



## **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 June 5, 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 is \_\_\_\_\_ with a disability pursuant to IDEA with a disability classification of multiple disabilities (“MD”) for specific learning disability (“SLD”) and other health impairment (“OHI”). The student is currently in seventh grade and attending a District of Columbia public charter school (“School A”) for which DCPS is the local educational agency (“LEA”) for special education purposes.

Petitioner filed this due process complaint on April 4, 2014, alleging the student’s individualized educational program (“IEP”) and placement are inappropriate because the IEP prescribes insufficient services outside general education, has inappropriate goals and lacks a behavior intervention plan (“BIP”).<sup>2</sup> Petitioner asserts the student needs a full-time out of general education IEP and placement. Petitioner seeks as relief an order directing DCPS to place and fund the student at a non-public day school, convene an IEP meeting to review and revise the student’s IEP, develop a BIP, and provide compensatory education for the violations alleged.

DCPS filed a response to the complaint on April 9, 2014, and denied all alleged violations. DCPS asserted the student’s current IEP and placement is appropriate, but the student has truancy and attendance concerns.

A resolution meeting was held April 29, 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 18, 2014.

The Hearing Officer convened a pre-hearing conference on May 8, 2014, and issued a pre-conference order outlining, inter alia, the issues to be adjudicated.

## **ISSUE: <sup>3</sup>**

### **The issue adjudicated is:**

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<sup>2</sup> In the complaint Petitioner also alleged School A failed to allow her the opportunity to participate in a January 23, 2014, IEP meeting. However, Petitioner withdrew this issue at the start of the due process hearing.

<sup>3</sup> 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.

Whether DCPS denied the student a free and appropriate public education (“FAPE”) by failing to provide the student with an appropriate IEP and placement since the start of school year (“SY”) 2013-2014<sup>4</sup> because her IEP lacks (1) full time out of general education services, and/or (2) appropriate written expression and math goals and/or (3) a BIP.

**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 27 and Respondent’s Exhibits 1 through 31 ) that were all admitted into the record and are listed in Appendix A. Witnesses a listed in Appendix B.

**FINDINGS OF FACT:**<sup>5</sup>

1. The student \_\_\_\_\_ with a disability pursuant to IDEA with a disability classification of MD for LSD and OHI. The student is currently in seventh grade and attending School A for which DCPS is the LEA. (Petitioner’s Exhibits 8-1, 12-1)
2. During SY 2012-2013 the student was in sixth grade and attending a DCPS school (“School B”). The student attended School B from kindergarten through sixth grade. The student has had an IEP since age six. At School B the student had an IEP developed on December 20, 2012, that included goals in the areas of math, reading, written expression and social/emotional/behavioral development. It prescribed 12.5 hours of specialized instruction outside general education and 120 minutes per month of behavior support services. (Parent’s testimony, Petitioner’s Exhibit 21-1, 21-2, 21-13 12-4, 12-5, 12-6)
3. The parent was told that School B was providing the student all the specialized instruction that could be provided at the school. No one at School B, however, suggested to the parent that the student needed more services that were in her IEP. The parent asked for more services for the student at School B but no more were provided. The parent transferred the student to School A because the parent believed she wasn't progressing at School B, did not read and do math well and overall her academics were lacking. The student brought the December 20, 2012, IEP with her to School A at the start of SY 2013-2014. (Parent’s testimony)

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<sup>4</sup> Petitioner alleged that since the start of the current school year the student’s has been without an appropriate IEP. Two IEPs were in effect during SY 2013-2104, one dated December 12, 2012, and the other dated January 23, 2014.

<sup>5</sup> 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.

