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OSSE
Office of Dispute Resolution
March 4, 2015

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)[“LEA”]</p> <p>Respondent.</p> <p>Date Issued: March 2, 2015</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on February 19, 2015, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, DC 20003, in Hearing Room 2003 and Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is _____ at DCPS public school (“School A”) where he began attending at the start of school year (“SY”) 2014-2015. The student receives special education and related services under the disability classification of developmental delay (“DD”). Prior to attending School A the student attended another DCPS school (“School B”) for kindergarten during SY 2013-2014.

The student was initially determined eligible for special education through DCPS Early Stages on May 17, 2011. Prior to his initial eligibility the student received a developmental evaluation on September 29, 2010, that was the basis of the student’s DD classification. In April 2011 DCPS Early Stages conducted a speech language evaluation.

As a part of the triennial eligibility process to determine if the student continued to be eligible DCPS conducted a Woodcock Johnson-III (“WJ-III”) in November 2013 and in December 2013 DCPS completed an analysis of existing data. DCPS issued a prior written notice (“PWN”) to the student’s parent informing her that student’s IEP team had concluded that sufficient data was available to the team to determine the student continued to have a disability and that no further evaluations were needed to determine the student’s eligibility and his academic and related services needs.

School B developed an individualized educational program (“IEP”) for the student on December 9, 2013. The IEP included extended school year services (“ESY”). The student completed kindergarten at School B at the end of SY 2013-2014 but did not participate in ESY during summer 2014.

The student began attending School A at the start of SY 2014-2015. At School A the student has received discipline referrals due to disruptive behaviors. As a result, DCPS conducted a functional behavior assessment (“FBA”) and developed a behavior intervention plan (“BIP”). The student’s first term report card noted his need for frequent prompting in order to follow directions, complete class work, and respect others. On November 13, 2014, School A convened the student’s annual IEP review meeting and updated his IEP.

Petitioner filed this due process complaint on December 17, 2014. Petitioner is asserting that DCPS denied the student a free appropriate public education (“FAPE”) by: (1) failing to provide the student with an appropriate IEP on December 9, 2013, and November 13, 2014; (2) failing to

evaluate the student in all areas of suspected disability; and (3) failing to perform the student's triennial evaluation(s). In her complaint Petitioner alleged that for the past two years the student has been experiencing significant behavioral issues that have not been addressed. As relief Petitioner seeks a compensatory education award.²

On January 7, 2015, DCPS filed a response to the complaint. DCPS denied any alleged violations and denied that it failed to provide the student with a FAPE. DCPS asserted it has made appropriate IEPs and placement available to the student that have been reasonably calculated to provide the student with an appropriate education. However, the student has not always participated in recommended services such as ESY. DCPS also asserted the student received an updated IEP, a FBA and BIP and was referred for update evaluations.³ DCPS asserted that until all evaluations have been completed there is no justification for the relief Petitioner seeks.

A resolution meeting was held on January 20, 2015. The case was not resolved and the parties did not mutually agree to proceed to hearing. The 45-day period began on January 17, 2015, and ends [and the Hearing Officer's Determination ("HOD") is due] on March 2, 2015.

The Hearing Officer convened a pre-hearing conference on January 16, 2015 and issued a pre-hearing order on January 22, 2015, outlining inter alia, the issues to be adjudicated.

ISSUES: ⁴

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to provide the student with appropriate IEPs on December 9, 2013, and November 13, 2014.⁵

² In the complaint Petitioner sought other forms of relief but at the outset of the hearing Petitioner's counsel stated that Petitioner was seeking compensatory education as her sole remedy.

³ In January 2015, DCPS conducted a comprehensive psychological re-evaluation and a speech language re-evaluation. On February 10, 2015, DCPS convened an IEP meeting and reviewed the evaluations. However, no IEP was finalized and the parties have agreed to reconvene the IEP meeting but did not do so prior to the hearing. Prior to the hearing the parties discussed but did not agree to postpone the hearing until the IEP meeting was reconvened and an IEP finalized.

