

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**

<p>Parents on Behalf of Student<sup>1</sup>,</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS") ["LEA"]</p> <p>Respondent.</p> <p>Case # 2015-0229</p> <p>Date Issued: October 5, 2015</p>	<p>HEARING OFFICER'S DETERMINATION<sup>2</sup></p> <p>Hearing Date(s): September 24, 2015, &amp; September 25, 2015</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Nicholas R. Ostrem, Esq. &amp; Douglas Tyrka, Esq. The Ostrem Firm, LLC 2701 South Adams Street, # 304 Arlington, VA 22206</p> <p>Counsel for Respondent: Daniel McCall, Esq. District of Columbia Office of the General Counsel 1200 First Street, NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
---	---

<sup>1</sup> Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to

<sup>2</sup> This version of the HOD is issued to make typographical corrections only; no substantive changes have been made and the HOD issuance date (October 5, 2015) and applicable appeal date remain the same.

## **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 September 24, 2015, and concluded on September 25, 2015, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student currently attends a private full-time special education day school (“School A”) at his parents’ expense. The student has been identified by DCPS as a child with a disability pursuant to the IDEA with a disability classification of autism spectrum disorder (“ASD”).

In September 2012 the student’s parents (“Petitioners”) made a referral to OSSE for the student to be evaluated under the D.C. Strong Start Early Intervention Program (“Strong Start”). The evaluation resulted in a finding that the student had “mild” developmental delays and a significant developmental delay in communication. By February 12, 2013, DCPS Early Stages began transitioning the student to IDEA Part B services by performing evaluations.

DCPS performed evaluations of the student including a psychological evaluation that noted deficits in the student’s adaptive behavior and language performance and concluded the student met the criteria for ASD. On April 4, 2013, DCPS convened a meeting to determine the student’s initial eligibility for Part B services. DCPS found the student eligible with the ASD classification and developed an individualized educational program (“IEP”) that required the student receive specialized instruction and related services outside general education. The IEP prescribed that the student’s specialized instruction was to be provided in a small group autism classroom that uses applied behavioral analysis (“ABA”).

Petitioners assert that prior to the April 4, 2013, eligibility/IEP meeting DCPS issued a letter assigning the student to an autism classroom at a DCPS elementary school (“School B”) for the school year (“SY”) 2012-2013. Petitioners assert DCPS pre-determined the student’s placement before the eligibility meeting and did not permit Petitioners to participate in the placement decision.

In addition, Petitioners allege that School B was an inappropriate placement for the student. The student’s parents chose for the student to remain at his private day care facility rather than attend School B. On May 16, 2013, the student’s parent signed a form that purportedly revoked consent for DCPS to provide the student special education services. DCPS issued a prior written notice (“PWN”) acknowledging the revocation.

On May 21, 2013, DCPS developed an individual family service plan (“IFSP”) for DCPS to provide the student related services. The IFSP provided the student with goals in communication, speech language and motor skills and speech language pathology and

occupational therapy. The student's parent consented to the IFSP. During Summer 2013 the student received these services at a DCPS elementary school ("School C").

At the start of SY 2013-2014 the student's parents contacted DCPS to request an educational placement for the student. Based upon the prior revocation of consent to services DCPS treated the parent's request as an initial request for special education and in November 2013 began performing evaluations. On December 9, 2013, DCPS convened meeting at which the student was determined eligible and an IEP was developed.

The student's December 9, 2013, IEP requires the student receive all instruction and related services outside general education in a small group autism classroom that uses ABA. DCPS proposed to place the student at a different DCPS elementary school ("School D").

Petitioners did not believe School D was an appropriate placement for the student and chose for the student to continue to attend his private day care center rather than School D. On April 1, 2014, DCPS sent the student's parents a letter stating that as of that date the parents had not enrolled the student at School D and as a result the seat offered to the student at School D was no longer available.

On April 9, 2014, the student's parent signed a form that purportedly revoked her consent for DCPS to provide the student special education services. The student remained at his private day care center until his parents, at the start of SY 2014-2015, unilaterally placed him at School A, where he continues to attend.

On May 28, 2015, Petitioners, through counsel, made a request for DCPS to provide access to the student's educational records and requested DCPS provide authorization for independent evaluations. After what Petitioner's alleged was undue delay DCPS advised Petitioners that DCPS would need to be conduct initial evaluations before independent evaluations could be performed.

On July 6, 2015, Petitioners filed this due process complaint alleging DCPS failed to provide the student with a free appropriate public education ("FAPE") by: (1) significantly impeding the parent's opportunity to participate in the decision-making process regarding the provision of FAPE; (2) failing to provide the student with an appropriate placement, or in the alternative, failing to provide the student with an appropriate IEP; and (3) failing to authorize independent evaluations.

