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

Parent on Behalf Student[1], Petitioner, v. District of Columbia Public Schools ("DCPS") ("LEA") Respondents. Case # 2016-0060 Date Issued: June 8, 2016	HEARING OFFICER'S DETERMINATION Hearing Dates: May 19, 2016 May 24, 2016 Counsel for Each Party listed in Appendix A Hearing Officer: Coles B. Ruff, Esq.

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

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 19, 2016, and concluded on May 24, 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 and Hearing Room 2008 respectively.

BACKGROUND AND PROCEDURAL HISTORY:

The student attends a DCPS [redacted] school ("School A") and has been determined to be a child with a disability pursuant to IDEA with a classification of other health impairment ("OHI). On March 15, 2016, the student's aunt and guardian ("Petitioner") filed a due process complaint alleging that DCPS denied the student a free appropriate public education ("FAPE") by, inter alia, not timely identifying the student as eligible for special education services and by developing an inappropriate individualized educational program ("IEP").

Petitioner seeks as relief a finding that DCPS denied the student a FAPE and requests an order requiring DCPS to conduct or fund a speech and language evaluation and an occupational therapy evaluation, amend the student's IEP to provide additional hours of specialized instruction, extended school year ("ESY") services for the summer of 2016, and compensatory education.

On March 24, 2016, DCPS filed a timely response to Petitioner's complaint in which it denies that it failed to provide the student with a FAPE on all issues alleged. DCPS maintained the student was found eligible in timely manner and her IEP was reasonably calculated to provide educational benefit.

The parties participated in a resolution meeting on March 23, 2016. They did not resolve the complaint and did not mutually agree to proceed directly to hearing. The 45-day period began on April 15, 2016, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on May 29, 2016. Petitioner submitted a motion to extend the HOD due date to accommodate a change the second date of hearing and to allow for written closing arguments. The motion was unopposed and granted. The HOD is now due June 8, 2016.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on the complaint on April 14, 2016, and issued a pre-hearing order ("PHO") on April 19, 2016, outlining, inter alia, the issues to be adjudicated.

ISSUES: [2]

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to timely identify the student as eligible for special education services, and/or to timely provide the student with an IEP and services within a reasonable time after the end of the first advisory of school year ("SY") 2014-2015.

2. Whether DCPS denied the student a FAPE by failing to comprehensively evaluate her by conducting a speech and language evaluation and an occupational therapy evaluation as requested by the parent in April 2015.

3. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP on or about March 8, 2016, because the IEP lacks sufficient specialized instruction both inside and outside general education and no ESY services.

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 54 and Respondent DCPS's Exhibits 1 through 36) that were admitted into the record and are listed in Appendix A.[3] Witnesses' identifying information is listed in Appendix B.[4]

SUMMARY OF DECISION:

Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS did not timely find the student eligible for special education and did not timely develop her IEP during SY 2014-2015. Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS failed to evaluate the student in the area of speech and language and occupational therapy and did not sustain the burden of proof by a preponderance of the evidence that DCPS failed to provide the student an appropriate IEP on March 8, 2016. The Hearing Officer grants Petitioner compensatory education as relief.

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[2] The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

[3] Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

[4] Petitioner presented four witnesses: Petitioner, two educational advocates, one of whom was designated as an expert witness, and an independent education consultant designated as an expert witness. Respondent presented seven witnesses: an occupational therapist, a speech language pathologist, a special education teacher, the special education coordinator, a general education teacher, a social worker/attendance monitor, and a school psychologist.