⁴ 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.

⁵ Petitioner asserts that the IEPs (12/9/13 & 11/13/14) were inappropriate from inception and DCPS failed to update the IEPs based upon the student's needs. As basis for the alleged inappropriateness Petitioner asserts the IEPs have/had (1) insufficient hours outside general education (Petitioner asserts the LRE is inappropriate and should be more time outside general education, up to an including stand alone separate school), (2) inappropriate goals: no PLOP and the goals are based on outdated data/evaluations; no writing goal by the 11/13/14 IEP (described in paragraphs 20, 23 & 30 of the complaint), (3) social/emotional concerns not addressed in the IEP, and (4) no dedicated aide to assist with the student's behavioral concerns from 11/13/14.

2. Whether DCPS denied the student a FAPE by failing to provide the student with evaluations in all areas of suspected disability by conducting an auditory processing evaluation and FBA by November 30, 2014.⁶
3. Whether DCPS denied the student a FAPE by failing to timely (by Spring 2014) perform the student's triennial evaluation, specifically a FBA, BIP, comprehensive psychological and speech language evaluation.

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 40 and Respondent's Exhibits 1 through 16) that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT:⁷

1. The student is _____ at School A where he began attending at the start of SY 2014-2015. The student receives special education and related services and has a DD disability classification. (Petitioner's Exhibit 5-1)
2. Prior to attending School A the student attended School B for kindergarten during SY 2013-2014. (Petitioner's Exhibit 6-1)
3. The student was initially determined eligible for special education through DCPS Early Stages on May 17, 2011. Prior to his initial eligibility the student received a developmental evaluation that was completed via the Connections Therapy Center when he was 2 years, 3 months on September 29, 2010, that concluded the student's developmental quotient was in the low average range. He was determined to have developmental delays in the areas of cognition and communication. This evaluation was the basis of the student's DD classification. (Petitioner's Exhibit 7-1, 13-3, 13-4)
4. In April 2011 DCPS Early Stages conducted a speech language evaluation of the student when he was age 2 years, 9 months. The student's voice, resonance, and fluency skills were within normal limits. His pragmatic language skills were below age expectations. His overall language skills were in the below average range of performance. His articulation skills were below normal limits and his intelligibility was rated to be less than 50% in known context with unfamiliar persons. The evaluator concluded the student's

⁶ Petitioner alleges DCPS should have been put on notice that these evaluations were necessary by this date.

⁷ 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.

language and articulation skills were delayed, that his deficits would impact his progress in the general education setting and speech language therapy was warranted. (Petitioner’s Exhibit 14-4)

5. In December 2013 as part of the student’s triennial evaluation to determine if the student continued to be eligible DCPS completed an analysis of existing data. The analysis of existing data form included a statement the student should be evaluated in the area of adaptive/cognitive to obtain additional information to determine eligibility. (Petitioner’s Exhibit 26-3)
6. As a part of the triennial eligibility process a Woodcock Johnson-III (“WJ-III) was administered while the student was attending School B. At the time the student was 5 years 5 months. (Petitioner’s Exhibit 13-4, Respondent’s Exhibit 11)

