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 of Student[1], Petitioner, v. District of Columbia Public Schools ("DCPS") ["LEA"] Respondent. Case # 2015-0369 Date Issued: March 2, 2016	HEARING OFFICER'S DETERMINATION Hearing Dates: January 21, 2016 February 10, 2016 February 17, 2016 Representatives: Counsel for Petitioner: Alana Hecht, Esq. Disability Law Group, P.C. 37 Florida Avenue, N.E. Suite 100 Washington, D.C. 20002 Counsel for Respondent: Daniel McCall, Esq. District of Columbia Office of the General Counsel 1200 First Street, NE Washington, DC 20002 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 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 January 21, 2016, February 10, 2016, and concluded on February 17, 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 2006 on February 10, 2016, and Hearing Room 2006 on February 17, 2016.

BACKGROUND AND PROCEDURAL HISTORY:

On November 16, 2015, Petitioner filed this due process complaint. Petitioner alleged, inter alia, DCPS denied the student a free appropriate public education ("FAPE") by failing provide the student appropriate IEPs on October 16, 2014, and November 12, 2015, because the IEPs failed to provide the student with sufficient specialized instruction hours and a placement in a separate school capable of meeting the student's needs.

Petitioner seeks as relief that the Hearing Officer find DCPS denied the student a FAPE and order DCPS to fund the student's tuition and transportation to a private special education school ("School C") and issue a prior written notice regarding the placement no later than 15 days following the issuance of the Hearing Officer's Determination ("HOD"). Petitioner also requests that DCPS convene an IEP meeting and review and revise the student's IEP to provide a minimum of 27.5 hours of specialized instruction outside of the general education setting, revise the least restrictive environment ("LRE") to reflect placement in a separate special education school. Finally, Petitioner requests that DCPS fund the compensatory education plan presented by Petitioner during the due process hearing, or in the alternative, that the Hearing Officer develop a compensatory education plan.

On December 1, 2015, DCPS filed a response to Petitioner's complaint in which it denied that it failed to provide the student with a FAPE. DCPS asserted inter alia, that the IEPs proposed in October 2014 and in November 2015 were reasonably calculated to provide the student with meaningful educational benefit and the school proposed by DCPS ('School B") can implement the student's most recent IEP.

A resolution meeting occurred on November 23, 2015. However, the parties did not reach any agreement on the issues. The parties did not agree to move directly to hearing. The 45-day period began on December 16, 2015, and ended [and the Hearing Officer's Determination ("HOD") was originally] on January 30, 2016. The parties filed a joint motion to continue the hearing and extend the HOD due date that was granted. Later Petitioner filed a second motion to extend the HOD that was also granted. With the granting of those two motions the HOD is due March 2, 2016.

The Hearing Officer convened a pre-hearing conference ("PHC") on the complaint on December 2, 2015, and issued a pre-hearing order ("PHO") on December 7, 2015, and a revised PHO on December 13, 2015, outlining, inter alia, the issues to be adjudicated.

ISSUES: [2]

The issue(s) to be adjudicated are:

1. Whether DCPS denied the student a FAPE by providing the student with an inappropriate IEP on October 16, 2014, because the IEP failed to provide the student with sufficient specialized instruction hours and a corresponding placement that required all services outside general education.

2. Whether DCPS denied the student a FAPE by failing to revise the student's IEP in March 2015, and/or April 2015, and/or August 2015 to require full time outside general education services.[3]

3. Whether DCPS denied the student a FAPE by delegating the placement decision to the LRE team as of the April 1, 2015, IEP meeting and thereby denying the parent and the team[4] the ability to determine the student's IEP services and educational placement.

4. Whether DCPS denied the student a FAPE following the May 12, 2015, and/or September 16, 2015, meeting(s) by failing to finalize the IEP within 15 days and failing to advise the parent of the decision not to finalize the IEP following that meeting.

5. Whether DCPS denied the student a FAPE by failing to offer the student an appropriate educational placement since October 16, 2014, and/or since May 12, 2015,[5] that provided the student with a full-time out of general education program that could meet the student's needs.

6. Whether DCPS denied the student a FAPE by failing to revise the student's IEP within the one (1) year deadline required by IDEA allowing the October 16, 2014, IEP to expire.

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[2] 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 hearing and the parties agreed that these were the issue(s) to be adjudicated. At the outset of the hearing Petitioner's counsel withdrew issues 1 & 6 that were listed in the PHO: (1) Whether DCPS denied the student a free appropriate public education ("FAPE") by failing to timely evaluate the student following a parental written request in mid February 2015 for a comprehensive psychological evaluation; and (6) Whether DCPS denied the student a FAPE by failing to implement the student's IEP by failing to provide the student with any speech and language services after the February 23, 2015, eligibility meeting. With the removal of these to issues, all issues were renumbered with a total of 10 issues rather than 12.

[3] Petitioner alleges DCPS failed to change the student IEP on these dates despite its knowledge that the student's IEP was inappropriate.

[4] Petitioner asserts that the placement determination was to be made solely by the parent and the rest of the team who were knowledgeable about the student.

[5] Petitioner asserts that as of this date School A and DCPS acknowledged the student's needs could not be met at School A.

