



## **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 February 18, 2015, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student is a \_\_\_\_\_ at a DCPS middle school (“School A”). The student receives special education and related services pursuant to the IDEA with a disability classification of other health impairment (“OHI”) for Attention Deficit Hyperactivity Disorder (“ADHD”).

Prior to attending School A the student attended a District of Columbia public charter school (“School B”) for one year during school year (“SY”) 2012-2013. DCPS is the local educational agency (“LEA”) for School B. Prior to attending School B the student attended a DCPS elementary school where he had an individual education program (“IEP”).

On May 31, 2013, while the student was attending School B, DCPS conducted a psycho-educational evaluation that assessed the student’s academic, cognitive and behavioral functioning. The student’s cognitive functioning was below average and his reading abilities were measured as low average and his math and written language abilities were significantly below average. The evaluator noted that the student’s inattention, hyperactivity and impulsivity impacted his educational performance. School B also performed a functional behavioral assessment (“FBA”) and developed a behavioral intervention plan (“BIP”).

On July 16, 2013, School B convened a meeting to review the student’s psycho-educational and other evaluations. After a review of the evaluations and discussion of the student’s performance the IEP team determined the student continued to be eligible as a student with OHI and determined that his IEP could not be implemented at School B.

The student began attending School A at the start of SY 2013-2014. At School A the student has been in \_\_\_\_\_ special education class for students with behavioral and emotional difficulties. School A convened an IEP meeting for the student on November 15, 2013, and developed an IEP that prescribed 26 hours of specialized instruction per week outside general education, 240 minutes per month of behavioral support services and 120 minutes per month of occupational therapy (“OT”) services both outside general education.

On October 23, 2014, School A updated the student’s IEP. The team noted the student’s academic performance and that he has below grade level performance in math. The team also noted the student’s continuing need to be redirected and his problems maintaining focus and concluded the student’s overall behavior continued to impact his academics due to inattention.

The team discontinued the student's direct OT services and changed them to consultative services and reduced his behavior support services to 120 minutes per month.

Petitioner filed this due process complaint on December 5, 2014, asserting DCPS denied the student a free appropriate public education ("FAPE") by: (1) failing to place the student in an appropriate setting in a separate special education day school as of his October 23, 2014, IEP, (2) failing to develop an appropriate IEP on October 23, 2014, because the IEP lacked (a) continued occupational therapy outside of the general education setting and/or (b) did not contain sufficient behavioral support services of 1 hour per week; and (3) failing to conduct the student's FBA and/or update and implement a revised BIP in a timely manner. Petitioner is seeking the student's placement at a non-public day school, reinstatement of the original levels of OT and behavior support services and funding of an independent FBA, a revised BIP and compensatory education.

On December 16, 2015, DCPS filed a response to the complaint and denied any failure to provide the student with a FAPE. DCPS maintains the student is making progress and his IEP is appropriate and can be implemented at School A.

A resolution meeting was held on December 16, 2014. The case was not resolved. The parties did not mutually agree to proceed to hearing. The 45-day period began on January 5, 2015, and originally ended [and the Hearing Officer's Determination ("HOD") was due] on February 18, 2015. Petitioner requested that the case be continued and the HOD due date be extended to allow for the hearing to be held on February 18, 2015. Respondent did not oppose the continuance/extension and the motion was granted extending the HOD due date to February 28, 2015.

The Hearing Officer convened a pre-hearing conference on December 30, 2014, and issued a pre-hearing order on January 6, 2015, outlining, inter alia, the issues to be adjudicated.

## **ISSUES:**<sup>2</sup>

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to provide the student an appropriate educational setting in a separate special education day school as of his October 23, 2014, IEP.
2. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP on October 23, 2014, because the IEP lacks (a) continued occupational therapy<sup>3</sup> outside

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<sup>2</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.

<sup>3</sup> Petitioner asserts direct OT services were discontinued without any documentation that the student had mastered his OT goals. Petitioner acknowledged that as of January 6, 2015, direct OT services were reinstated at 60 minutes per month.

general education and/or (b) does not contain behavioral support services of 240 minutes per month.