FINDINGS OF FACT: [5]

1. The student is age _____and in grade _____.[6] She attends School A, a DCPS [redacted] school. The student was evaluated for special education and related services pursuant to the IDEA during SY 2013-2014 and found ineligible. (Petitioner's Exhibit 25-2, 25-3)

2. On February 14, 2014, Petitioner obtained an independent comprehensive psychological evaluation[7] and the student was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and a specific learning disability ("SLD") in reading, written expression, and math. (Petitioner's Exhibit 18-1, 18-11)

3. The independent psychological evaluation also recommended that the student receive an occupational therapy ("OT") evaluation due to weaknesses in visual motor functioning, and a speech and language evaluation to determine if therapy was needed to address her limited phonemic awareness. (Petitioner's Exhibit 18-11, 18-12)

4. The student's academic achievement assessment indicated she was performing in the poor and very poor ranges in reading and below average in the majority of areas of math and written expression.[8] (Petitioner's Exhibit 18-14)

5. On March 14, 2014, a multi-disciplinary meeting ("MDT") meeting was held at School A to review the independent evaluation and determine the student's eligibility. The team did not find the student eligible for special education services, principally because of her excessive absenteeism and late arrivals to school and the resulting missed instruction. Instead, the team recommended a 504 plan for the student. DCPS requested that Petitioner provide medical documentation to assist in developing the 504 Plan in light of her ADHD diagnosis. The parent agreed to sign a consent form to allow DCPS to obtain the requested medical documentation. (Petitioner's Exhibit 21-1, 21-2)

6. On March 19, 2014, Petitioner filed a due process complaint challenging the ineligibility determination and alleging DCPS failed to comprehensively evaluate the student, specifically that DCPS failed to perform speech and language and OT evaluations. The

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[5] The evidence (documentary and/or testimony) that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. 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.

[6] The student's current age and grade are in indicated in Appendix B.

[7] The guardian requested and DCPS granted funding for this independent evaluation after the student had twice been found ineligible for special education. The student was found ineligible as a student with specific learning disability on November 6, 2013. The student's guardian later provided additional information regarding the student's diagnosis for ADHD that DCPS considered and the student was found ineligible under the OHI classification on January 15, 2014. (Petitioner's Exhibit 21-1)

[8] The student's standard score in total Word Reading Efficiency was 65. Her composite standard scores in written expression, mathematics and math fluency were 79, 74, & 65, respectively. (Petitioner's Exhibit 18-4)

complaint was dismissed with prejudice on May 5, 2014, because Petitioner failed to appear for the due process hearing. (Respondent's Exhibit 3)

7. The student returned to School A for SY 2014-2015. Despite the dismissal of Petitioner previous complaint with prejudice, Petitioner's counsel's office contacted School A in September 2014 and requested, among other things, that an eligibility meeting for the student be scheduled to review additional medical information. School A offered to schedule a meeting in October 2014. After correspondence back and forth attempting to determine an agreeable date, the parties finally confirmed a meeting date of January 21, 2015. (Witness 3's testimony, Petitioner's Exhibit 38)

8. During the first advisory of SY 2014-2015 the student's report card reflected that she was operating "basic" in reading, writing and language, speaking and listening, social studies and art, and "below basic" in math and science. She was "proficient" in music and physical education and "advanced" in world languages. In work habits and personal and social skills, the student was independent in completing work on time, working well with others, and using time wisely, following rules and respecting the rights of others and practicing self-control. She needed limited prompting in following directions, completing and returning homework, participating in class discussions and listening while others speak. (Petitioner's Exhibit 6-1)

9. During SY 2014-2015 the student had chronic attendance and tardiness problems and School A took action to address the student's attendance by requesting documentation for the absences from Petitioner. Petitioner presented written verification for some of the absences. School A convened a meeting to develop and attendance plan to address the student's attendance, but Petitioner did not attend the meeting. (Witness 8's testimony, Respondent's Exhibits 34, 35, 36)

10. The eligibility meeting scheduled for January 21, 2015, was rescheduled to February 4, 2015. Petitioner went to School A on February 4, 2015, but her counsel and/or educational advocate did not arrive. The meeting did not go forward and DCPS offered to reconvene the meeting on March 3, 2015. However, no rescheduled date was confirmed. (Petitioner's Exhibits 39, 42, 43)

11. On February [redacted], 2015, DCPS issued Petitioner a notice that concluded the student was not a resident of the District of Columbia. The notice informed Petitioner that the student would be excluded from school unless Petitioner paid tuition. On February 27, 2015, School A communicated to Petitioner's counsel that DPCS had put the student's eligibility meeting on hold until the residency issue was resolved. (Witness 7's testimony, Petitioner's Exhibits 40, 42)