7. Whether DCPS denied the student a FAPE by failing to issue prior written notice(s) to the parent following: (a) the February 23, 2015, meeting when the student's speech and language services were terminated, and/or (b) the May 12, 2015, meeting when the team determined the student was in need a more restrictive IEP and placement and that School A could no longer meet the student's needs, and/or (c) the decision of the LEA and School A not to finalize the May 12, 2015, and/or September 16, 2015, IEPs.

8. Whether DCPS denied the student a FAPE by failing to provide the parent and/or her representatives with the proposed IEP at least five (5) business days in advance of the November 12, 2015, IEP meeting.

9. Whether DCPS denied the student a FAPE when it developed the November 12, 2015, IEP because the IEP: (a) fails to provide speech and language services, and/or (b) fails to provide sufficient specialized instructional hours and a corresponding placement in a separate school or even a separate program that is capable of meeting the student's needs.

10. Whether DCPS denied the student a FAPE by failing to place the student in appropriate placement following revision of the student's IEP on November 12, 2015.

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 38 and Respondent's Exhibits 1 through 10) that were admitted into the record and are listed in Appendix A).[6] Witnesses are listed in Appendix B.

FINDINGS OF FACT: 5

1. The student is age ____ in ____ grade [7] attending a District of Columbia public charter school ("School A") for which the District of Columbia Public Schools ("DCPS") is the local education agency ("LEA"). (Petitioner's Exhibit 27, Witness 5's testimony)

2. School A is an application school in which a parent chooses to enroll his or her child. School A accepts student's irrespective of their special education status unless a parent provides School A the student's IEP at the time of application and School A is aware ahead of time it cannot implement the student's IEP. If School is not provided the IEP ahead of time and the student is accepted it may take up to 30 days for School A to gain access to a student's IEP from OSSE database. If is determined after 30 days that School A cannot implement the IEP the parent is informed that he or she should enroll the student in another school that can implement the IEP or should enroll in the student's local DCPS school. (Witness 5's testimony)

[6] Any docments that were ojbected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

[7] The student's age and grade are listed in Appendix B.

3. The student began attending School A in [redacted] grade. He is now in School A's high school program. When he started at School A the student's individualized education program ("IEP") had a multiple disability ("MD") classification including specific learning disability ("SLD") and speech and language impairment ("SLI"). (Parent's testimony, Petitioner's Exhibit 10-1)

4. The student's October 16, 2014, IEP required that the student receive 15 hours per week of specialized instruction in a general education setting and 240 minutes per month of speech and language services outside of the general education setting. The IEP's present levels of performance note the student reading levels were below basic. The IEP included goals in math, reading, written expression, and communication/speech and language. (Petitioner's Exhibit 12-1, 12-3 though 12-6, 12-8)

5. In February 2015 the student's parent contacted the student's former fourth grade teacher who was employed at the time with the parent's current law firm. As result, the law firm sent a letter to School A requesting that School A evaluate the student based on the parent's concerns about the student's academic deficits. (Witness 2's testimony)

6. The student's parent later became a client of the former teacher who began her own parent advocacy business after leaving the law firm later in February 2015. The advocate attended three meetings at School A with the student's parent. (Witness 2's testimony)

7. On February 12, 2015, the parent's educational advocate (" the advocate") requested in an email to School A that School A requesting on behalf of the parent that the student be evaluated. The advocate later requested the student's educational records. (Petitioner's Exhibit 2-5, 2-6)

8. School A provided the student's records including a document that seem to indicate that School A had conducted an eligibility determination meeting on February 23, 2015, and that the student's disability category had been changed to MD with other health impairment ("OHI") and SLD.[8] The parent does not recall attending any meeting at which the student's disability classification was changed. (Witness 2's testimony, Parent's testimony, Petitioner's Exhibit 13)

9. The advocate attended a meeting with the parent at School A on March 10, 2015. During the March 10, 2015, meeting the advocate made a request that School A conduct comprehensive psychological evaluation. The advocate hoped to glean from academic assessments what if any progress the student's was making. School A did not agree to conduct comprehensive psychological evaluation but did agree to perform an academic assessment. (Witness 2's testimony)

10. During the March 10, 2015, meeting the advocate made a request that the student receive an out of general education IEP. However, School A did not agree and no changes were

[8] The advocate did not become aware of this document, however, until much later after she was not longer the parent's advocate.

made to the student's IEP. School A agreed to reconvene on April 1, 2015, in order to review evaluations. (Witness 2's testimony, Petitioner's Exhibit 14)

11. The next meeting the parent and the advocate attended at School A was on April 1, 2015. By April 1, 2015, School A had conducted an educational assessment. The scores indicated the student was operating significantly below grade level. School A proposed to conduct a speech language ("S/L") evaluation. Neither the parent nor the advocate had requested a S/L evaluation. (Witness 2's testimony)

12. Based upon the information that was shared about the student's academic performance at the March 10, 2015, and April 1, 2015, meetings the advocate formed the opinion the student required a full time out of general education placement.[9] The advocate on behalf of the parent requested that the student be provided a full time out of general education placement. There was no DCPS (LEA) representative at the March 10, 2015, or April 1, 2015, meetings and the advocate was aware that the School A special education coordinator ("SEC") was not serving as the LEA representative at these meetings. (Witness 2's testimony, Petitioner's Exhibit 15)