3. Whether DCPS denied the student a FAPE by failing to conduct a FBA and/or update and implement a revised BIP in a timely manner by June 2014.<sup>4</sup>

### **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 22 and Respondent's Exhibits 1 through 20) that were all admitted into the record and are listed in Appendix A.<sup>5</sup> Witnesses are listed in Appendix B.

### **FINDINGS OF FACT:**<sup>6</sup>

1. The student is \_\_\_\_\_ at School A. The student receives special education and related services pursuant to the IDEA with a disability classification of OHI for ADHD. The student began attending School A at the start of SY 2013-2014. (Petitioner's Exhibits 11-1, 12-13)
2. Prior to attending School A the student attended a District of Columbia public charter school, School B, for one year for sixth grade during SY 2012-2013. DCPS is the LEA for School B. (Petitioner's Exhibits 12-1)
3. Prior to attending School B the student attended a DCPS elementary school and had an IEP dated March 16, 2012, that required 1 hour per day of specialized instruction in reading outside general education, 2 hours per day of specialized instruction in math outside general education, 30 minutes per week of specialized in written expression inside general education. The IEP also required 240 minutes per month of behavioral support services and 120 minutes per month of OT services both outside of general education. (Petitioner's Exhibit 5-7)
4. On May 31, 2013, while the student was attending School B, DCPS conducted a \_\_\_\_\_ evaluation that assessed the student's academic, cognitive and behavioral functioning. The student's cognitive functioning was below average at the 18<sup>th</sup> percentile with an overall intelligence score of 86. At the time of the evaluation the student was age \_\_\_\_\_

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<sup>4</sup> Petitioner asserts that by the end of SY 2013-2014 DCPS should have been on notice based on the student's behaviors that at FBA should have been updated and revised BIP developed.

<sup>5</sup> Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

<sup>6</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.

12 years, 4 months (12-4). His broad reading score was low average at the 65<sup>th</sup> percentile and an age equivalency of 9-11. Thus, the student had a deficit in reading of 2 years, 5 months (2-5). The student's broad math score was very low at the 16<sup>th</sup> percentile and an age equivalency of 7-11. His broad written language was very low at the 27<sup>th</sup> percentile and an age equivalency of 7-11. Thus, the student had academic deficits in these areas of 4 years, 5 months (4-5). (Petitioner's Exhibit 12-1, 12-6, 12-8)

5. The evaluator noted that the student's inattention, hyperactivity and impulsivity had an impact on his educational performance. The evaluator also noted that School B staff had implemented various strategies to address the student's academic and behavioral concerns and noted that the student benefits from the following: a small group setting, peer-to-peer tutoring and a scribe to write his answers while he provides oral responses to questions. (Petitioner's Exhibit 12-3, 12-13, 12-14)
6. School B also performed a FBA that included observations of the student from May 2013. The FBA noted the student's hyperactive and off-task behavior to avoid or postpone challenging or unappealing tasks. School B developed BIP on July 16, 2013, to assist the student to control his impulsive behavior and increase his academic success. The BIP included strategies and actions for school staff to assist the student in demonstrating desired behaviors. The set time for the BIP to be reviewed was August 16, 2013. (Petitioner's Exhibit 13-1, 13-4, 13-5)
7. On July 16, 2013, School B convened a meeting to review the student's evaluation, OT evaluation and FBA and to review the student's progress. The student's parent did not attend the meeting. After a review of the evaluations and discussion of the student's performance the IEP team determined the student continued to be eligible as a student with OHI. The eligibility report cited the student's strengths and weaknesses in academics and in his social, emotional, behavioral and physical development. The team determined the student would be provided 18 hours per week of specialized instruction outside general education in reading, math and written expression, 9 hours per week of specialized instruction inside general education, 4 hours per month of behavior support services and two hours per month of OT services. The team determined that the IEP as amended could not be implemented at School B. (Petitioner's Exhibit 7-1, 7-3, 7-4)
8. The student began attending School A at the start of SY 2013-2014. At School A the student has been in special education class for students with behavioral and emotional difficulties. School A convened an IEP meeting for the student on November 15, 2013. The student's parent participated in the IEP meeting. The student's November 15, 2013, IEP provided the student with 26 hours of specialized instruction per week outside general education, 240 minutes per month of behavioral support services outside general education, and 120 minutes per month of occupational therapy services outside general education. (Petitioner's 8-1, 8-11)
9. The student received progress reports for each of the four quarters of SY 2013-2014. The goals addressed were those contained in the student's November 15, 2013, IEP. The