Petitioners seek as relief that the Hearing Officer order DCPS fund and place the student at School A prospectively and reimburse expenses paid by Petitioners to School A for SY 2014-2015; fund independent comprehensive psychological, occupational therapy, speech language and applied behavior analysis evaluations; and review and revise the student's IEP as appropriate. Petitioners also seek a discussion and determination of compensatory education at a meeting or an independent evaluation to be used by Petitioner to bring a subsequent due process complaint for compensatory education.

On July 23, 2015, DCPS filed a response to Petitioners' complaint in which it denied that it failed to provide the student with a FAPE. DCPS contended Petitioners withdrew their consent

for the provision of services to the student on May 6, 2013, and again on April 9, 2014, and that this released DCPS from the obligation to provide FAPE and requires a request for “initial evaluation” in order for the student to receive special education services and for the parent to assert a right to independent evaluation(s). DCPS also asserted that both placement and the IEPs of the student were appropriate and that any challenge of the initial IEP (April 2013) is barred by the two-year period of limitation.

A resolution meeting was held on July 22, 2015. The case was not resolved and the parties did not mutually agree to waive the remainder of the resolution period. The 45-day period began on August 6, 2015, and originally ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on September 19, 2015. Petitioners filed a consent motion to continue/extend the HOD due date. The motion was granted and the HOD is now due October 5, 2015.

The Hearing Officer convened a pre-hearing conference (“PHC”) on July 31, 2015, and issued a pre-hearing order (“PHO”) on August 5, 2015, outlining, inter alia, the issues to be adjudicated. The Hearing Officer issued a revised PHO on August 19, 2015, addressing concerns raised by Petitioners’ counsel about the initial PHO.

On August 14, 2015, Respondent filed a motion to dismiss Petitioners’ complaint. On August 21, 2015, Petitioners filed an opposition to Respondent’s Motion to Dismiss. On September 9, 2015, the Hearing Officer issued an order denying Respondent’s Motion to Dismiss.

**ISSUES:**<sup>3</sup>

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by significantly impeding the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE by pre-determining the student’s placement at School B on April 3, 2013, a day prior to the student’s April 4, 2013, eligibility/IEP meeting.
2. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate placement at School B (as of two years prior to the date the complaint was filed) and at School D on December 9, 2013, by (a) not prescribing a separate special education school for the student or, in the alternative, (b) failing to provide the student with an appropriate IEP on April 4, 2013, and December 9, 2013, that prescribed a separate special education school.

---

<sup>3</sup> The alleged violation(s) and/or issue(s) listed in the complaint or in the PHO do not directly correspond to the issues outlined here. At the outset of the July 31, 2015, PHC Petitioners’ counsel withdrew the first issue alleged in the due process complaint: Whether DCPS denied the student a FAPE by failing to provide access to student records. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that the issues as listed in this HOD are the issue(s) to be adjudicated. The Hearing Officer changed numerical order of the issues in the HOD so they would be listed chronologically. Issue 1 in the PHO is issue 3 in the HOD; issue 2 is now issue 1 and issue 3 in the PHO is now issue 2.

3. Whether DCPS denied the student a FAPE by failing to authorize independent evaluations following Petitioner's May 28, 2015, written request through counsel.

**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 31 and Respondent's Exhibits 1 through 22) that were admitted into the record and are listed in Appendix A).<sup>4</sup> Witnesses are listed in Appendix B.

**FINDINGS OF FACT:**<sup>5</sup>

1. The student was diagnosed with autism at age two and his parent began providing him private therapy at home. (Parent's testimony)
2. On September 18, 2012, the student's parent made a referral to OSSE for a Strong Start evaluation to be performed on the student. The evaluation, conducted October 2, 2012, resulted in a finding that the student had "mild" developmental delays and a significant developmental delay in communication. (Petitioner's Exhibit 5-1, 5-5, 5-8)
3. The student began receiving the following weekly services pursuant to a IFSP: 10 hours of ABA therapy, 120 minutes of speech language therapy and 60 minutes of occupational therapy ("OT"). (Petitioner's Exhibits 6-1, 9-2, 16)
4. By February 2013 DCPS began transitioning the student to Part B services and performing evaluations to assess his level of educational performance and his eligibility for special education. (Petitioner's Exhibits 6-1, 7, 8, 9)
5. On February 21, 2013, DCPS performed an educational and developmental evaluation. This evaluation recommended the student receive, inter alia, ABA, a positive behavior support system and a communication log between home and school. (Petitioner's Exhibit 6-1, 6-5, 6-6)
6. On March 4, 2013, DCPS performed an OT evaluation that detailed the student's deficits with motor planning and sensory processing. The evaluator recommended the student be provided OT services. (Petitioner's Exhibit 8-1, 8-2, 8-5, 8-6)
7. On April 2, 2013, DCPS conducted a psychological evaluation of the student. The evaluator was unable to conduct a formal cognitive assessment because the student could

