IEE and withdrawn by Petitioner.

⁵ Petitioner asserts the proposed DCPS BES classroom is not an appropriate placement consistent with the determination of the March 31, 2014, IEP regarding the student's placement.

FINDINGS OF FACT:⁶

1. The student _____ resides with his parent in the District of Columbia and is a child with a disability pursuant to IDEA with an ED classification. The student was previously classified with OHI for ADHD. (Petitioner's Exhibits 18-1, 23-1)
2. The student is currently in _____ School A. During SY 2012-2013 the student attended School B, a public charter school, where he was repeating fourth grade. DCPS is the LEA for School B. (Petitioner's Exhibit 12-4)
3. The student received speech therapy since age three and was retained in second and fourth grade. The student's parent enrolled him in School A for the start of SY 2013-2014. Since attending School A the student has continued to have academic and behavioral concerns and problems reading, spelling and writing. The School A principal and teachers have repeatedly called the student's home to report on the student's behavior and the student has been frequently sent to the principal's office due to his behavior. He often fails to do class work or homework because he does not know how to do the work and as a result misbehaves in school. (Parent's testimony)
4. Soon after the student began attending School A his parent consented to DCPS conducting reevaluations of the student. In September 2013 DCPS conducted a speech and language evaluation and a comprehensive psychological evaluation and in October 2013 conducted an OT evaluation. (Petitioner's Exhibit 21-1, Respondent's Exhibit 3-1 through 3-21)
5. On October 10, 2013, DCPS convened a meeting to review the evaluations and developed an IEP for the student that prescribed the following services: 12.5 hours per week of specialized instruction outside general education, 120 minutes per month of behavioral support services and 30 minutes per month of consultative OT services. (Petitioner's Exhibit 19-1, 19-20, 19-21, 19-24)
6. On January 11, 2014, DCPS authorized the parent to obtain independent evaluations (speech and language, comprehensive psychological and OT) that were conducted in January 2014 and the parent provided the evaluation reports to DCPS in February 2014. In February 2014 DCPS agreed to conduct a FBA and develop a BIP to address the student's in-school behaviors. (Respondent's Exhibit 5, Petitioner's Exhibit 17)
7. The independent speech and language evaluation (report dated February 3, 2014) included the Clinical Evaluation of Language Fundamentals ("CELF5") an informal speech and language sampling and a parent interview. The evaluator concluded the student's language skills were moderately delayed for his age and his receptive language

⁶ 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.

skills were better than his expressive. He struggled with grammar and sentence formulation. The evaluator concluded that student had average conversation skills but his narrative discourse - expressing a narrative or giving explanations - requires scaffolding and he may have deficits in sequencing memory, syntax and ordering. The evaluator concluded that student required language therapy twice weekly ideally in a group setting and recommended strategies to be used with the student in the classroom. (Witness 1's testimony, Petitioner's Exhibit 10-1, 10-7, 10-8)

8. A DCPS speech language therapist conducted several observations of the student including a classroom observation and reviewed the student's independent speech language evaluation. The DCPS speech language therapist concluded that the independent evaluation was not a thorough evaluation of the student's language abilities because it only included a single assessment tool and did not measure the student's pragmatic language skills and did not include a review of previous speech language evaluation(s). Based on the DCPS speech language evaluator's review of all the student's evaluation data and her observations of the student over a variety of academic and social settings she concluded the student's displayed strong language and in her opinion he did not qualify for individual speech language services and made that recommendation at the student's March 31, 2014, IEP meeting. (Witness 5's testimony, Petitioner's Exhibit 10, Respondent's Exhibit 4-16, 4-17, 4-18)
9. The independent psychological evaluation (report dated February 13, 2014) included assessments of the student's cognitive and academic functioning as well as behavior assessments and an attempted classroom observation. The student's cognitive functioning was determined to be borderline with a full scale IQ score of 75, his academic functioning was generally at the second grade level except his reading fluency which was at the fourth grade level. As to the student's social emotional functioning the evaluator determined that the student was experiencing significant levels of internal distress both at school and at home. The evaluator diagnosed the student with Mood Disorder Not Otherwise Specified, Learning Disability Not Otherwise Specified and a Rule Out for ADHD and a Nonverbal Learning Disability ("NVLD"). The evaluator made several recommendations including that a neuropsychological evaluation be conducted to determine if the student's symptoms are due to ADHD or NVLD. Because of the student's emotional, behavior, attention and achievement concerns she recommended a full time therapeutic setting. She talked with both his general education and special education teacher and found he does much better in the special education classroom. (Witness 2's testimony, Petitioner's Exhibit 12-1, 12-2, 12-7, 12-10, 12-12, 12-13)
10. The OT evaluation (report dated February 21, 2014) assessed the student's visual motor integration and included a classroom observation. The evaluator concluded the student demonstrated difficulties with copying written information, copying complex shapes and figures and remaining focused and paying attention to detail. The evaluator recommended the student be provided 30 minutes of OT intervention per week. DCPS conducted a review of the independent evaluation that did not disagree with the level of recommended services. (Petitioner's Exhibit 14-1, 14-7, Respondent's Exhibit 2)