7. The student’s scores on the WJ-III were the following:

	SS	Age Eq.	Descriptive
<u>Clusters:</u>			
Oral Language	83	3-10	Low Avg.
Oral Expression	84	3-10	
Listening Comp	84	3-11	Low Avg.
Pre-Academic	96	5-3	
Brief Achievement	104	5-7	
Total Achievement	104	5-9	Avg.
Broad Reading	104	5-10	Avg.
Reading Comprehsn.	105	5-10	Avg.
Brief Reading	109	5-11	Avg.
Basic Reading Skills	111	6-0	Hi Avg.
Broad Math	94	5-1	Avg.
Math Calcultn. Skills	101	5-6	Avg.
Math Reasoning	94	5-2	Avg.
Brief Math	94	5-1	Avg.
Broad Written Lang.	110	6-0	Avg.
Brief Writing	113	6-1	Hi Avg.
Basic Writing Skills	107	6-0	Avg.
Written Expression	109	6-1	Avg.
Academic Skills	107	5-9	Avg.
<u>Subtests Administered:</u>			
Letter Word Idtificatn.	106	5-10	
Reading Fluency	n/a	4-1	
Calculation	n/a	5-7	
Math Fluency	n/a	<5-1	
Spelling	110	5-11	
Writing Fluency	n/a	<5-4	
Passage Comprehsn.	108	5-11	
Applied Problems	94	4-10	

8. On December 9, 2013, DCPS issued a prior written notice (“PWN”) to the student’s parent informing her that student’s IEP team had concluded that sufficient data was available to the team to determine that the student continued to have a disability and no further evaluations were needed to determine the student’s needs. DCPS did not proceed to conduct any additional evaluations after its analysis of existing data. (Petitioner’s Exhibit 28-1, Respondent’s 14, 15)
9. On December 9, 2013, DCPS convened an annual review meeting for the student at which his continued eligibility was determined. The meeting resulted in the student continuing to be eligible under the DD classification and an IEP was completed that provided the student the following services: 4.5 hours per week of specialized instruction in general education, 3 hours per week outside general education and 4 hours per month of speech and language pathology. The IEP included ESY year services. The student’s parent participated in the December 9, 2013, IEP meeting and agreed with the disability determination. (Parent’s testimony, Petitioner’s Exhibits 6-1, 6-8, 27-1, Respondent’s Exhibits 14, 15)
10. The student performed well academically in his kindergarten classroom at School B and was occasionally off task but could be redirected. The student’s report card for SY 2013-2014 reflects that the student approached expectations, but was not yet proficient in reading, writing and language and math and in all areas measured except in Social Studies in which he was rated as proficient. The report card noted that the student displayed self-discipline and followed classroom rules with frequent prompting. (Witness 5’s testimony, Petitioner’s Exhibit 20-1, 20-4)
11. ESY was available to the student during summer 2014 but he did not attend. Because the student did not attend ESY the impact may have caused him to show some regression when he resumed school at the start of SY 2014-2015. (Witness 5’s testimony, Petitioner’s Exhibits 6-11, 23)
12. The student began attending School A at the start of SY 2014-2015. At School A the student has received discipline referrals due to disruptive behaviors in which he was removed from the classroom for in-school suspension on occasion and has had out of school suspensions for a total of seven days for disruptive and or aggressive behaviors toward student’s and /or school staff. (Petitioner’s Exhibit 13-3)
13. The student’s most recent IEP was developed at School A on November 13, 2014, and requires the student to receive 3.0 hours per week of specialized instruction inside the general education, 4.5 hours per week of specialized instruction outside the general education and 4.0 hours per month of speech and language services outside general education. (Petitioner’s Exhibit 5-1)
14. On November 20, 2014, School A conducted a FBA to address the student’s inability to focus and violence that included verbal and physical aggression. School B also developed a BIP to address the behaviors. (Petitioner’s Exhibits 9, 10)