13. During the April 1, 2015, meeting the School A SEC stated that School A could not provide the student placement outside general education without involving the LEA. The SEC stated that she would involve DCPS and least restrictive environment ("LRE") team process would take 30 days to complete. (Witness 2's testimony, Petitioner's Exhibit 15)

14. The LRE process is used as a tool to assist School A in determining if the student still can be serviced at its school. For a student to go from a total inclusion setting to a total outside general education setting the School A team needed to obtain an evaluation completed and more current data than was available. (Witness 5's testimony)

15. The advocate informed School A at the April 1, 2015, meeting she would be looking for an alternative placement. School A agreed to involve the LEA and agreed to perform a psychological evaluation and agreed to hold another meeting on May 12, 2015. (Witness 2's testimony, Petitioner's Exhibit 15)

16. Based upon the discussion of the student requiring outside general education program the advocate sent the parent to School C and another private special education school and School C offered the student acceptance in May 2015. The advocate gave a copy of the acceptance letter to the School A SEC and to the parent.[10] (Witness 2's testimony)

17. On May 11, 2015, School A convened an IEP meeting that a DCPS representative participated by telephone. The parent attended with the advocate. The DCPS speech and language pathologist who evaluated the student reviewed her evaluation. Based upon the

[9] The advocate reviewed service trackers that described the difficulties that student had and the help he needed in the classroom and inability to complete his homework. (Petitioner's Exhibit 6-1, 6-6)

[10] At the time, the advocate who is now employed by School C, was not affiliated with School C.

evaluator review the team concluded, despite the parent and advocate's objection, the student would be exited from speech services. The School A speech language pathologist was present and talked about the supports she was providing the student. She did not agree with the student's dismissal from services. (Witness 2's testimony)

18. At this May 11, 2015, meeting School A presented a draft IEP the that required that the student receive 15 hours per week of specialized instruction outside of general education with no related services. The School A team did not indicate in what areas the hours of specialized instruction would be provided. The student's parent did not agree with the level of services proposed as she believed the student needs a smaller class setting because of his poor reading skills and because he is easily distracted. The draft IEP contained the SL goals but there were no S/L service hours. (Witness 2's testimony, Parent's testimony, Petitioner's Exhibits 16, 17)

19. The team agreed at the May 11, 2015 meeting the student would get support outside general education and provided a copy of the draft IEP so that team members could be provide feedback by prior to finalizing the IEP. (Witness 5's testimony)

20. The advocate asked for an update regarding the requested psychological evaluation but it had not been conducted. The advocate then asked School A for authorization for an independent evaluation ("IEE"). DCPS granted the parent authorization for an independent comprehensive psychological evaluation. The advocate took a copy of the draft IEP away with her from the meeting. (Witness 2's testimony, Petitioner's Exhibits 16, 17, 18)

21. At the May 11, 2015, meeting after the IEP was proposed School A reiterated that it was an inclusion school and the student's teachers expressed that the student needed another school for the services that were proposed. The student's parent understood that School A could not implement any out of general education instruction and could only implement inclusion instruction. (Parent's testimony)

22. The parent and the advocate believed the draft IEP would be finalized but the parent never got a final copy as she did in the past by School A sending a copy of the IEP home with the student. (Witness 2's testimony, Parent's testimony)

23. The advocate noted in the notes she made during the meeting that School A would be continuing the inclusion services for the student while waiting for the LRE process and then another meeting would be held. The School A SEC made it clear that if the parent wanted the student to be provided "pullout" specialized instruction the parent would have enroll the student in another school. School A was clear about not having pull out services and that the parent could start looking for another school. (Witness 2's testimony, Petitioner's Exhibit 16-4)

24. The advocate acknowledged in an email to School A that she had received the IEE authorization and she referred the authorization to a provider to be conduct the evaluation. (Witness 2's testimony, Petitioner's Exhibit 2-21, 2-29)

25. The DPCS LRE team completed and issued a report in June 2015. The report indicates the observations of the student were performed on June 4, 2015, during an assembly, and on June 5, 2015. The report only recommends that the student should continue to receive supports to address his needs but does not make any further recommendations. (Petitioner's Exhibit 19)

26. At the end of SY 2014-2015 the student failed Algebra and had to go to summer school and passed the class in summer school. (Parent's testimony)

27. The student earned the following grades for each quarter in the following subjects during SY 2014-2015:

Subjects	Adv.1	Adv. 2	Adv. 3	Adv. 4	Final Grade
Algebra 1	F	C	F	F	F
Biology	C	C	B	C	C
Dance & Theatre			C	C	C
English 9	B	F	C	C	C
General Music			C	C	C
Global Citizenship	B	B			B
Health & Fitness	A	A			A
Spanish 1	F	C	C	C	F
World History	C	C	C	C	C

28. By July 1, 2015, the independent comprehensive psychological evaluation was complete and the advocate forwarded the evaluation report to DCPS. (Witness 2's testimony, Petitioner's Exhibit 20)