progress reports indicated that the student made progress toward his IEP goals. The reports cited the academic common core standards that were related to each of his academic goals. The student's report card for SY 2013-2014 indicates that he earned passing grades in all courses and was promoted to 8<sup>th</sup> grade. (Respondent's Exhibits 13, 14)

10. The student's OT provider noted that the student made moderate progress toward his OT goals during SY 2013-2014 but on occasion had difficulty focusing on tasks. The provider noted near the end of the school year that the student was having a difficult time attending to tasks and was not attending to his hygiene. (Respondent's Exhibit 15-3, 15-7, 15-8)
11. On October 23, 2014, School A held the student annual IEP meeting and updated the student's IEP. The student's parent and her educational consultant participated in the meeting. During the meeting the team noted the student's receives support with reading comprehension in the Read 180 program and performs reading fluency, spelling assessments and writing support in conjunction with English/Language Arts, Science and Social Studies. The team noted the student has below grade level performance in math and continues to require support of a calculator to complete regrouping with subtraction, multiplication and division facts. The student's overall behavior continued to impact his academics due to his attention concerns. The team noted the student is easily off task, has to frequently be redirected, is a playful and follows inappropriate behaviors of others but is not mean or disrespectful. The team discontinued the student's direct OT services and changed them to consultative services and continued reduced his behavior support services to 120 minutes per month. (Petitioner's Exhibits 9-9, 10-1, 10-2, 10-3, 10-4, 11-9)
12. The student's October 23, 2014, IEP included academic goals in the areas of math, reading, and written expression. The student has two math goals, two reading goals and two written expression goals.<sup>7</sup> The student's present levels of performance ("PLOP") cite information from SY 2009-2010 and 2010-2011 for math, SY 2011-2012 for reading and SY 2011-2012 for written expression. The PLOPs for all these academic areas are identical to the PLOPs in the student's March 5, 2012, IEP from 5<sup>th</sup> grade. (Petitioner's Exhibit 5-2, 5-3, 5-4, 9-4, 9-5, 9-6)
13. The student's October 23, 2014, IEP eliminated two additional math goal that were his November 15, 2013, that were the following: Goal 3: When given a set of interest-related word problems at [the student's] independent reading level [the student] will calculate sales, discounts, interests earned and tips with 80% accuracy on 4 out of 5 trials; and

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<sup>7</sup> The student's two math goals are as follows: Goal 1: When given mathematical word problems [the student] will use strategies of application and reasoning with and without a calculator in order to demonstrate knowledge of various skills. Goal 2: When given a mixture of math problems requiring both single and multistep solutions, [the student] will determine how and when to break a problem into simpler parts with 80% accuracy in 4 out of 5 trials. (Petitioner's Exhibit 9-3)

Goal 4: When given a teacher made chart of the math terms mean, median, and mode with definitions and examples [the student] will solve word problems at his independent reading level with 80% accuracy. These two math goals that were in the previous IEP were apparently eliminated without the student having mastered the two goals. The progress report reflects that in the fourth term of SY 2013-2014 the student was progressing in the goals but had not mastered them. (Respondent's 14-4, Petitioner's Exhibit 8-4)