15. In the first term of SY 2014-2015 the student was performing significantly below grade level in reading, writing, speaking and listening. He was approaching expectations and at Basic level in all other areas. The student needed frequent prompting with regard to his work habits, personal and social skills in the classroom. By the second term report card the student was approaching expectations and at Basic Level in all areas except writing and language in which he was still rated as being Below Basic Level. And by second term the student needed less prompting in his work habits, personal and social skills. The student's overall academic and behavior functioning improved in the second term as compared to the first term. (Petitioner's Exhibits 18-1),
16. Since the start of SY 2014-2015 the student has made academic and behavioral progress. The student was displaying behavioral difficulties at the start of the school year that have improved overtime. On occasion the student was sent to another classroom to help address his behavior but that course of action now occurs was far less frequently. A FBA was conducted and a BIP implemented that have assisted in the student's behavioral improvements. (Witness 4's testimony)
17. The student's parent has received calls from School A about the student's in-school behaviors starting the second week of school and to her the calls seemed to become an everyday occurrence. The student's parent met with the School A principal and told him to put the student in another class because she believed his classroom teacher did not know how to control the student's behaviors. (Parent's testimony)
18. Petitioner filed this due process complaint on December 17, 2014. At a resolution meeting on the complaint DCPS acknowledged that it had already started evaluations of the student including a new FBA, a psychological evaluation and a speech language evaluation. (Respondent's Exhibit 3-1)
19. On January 27, 2015, DCPS conducted a comprehensive psychological re-evaluation. The evaluator was not able to determine the student's cognitive functioning because of his behavior and refusals to do the assessments. The evaluator conducted an education assessment WJ-III and assessed the student's social emotional and behavioral functioning. The evaluator recommended the student be classified with other health impairment ("OHI") for Attention Deficit Hyperactivity Disorder ("ADHD"). (Petitioner's Exhibit 13)
20. The student's scores on the WJ-III were the following and compared with his previous WJ-III Scores:⁸

	November 2013			January 2015	
	SS	Age Eq.	Descriptive	SS	Descriptive
<u>Clusters:</u>					
Oral Language	83	3-10	Low Avg.		
Oral Expression	84	3-10			
Listening Comp	84	3-11	Low Avg.		

⁸ The two WJ-III scores did not correspond fully but the extent they offered comparable data those comparisons are displayed.

Pre-Academic	96	5-3			
Brief Achievement	104	5-7		92	Low Avg.
Total Achievement	104	5-9	Avg.		
Broad Reading	104	5-10	Avg.	83	Low Avg.
Reading Comprehsn.	105	5-10	Avg.		
Brief Reading	109	5-11	Avg.	87	Low Avg.
Basic Reading Skills	111	6-0	Hi Avg.		
Broad Math	94	5-1	Avg.	93	Avg.
Math Calcultn. Skills	101	5-6	Avg.	93	Avg.
Math Reasoning	94	5-2	Avg.		
Brief Math	94	5-1	Avg.	94	Avg.
Broad Written Lang.	110	6-0	Avg.		
Brief Writing	113	6-1	Hi Avg.		
Basic Writing Skills	107	6-0	Avg.		
Written Expression	109	6-1	Avg.		
Academic Skills	107	5-9	Avg.	91	Avg.
<u>Subtests Administered:</u>					
Letter Word Idtificatn.	106	5-10		97	Avg.
Reading Fluency	n/a	4-1		0	Very Low
Calculation	n/a	5-7		95	Avg.
Math Fluency	n/a	<5-1		80	Low Avg.
Spelling	110	5-11		87	Low Avg.
Writing Fluency	n/a	<5-4		77	Low
Passage Comprehsn	108	5-11		77	Low
Applied Problems	94	4-10		97	Avg.

21. On January 18, 2015, DCPS conducted a speech language reevaluation. The testing indicated that the student exhibits strengths with his fluency, voice and resonance that were within normal limits. He was given two vocabulary testes on which he fell in the below average range indicating that he had difficulty with his receptive and expressive vocabulary skills. The student's overall articulation skills fell in the moderate deficit range indicating he had difficulty with producing sounds in words correctly. During the testing the student needed a lot of encouragement to complete most of the subtests and to remain focused. The evaluator left the decision about the frequency and duration of the student's speech language services to be determined by the team after relevant data was reviewed. (Petitioner's Exhibit 8)
22. On February 10, 2015, DCPS convened an IEP meeting and reviewed the evaluations DCPS conducted in January 2015 and discussed that cognitive testing was not possible due to the student's behaviors. The team discussed changing his disability classification and agreed that it would change to OHI. The student's classroom teacher related the student's behavioral difficulties in the classroom and the strategies used by the teacher to manage his behaviors but those strategies were not yet incorporated into the student's IEP. The parties discussed but did not agree on the number of hours the student's specialized instruction would be increased and did not complete an update of the

student's IEP that day but agreed to meet again to do so. The student's November 2014 remained in effect. (Witness 3's testimony, Petitioner's Exhibit 21-1, 25-1)