29. At the start of SY 2015-2016, the student returned to School A. The student's parent or her advocate never received a prior notice regarding the termination of the student's speech and language services. As it turned out the services the student continued to receive speech language services through the end of SY 2014-2015. The parent disagreed with the S/L services being discontinued and never got a prior notice stating that the S/L services would stop. After the start of SY 2015-2016 the student's parent found out that the School A S/L provider was not seeing the student. (Witness 2's testimony, Respondent's Exhibit 8)

30. On August 26, 2015, DCPS convened a meeting to review the student's independent psychological evaluation. Petitioner's new educational advocate employed by the Petitioner's current law firm attended with the parent. The evaluation results were shared. The student's full scale IQ score was 57, with a verbal comprehension score of 61, processing speed of 78, working memory of 62 and perceptual reasoning score of 61. DCPS did not believe an adaptive evaluation was necessary in order to rule out intellectual disability. The student's academic functioning scores were scattered. His reading comprehension was at the first grade level; his word reading and reading fluency were at the third grade level. His math functioning was higher at the fourth and fifth grade level. He had average functioning in numerical operations, math fluency in multiplication and average functioning in essay composition. The evaluator recommended that the student be in placement with classrooms with less than 10 students. (Petitioner's Exhibits 20-1, 20-9, 20-14, 21)

31. DCPS convened another meeting on September 16, 2015, in order to review and revise the student's IEP due to the results of the comprehensive psychological evaluation. At the September 16, 2015, meeting DCPS proposed an IEP that provided the student with 15 hours per week of specialized instruction outside of general education. The School A S/L provided voiced her opinion at the September meeting about the student still needing S/L services. The advocate on behalf of the parent expressed her disagreement with the IEP at the meeting and in a follow up letter. (Witness 3's testimony Petitioner's Exhibit 22, 24, 25)

32. DCPS advised the parent at the September 16, 2015, meeting that the student could attend his neighborhood high school (School B). However, there were no details provided at the meeting about how the IEP would be implemented at the local school. DCPS did not issue any prior written notice of placement or a location of services letter to the parent regarding the student's IEP being implemented at School B. (Witness 2's testimony, Parent's testimony)

33. At the September 16, 2015, meeting the School A SEC stated that the team had until October 2015 to get the IEP finalized. (Parent's testimony)

34. The parent's advocate or the parent never received a final copy of the IEP from September 2015 meeting. (Witness 3's testimony, Parent's testimony)

35. On November 12, 2015, DCPS convened a meeting to finalize the student's IEP that prescribed 15 hours per week of specialized instruction outside of general education. School A advised the parent she had not taken the steps to place the student in a school other than School A and School A could not implement the student's IEP. (Witness 5's testimony, Petitioner's Exhibit 27)

36. The advocate received a draft IEP prior to the November 12, 2015 meeting but there were changes to the IEP in the draft including accommodations removed that were in the student's prior IEP. (Witness 3's testimony)

37. At November 12, 2015 meeting the DCPS representative said the student should go to his neighborhood school and that his new IEP could be implemented there. There was no information about what class size the student would have at School B mentioned during the meeting. There was no mention of the type of reading intervention the student would receive at School B. The student's parent has received no official notice that the student should attend School B and she got no prior written notice. (Parent's testimony)

38. The student is unable to read signs. He cannot break down words and pronounce words correctly. He reads best when he is reading 4th grade level books and does not read fluently. He loves to go to school and is on time each day. When the student does home work he telephones the teacher for help. He is not embarrassed by his academic difficulties and is willing to do whatever it takes to learn to read better. (Parent's testimony)

39. The parent' education advocate who testified as an expert witness expressed an opinion that the student's October 16, 2014, and November 12, 2015, IEPs were/is not sufficient to the address the level of remediation the student requires. She opined that student needed and continues to need a small class setting to increase his reading comprehension skills and her opinion any inclusion support is insufficient to address his severe deficits. (Witness 3's testimony)

40. The student has remained at School A because his parent did not withdraw the student. At School C the student is passing all of his classes with a C or better. He is being exposed to grade level content and receives modifications and accommodations. He is on course to pass to the next grade. (Witness 5's testimony)

41. School B, where DCPS has proposed that the student's November 12, 2015, IEP be implemented has 265 students with disabilities and 25 case managers. School B can provide the instruction in the student's IEP that was developed in November 2015. Supports are available for students who have reading deficits like the student. At School B the student would be receive pull out services in resources class through the week with no more than 13 students. School B has a writing curriculum that the student will be exposed to in addition to the specialized instruction in reading, math and writing. (Witness 7's testimony)

42. At School B each of the student's his general education teachers will be provided IEP snap shots so they are aware of the accommodations and supports to be provided to the student. The student will have access to non-disabled peers. At present School B is not certain what classes the student would attend until he arrives and a schedule is generated. However, he will be provided resources classes in math and reading outside general education and in some of the resource class he can earn Carnegie units toward his high school diploma including English 1 and 2 and 3 that are taught by special education teachers. (Witness 7's testimony)

43. The student has been accepted to a private special education separate school, "School C". School C is a Pre-K through 12-grade special education school serving a variety

of disability classification. School C has an OSSE certificate of approval and has a total of 154 students. All students there are disabled. School C cannot provide general education instruction. The upper school at School C consists of grades 9 through 12, has 85 students with an equal representation of 20-22 students is each grade. School C has ascribed to the common core standards of the District of Columbia. (Witness 4's testimony, Petitioner's Exhibit 31, 32, [redacted])