14. The student's reading goals are the same in the November 15, 2013, and October 23, 2014, IEPs except that a third goal was eliminated that read as follows: Goals 3: When given a reading text at [the student's] independent reading level [the student] will analyze by connecting/clarifying main idea in 5 consecutive trials with 100% accuracy. The goal was in the previous IEP and was apparently eliminated without the student having mastered the goal because the progress report reflects that in the fourth term of SY 2013-2014 the student was progressing toward the goal but had not mastered it. The student's written expression goals in the two IEPs are the same. (Petitioner's Exhibit 8-7, 9-6, Respondent's Exhibit 14-6, Petitioner's 8-6)
15. The student's report cards and progress reports for SY 2014-2015 reflect that in the first term the student earned a passing grade in all subjects. The report card cites the student's 2014 DC CAS performances and indicates he scored basic in reading and math and below basic in composition. The student's report card for the second term of SY 2014-2015 reflects higher grades than he earned in the first term for all subjects. The report card indicate that on a September 2014 assessment the student's reading level was assessed as being at second grade level. (Respondent's Exhibits 6-1, 6-2, 6-3, 6-5, 6-6-, 6-7, 7,)
16. The student's SY 2014-2015 progress reports reflect a change to 8<sup>th</sup> grade common core standards cited under each IEP academic goal and reflect that the student is either progressing on the IEP goals or the goal had not yet been introduced in the first term. The second math goal indicates for the first term of SY 2014-2015 the goal had not been introduced. However, that same goal was in the student's progress report from the previous school year and the progress report reflected that he was making progress on the goal. This was also the case with one of the student's written expression goals. Two of the math goals and one of the reading goals that were in the previous IEP were eliminated apparently without the student having mastered the two goals. (Respondent's Exhibit 7-2, 7-6, 14-2, 14-4, 14-6, 14-7)
17. Despite the progress reports indicating most of the student has been making academic progress the student's IEP goals have virtually remained the same over the past two years which indicates he has at best made minimal progress. Petitioner's expert witness opined that lack of substantial progress is indication the student needs more assistance in the classroom that he is currently getting with a strong emphasis on academics as well as behavioral supports. The witness, however, also agreed that it is up to an IEP team to determine to what extent the student should be with or removed from his non-disabled peers. (Witness 1's testimony Petitioner's Exhibit 11-9, 11-10)

18. The student's behavioral support provider noted that during SY 2013-2014 and SY 2014-2015 the student was either progressing or maintaining relative to his IEP behavioral support goals. In November and December 2014 the student was engaged in group counseling and demonstrated continued progress in his counseling sessions. (Respondent's Exhibits 9, 16)
19. During September and October 2014 the student was provided direct OT services and the provider noted the student was progressing relative to his goals and completed tasks attempted with 80% accuracy. By October 2014 the OT provider noted that the student could type three words per minute and given the student's improving handwriting skills the typewriting goal would be discontinued. In November 2014 after the student's direct OT services had been changed to consultative services the OT provider noted the student's teacher had no OT concerns about the student during her consultation with the OT provider. (Respondent's Exhibits 8-1, 8-3, 8-4)
20. On January 6, 2015, after this due process complaint was filed DCPS convened an IEP meeting for the student in which Petitioner participated. The PLOPs and the student's academic goals remained the same. The student's behavior support services remained the same. However, the student's OT services were changed from consultative to direct services at 60 minutes per month to improve the student's writing speed to meet the upcoming demands for the student of a high school curriculum. (Petitioner's Exhibit 11-1, 11-9, Respondent's Exhibits 4, 8-5)
21. The student's current School A special education teacher notes that the student requires verbal redirection in the classroom but does not have behavior difficulties. He is able to complete classwork and computer based instruction without problems. The student is currently working with 7<sup>th</sup> and 8<sup>th</sup> grade standards with instructional modifications. The student's teacher indicates that once the student is provided instruction he can work collaboratively and independently. The student has shown progress in reading and comprehension skills and his allowed to retest in order to demonstrate academic proficiency. His grades are based on work he has completed in class and the scores he has made on quizzes and homework. The student has been turning in homework every day for the last 30 days and he is performing well relative to the behavior point system used in the classroom. At School A the student gets along with his peers and has the opportunity to interact with non-disabled peers. To address his ADHD the student is provided counseling and works with a self-advocacy group. (Witness 4's testimony)
22. The student's parent notes that the student's short attention did not improve much when he was administered medication for a six-month period. At School A the student is sometimes teased when he is with general education students because of his academic delays. The student's parent believes the student's most recent report card grades are inflated and she is concerned that the student is dependent on a calculator, cannot tell time with analog clock and is not fully adept at counting money. The student's parent does not believe the student is ready to move onto high school next school year because, among other things, he still does not know his multiplication tables and cannot do multiple digit addition. The student's parent sits and works with him regularly on his



homework. Although the student's teacher indicates the student is performing better the student's parent believes the student is still struggling academically. (Guardian's testimony)