4. Soon after the start of SY 2013-2014 the student's parent spoke to the student's School A teachers and staff about the student being bullied by other students and the parent attended some meetings at the school to address the bullying. She also talked with homeroom teacher and school psychologist about the student's academic progress and was told the student was doing okay. However, the parent believed that instead of teaching the student to learn and comprehend her work was not modified, rather the student was told to draw for assignment projects because she draws well. (Parent's testimony)
5. On October 23, 2013, School A conducted a functional behavior assessment ("FBA") and developed a behavior intervention plan ("BIP") to address the student's behaviors of verbal aggression and loud talking. The FBA noted the student was struggling with an array of stressors that impeded her daily functioning in school, including walking out of the classroom and being disrespectful toward school staff. She also engaged in verbal and physical altercations within school and consistently failed to accept responsibility for her actions and blamed others for her anger and lack of self-control. (Petitioner's Exhibit 11-1, 11-2, 11-3, 11-4, 11-5, 11-6, 11-7)
6. The evaluator believed the student's behaviors functioned to reducing her boredom, responding to or relieving internal stimuli, gaining negative attention, establish or maintaining power and work avoidance. This was the initial implementation of a behavior support plan and the evaluator expected to gather data the next three months to drive a revision of the plan. The plan identified antecedents to the student's undesired and targeted behaviors and instructions for staff responses to address the targeted behaviors. The FBA and BIP were to be provided to and reviewed by the student's IEP team. (Petitioner's Exhibit 11-1, 11-2, 11-3, 11-4, 11-5, 11-6, 11-7)
8. Because the student's parent had concerns about the student's progress she engaged the services of counsel. On November 25, 2013, the student's parent through counsel requested that DCPS conduct reevaluations of the student in order to address the concerns the parent had regarding the student's academic and behavioral difficulties. (Parent's testimony, Petitioner's Exhibit 1)
9. On January 23, 2014, School A convened an IEP meeting. The student's parent was not present. The student's general education reported that student works best in a one-on-one situation and often refused to participate in class and was functioning at the first grade level in reading skills and had a difficult time keeping up and completing assignments. The student's IEP was amended to prescribe 50 hours per month of specialized instruction outside general education in the areas of reading, math and written expression, and 60 minutes of behavioral support per week. (Respondent's Exhibit 19-3, Petitioner's Exhibit 8-3, 8-4, 8-5, 8-6, 8-9, 8-10)

10. On February 11, 2014, School A convened another IEP meeting. During the meeting the student's teachers noted that the student was not engaging in class, that a teacher needed to be sitting right next to the student in order for her to attempt to do any work and that she was becoming more defiant and disruptive in class. The School A staff noted the student believes she does not have to do any more work because her parent is finding a new school for her to attend. (Witness 5's testimony, Petitioner's Exhibit 4-1, Respondent's Exhibit 12-14)
11. The parent's educational advocate sent an email to School A in March 2014 expressing her concerns with the student's IEP. In the email she noted the student's math goals were missing a goal on statistics; although the students was performing below third grade level in reading she only had two reading goals. She requested additional goals for written expression and asked that the instructional services be expressed as weekly services rather than monthly and that the amount instruction outside general education be increased. She requested that the student be provided a full time therapeutic setting because her behaviors inside the classroom. (Witness 2's testimony, Petitioner's Exhibits 6, 8)
12. In March 2014 DCPS conducted a comprehensive psychological reevaluation.<sup>6</sup> The psychologist assessed the student and conducted a classroom observation and spoke with her teachers and parent. The student's cognitive functioning was considered average to below average and her academic achievement was considered be significantly below the instructional range of her grade level in all academic areas. The psychologist noted the student's teachers' comments that the student strives to meet behavior expectations but is difficult to engage in classroom activities as she chooses to sit alone and often naps in class. However, during the psychologist's classroom observation the student appeared engaged in the classroom lesson. (Petitioner's Exhibit 12-1, 12-3, 12-4, 12-8, 12-10)
13. The psycho educational evaluation's RIAS and WIAT-III assessments the student had the following scores:

<b>RIAS Indexes</b>	<b>Composite Score</b>	<b>% Rank</b>	<b>Qualitative Description</b>
Verbal Intelligence Index	85	16	Below Average
Non- Verbal Intelligence Index	89	23	Below Average
Composite Intelligence Index	85	16	Below Average
Composite Memory Index	93	12	Average

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<sup>6</sup> The psychologist conducted assessments that included the Reynolds Intellectual Assessment System (RIAS), Wechsler Individual Achievement Test - Third Edition (WIAT-III), Behavior Assessment System for Children, Second Edition (Teacher & Parent), Parent and Teacher interviews and records review.

WIAT Scale	Standard Score	% Rank	Description
Oral Language	76	5	Below Average
Basic Reading	56	14.02	Low
Written Exp	67	1	Low
Math	69	2	Low

(Petitioner’s Exhibit 12-6, 12-8)