44. School C would look at the student's transcript and develop a program and schedule for the student based on what the student needs to obtain a high school diploma. The upper school located on the west end of the second floor and all of third floor. Tuition is set by OSSE and is $44,200 annually and related services are billed separately. The school year is 180 days and is calibrated with DCPS and School C offers ESY for eligible students. Related services rates are also set by OSSE. (Witness 4's testimony, Petitioner's Exhibit 31, 32,)

45. The amount of the S/L therapy will be determined by the evaluation in the student's file and is billed at $101.72 per hour for SL services. School C has licensed speech and language clinicians on staff. The DCPS progress monitors review progress reports and monitor DCPS funded students on site in the building. At high school level School C uses the Wilson and Lexica reading programs and speech and language pathologists have training in Lindamood Bell reading comprehension program for students who are deemed to need it. The speech and language services are integrated into the classroom but individual services depend on student's goals. All students have smart phones for maintaining schedules and sending in homework and content applications and all classrooms have computers and lap top cart and computer lab. (Witness 4's testimony)

46. Accommodations modifications are made for students with LD classification to modify assignments and accommodations and supplemental strategies such as guided notes and scaffold instruction. Language processing assistance is used help student being able to repeat and break down components of language and used visual prompts. The student visited School C one day. The student could start immediately. School C has a tutoring program that is not affiliated with the school but and the tutors receive the same training as teacher in professional development and on-sight training of the nature and needs with student with reading and writing and math disabilities. (Witness 4's testimony)

47. The student was assessed at Lindamood Bell on December 9, 2015. The assessment was normed by age. The first assessment was the Peabody Picture Vocabulary assessing language processing. The student's age equivalent was 7.5 and his grade equivalent 1.9. On the Gray Oral Reading assessment the student's comprehension was below the 1st percentile. Lindamood Bell recommended the following services at its program: daily instruction of 4 hours per day 5 days per week for an initial period of 10-12 weeks of instruction 200 to 240 hours. The specific program includes: Seeing Stars program and visualizing and verbalizing for language comprehension and thinking. This is initial recommendation and the program is flexible with regard to the number of hours per day to match a student's school schedule. The goal is to have the student improve 3 to 4 grade

levels in the reading fluency. The cost of the services is $120 per hour. (Witness 1's testimony, Petitioner's Exhibit 33-1, 33-3, 33-5)

48. The parent educational advocate proposed a compensatory education plan for the student having been without a full time out of general education program from October 16, 2014. She recommended that student be provided 200 to 240 hours of Lindamood Bell interventions to develop his language processing and literacy skills along with transportation, or 200 to 240 hours of tutoring in language processing and literacy skills from the School C.

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 providing the student with an inappropriate IEP on October 16, 2014, because the IEP failed to provide the student with

sufficient specialized instruction hours and a corresponding placement that required all services outside general education.

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

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. "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).

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).

Requirements of the IDEA are satisfied when a school district provides individualized education and services sufficient to provide disabled children with some educational benefit. Blackmon v. Springfield R-XII Sch. Dist. 198 F.3d 648, at 653 (8th Cir. 1999)

34 C.F.R. § 300.324 requires that "each agency must ensure that… the IEP team… revises the IEP, as appropriate, to address…the results of any reevaluation conducted under § 300.303." The IEP must also be revised to address any lack of expected progress toward annual goals and in the general education curriculum, information about the child provided to, or by, the parents, the child's anticipated needs, and other matters. 34 C.F.R. § 300.324(b)(1)(ii)

The evidence in this case demonstrates that the student has attended School A since [redacted] grade and had been consistently promoted year to year and had successfully reached high school. Although the student's expressed concerns about the student's academic deficits as early as February 2015 or even sooner, there was little evidence presented to substantiate that prior to the IEP team meeting on May 12, 2015, when the team determined the student was in need of out of general education instruction, that the student's IEP was inappropriate.

As of that date, however, the evidence indicates that even though DCPS wanted to have a LRE assessment conducted the team members at that meeting were certain the student was in need of a more restrictive placement. There may have been disagreement about the appropriate next level of restriction for the student between the School A staff and the student's parent and advocate, but there was no disagreement the student was in need of a more restrictive placement

than School B could provide. The Hearing Officer thus concludes that as of that date, the student IEP that had been developed on October 16, 2014, had become inappropriate. The failure to develop a more appropriate IEP at that juncture was a denial of a FAPE to the student.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to revise the student's IEP in March 2015, and/or April 2015, and/or August 2015 to require full time outside general education services.[11]

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence of on this issue.

ISSUE 3: Whether DCPS denied the student a FAPE by delegating the placement decision to the LRE team as of the April 1, 2015, IEP meeting and thereby denying the parent and the team[12] the ability to determine the student's IEP services and educational placement.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence of on this issue.

IDEA requires that "consistent with § 300.501(c), each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child." 34 C.F.R. §300.327. This requirement is also contained in 34 C.F.R. § 300.501(b) ("the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to – (1) the identification, evaluation, and the educational placement of the child.").