23. Petitioner engaged the services of an Audiologist to review the student's evaluations and educational records and offer an opinion at the hearing. This expert witness opined that with regard to the student's inattention that it may be the result of auditory overloading and/or sensitivity and recommended that an auditory processing evaluation be conducted of the student to rule out this possibility.⁹ (Witness 1's testimony, Petitioner's Exhibit 32)
24. Petitioner's educational consultant developed a compensatory education proposal for the student designed to remediate for regression and for the student's evaluations having allegedly been untimely conducted. The consultant also based her proposal on the student having allegedly had inappropriate IEPs because he allegedly missed out on additional specialized instruction outside general education and behavioral support services. The consultant proposed that the student be provided 240 hours of specialized tutoring: two hours three times per week for 40 weeks and 80 hours of counseling/behavior support services at 2 hours per week for 40 weeks. (Witness 2's testimony, Petitioner's Exhibit 33)¹⁰

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;

⁹ Although this witness offered opinions on other areas of the student's functioning the Hearing Officer only credited those opinions that were related to the witness' designated area of expertise. The witness had not conferred with any of the student's teachers or observed or evaluated or assessed the student.

¹⁰ Petitioner attempted to offer this witness an expert but the designation was not granted. The witness offered testimony based on her review of documents of what she believed to be alleged violations. However, the Hearing Officer did not credit the witnesses testimony with regard to the appropriateness of the student's IEP or services because the witness had not conferred with the student's teachers, assessed or evaluated the student and had no personal knowledge of his educational functioning and services beyond her review of documents.

(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. ¹¹ *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) se 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 with appropriate IEPs on December 9, 2013, and November 13, 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 provide the student with appropriate IEPs.

“The IEP is the “centerpiece” of the IDEA’s system for delivering education to disabled children,” *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act. " *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.

To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

Schaefer v. Weast, 554 F.3d 470 (U.S. App. 2009) “The court is required to focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.” Blackmon v Springfield R-XII Sch. Dist. 198 F.3d 648, at 653 (8th Cir. 1999) Requirements of the IDEA are satisfied when a school

¹¹ 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.

district provides individualized education and services sufficient to provide disabled children with some educational benefit

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

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.” Furthermore, an IEP should not be “automatically set aside . . . for failing to include a specific disability diagnosis or containing an incorrect diagnosis.” *Fort Osage R-1 School District v. Sims*, 641 F.3d 996, 1004 (8th Cir. 2011). Classification of the precise impairment listed within 20 U.S.C. § 1401(3)(A)(i) is “not critical in evaluating FAPE” and IDEA charges schools to develop an “appropriate education, not with coming up with the proper label.” *Pohorecki v. Anthony Wayne Local School District*, 637 F. Supp. 2d 547, 557 (N.D. Ohio 2009) (quoting *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997)).

The “primary vehicle” for implementing the goals of the IDEA is the IEP, which the statute “mandates for each child.” *Harris v. District of Columbia*, 561 F.Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). See 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. “The IEP must, at a minimum, ‘provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.’” *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005), quoting *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). The “IEP must be ‘reasonably calculated’ to confer educational benefits on the child, but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.’” *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009).

Petitioner asserted that the student’s IEPs were inappropriate because they had insufficient hours outside general education, inappropriate goals, no present levels of performance, the goals were based on outdated data/evaluations, there were no writing goals, no social/emotional concerns addressed and no dedicated aide to assist with the student’s behavioral concerns.