12. Petitioner appealed DCPS's non-residency determination. In April 2015 the residency issue was resolved in Petitioner's favor after an administrative hearing.[9] The student continued to attend School A while the residency proceeding was pending. After the

[9] The administrative hearing was convened on [redacted] 2015, and a final decision was issued sometime on [redacted] 2015. (Petitioner's Exhibit 36)

student's residency was confirmed the student's eligibility process proceeded. (Witness 3's testimony, Parent's testimony)

13. On April 17, 2015, Petitioner's counsel contacted School A to schedule the student's eligibility meeting. School A offered dates in May 2015 and after correspondence back and forth, the parties agreed upon May 28, 2015. (Petitioner's Exhibit 47, 48, 49, 50)

14. On April 23, 2015, through counsel, Petitioner requested that School A reevaluate the student by conducting, among other things, a speech and language evaluation and an OT evaluation. (Respondent's Exhibit 15).

15. During SY 2014-2015 the student continued to have a problem with tardiness to school and attendance. She was tardy to school 63 times and was absent 16 days, 11 of which were unexcused. (Respondent's Exhibit 22)

16. On May 28, 2015, DCPS convened a multidisciplinary team ("MDT") meeting during which the team reviewed the student's evaluations, updated classroom data and assessments, and the additional data from Children's National Medical Center ("CNMC") regarding the student's ADHD diagnosis. The team determined that the student was eligible for special education under the OHI classification for ADHD. DCPS developed an IEP that required the student receive 5 hours per week of specialized instruction outside general education and 1 hour per week of specialized instruction inside general education as well as accommodations. (Witness 3's testimony, Witness 7's testimony, Respondent's Exhibits 18, 20-1, 20-11, 20-13, 20-14)

17. During the May 28, 2015, meeting Petitioner's advocate reiterated the request that DCPS conduct a speech and language evaluation and an OT evaluation. The DCPS speech language pathologist joined the meeting by telephone and based on her own work with the student she shared that she did not believe the student had any speech language concerns that would warrant an evaluation. The parent shared her concerns about the student's pencil grasp and fatigue in writing. There was no occupational therapist at the meeting. The DCPS team member determined that neither of the requested evaluations was warranted. The advocate also asked that the student be provided ESY services. The team concluded the student was not eligible for ESY services but did suggest the student attend summer school or other summer enrichment activity to prevent any loss of skills over the summer break. (Witness 10's testimony, Respondent's Exhibit 18-1, 18-2)

18. The DCPS speech and language pathologist who participated at the May 28, 2015, eligibility meeting testified as an expert witness. She worked directly worked with the student in Response to Intervention ("RTI") on vocabulary with nine of the students to prepare for the citywide standardized testing. The student responded to the intervention and made progress. During the May 28, 2016, meeting there were concerns raised regarding the student's articulation, ability to follow directions and behavioral issues. These were not areas that the speech language therapist had observed as problems while working with the student. There was nothing she observed that would have lead her to believe the student had concerns in the area of speech language therapy and she did agree that a speech language evaluation needed to be conducted of the student in May 2015 nor

does she believe one is warranted currently based on her observations and after conferring with the student's teachers. (Witness 4's testimony, Respondent's Exhibit 18-2)

19. The student does not display behavior concerns in the classroom but is sometimes inattentive. She can be easily directed, however, when working with one to one support. In previous school years, prior to being provided special education services, the student's academic progress was minimal. (Witness 1's testimony, Petitioner's Exhibits 9, 10)

20. The student is currently reading below grade level but she has made a year's growth in reading comprehension within a half school year during SY 2015-2016. Her current reading teacher believes based on the student's progress thus far that she will improve to another grade level by the end of SY 2015-2016. The student is a mid-second grade level in literacy and she is expected to also make progress comparable to what is expected in comprehension by the end of SY 2015-2016. (Witness 8's testimony)