15. The student’s School A special education teacher pushes into the student's English class and sometimes pulls her out of her History class. During pullout session the teacher is working with student on her basic readings skills, phonics, and short stories. (Witness 7’s testimony)
16. Weekly behavior checklists were completed for the student assessing her behavior during mornings and afternoons of each school day throughout SY 2013-2104. (Respondent’s Exhibit 12)
17. During the final progress period of SY 2013-2014 the student made no progress toward her IEP goals due to her lack of engagement in classes although she did attend class regularly during that period. During the second semester of SY 2013-2014 the student’s engagement in individual counseling was inconsistent but she seemed to be more engaged in her group counseling sessions that were focused on addressing bullying behaviors among the group of students. (Respondent’s Exhibits 23, 27)
18. The student had a 91% attendance rate at School A for SY 2013-2014. (Petitioner’s Exhibit 19)
19. The student’s seventh grade report card reflects that she had the following grades in the following courses during the following grading periods: (Petitioner’s Exhibit 14-1)
 

a. Class	1 <sup>st</sup>	2 <sup>nd</sup>	3 <sup>rd</sup>
b. Citizenship	D+	C+	C
c. Computer Tech	A	C+	B
d. English 7	F	C	B-
e. Life Science 7	D	C	C-
f. Math 7	D+	D	D
g. Phys Ed 7	C-	D-	D
h. World Hist/Geo	C	C-	C+
20. On May 8, 2014, DCPS convened an IEP meeting for the student that the parent attended along with her educational consultant. During the meeting the school psychologist went over BIP briefly and stated that he would be willing to create a separate BIP because the FBA and BIP seemed to be combined into one document. The consultant asked the school psychologist about the student’s WIAT results so parent could compare them with previous scores. The consultant asked that the team refer the student full time out of general education placement and for extended school year (“ESY”) and transportation

services to be added to the IEP. DCPS agreed to ESY and transportation but not the full-time placement. (Witness 1's testimony)

21. The student's IEP math goal was reduced in terms that the student would be able to master. The parent's educational consultant noted that the student reading goals in the 2012 IEP and the most recent IEP were identical and there seemed to be an ongoing issue of the student not being able to identify letter sounds, which in the consultant's opinion indicated that the student needs more intense instruction. The student's general education teacher noted during the meeting that student seems to do better with one to one instruction and the student tends to engage in work avoidance behaviors. (Witness 1's testimony, Respondent's Exhibit 19, Petitioner's Exhibit 12)
22. The consultant sent a letter to School A after the May 8, 2014, meeting to memorialize everything she requested at the meeting. The consultant opined that instead of repeating goals in the IEP if the student is unsuccessful the ideal strategy would be to increase the student's specialized instruction and if that was unsuccessful then move her to full time instruction in a small setting. (Witness 1's testimony)
23. The student has been interviewed by and accepted to a private full time special education day school ("School C"). School C services student with a variety of disabilities. It's student to teacher ratio in its middle school one teacher and aide to 9 students. The classroom teachers are certified in special education and there are crisis intervention specialists available to support all students. Behavior and social emotional addressed with all student receiving individual and group therapy once per week. The school has a therapist on staff to help meet the social and emotional needs of students. The School C staff believed the student's needs could be met there consistent with her IEP. The school has an OSSE COA. The annual tuition is approximately between \$40,000 and \$50,000 annually. At School C the student would have no exposure to non-disabled peers at school except on field trips and community outings. (Witness 4's testimony, Petitioner's Exhibit 16)
24. The parent had a consultant proposed a compensatory education program based upon the consultant's meeting with the student and her family and reviewing the student's educational records, IEP and meeting notes. Based upon the claim that the student had insufficient hours of specialized instruction in her IEP and insufficient behavior support and no BIP the consultant proposed 120 hours of tutoring and 48 hours of counseling over 24 weeks to compensate the student for the alleged denials of FAPE. (Witness 3's testimony, Petitioner's Exhibit 22)

#### **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.<sup>7</sup> *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 and appropriate public education ("FAPE") by failing to provide the student with an appropriate IEP and placement since the start of SY 2013-2014 because her IEP lacks (1) full time out of general education services, and/or (2) appropriate written expression and math goals and/or (3) a BIP.

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student's IEP is inappropriate because it lacks full-time out of general education services and inappropriate goals or a BIP. However, there was sufficient evidence that the student's IEP lacks sufficient specialized instruction to address her level of academic deficits.

"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

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<sup>7</sup> 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.

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).

Petitioner challenged the student's December 2012 and January 2014 IEPs. There was insufficient documentary evidence that the student's IEP that was developed while she was at School B and that she brought with her to School A was not reasonably calculated to provide her educational benefit. The Hearing Officer did not find the parent's testimony that the student was doing poorly academically at School B and had asked for additional services for the student while she was there to be sufficient to demonstrate that the student's December 2012 IEP was inappropriate.