The evidence in this case demonstrates that at the April 1, 2015, meeting when the parent, her advocate and School A staff in attendance the team were of the opinion that the student was in need of specialized instruction and services outside general education that School could not provide. At that juncture the School A SEC indicated that there was need to have the LEA participate in a meeting to discuss the next steps for the student. And in fact such a meeting was convened with the LEA's participation on May 12, 2015. The Hearing Officer concludes that at that juncture the team it self determined the student was in need of a more restrictive setting but it was not clear at that meeting that all team member agreed that the student was in need of a full time out general education placement. It was certainly clear the parent and her advocate were of that opinion. The evidence indicates that School A and DCPS at that point initiated and a LRE review by DCPS to assist the team in determining what level of restriction in placement was appropriate for the student. That review which consisted of observations of the student at School A presumably by some DCPS staff and a report was generated in June 2015. However, there was not meeting to review either that report or the student's independent psychological evaluation until August 26, 2015. The Hearing Officer does not conclude based upon this

[11] Petitioner alleges DCPS failed to change the student IEP at these junctures despite its knowledge that the student's current IEP was inappropriate.

[12] Petitioner asserts that the placement determination was to be made solely by the parent and the rest of the team who were knowledgeable about the student.

evidence that there was any delegation of the placement decision regarding the student as result of the referral for the LRE observation, but there was certainly a significant delay in making a determination about the student's new level of service and where he would attend school. That delay was, as Hearing Officer has determined with regard to other issue(s), a denial of FAPE to the student. However, the Hearing Officer does not conclude based upon the evidence in this case that DCPS delegating the placement decision to the LRE team. Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

ISSUE 4: Whether DCPS denied the student a FAPE following the May 12, 2015, and/or September 16, 2015, meeting(s) by failing to finalize the IEP within 15 days and failing to advise the parent of the decision not to finalize the IEP following that meeting.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence of on this issue.

Under DC Code § 38-2571.03, codified on March 10, 2015, parents are afforded new rights with respect to the provision of documents prior to IEP and eligibility meetings and the receipt of finalized documents following those meetings. The Special Education Students Rights Act (DC Act 20-486) requires that after an IEP meeting, parents be given the finalized IEP within 5 business days. In the event that the IEP is not finalized within that period, the LEA has to provide the parents with the draft IEP as it stands as of that date. Finally, even if the IEP must be translated, the LEA must provide a parent with the finalized IEP no later than 15 days after the meeting at which the IEP was developed. No delays in excess are excused past the 15-day mark even to comply with the Language Access Act.

The evidence in this case demonstrates that DCPS provided the student's parent and her advocates draft IEP as the May 12, 2015, and September 16, 2015, IEP meetings. At neither of these meetings were the IEPs finalized and it was School A's position that the student's October 16, 2014, IEP was still effect until evaluations had been conducted and reviewed at the team made a final determination regarding the student's IEP. Although the Hearing Officer has determined in another issue herein that the October 16, 2014, IEP was not longer appropriate as of May 12, 2015, School A and DCPS were operating under the (now determined to be erroneous) notion that the student IEP was still in effect. Under these circumstances and with this evidence the Hearing Officer concludes that DCPS it was not a violation DC Code § 38-2571.03 for School A and/or DCPS to have not provided a copy of a final or draft of the student's IEP following the May 12, 2015, or September 16, 2015, meetings.

ISSUE 5: Whether DCPS denied the student a FAPE by failing to offer the student an appropriate educational placement since October 16, 2014, and/or since May 12, 2015,[13] that provided the student with a full-time out of general education program that could meet the student's needs. [14]

[13] Petitioner asserts that as of this date DCPS and [redacted] acknowledged the student's needs could not be met at [redacted].

[14] Petitioner's asserts that the student's IEP, program and placement should have, in addition to being full-time out of general education, been a program for students with severe learning disabilities that included a research-based reading intervention program and the integration of assistive technology in the classroom.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence of on this issue.

The term "educational placement" is defined in IDEA as any one of the placements on the "continuum of alternative placements." 34 C.F.R. § 300.115 lists this continuum as including: "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." See also, 34 C.F.R. § 300.39(a)(1)(i). The group determining the placement must select the placement option on the continuum in which it determines that the child's IEP can be implemented in the LRE." 71 Fed. Reg. 46587 (August 14, 2006), See also, 34 C.F.R. §§ 300.114 and 300.116. While educational placement is some point on the continuum of placement options, "location" is described "as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services." Id. at 46588. "[T]he physical school alone does not constitute an 'educational placement'" D.K. v. District of Columbia, Civ. 13-110, p. 11 (D.D.C. 2013). In fact, according to 20 U.S.C.A. § 1414(d)(1)(A)(i)(VII), an IEP must include "the…location…of those services and modifications."

As pointed out earlier the evidence in this case demonstrates that the student has attended School A since [redacted] grade and had been consistently promoted year to year and had successfully reached high school. Although the student's expressed concerns about the student's academic deficits as early as February 2015 or even sooner, there was little evidence presented to substantiate that prior to the IEP team meeting on May 12, 2015, when the team determined the student was in need of out of general education instruction, that the student's IEP was inappropriate.