21. DCPS convened the student's annual IEP review meeting on March 8, 2016. Petitioner, through her educational advocate, requested that the student receive an increase in specialized instruction, in reading, writing, and mathematics as well as in social studies and science. During that meeting the team maintained the same level of services as in the student's previous IEP because the DCPS team members were of the opinion the student had made considerable progress with the level of specialized instruction she was being provided. Petitioner and her educational advocate were not in agreement. (Witness 1's testimony, Witness 7's testimony, Respondent's Exhibit 4, 5)

22. During the March 8, 2016, meeting Petitioner's advocate also requested ESY for summer of 2016. DCPS did not agree the student needed ESY services because of the nature of her disability, she did not show signs of possible regression and ESY would be far too restrictive for her. The team, however, suggested that the student take advantage of summer enrichment activities. (Witness 1's testimony, Witness 7's testimony, Respondent's Exhibit 4)

23. The student' reading teacher participated in the student's March 8, 2016, IEP meeting and believes based on the student's progress and her interaction in general education that the student's level of specialized instruction in her IEP is sufficient and she does not need more specialized instruction. The general education teacher has not seen any regression in the student's skills during the current school year. The student decoding skills and fluency skills need improvement, however. Her fluency and accuracy has picked up so she expects that by the end of the year she will have progressed even more. During winter break the student did not display any retention problems or regression. Although she could benefit from services over the summer it is not based on her reading teacher's concern for regression, rather a desire the student to make further progress. (Witness 8's testimony, Respondent's Exhibit 10-3)

24. During SY 2015-2016, with the accommodations in the student's current IEP she is making progress in reading, math and written expression. From beginning of school year until February she has mastered two of her IEP goals. It is not unusual for a student to not master all IEP goals in a single school year. The student's special education teacher believes the student is being provided sufficient hours of specialized instruction to work on all her academic goals and with her accommodations she is making adequate growth. (Witness 6's testimony, Respondent's Exhibit 7, 8)

25. The student had made significant progress in the current school year and the data does not suggest that she is in need of ESY services. There is no indication the student would experience significant regression during the summer break. (Witness 6's testimony, Witness 10's testimony, Petitioner's Exhibit 11, 12)

26. The student's reading assessment administered by School A for [redacted] grade indicates that she lost some skills during the summers between school years. However, the student progressed significantly in her text reading comprehension between end of year 2014-2015 measures and beginning of year 2015-2016 because the mother read with the student consistently during the summer. (Witness 1's testimony, Petitioner's Exhibit 10-3)

27. The student tardiness to school and absenteeism has continued during SY 2015-2016. The student's has had 39 days tardy to school and 12 days absent, 5 of which were unexcused. On April 14, 2016, School A convened a Student Support Team ("SST") meeting to address the student's absences from school. The student is missing much of the specialized instruction that is in her IEP now due to her tardiness and before more is provided she should be fully available for the services that are currently prescribed. (Witness 10's testimony, Witness 8's testimony, Respondent's Exhibit 13)

28. The student has therapy in the morning and she arrives to school late when she has a therapy appointment. She is sometimes tardy to school during time she is supposed to be in reading instruction, but does not usually miss other parts of the school day. The student's teachers have reported to Petitioner that the student is sometimes forgetful but wants to learn. She is excited whenever she has moved up a notch in her reading. (Guardian's testimony)

29. On April 23, 2016, DCPS convened a resolution meeting in which a DCPS occupational therapy participated in a meeting and testified at the hearing as an expert witness. During the resolution meeting Petitioner's counsel raised concern that the student's visual motion integration ("VMI") scores from her independent psychological evaluation were low. In his expert opinion a low score of a VMI does not necessarily indicate that there is educational impact to the student accessing the curriculum or that an OT evaluation was necessary. If the student has an awkward pencil grip it would not necessarily be addressed with direct OT services. Invention could with consultation or modifications to the writing tool. However, if a student gets tired after writing and has fatigue, the fatigue is a valid reason to conduct an OT evaluation. (Witness 4's testimony, Respondent's Exhibits 2, Petitioner's 18-5)

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 FAPE by failing to timely identify the student as eligible for special education services, and/or to timely provide the student with an IEP and services within a reasonable time after the end of the first advisory of school year ("SY") 2014-2015.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS was on notice by the end of the first advisory of SY 2014-2015 that student should have been found eligible under "Child Find. " However, Petitioner did sustain the burden of proof by a preponderance of the evidence that the student should have been found eligible two months prior to the May 28, 2015, date she was found eligible.