23. From January 2014 to August 2014 the student was provided independent tutoring by an educational consultant who also participated with the student's parent in the October 23, 2014, IEP meeting. Based upon her work with the student the consultant believes the student is functioning solidly at fourth and fifth grade level in reading but has significant deficits in written expression, in spelling and generating complete sentences. The consultant was concerned that the student's IEP references common core standards that are far beyond his current functioning. At the October 2014 annual review meeting the consultant expressed her belief that the student's IEP goals were inappropriate and requested that they be aligned to his present levels of performance. The School A team members indicated the student was making progress and provided work samples but no assessment data to support their contentions. (Witness 3's testimony, Petitioner's Exhibit 14)
24. The student has been accepted to a full time special education separate school ("School C"). School C has a certificate of approval ("COA") from OSSE. At School C the student would be placed in a classroom with nine other eighth grade male students. The classroom teacher is certified in special education. There is also a full time assistant teacher in the classroom. School C can provide the student his related services by certified providers. School C offers a curriculum that includes a regular rotation between direct teacher instruction, independent work and computer-based instruction. School C can provide the student intense academic remediation and has a reading specialist on staff. At School C the student would have no opportunity for interaction with non-disabled peers, but the goal of the school is to return its students to a less restrictive environment as soon as practicable. School C has a monitor from OSSE. The tuition is just under \$40,000. Related services that are billed separately. (Witness 2's testimony, Petitioner's Exhibit 18)
25. Petitioner's educational consultant developed a compensatory education plan for the student designed to remediate for the student's failure to progress sufficiently and for him having what she considered to be an inappropriate IEP and inappropriate programming and for his BIP allegedly not being implemented. The consultant proposed that the student be provided four hours per week of tutoring for 50 weeks and mentoring services for 1 hour per week for 40 weeks. The proposal also included a request for an independent FBA and independent OT evaluation. (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>8</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 5-3030.14. 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) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE 1:** Whether DCPS denied the student a FAPE by failing to provide the student an appropriate educational setting in a separate special education day school as of his October 23, 2014, IEP.

**Conclusion:** Petitioner did not sustain the burden proof by a preponderance of the evidence that the student is in need of placement in a separate special education day school and that he has been denied a FAPE because his has not had such a placement since his October 24, 2014, IEP was developed. However, the evidence demonstrates that the outdated PLOPs in the student's IEP, the continuation of the student's IEP goals over the years and the elimination of some goals without clear data to support their elimination raises serious questions about the student's real academic progress such that Hearing Officer concludes that he will order a formal assessment of the student's academic functioning.

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<sup>8</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.

The “educational placement” consists of: (1) the education program set out in the student’s IEP, (2) the option on the continuum in which the student’s IEP is to be implemented, and (3) the school or facility selected to implement the student’s IEP. *Letter to Fisher*, 21 IDELR 992 (1994).

In this jurisdiction, the educational placement is based upon the child’s IEP, and the school designated by the public agency to implement the child’s IEP is the location of services. *Johnson v. District of Columbia*, 2012 L 883125 (D.C.C., March 16, 2012). The school district is not required to maximize or provide the best program; rather, it need only be an education that is specifically designed to meet the child’s unique needs, supported by services that will permit the child to benefit from the instruction. *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982).

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." 34 C.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 CFR. 300.114, 34 CFR. 300.116.

The IDEA only mandates a "basic floor of opportunity." *Id.*; *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995). To accomplish this, an IEP must only "be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." *Chambers v. Sch. Dist. of Philadelphia Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir. 2009) (quoting *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004)).