However, there was no credible testimony offered with regard to these areas of alleged insufficiencies of the IEPs and there was insufficient documentary evidence to support these assertions. To the contrary, the evidence demonstrated that the student’s IEPs developed at both School B and then at School A were reasonably calculated to confer educational benefit to the student. The December 9, 2013, IEP was based upon the November 2013 WJ-III assessment and the evidence indicates that during SY 2013-2014 the student made academic progress during the school year from the services provided him pursuant to the IEP. Although there was evidence the student had some behavioral difficulties during that school year and needed frequent

prompting, there is no evidence to support a finding that the student was unable to progress in the general education curriculum or was denied a FAPE.

Similarly, in SY 2014-2015, although the student displayed more challenging behaviors, needed more prompting and did not perform as well academically during the first term, there was evidence that the student did not attend ESY as his IEP prescribed, and this is a plausible reason why the student had difficulty at the beginning of the school year. By the second term, however, both the student's academic performance and his behavior had begun to improve. This is a basis for the IEP that was developed in November 2014 to be considered reasonable. In addition, after the IEP was developed School A conducted a FBA and developed a BIP to address the student's behavioral issues that appeared to be interfering with his academic performance.

Consequently, the Hearing Officer concludes that Petitioner presented insufficient evidence to support a conclusion that the student's two IEPs that are in question were not reasonably calculated to confer educational benefit to the student at the time they were developed or that the student did not derive educational benefit from the services that were provided him pursuant to these IEPs.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to provide the student with evaluations in all areas of suspected disability by conducting an auditory processing evaluation and FBA by November 30, 2014.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS failed to provide the student with evaluations in all areas of suspected disability by conducting auditory processing evaluation and FBA by November 30, 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).

The evidence demonstrates that the student's behavior difficulties during SY 2013-2014 were not significant such that DCPS should have been put on notice to conduct a FBA prior to when it did so in November 2014. When the student began to attend School A at the start of SY 2014-2015, after having missed ESY services, the student began to display significant behavioral difficulties that School A ultimately addressed when the student's IEP was reviewed in November 2014 by quickly moving forward with an FBA and developing a BIP. The Hearing Officer concludes that School A's response and actions to address the student's behavioral difficulties, including the timing, was reasonable. Consequently, the Hearing Officer concludes that Petitioner presented insufficient evidence to support a conclusion that DCPS should have conducted a FBA sooner

than it did. The evidence demonstrates there was no request for an auditory processing evaluation prior to the due process complaint being filed and there was insufficient evidence that DCPS should have been put on notice to conduct such an evaluation prior to the complaint being filed. Petitioner may make a request to DCPS for this and any other evaluation that she believes reasonable for its consideration. However, at this juncture there was insufficient evidence of a denial of a FAPE to the student for DCPS not conducting the evaluation(s).

ISSUE 3: Whether DCPS denied the student a FAPE by failing to timely perform the student's triennial evaluation.

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 timely perform the student's triennial evaluation.

20 USC §1414(a)(2)(A) requires that a local education agency shall ensure that a reevaluation of each child with a disability is conducted, if conditions warrant a reevaluation or if the child's parent or teacher requests a reevaluation, but at least once every 3 years.

The evidence demonstrates that DCPS timely conducted the student's triennial evaluation when it conducted the WJ-III and the analysis of existing data. The IEP team concluded that no additional evaluations were necessary to determine the student's continued eligibility or his needs. DCPS issued a PWN notice to the parent to this effect and the parent agreed and signed the eligibility determination form. Consequently, the Hearing Officer concludes that DCPS conducted timely triennial evaluation of the student.

ORDER:

The due process complaint is hereby dismissed with prejudice and all 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

Coles B. Ruff, Esq.
Hearing Officer
Date: March 2, 2015