As May 12, 2015, the evidence demonstrates the team members at that meeting were certain the student was in need of a more restrictive placement. There was disagreement about the appropriate next level of restriction for the student between the School A staff and the student's parent and advocate, but there was no disagreement the student was in need of a more restrictive placement than School B could provide. At the May 12, 2015, meeting the team had reviewed an educational assessment and a speech language evaluation. And there was a request for and an authorization granted for comprehensive psychological evaluation to be conducted. Prior to that evaluation being conducted there was in the Hearing Officer's opinion insufficient evidence that the student was in need of a full time out of general education placement. To the contrary the student's grades for SY 2014-2015 indicate that he passed all but two of his classes and was able to pass one of the two he failed in summer school. Consequently, the Hearing Officer concludes that based the data available as of the May 12, 2015, meeting there was the insufficient evidence to demonstrate that the student was in need of a full time out of general education placement as of May 12, 2015. Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

ISSUE 6: Whether DCPS denied the student a FAPE by failing to revise the student's IEP within the one (1) year deadline required by IDEA allowing the October 16, 2014, IEP to expire.

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

The IDEA requires that a student's IEP be reviewed and revised no less than annually. 34 C.F.R. § 300.324(b)(1)(i).

The evidence in this case demonstrates that the student's October 16, 2014, IEP was due to expire on October 15, 2015. Although School A and DCPS began meeting to consider revision of the student's IEP as early at May 2015 and met again in August 2015 and September 2015, the student's IEP was not finalized and effective until November 12, 2015. This was a lapse albeit by a few weeks in which the student's IEP was not updated and renewed in the timeframe IDEA requires. Not in all instances is there would the expiration of an IEP result in harm to the student and might only cause a procedural violation. However, in this instance the evidence demonstrates that as early as May 11, 2015, School and DCPS were aware the student's IEP was inappropriate and that he was in need of special education instructional services outside general education. In this instance the failure to timely update the student's IEP was in this Hearing Officer opinion a denial of a FAPE to the student.

ISSUE 7: Whether DCPS denied the student a FAPE by failing to issue prior written notice(s) to the parent following: (a) the February 23, 2015, meeting when the student's speech and language services were terminated, and/or (b) the May 12, 2015, meeting when the team determined the student was in need a more restrictive IEP and placement and that School A could no longer meet the student's needs, and/or (c) the decision of the LEA and School A not to finalize the May 12, 2015, and/or September 16, 2015, IEPs.

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

Parents are entitled to prior written notice whenever the school system proposes or refuses to change the placement of a child, the opportunity to challenge the appropriateness of a placement in an impartial due process hearing, and maintenance of the child in his "then-current educational placement" during the pendency of all administrative and judicial proceedings. 20 U.S.C.A. §§1415(b)(1),(3) (West 2005). Prior to proposing or refusing to change the placement of the child, the District must notify the parents in writing of (1) the description of the placement proposed or refused, (2) an explanation of why the placement was proposed or refused, (3) a description of the evaluation procedures, assessments, records, or reports that were used as the bases for the proposal or refusal, (4) a notice of the procedural safeguards under the IDEA, (5) sources for parents to contact to obtain assistance under the IDEA, (6) a description of other options considered and the reasons why they were rejected, and (7) a catch-all provision providing notice of all "other factors" that are relevant to the proposal or rejection of a placement. 34 C.F.R. § 300.503.

"[A] PWN must include . . . (E) a description of other options considered by the IEP Team and the reason by those options were rejected . . . ." Jalloh v. D.C., 968 F. Supp. 2d 203, 213 (D.D.C. 2013)(citing 20 U.S.C. § 1415(b)(3)); see also, Jalloh, 968 F.Supp.2d at 213 ("The intent of PWN is to "provide sufficient information to protect the parents' rights under the Act. It should enable the parents to make an informed decision whether to challenge DCPS's determination and to prepare for meaningful participation in a due process hearing on their challenge.") Id. (emphasis added).

Although the evidence indicates that there was a change of disability classification in the record for the student in February 2015, there was no other evidence presented regarding this document and it was not clear from the record whether the student's disability classification was actually changed during that time period. Consequently, the Hearing Officer does not conclude that a PWN was required to be issue regarding that notice.

However, as noted above the evidence demonstrates that as of May 11, 2015, the School A had determined that the student was in need of out of general education services and that it could not provide those services. Although there were outstanding evaluations that were to be conducted prior to the student's IEP being finalized, the Hearing Officer concludes that this juncture when it was clear as communicated by School A staff and with DCPS participating in the meeting that the student was in need of a more restrictive placement DCPS should have at that point issued a PWN indicating what action it was or was taking relative to the student's change of placement to a more restrictive setting. Consequently, the Hearing Officer concludes that DCPS' failure to issue a PWN on May 12, 2015, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE. However, the Hearing Officer does not conclude there was a sufficient evidence that a PWN was necessary following the September 16, 2015, IEP meeting because there is evidence of clear communication School A at that meeting that there remained sufficient time for the student's IEP to be finalized.

ISSUE 8: Whether DCPS denied the student a FAPE by failing to provide the parent and/or her representatives with the proposed IEP at least five (5) business days in advance of the November 12, 2015, IEP meeting.

Conclusion: Petitioner din not sustain the burden of proof by a preponderance of the evidence of on this issue.