The evidence in this case demonstrates that since attending School A the student has been provided specialized instruction and related services in a full time out general education setting but the student has continued to have interaction with non-disabled peers. The evidence also demonstrates that the student has made some academic progress since attending School A. The parent’s educational consultant who has tutored the student has noted his progress as a result of her work with him. And the student’s School A classroom teacher noted that he is making

progress.<sup>9</sup> IDEA clearly mandates that to the students should be placed in the least restrictive environment (“LRE”) and to the greatest extent possible students should be educated with their non-disabled peers. There has been insufficient evidence to demonstrate that this student needs to be in a setting where he is totally removed from his non-disabled peers, as he would be if he were placed in at the school Petitioner has proposed.

However, although there is indication the student has made some progress since attending School A, in the Hearing Officer’s opinion the evidence does not sufficiently demonstrate the degree of progress he has actually made, as his progress has not been fully verified with any objective and/or formal assessments since the student began attending School A.<sup>10</sup> In addition, the PLOPs in the student’s IEP cite data from as far back as SY 2009-2010 and the student’s IEP goals have been repeated for years and some academic goals were eliminated even though there was no indication the student had mastered the goals.<sup>11</sup>

As Petitioner’s expert witness testified despite that the student’s progress reports indicating the student is making academic progress the student’s IEP goals don’t reflect progress. Petitioner’s expert witness aptly opined the lack of substantial progress is indication the student needs more assistance in the classroom that he is currently getting. The expert witness, however, could not clearly state that the student was in need of a placement in a separate school where he would be totally removed from his non-disable peers. The expert witness pointed out that it is up to an IEP team to determine to what extent the student should be with or removed from his non-disabled peers. Consequently, the Hearing Officer determines that the evidence does not support a conclusion that the student should be totally removed from his non-disabled peers and placed in a separate special education school and that a separate day school is his LRE.

However, the evidence indicates that the student’s progress relative to his IEP goals has been minimal in that the goals have remained the same and some goals were eliminated even though there was no apparent evidence that the goals had been mastered. As result of this concern and the clear uncertainty about the student’s progress the Hearing Officer in the order below directs that the student be provided a independent comprehensive psychological evaluation and that an IEP team review the student’s assessments to determine his current levels of functioning, his academic progress, review the his academic goals, review and revise his IEP as appropriate and consider and determine his educational placement thereafter.

**ISSUE 2:** Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP on October 23, 2014, because the IEP lacks (a) continued occupational therapy outside general education and/or (b) does not contain behavioral support services of 240 minutes per month.

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<sup>9</sup> FOF #21

<sup>10</sup> Although the student’s report card notes that his DC CAS scores for 2014 were basic in reading and math and below basic in composition the Hearing Officer was not convinced by this notation that the student had significant progress because the actual scores were not in evidence and that the last time the student was formally assessed in 2013 he had academic deficits measured by age equivalency that were as much as four years below his actual age.

<sup>11</sup> FOF #s 12, 13, 14

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE by failing to develop an appropriate IEP on October 23, 2014, because the IEP lacks (a) continued occupational therapy outside the general education setting and/or (b) does not contain behavioral support services of 1 hour per week.

“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).

The evidence in this case demonstrates that prior to the October 23, 2014, IEP meeting the student’s prior IEP required 240 minutes per month of behavioral support services and 120 minutes per month of OT services both outside of general education. At the October 2014 meeting the team noted that the student’s overall behavior continued to impact his academics due to his attention concerns and that he is easily off task, has to be frequently be redirected, is a playful and follows inappropriate behaviors of others.<sup>12</sup> Despite the continued concern with the student’s attention the team reduced the student’s behavior support services from 240 minutes per month to 120 minutes per month.

On the other hand, the evidence demonstrates that during SY 2014-2015 the student has consistently been provided group and individual counseling and made progress relative to his behavior support goals.<sup>13</sup> In the Hearing Officer’s opinion the IEP team’s noting the student’s continued inattention did not necessarily demonstrate that a reduction his behavior support services was unreasonable given that the student’s behavior support provider noted the student’s consistent participation in counseling and his continued progress. The Hearing Officer concludes that insufficient evidence was presented to demonstrate that the IEP team’s reduction of behavior support services at the October 23, 2014, meeting was not calculated at the time to provide the student educational benefit. Thus, the Hearing Officer concludes Petitioner did not sustain the burden of proof on this issue.