The "Child Find" requirements of IDEA at 20 U.S.C. 1412 (a); 34 C.F.R. Section 300.111 require every state to effectuate policies and procedures to ensure that all children with disabilities residing in the state including wards of the state who are in need of special education and related services are "identified, located and evaluated." This Circuit in *Reid v. District of*

Columbia, 401 F. 3d 516, 519 (D.C. Cir. 2005) held: "School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction. Instead, school systems must ensure that 'all children with disabilities residing in the State...regardless of the severity of their disabilities and who are in need of special education and related services, are identified, located, and evaluated." See also *Branham v. District of Columbia*, 427 F. 3d 7, 8 (D.C. Cir. 2005) In *Scott v. District of Columbia*, 2006 U.S. Dist. LEXIS 14900, the Court citing the above cases held: "The Circuit's holdings require DCPS to identify and evaluate students in need of special education and related services, whether or not parents have made any request, written or oral." The "Child Find" requirement is an affirmative obligation on the school system. A parent is not required to request that a school district identify and evaluate a child. In *N.G., et al. v. District of Columbia*, 556 F. Supp. 2d 11, (U.S.D.C. 2008) the Court stated: "This Court has held on numerous occasions that as soon as a student is identified as a potential candidate for special education services, DCPS has a duty to locate that student and complete the evaluation process.

The evaluation component of "Child Find" requires a district to conduct an initial evaluation of a child to determine whether he qualifies as a child with a disability within 60 days or within the time frame specified by the state (120 days as mandated by the District of Columbia) and to determine his educational needs, including the content of his IEP. 20 USC 1414(a)(1)(C); 20 USC 1414(b)(2)(A).

Petitioner asserts that School A should have been on notice by the end of the end of the first advisory of SY 2014-2015 that the student was in need of special education services and should have, within a reasonable time thereafter, been found her eligible for special education services and provided her an IEP. However, the evidence demonstrates otherwise. This student had on three prior occasions been found ineligible and the challenge in a due process complaint to the most recent ineligibility determination had been dismissed with prejudice near the end of SY 2013-2014. Based upon that ruling it was reasonable for School A not consider that the student was in need of special education services until there was new information available that would have put DCPS on notice that the child should again be considered for special education services or there was a new request.

Petitioner's counsel began asking for a new eligibility consideration based on additional data as early as September 2015. After much back and forth to arrive at an agreeable date, an eligibility meeting was scheduled for January 2015. However, despite the request for the meeting, there was no independent basis for School A to have expected at the end of the first advisory of SY 2014-2015 that the student should have been eligible for special education. The evidence demonstrates that the student's first advisory grades reflected that she was operating at a basic level in most areas. In addition, the student continued to have absences and tardies that caused her to miss instruction. Despite her attendance record, the student was still able to get a decent report card by the end of the first advisory. There was no evidence that by the end the advisory there was any additional reason for School A to have considered the student for special education services under "Child Find."

However, to comply with the request made by Petitioner's counsel, School A made effort to schedule a meeting at which the student's eligibility could be considered. The meeting was initially scheduled for January 15, 2015, and then rescheduled until February 4, 2015. On that

day, Petitioner appeared for the meeting, but her counsel and/or her advocate did not. The meeting did not proceed and School B offered a date in March 2015 to convene the meeting.

In the interim, DCPS concluded the student was not a resident of the District of Columbia and informed Petitioner that the student's eligibility for special education was being held in abeyance and she would need to remove the student from DCPS or pay tuition. Petitioner challenged the non-residency determination through an administrative hearing and won. While the hearing was pending the student continued to attend School A. After Petitioner won in the administrative hearing, DCPS then proceeded with scheduling the student's eligibility meeting that finally occurred on May 28, 2016. On that date the student was found eligible and an IEP was developed.