Under DC Code § 38-2571.03 (March 10, 2015), parents are entitled to receive copies of proposed IEPs at least five business days prior to an IEP meeting. The purpose of this new legislation is to ensure that parents are able to meaningfully participate in IEP meetings involving their children.

The evidence demonstrates based upon Witness 3's testimony that she did receive a copy of the student's draft IEP prior to the November 12, 2015, meeting. However, the evidence did not reflect, as far as the Hearing Officer could discern the number of days prior to the meeting the IEP was provided. The evidence does demonstrate that there were accommodations and other changes that had been made to the IEP since the September 2015 meeting. However, the fact that the IEP was received prior to the meeting was sufficient to for the Hearing Officer to conclude that in this instance that the parent's opportunity to participate in the decision making process regarding provision of FAPE was significantly impeded.

ISSUE 9: Whether DCPS denied the student a FAPE when it developed the November 12, 2015, IEP because the IEP: (a) fails to provide speech and language services, and/or (b) fails to provide sufficient specialized instructional hours and a corresponding placement in a separate school or even a separate program that is capable of meeting the student's needs.

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. "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).

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).

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

The evidence demonstrates that although the student has evidently been marginally successful attending School A since [redacted] grade and is now in high school, the results of his most recent comprehensive psychological evaluation reflect significant academic deficits. The student's academic skills as measured by this evaluation are somewhat scattered it is clear that his reading and math skills are at the low elementary level. In addition, the evaluator recommended that he student be placed in classrooms with less than 10 students. The evidence demonstrates that at least at this juncture until the student is able to significantly improve his academic skills he needs to be in a program that provides for his instruction outside general education. It is not clear from the record, however, that there is any reason for the student to be totally removed from his non-disabled peers for non-academic activities. Nonetheless, the IEP and placement proposed by DCPS for the student as of November 12, 2015, with only 15 hours of specialized instruction outside general education is woefully insufficient, despite the description of the significant services that would be available to him at School B.

Consequently, the Hearing Officer concludes that the student should be placed and funded in the placement proposed by Petitioner both as a prospective placement for the remainder of SY 2015-2016 and as part of the compensatory education the student is due a result of being in an inappropriate placement since May 12, 2015.

As to the claim regarding speech and language services, the evidence demonstrates that DCPS conducted a speech and language evaluation of the student and determined that the student no longer qualifies for the services. There was insufficient evidence in the record to refute this evaluation and finding, therefore, the Hearing Officer does not conclude that the student's November 12, 2015, IEP is inappropriate because it lacks speech and language services.

ISSUE 10: Whether DCPS denied the student a FAPE by failing to place the student in appropriate placement following revision of the student's IEP on November 12, 2015.

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

Consistent with the conclusion in the issue above the Hearing Officer concludes that the placement and location of services that was proposed by DCPS to implement his November 12, 2015, IEP is inappropriate as the evidence demonstrates that student is need of a more restrictive setting with all instruction outside general education.

Remedy:

"[C]ourts have identified a set of considerations 'relevant' to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment." Branham, 427 F.3d at 12 (citations omitted).

Petitioner has proposed that the student be placed at School C. Based upon the evidence presented School C has the level and variety of services and accommodations that can directly address the student's academic deficits and otherwise meet his needs and School C has an OSSE COA. Based upon the evidence presented the Hearing Officer concludes that the school proposed by the parent meets the factors that the Hearing Officer is to consider in determining a prospective placement for the student and will grant his placement at School C for the remainder of SY 2015-2016 as the remedy and part of the compensatory education for the student being without a appropriate school placement since May 12, 2015.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Reid, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

The Hearing Officer has concluded that the compensatory education proposal submitted by Petitioner did not accurately reflect and overstated the denial of FAPE determined by this decision and that is appropriate that the non-public placement ordered herein will also serve as part of the compensatory education for the denial of FAPE.

The evidence does demonstrate that the student would benefit from tutoring services and that the tutoring services can be provided at the placement that Petitioner has proposed. Although the plan Petitioner presented overstated the denial of FAPE, to award no compensatory education when a denial of a FAPE has been established would be inequitable. Consequently the Hearing Officer also will grant Petitioner a nominal amount of independent tutoring as compensatory

education.[15]

ORDER:

1. DCPS shall, within ten (10) school days of issuance of this order place and fund the student at School C ([redacted] for the remainder of SY 2015-2016 and provide transportation services.

2. DCPS shall within ten (10) school days of this issuance of this order provide the student as compensatory education 50 hours of independent tutoring at the DCPS/OSSE prescribed rates to be used by Petitioner by June 30, 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: March 2, 2016

Copies to:
Petitioner Representative: Alana Hecht, Esq.
Respondent Representative: Daniel McCall, Esq.
OSSE-SPED (due.process@dc.gov)
ODR (hearing.office@dc.gov)
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[15] The Hearing Officer concludes that despite Petitioner's inability to establish appropriate compensatory education, to award nothing would be inequitable. (A party need not have a perfect case to be entitled to compensatory education. *Stanton v. D.C.* 680 F Supp. 201 (D.D.C. 2011). If a student is denied a FAPE a hearing officer may not "simply refuse" to grant a compensatory education award. *Henry v. D.C.* 55 IDELR (D.D.C. 2010))