As to the student’s OT services, during September and October 2014 the student was provided direct OT services and the provider noted the student was progressing relative to his goals and

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<sup>12</sup> FOF # 11

<sup>13</sup> FOF #18

completed the tasks attempted with 80% accuracy. By October 2014, the OT provider noted that given the student's improving handwriting skills his typewriting goal would be discontinued. In November 2014 after the student's direct OT services had been changed to consultative the OT provider noted the student's teacher had no OT concerns about the student during consultation with the OT provider.

However, on January 6, 2015, DCPS convened an IEP meeting and the student's OT services were changed from consultative back to direct services at 60 minutes per month to improve the student's writing speed to meet the demands of a high school curriculum. This is a clear reversal of position by DCPS to reinstate the direct OT services albeit not at the original level. However, there is no clear evidence of any harm to the student as a result him not having direct OT services between October 23, 2014, meeting and the January 6, 2015, meeting. In addition, there was insufficient evidence that the reinstatement of OT services to 60 minutes per month rather than 180 was not reasonably calculated to provide the student educational benefit. Consequently, this Hearing Officer concludes that Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student's October 24, 2014, IEP was inappropriate.

**ISSUE 3:** Whether DCPS denied the student a FAPE by failing to conduct a FBA and/or update and implement a revised BIP in a timely manner by June 2014.

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE by failing to conduct a FBA and/or update and implement a revised BIP by June 2014.

34 C.F.R. § 300.303(a)(2) make clear that, "A local education agency ("LEA") *shall ensure* that a re-evaluation of each child with a disability is conducted...if the child's parents or teacher requests a re-evaluation." (emphasis added). 34 C.F.R. § 300.305(d)(2) also clarifies that the parent must be advised by the LEA of the right to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs. *See also Letter to Copenhaver*, 108 LRP 16368 (OSEP 2007).

20 U.S.C. §1414(b)(3)(B) and 34 C.F.R. § 300.304(c)(4) make clear that an "LEA *shall ensure* that a child is assessed in all areas of suspected disability, including, if appropriate, health, vision, *hearing, social and emotional status...and motor abilities.*" (emphasis added).

Although the evidence indicates that the student's BIP was to be reviewed by August 16, 2013, there was no apparent requirement or request that another FBA be conducted or the BIP be reviewed and/or revised while he attended School A. The BIP was developed when the student attended School B. The evidence demonstrates that the behavior addressed in the BIP was also the subject of the student's behavior support services and were being consistently addressed at School A. There insufficient evidence that a new FBA was warranted or requested or that the BIP be revised. No request has apparently been made at any of the student's recent IEP meetings. Consequently, despite evidence that the student continued to display inattention related to his ADHD, there was insufficient evidence presented that DCPS should have been put on notice or was required to take any action as to a new FBA or revised BIP sufficient to demonstrate that its not conducting the FBA or revising the BIP denied the student a FAPE.

## **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 submitted a compensatory education proposal that requested services for alleged violations and denials far beyond what the Hearing Officer concluded warrants a remedy in this HOD. There was insufficient evidence of the degree of harm if any there has been to the student absent the evaluation and the IEP meeting the Hearing Officer has ordered. Consequently, the Hearing Officer concludes that there is, under the facts of this case, an insufficient basis to award of compensatory education to this student.

### **ORDER:**

1. DCPS shall, within ten (10) school days of this issuance of this order fund an independent comprehensive psychological evaluation at the OSSE approved rate.
2. DCPS shall within twenty (20) school days of its receipt of the report from the independent evaluation ordered above, convene an IEP meeting to the review the evaluation, review the student's progress and review and update the student's IEP as appropriate and determine an appropriate placement and location of services for the student for the remainder of SY 2014-2015.
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: February 28, 2015**