---

<sup>4</sup> Any documents that were objected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

<sup>5</sup> The evidence that is the source of the Finding of Fact 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.

not comply with the standardized testing requirements. Due to the student's social interactions and concerns regarding his attention and communication skills he was also assessed to rule out an autism diagnosis. The evaluation noted deficits in the student's adaptive behavior and based upon the autism assessment the evaluator concluded the student met the criteria for ASD. (Petitioner's Exhibit 9-1, 9-2, 9-5, 9-6, 9-8, 9-9, 9-10)

8. DCPS issued a notice of location of services ("LOS") to the student's parents dated April 3, 2013, stating that the student's IEP would be implemented at School B for the school year ("SY") 2012-2013 in an autism classroom. The notice stated that if the student's parents did not enroll him at School B within thirty days of the notice his reserved seat in the autism classroom at School B would be released. The notice indicated that the school location had been selected by DCPS Early Stages ("ES"). (Petitioner's Exhibit 13-1)
9. Prior to date of this letter DCPS had not discussed School B as a possible school for the student with the student's parents. (Parent's testimony)
10. On April 4, 2013, DCPS convened a meeting to determine the student's initial eligibility for Part B services and, if eligible, to develop his IEP. The participants in the April 4, 2013, eligibility meeting included the student's parents, the ES evaluation coordinator, the ES family care coordinator and the following DCPS evaluators who evaluated the student: the psychologist, the occupational therapist and the speech language therapist (along with her intern). (Respondent's Exhibits 3-1, 3-2, 5-1)
11. The April 4, 2013, meeting notes indicate that the student's parents each reported on the student's recent progress and their desires for specific areas of development by the student. The DCPS evaluators reviewed their evaluations and the student was determined eligible as a child with a disability with a disability classification of ASD and the student's IEP was developed. (Respondent's Exhibit 4-4, 4-5, 4-6)
12. At the April 4, 2013, meeting DCPS developed an IEP which required the student receive 26 hours per week of specialized outside general education; 4 hours per month of speech language pathology outside of general education; 120 minutes per month of occupational therapy outside general education; 15 minutes per month of occupational therapy consultation services. The IEP noted that due to the nature and severity of the student's needs his specialized instruction should be delivered in a small group Autism classroom that uses ABA. (Respondent's Exhibit 4-1, 4-7, 4-8)
13. The student's IEP stated that the student would be in an ungraded program and prescribed goals in the following areas: adaptive/daily living skills, communication/speech and language and motor skills/physical development. The IEP did not include any academic goals. (Respondent's Exhibit 4-1, 4-4, 4-5, 4-6)
14. During the April 4, 2013, meeting there was no disagreement as to the evaluation findings and the student's parent was allowed to participate fully in the meeting. The team determined the student should be in full time out of general education classroom. The team determined the student's goals and services and hours and the type of

classroom but not the location of the classroom. There was no discussion about the school location where all team members were present. (Witness 1's testimony, Respondent's Exhibit 5-5)