11. On March 31, 2014, DCPS convened an IEP meeting to review the independent evaluations the FBA and update the student's IEP. As a result of discussions during the meeting the student's IEP was updated to prescribed 26.5 hours per of specialized instruction outside general education, 240 minutes per month of behavioral support and 30 minutes per month of OT services. (Respondent's Exhibit 11, Petitioner's Exhibit 23-1, 23-9, 23-10)
12. At the March 31, 2014, IEP meeting the team discussed the student's school placement. DCPS proposed that the student be moved from School A to a DCPS BES in another DCPS school. The student's parent and her representative at the meeting disagreed with that proposal and asserted that the team had determined the student should be placed in a full time out of general education therapeutic day program. (Witness 3's testimony)
13. The parent and her educational advocate participated in the student's March 31, 2014, IEP meeting. Two of the student's teachers were in attendance - his general education and special education teachers. The teachers stated that they were often unable to keep the student in the classroom and his frequent elopements resulted in them contacting the main office. The special education teacher was more specific about lost instruction time and estimated that he was sometimes losing five hours of instruction per day being pursued by staff or sitting with the principal. (Witness 3's testimony)
14. The student is a hall-walker and is verbally aggressive to peers and staff at School A. The student's BIP has been implemented by the School A social worker and his teachers. The student often came to the social worker after leaving class and she was able to counsel him and return him to class. (Witness 6's testimony, Respondent's Exhibit 5)
15. The student's parent and her advocate also disagreed with the March 31, 2014, team's decision as the OT services and requested that level of services recommended in the independent evaluation be provided to the student. (Witness 3's testimony, Petitioner's Exhibit 26)
16. After the psychologist reviewed the independent psychological evaluation the parent's advocate requested that DCPS conduct a neuropsychological evaluation in light of the recommendation in the independent evaluation. The DCPS team members did not believe the student's programming would be different and felt that the neuropsychological evaluation was not necessary. The parent and DCPS personnel agreed to disagree on this issue. (Witness 3's testimony)
17. The DCPS team initially offered the same level of IEP services that the student had in his October 2013 IEP. The parent and her advocate disagreed and requested full time therapeutic out of general education placement. The psychologist concurred that the student is in need of IEP with 26.5 hours of instruction. The DCPS team members huddled and then offered that a DCPS BES classroom could implement the student's new IEP. However, the location of the BES classroom was not specified. The parent was offered a one-page description of the BES program but there was no input from anyone

from the proposed program. The meeting ended with several issues undecided including where the student's IEP would be implemented. (Witness 3's testimony)

18. The parent's advocate's understanding of the difference between a BES classroom and a separate therapeutic day school is that the BES self contained program is a classroom in a mainstream school where the student would have interaction with non-disabled peers and would not have protections to address his issues with elopement. Whereas in a therapeutic day school there are more behavioral and therapeutic supports available to prevent and address the student's behavioral difficulties. (Witness 3's testimony)
19. DCPS convened another meeting on April 10, 2014, to have additional discussion about the student's IEP and the location of services. The DCPS psychologist balked at the advocate's notes that stated that the psychologist had recommended a full time therapeutic program. The staff also discussed the student missing instruction due to his behavior of leaving the classroom. There was no definite number hours discussed that the student had missed. The DCPS team members did not agree to conduct the neuropsychological and did not agree to include an IEP goal related the abuse. (Witness 3's testimony, Petitioner's Exhibits 27, 28)
20. School A staff was not aware of any trauma to the student and the school staff expressed to the parent that because such issues had not surfaced at school they were not the subject of school counseling and are better handled by the student's outside service providers. Generally school behavior counseling does not address any student's trauma; rather in-school counseling is designed to address a student's ability to access the general education curriculum. (Witness 6's testimony)
22. The DCPS team at the April 10, 2014, meeting stated that DCPS would issue a location of services ("LOS") letter for the student to attend a BES program and later issued a LOS letter.⁷ (Witness 3's testimony, Petitioner's Exhibit 4-2)
23. The student has been interviewed by and accepted to School C and spent a day at the school C. The student has been accepted into the school's low teen division in fifth grade. School C is a full time day school with an OSSE certificate of approval ("COA"). School C serves students with various disability classifications including: SLD, OHI and high functioning autism and specializes in behavior modification and has a school-wide behavior modification program.
The tuition rates have been approved by OSSE. The school currently has 113 students who range in age from 6 to 20 and 67 students are funded by District of Columbia. Students are grouped by age and cognitive ability. The student would be grouped according to his ability in reading and math. All teachers are certified in special

