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Office of the State Superintendent of Education
Office of Review and Compliance
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Confidential

<p>Parent on Behalf of Student,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”) Respondent.</p> <p>Case # 2018-0023</p> <p>Date Issued: March 2, 2018</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Date: February 26, 2018</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ This “Corrected” HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, March 2, 2018, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

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 26, 2018, , at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution, 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 111.

BACKGROUND AND PROCEDURAL HISTORY:

The student or “Student” is age _____ and in grade _____.² The student resides with Student’s parent in the District of Columbia. The student attends a District of Columbia Public Schools (“DCPS”) elementary school (“School A”) and attended School A during school year (“SY”) 2016-2017 and SY 2017-2018. DCPS is the student’s local educational agency (“LEA”). On February 1, 2018, Petitioner filed the current due process complaint.

The parties did not mutually agree to shorten the thirty (30) day resolution period with regard to the issues that were not subject to an expedited hearing. The 45-day period began on March 2, 2018, and ends [and the Hearing Officer’s Determination (“HOD”) is due] on April 16, 2018.³

The undersigned Impartial Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on the complaint on February 9, 2019, and issued a pre-hearing order (“PHO”) on February 13, 2018, outlining, inter alia, the issues to be adjudicated.

RELIEF SOUGHT:

Petitioner seeks as relief: That the Hearing Officer find the DCPS has denied the student a free appropriate public education (“FAPE”), and find the student eligible for special education services with a disability classification of emotional disability (“ED”), direct DCPS to develop an individualized educational program (“IEP”) and reserve compensatory education until Student has an IEP. ⁴

LEA Response to the Complaint:

The LEA filed a timely response to the complaint on February 8, 2018, asserting that DCPS did not deny Student a FAPE.

² The student’s current age and grade are indicated in Appendix B.

³ The complaint alleged an issue that also entitled Petitioner to an expedited hearing and decision. That issue was withdrawn at the outset of the hearing.

⁴ Petitioner withdrew on the record additional requests for relief that are listed in the PHO.

ISSUE: ⁵

The issue adjudicated is:

Whether DCPS denied the student a FAPE by failing to determine Student eligible for special education on August 29, 2017, or thereafter.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the stipulation(s) made by the parties on the record and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 30 and Respondent's Exhibits 1 through 61) that were admitted into the record and are listed in Appendix A.⁶

SUMMARY OF DECISION:

The Hearing Officer concludes the Student was denied a FAPE by DCPS failing to determine the student eligible for special education on August 29, 2017. The Hearing Officer grants Petitioner relief by directing in the order below that DCPS convene a multidisciplinary team ("MDT") meeting to develop an individualized educational program ("IEP") for Student and discuss conducting a functional behavior assessment ("FBA") of Student and discuss compensatory education for denial of FAPE to the Student for DCPS not finding Student eligible on August 29 2017, and developing an IEP within 30 days of that date. If the parties are do not reach agreement on compensatory education Petitioner may file a subsequent due process complaint to seek compensatory education for the denial of FAPE that is determined in this HOD.

⁵ The Hearing Officer restated the issue to be adjudicated at the outset of the hearing and the parties agreed that this was the sole issue to be adjudicated. Petitioner withdrew on the record the following issues that were stated in the PHO:

- (1) Whether the DCPS denied the student a FAPE by failing to comprehensively evaluate the student because the FBA and OT evaluation DCPS conducted were inadequate and/or inappropriate.
- (2) Whether DCPS denied the student a FAPE by failing to convene a manifestation determination review ("MDR") once the student's in-school suspensions during SY 2017-2018 reached the equivalent of more than 10 school days of suspension.
- (3) Whether DCPS denied the student a FAPE by failing to provide the student an appropriate educational placement for SY 2017-2018.

⁶ Any items disclosed and not admitted or admitted for limited purposes were noted on the record and summarized in Appendix A.