Based upon the evidence of the attempts to schedule an eligibility meeting for the student prior to the residency challenge, the Hearing Officer concludes that DCPS could have and should have scheduled an eligibility meeting sometime in March 2015, two months prior to when the student was actually found eligible. It reasonable to conclude that had the meeting been held in March 2015 the student would have been found eligible and provided services two months prior to when she actually was.

The Hearing Officer is aware of no regulation or other authority that supports the principal that an eligibility determination is to be "held in abeyance" while a residency determination is made. The residency regulations of the District of Columbia allow for a student to continue to attend DCPS while the non-residency determination is adjudicated. It seems reasonable to the Hearing Officer that if the student continued to attend School A during the pendency of that proceeding, School A was obligated to move forward with the student's eligibility determination based on Petitioner's request for the student's eligibility to be reconsidered with new information available. Consequently, the Hearing Officer concludes that this two-month delay in the student being found eligible and being provided an IEP and the services therein was a denial of a FAPE to student.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to comprehensively evaluate her by conducting a speech and language evaluation and an occupational therapy evaluation as requested by the parent in April 2015.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student should have been provided a speech language evaluation or an OT evaluation based upon Petitioner's April 2015 request.

Pursuant to 34 C.F.R.§ 300.303 (a) A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311— (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation. (b) Limitation. A reevaluation conducted under paragraph (a) of this section— (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

Pursuant to 34 C.F.R. § 300.304 (c)(4): Each public agency must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

Pursuant to 34 C.F.R. § 300.306 a school district must ensure that after a student has been appropriately evaluated for special education and that a group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8. D.C. law requires that a "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas "related to the suspected disability" should be assessed, including: academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title. 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2006).

The evidence demonstrates that during the student's May 28, 2015, IEP meeting that Petitioner requested, based upon recommendations made at the independent psychological evaluation, a speech language evaluation and an OT evaluation. DCPS declined both evaluations. The evidence demonstrates that at that meeting a DCPS speech language pathologist who had worked with the student related her experience the student and that in her opinion the student did not display concerns that would warrant a speech language evaluation. There was no occupational therapist at that meeting. However, the student's teachers and other schools staff at the meeting did not express any concerns with the student's pencil grasp, or otherwise, led them to believe the student was in need of an OT evaluation.

At the student March 8, 2016, IEP meeting Petitioner's educational advocate renewed her request the evaluations. DCPS concluded the evaluations were not warranted and declined to conduct them. The evidence demonstrates, based on the credible testimony of DCPS' expert witnesses that the data in the independent evaluation and the information available to the team both at the May 28, 2015, IEP meeting and the student's most recent March 8, 2016, IEP meeting, that the requested evaluations were not warranted.

There was testimony, however, by the DCPS occupational therapist that a concern about the

student having writing fatigue would be a basis for conducting an OT evaluation. However, although there was mention by one of Petitioner's witnesses that the student handwriting fatigue was raised at the May 28, 2015, meeting, this writing fatigued was not mentioned by Petitioner herself during her testimony or mentioned by the student's teachers or other School A personnel who work with the student. The primary concern Petitioner raised during the hearing was the student's pencil grasp. The DCPS occupational therapist credibly testified that principal grasp is a concern that can be addressed without an OT evaluation. Consequently, the Hearing Officer concludes that DCPS' refusal to conduct the requested evaluations was reasonable and was not a denial of a FAPE to the student. Nonetheless, after the complaint was filed DCPS agreed to conduct the requested evaluations and they are underway. [10]

ISSUE 3: Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP on or about March 8, 2016, because the IEP lacks sufficient specialized instruction both inside and outside general education and no ESY services.

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

To provide a FAPE, the school district is obligated to devise an IEP for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir.1991); *District of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir.2010).

The FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia,* 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005) (quoting *Rowley*, 458 U.S. at 201.) The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

[10] Even if the evidence had demonstrated that the requested evaluations were warranted, prior to the evaluations being completed and reviewed by a team it would have been premature to determine whether the student is at all harmed by the evaluations not being conducted sooner.