⁷ Although a particular BES program had been identified by the time of the hearing the appropriateness of that particular location was not an issue that was adjudicated.

education and the school has licensed related service providers. The class to which the student would be assigned currently has 5 students. (Witness 4's testimony, Petitioner's Exhibit 5)

24. The student's parent has visited School C and believes it would be helpful for the student because there he would have access to a behavior counselor and psychiatrist. The student was comfortable there when he visited and excited about attending. The student stopped attending School A about two weeks prior to the due process hearing. (Parent's testimony)

25. Petitioner's educational advocate designed a compensatory education plan for the denials of FAPE alleged in the April 7, 2014, due process complaint. The plan recommended the student be provided 300 hours (3 hours per day for 20 weeks) of tutoring, 4 hours of speech language services and 2 hours of OT services. (Witness 3's testimony, Petitioner's Exhibit 31)

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.⁸ *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

⁸ 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.

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 evaluate the student with a neuropsychological to determine if the student suffers from non-verbal learning disability or attention deficit disorder as recommended by the student's comprehensive psychological evaluation provided to DCPS.

Conclusion: Petitioner sustained the burden of proof by preponderance of the evidence that DCPS failure to conduct the requested neuropsychological evaluation was denial a FAPE to the student.

34 C.F.R. § 300.304 and §305 of the IDEA requires DCPS to evaluate a student in all areas of suspected disabilities. The evidence demonstrates that the student's independent evaluation recommended that the student be provided a neuropsychological evaluation to determine if he has a non-verbal learning disability.⁹ The student's parent through her representative requested the evaluation at the March 31, 2014, IEP meeting and DCPS refused to conduct the evaluation. Petitioner's expert witness provided credible testimony as to why the evaluation is necessary to appropriately determine the nature of the student's disability and needs.

There was no evidence provided by DCPS to refute this testimony and the recommendation in the evaluation. Neither of the two witnesses presented by DCPS discussed the student's need for further testing with a neuropsychological evaluation. DCPS has yet to conduct the student's recommended neuropsychological evaluation to determine if the student's educational obstacles are the result of a nonverbal learning disability or attention deficit disorder. DCPS, by failing to complete the evaluation/assessment is denying the student a FAPE because the parent is being deprived of information the parent requires in order to make appropriate educational decisions regarding the student and the student further may not be receiving the special education supports he is entitled to receive, indeed, the student's entire disability and educational program could be lacking. Consequently, the Hearing Officer concludes Petitioner sustained the burden of proof on this issue.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to provide an appropriate IEP on March 31, 2014, that is reasonably calculated to provide educational benefit because the IEP does not prescribe: (1) appropriate behavioral support services, (2) direct OT services, (2) direct speech services.

Conclusion: Petitioner sustained the burden of proof by preponderance of the evidence that the student's March 31, 2014, IEP was not reasonably calculated to provide educational benefit

⁹ FOF #9

because it did not provide the level of OT services recommended in the student's independent OT evaluation. However, there was insufficient evidence presented that the IEP is inappropriate because it does not provide goal(s) to address abuse, or speech and language services.

"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.

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).

There was sufficient evidence presented in the student's independent OT evaluation that he is need of direct OT services of 30 minutes per week.¹⁰ There was no evidence presented that refuted this recommendation. The DCPS review of that evaluation did not disagree that the student would benefit from the recommended level of services. Thus, the Hearing Officer concludes that Petitioner met the burden of proof by a preponderance of the evidence that the student is in need of that level of services and the lack thereof renders the IEP inappropriate.

However, the Hearing Officer did not find Petitioner's expert witness any more credible than the DCPS witness as to the student's need for speech and language services. As the DCPS witness pointed out the independent evaluation only included a single assessment tool and did not measure the student's pragmatic language skills and did not include a review of previous speech language evaluation(s).¹¹ Similarly, the Hearing was unconvinced by the evidence that the student's IEP is inappropriate because it does not contain behavior support goal(s) to address the student's history of abuse. The DCPS witness convincingly testified that the issues were not surfacing at school and are typically not the subject of in-school counseling and better addressed with outside counseling. The parent also testified that the student is receiving outside counseling on this issue. Consequently, the Hearing Officer concludes there was insufficient evidence presented to sustain the burden of proof that the student's IEP is inappropriate because of the lack of such goals.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to implement the student's IEP during SY 2013-2014 because the student was often out of the classroom up to five hours

¹⁰ FOF # 10

¹¹ FOF #8

per school day and missing instruction because the student is allowed by school staff to wander the school building and hallways.