FINDINGS OF FACT:⁷

1. Student resides with Student's parent in the District of Columbia. (Petitioner's Exhibit 12-2)
2. Petitioner filed a due process complaint on January 18, 2017, that was resolved by a settlement agreement ("SA") signed by Petitioner on May 25, 2017, and fully executed on May 26, 2017. In addition to resolving all claims and requests for relief that Petitioner asserted in the underlying complaint, the SA included a clause that waived all claims Petitioner could have asserted as of the date the SA was executed. (Respondent's Exhibits 1, 2)
3. The SA granted Petitioner an independent comprehensive psychological evaluation ("IEE") and required DCPS to conduct a FBA and to convene an eligibility meeting. (Respondent's Exhibit 1-2, 1-3)
4. The IEE was completed in July 2017. The evaluator concluded the student met the criteria for eligibility due to Attention Deficit Hyperactivity Disorder ("ADHD") and also met the criteria for classification of ED. (Petitioner's Exhibit 18-1, 18-13, 18-14)
5. On August 29, 2017, DCPS convened an eligibility meeting at which DCPS' review of the IEE, along with other data, was reviewed. DCPS did not find the student eligible but agreed to conduct an FBA and occupational therapy ("OT") evaluation and reconvene to review a 504 Plan for Student. (Petitioner's Exhibit 20)
6. Student is a child with a disability pursuant to IDEA with a disability classification of ED as of August 29, 2017. (Stipulation)

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").

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;

⁷ In addition to the Findings of Fact from the prior HODs, the other Findings of Fact in this HOD are based on the documents and testimony from the hearing conducted on August 21, 2017, and August 22, 2017. The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit (or the page number of the entire disclosure document) 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.

and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

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

Pursuant to 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)

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO and at the hearing, Respondent held the burden of persuasion on the issue to be adjudicated. The normal standard is preponderance of the evidence. See, e.g. *N.G. v. District of Columbia* 556 F. Supp. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE: Whether DCPS denied the student a FAPE by failing to determine Student eligible for special education on August 29, 2017, or thereafter.

Conclusion: The parties stipulated on the record that Student was eligible for special education services as of August 29, 2017. Based upon this stipulation, the Hearing Officer concludes that Student should have been found eligible by DCPS on August 29, 2017, and DCPS' failure to find Student eligible on that date and to develop an IEP within 30 days following that date is a denial of a FAPE for which relief is warranted.

To be eligible for special education services a child must be evaluated as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 CFR § 300.8 (emphasis supplied.) See *Parker v. Friendship Edison Public Charter School*, 577 F.Supp.2d 68, 74 (D.D.C.2008).⁸

⁸ 34 C.F.R. §300.8 provides:

Child with a disability.

(a) General.

(1) Child with a disability means a child evaluated in accordance with Sec. Sec. 300.304 through 300.311 as having ... [listed disabilities] and who, by reason thereof, needs special education and related services.

(2) (i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation

Pursuant to 34 CFR § 300.323 (c) each public agency must ensure that— (1) A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and (2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

As stated above, the parties stipulated on the record that Student was eligible for special education services as of August 29, 2017. Based upon this stipulation, the Hearing Officer concludes that Student should have been found eligible by DCPS on August 29, 2017, and DCPS' failure to find Student eligible on that date and to develop and IEP within 30 days following that date is a denial of a FAPE for which relief is warranted.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.)

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

Petitioner requested that compensatory education be reserved until Student has been provided an IEP. The Hearing Officer concludes that Petitioner's request to reserve compensatory education is reasonable.⁹

under Sec. Sec. 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.

(ii) If, consistent with Sec. 300.39(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.

⁹ Once a plaintiff "has established that she is entitled to [a compensatory education] award, simply refusing to grant one clashes with *Reid*, which sought to eliminate 'cookie-cutter' awards in favor of a 'qualitative focus on individual needs' of disabled students." *Stanton ex rel. K.T. v. District of Columbia*, 680 F. Supp. 2d 201, 207 (D.D.C. 2010) (quoting *Reid*, 401 F.3d at 524, 527).

ORDER: ¹⁰

1. Student is hereby eligible as a child with disability pursuant to IDEA with a disability classification of ED.
2. DCPS shall, within fifteen (15) school days of the issuance of this Order, convene an MDT meeting and develop an IEP for Student and determine an appropriate educational placement. DCPS shall determine a location of services within five (5) school days of the MDT in the event Student's current school cannot implement the IEP developed. When the MDT meets it shall also discuss conducting a FBA of Student and discuss compensatory education.
3. Parent shall not be precluded by this order from seeking compensatory education in a new proceeding for denials of FAPE found in this HOD or as Petitioner alleges in a subsequent due process complaint.
4. All other relief requested by Petitioner in the due process complaint 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 ninety (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, 2018

Copies to: Counsel for Petitioner
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¹⁰ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.