In January 2014 School A convened an IEP meeting for the student and modified her IEP to change the specialized instruction from weekly services to monthly but kept the amount of services the same. By the time of this meeting the evidence demonstrates that the student was not performing adequately in her general education classes. Her general education teacher noted at that meeting the student often refused to participate in class and was functioning at the first grade level in reading skills and had a difficult time keeping up and completing assignments.<sup>8</sup>

Despite this information the student's amount of specialized instruction was not increased but remained the same. The student's IEP was amended to change the instruction from weekly services to monthly services. Based upon the student's academic performance that was apparent to School A at this point time it would reasonable and appropriate for the student's specialized instruction to have been increased.

Once DCPS conducted a reevaluation of the student the evaluation further demonstrated that the student was operating far below grade level. This evidence sufficiently demonstrates that the student was in need of more specialized instruction than her IEP prescribed. However, the evidence does not sufficiently demonstrate that the student was or is in need of a full time out of general education placement. As the parent's educational consultant aptly opined during her testimony the ideal strategy is to increase the student's specialized instruction first and if that is unsuccessful then move her to full time instruction in a small setting.<sup>9</sup> An increase in the student's service has yet to made. Although the student has been accepted to a full time out general education placement the evidence does not demonstrate that the student should at this

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<sup>8</sup> FOF # 9

<sup>9</sup> FOF #s 21, 22

juncture be totally removed from interaction with non-disabled peers. IDEA requires that to the greatest extent possible special education student should be educated with their non-disabled peers. Consequently, the Hearing Officer does not conclude that the Petitioner met the burden by a preponderance of the evidence that the student's IEP is inappropriate because it does not prescribe full time out of general education services.

Although there was testimony that the goals in the student's IEP could be and now have been modified to more effectively address her academic deficits, the evidence demonstrates it was not until March 2014 that DCPS had fully evaluated the student to be able to effectively determine how her academic goals should have been changed. When the January 2014 IEP was developed there had been no suggestions yet provided or requests made for the student's IEP goals to be modified. Although at the time of the January 2014 IEP meeting it was apparent that the student was in need of more specialized instruction, there was insufficient evidence presented that at that point her IEP goals should be changed. There was insufficient evidence that any lack of change rose to the level of a denial of a FAPE. Consequently, the Hearing Office does not conclude that that Petitioner sustained the burden of proof by a preponderance of the evidence that the student's IEP was inappropriate because of inappropriate IEP goals.

Finally, Petitioner asserts the student's IEP was inappropriate because it lacked a BIP. The evidence clearly demonstrates that School A had conducted a FBA and developed a BIP for the student and that her behaviors were being monitored and tracked by the school staff.<sup>10</sup> Although the evidence does not reflect that the BIP was reviewed by an IEP team, the evidence does not demonstrate that the lack of such a review amounted to a denial of a FAPE to the student. The Hearing Officer concludes that a BIP existed and was being implemented for the student and Petitioner did not sustain the burden of proof by a preponderance of evidence that the student's IEP was inappropriate because it lacked a BIP.

### **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 concludes based on the testimony offered at hearing that tutoring and counseling would serve to place the student in the stead she would have been had received appropriate services. However, the evidence did not support the amount of services Petitioner requested because the proposed plan was based on the student having not been provided full time out of general education services. The Hearing Officer did conclude the student was in need of

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<sup>10</sup> FOF #s 5, 6, 16

this level of services and thus concludes the proposed amount of services was inappropriate. The Hearing Officer concludes that to award the student no compensation for the missed services would be inequitable and therefore concludes that the student should be awarded at least nominal services as compensation. Consequently, the Hearing Officer directs that the student be provided academic tutoring and counseling services in the order below.

**ORDER:<sup>11</sup>**

1. DCPS shall, within ten (10) school days of the issuance of this Order convene an IEP meeting to review the student's evaluations, review the student's academic performance during SY 2013-2014 and increase the amount of specialized instruction in the student's IEP to at least 20 hours per week<sup>12</sup> outside general education and review and revise the student's IEP goals to more effectively address the level of her academic deficits and then determine an appropriate school location to implement the student's IEP.
2. As compensatory education DCPS shall within 30 calendar days of the issuance of this Order provide the student 30 hours of independent tutoring and 15 hours of independent counseling or at the prescribed OSSE/DCPS rates. Petitioner shall use and complete this award by December 31, 2014.
3. All other requested relief is denied.

**APPEAL PROCESS:**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: June 18, 2014**

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<sup>11</sup> 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.

<sup>12</sup> The Hearing Officer determines based upon the evidence presented and particularly the testimony of Witness 1 that this level of increase in the amount of the student's specialized instruction is a reasonable increase prior to the student being provided full-time out of general education services.