Conclusion: Petitioner sustained the burden of proof by preponderance of the evidence that DCPS failed to consistently implement the student's IEP because he was allowed to wander the halls.

5E DCMR 3002.3 provides that:

(c) The LEA shall ensure that an IEP is developed and implemented for each eligible with a disability served by the LEA.

(d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP...

(f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

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

The evidence demonstrates through testimony of Petitioner's and DCPS witnesses that the student was a hall walker and spent a considerable amount of time out of both his special education and general classrooms and that the student's academic performance suffered as result.¹² There was no evidence that School A was able to effectively alter the student's behaviors in this regard although the school social worker did testify that she was able to eventually return the student to class on the occasions that he came to her. However, she was not always present at the school and there was other testimony that the student spent significant time out of the classroom and in the school principal's office. The Hearing Officer concludes that this unaddressed behavior by the student caused him academic harm and was far more than *de minimus* and amounted to a denial of a FAPE.

ISSUE 4: Whether DCPS denied the student a FAPE by failing provide an appropriate placement/location of services because the student needs a self-contained, therapeutic separate special education day school as agreed by the March 31, 2014, IEP.

Conclusion: Petitioner sustained the burden of proof by preponderance of the evidence that DCPS failed to offer the student an appropriate placement to implement his IEP. There was insufficient evidence that an appropriate placement had been offered that would effectively address the student's needs.

Removing a child with disabilities "from the regular education environment occurs only when

¹² FOF #s 3, 13, 14

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

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision (1) is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; (2) is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA that mandate that to the maximum extent possible, disabled children are to be educated with their nondisabled peers and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; (3) is determined annually; (4) is based on the child's IEP; and (5) is as close as possible to the child's home. 34 C.F.R. 300.114, 34 C.F.R. 300.116.

Petitioner asserted the proposed DCPS BES classroom is not an appropriate placement consistent with the determination of the March 31, 2014, IEP regarding the student's placement. The only testimony offered as to the student's school placement was that offered by Petitioner. Based upon the evidence offered by Witness 3 about the DCPS BES program such a program, cannot effectively address the student history of elopement. There was no evidence presented to refute this testimony. Based upon the student's history at School A of elopement the Hearing Officer concludes that Petitioner sustained the burden of proof by preponderance of the evidence that his placement, at this juncture with his history and lack of academic progress at School A, in the DCPS BES program is inappropriate.

The student placement at School C, which based upon the evidence presented, meets the requirements the Hearing Officer is to consider in determining the appropriateness of a proposed private placement, is an appropriate school location to implement the student's current IEP.¹³

As result of the denials of FAPE found herein, the Hearing Officer concludes that the student's prospective placement at School C for SY 2014-2015 is the appropriate remedy and the appropriate compensatory education to the student.

ISSUE 5: Whether DCPS denied the student a FAPE by failing to comply with procedural requirements (34. C.F.R. § 300.116 (a)(1)) in determining the student's placement to be one of DCPS' BES classrooms.

Conclusion: Petitioner did not sustain the burden of proof by preponderance of the evidence that the parent did not participate in the determination of the student's educational placement.

¹³ FOF # 23

The evidence demonstrates that the parent and her advocate were present and fully participated in the development of the student's IEP and the level of services. Although there was a disagreement between the parties about whether the student should be placed at a DCPS BES program the evidence did not demonstrate that a particular school location was determined prior to complaint being filed and there no particular school location other than that offered by the parent that was subject of this adjudication. Consequently, in light of the determination made by the Hearing Officer in the issue above, the Hearing Officer concludes the was insufficient evidence on this issue for Petitioner to sustain the burden of proof.

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 evidence demonstrates that although the student missed significant time out of the classroom due to his elopement there was no evidence of the total amount of time missed. The Hearing Officer has determined that rather than award the proposed compensatory services the student's prospective placement at School C is the appropriate remedy for the denials of FAPE determined herein.

ORDER:¹⁴

1. DCPS shall place and fund the student at School C (Accotink Academy) for SY 2014-2015 and School C shall be the student's current school location.
2. Within thirty (30) school days of the issuance of this Order DCPS shall conduct a neuropsychological evaluation and convene an IEP meeting at School C to review and revise the student's IEP as appropriate and also revise the student's IEP to include 30 minutes direct OT services per week.
3. All other requested relief is denied.

¹⁴ Any delay in Respondent in meeting the timelines of this Order that are 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: June 21, 2014