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200 (1982), the Hearing Officer must first look to whether the State complied with the procedures set forth in the IDEA, and second, whether an individualized educational program developed through the IDEA's procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. Id. at 206-07

"[T]he measure and adequacy of an IEP can only be determined as of the time it is offered to the student. Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *S.S. ex rel. Schank v. Howard Road Academy*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008) (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008)). An IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley,* 458 U.S. at 204. "An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is at the time the IEP was promulgated." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). *District of Columbia v. Walker*, 2015 WL 3646779, *6 (D.D.C. Jun. 12, 2015) ("the adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.").

An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. See *Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002). While parents may desire "more services and more individualized attention," when the IEP meets the requirements discussed above, such additions are not required. *See, e.g., Aaron P. v. Dep't of Educ., Hawaii,* No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011)

IDEA requires that children with disabilities be placed in the least restrictive environment ("LRE") so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. See 20 U.S.C. § 1412(a)(5)(A). Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." See 20 USC 1412(a)(5), 34 CFR 300.114(a)(2)(i)-(ii) (emphasis added); 34 C.F.R. § 300.550; *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.") Further, an appropriate location of services under the IDEA is one that is capable of "substantially implementing" a Student's IEP. *Johnson v. District of Columbia*, 962 F. Supp. 2d 263 (D.D.C., 2013).

34 C.F.R. 300.106 (a) provides:
(1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.
(2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with Sec. Sec. 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.

In this case there was no evidence presented that demonstrated that DCPS did not comply with procedural requirements in developing the student's IEP at the March 8, 2016, meeting.

Petitioner asserted that the student's IEP was inappropriate because it did not require more specialized instruction and ESY services.

The evidence in this case demonstrates that on March 8, 2016, the DCPS members of the student's IEP team determined that since the student has been provided an IEP she has made significant progress, despite her continued tardiness and absenteeism, and that the level of specialized instruction she was being provided should be continued. The DCPS witnesses credibly testified that the student had made significant progress in the current school year. Although the student remains below grade level she has made significant progress. The Hearing Officer found the testimony of the DCPS witnesses, who were qualified as expert witnesses, and who worked directly with the student for more that a year providing her services, far more credible than Petitioner's witnesses who had simply reviewed her education records and participated in her IEP meetings.

The Hearing Officer was unconvinced by Petitioner's witnesses testimony that the student was in need of more specialized instruction that she is currently being provided, particularly because due the student's continued tardiness, she is not taking advantage of the all the specialized instruction she is currently being prescribed.

In addition, the DCPS witnesses credibly testified that the student has shown no regression or retention issues in the current school year or during the most recent winter break, despite comments in the student's IEP that speak to her retention. Petitioner's witnesses comments about data showing summer regression was during years prior to the student being provided special education services. During the most recent summer, the data indicates the student made progress in her reading skills when Petitioner read with the student during the summer.

Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of proof that DCPS denied the student a FAPE by not increasing her specialized instruction and not adding ESY services to her IEP at the March 8, 2016, IEP meeting.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that the student should have been determined eligible and provided an IEP and specialized instruction two months prior to May 28, 2015. The student is due missed specialized instruction for a period of two months. The Hearing Officer, in the order below, directs that DCPS provide the student compensatory education for the missed services.

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.

Petitioner proposed a compensatory education plan that presumed the student missed far more instruction than the Hearing Officer has concluded the student missed. Consequently, the Hearing Officer will not award the requested amount of tutoring services. However, the Hearing Officer, based upon the evidence that the student has made significant progress when provided specialized instruction in the current school year, shall award the student an amount of independent tutoring that the Hearing Officer determines is reasonable to remediate the loss the student incurred from the two month delay in being provided specialized instruction.

ORDER: [11]

1. Within ten (10) business days of the date of this order, DCPS provide Petitioner authorization to obtain 30 hours of independent tutoring services at the DCPS/OSSE prescribed rate.

2. 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 8, 2016

Copies to: Counsel for Petitioner
Counsel for DCPS - LEA
Counsel for PCS-LEA
OSSE-SPED {due.process@dc.gov}
ODR {hearing.office@dc.gov}

[11] Any delay in Respondent School A 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.