15. The DCPS meeting notes from the April 4, 2013, meeting reflect that DCPS mentioned to the student's parents that the student's local school did not have a self-contained autism classroom but that School B had an available seat in its autism classroom. The notes state the following: "the IEP does not designate placement. The services stated in the IEP will determine which placement is appropriate for the child." (Respondent's Exhibit 5-5)
16. DCPS explained at the April 4, 2013, meeting that with the student having been found eligible DCPS would be offering the student a FAPE as of his upcoming third birthday and his parents would have a choice to enroll him for the remainder of SY 2012-2013 or wait until the start of SY 2013-2014. The meeting notes indicate that the student's family planned to visit School B to observe and meet the teacher. The notes also stated that a PWN had been issued and another PWN would be issued after the student's parents communicated their decisions regarding the offer of FAPE and the PWN would be paired with a LOS letter with the assigned school's address and contact information. (Respondent's Exhibit 5-5, 5-6)
17. On April 4, 2013, the student's parent signed a form consenting to the initial provision of special education and related services to the student. (Respondent's Exhibit 6)
18. The student's parent visited School B after the April 4, 2013, meeting three or four times during a single week. During her visits she spoke with the School B autism classroom teacher and assistant teacher. The classroom teacher told the student's parent that academic activities were conducted in the classroom between 9 a.m. and 11:00 a.m. During her four visits between 9:00 a.m. and 11:00 a.m. each time the parent did not see any academic activities. During a visit the classroom teacher told the parent she did not have any support to provide academic activities. The parent also left with the impression that the assistant teacher had insufficient English language skills. (Parent's testimony)
19. The student's parent returned to ES and shared her observations and impressions. She told DCPS staff she did not believe School B would meet the student's individual needs based on her observations and conversations with the classroom teacher and assistant teacher. The parent believed School B did not provide ABA. DCPS staff did not dispute what the parent said about the academic instruction and did not offer any other school for the student to attend. The parent asked what her options were and was told she could accept or deny DCPS' offer of the School B autism classroom. (Parent's testimony)
20. The student's parents chose for the student to remain at his private day care center. (Parent's testimony, Petitioner's Exhibit 11-6)
21. On May 16, 2013, the student's parent signed a form revoking her consent for DCPS to provide special education and related services to the student. (Parent's testimony, Respondent's Exhibit 8)

22. On May 16, 2013, DCPS issued a PWN affirming the parent's revocation of consent to provide services. (Respondent's Exhibit 9)
23. On May 21, 2013, DCPS developed an IFSP to which Petitioners gave their consent. The IFSP provided the student with goals in communication, speech language and motor skills; 240 minutes per month of speech language pathology and 120 minutes per month of occupational therapy. During Summer 2013 the student received the IFSP services at School C. (Petitioner's Exhibit 16)
24. At the start of SY 2013-2014 Petitioners contacted DCPS to request an educational placement for the student. In November 2013 DCPS began performing evaluations: a speech language evaluation and an educational and developmental review that included observations of the student at the ES center and at the student's private day care center. (Petitioner's Exhibits 10, 11-1, 11-6)
25. On December 9, 2013, DCPS convened a meeting to review data and determine the student's eligibility for special education services and develop an IEP. (Petitioner's Exhibits 10, 11)
26. The participants in the December 9, 2013, meeting included the student's parents, an ES evaluation coordinator, an ES family care coordinator and the following DCPS evaluators: the DCPS psychologist, occupational therapist and a speech language therapist. The student's parents invited their ABA therapy provider and their educational advocate to participate in the meeting. (Respondent's Exhibit 16-1)
27. At the December 9, 2013, meeting the evaluators reviewed the evaluation reports and found the student eligible with the ASD classification and developed the student's IEP. The student's parents expressed concern that the student's IEP goals were based on DCPS observations and testing that was only a brief snapshot of the student's skills. The team discussed the possibility of the parents obtaining an independent evaluation and the parents did not at the time choose to pursue an independent evaluation. The team also discussed a classroom at School D where the student's IEP could be implemented. (Respondent's Exhibit 16-2, 16-3)
28. The student's parent fully participated in the meeting and her concerns were noted. The team reviewed, and there was no disagreement about, any of the evaluation data. There was a disagreement about a classroom observation. It was noted at the meeting that the student still demonstrated some difficulty following directions in the classroom and with his interaction with peers in the classroom. (Witness 2's testimony, Respondent's Exhibit 16)
29. The student's parent consented to the initial provision of services at the December 9, 2013, meeting and agreed to visit School D. However, at the meeting the student's parents' advocate noted that the parents were agreeing to the provision of services to the

student but not to the contents of the IEP that was developed. (Respondent's Exhibits 16-2, 17)

30. The student's December 9, 2013, IEP requires the student receive 26 hours per week of specialized instruction per week outside general education; 4 hours per month of speech language pathology outside general education; 120 minutes per month of occupational therapy outside general education and 30 minutes per month of OT consultation services. (Petitioner's Exhibit 17-1, 17-8, 17-9)
31. The December 9, 2013, IEP notes the following: "Due to the nature and severity of [the student's] needs, his specialized instruction should be provided in a small group Autism classroom that utilizes ABA. ABA has been a successful form of therapy for [the student] during his time receiving Part C services. To accommodate the sensory needs, [the student] will benefit from the implementation of a sensory motor plan to facilitate participation within the classroom." (Petitioner's Exhibit 17-8)
32. The student's parent visited School D twice, once in December 2013 and again in May 2014. She observed the autism classroom at School D and had the opportunity to speak with the ABA coordinator there about the program offered to the student at School D. She was informed that School D could only offer the student 20 hours of specialized instruction per week. (Parent's testimony)
33. When the parent observed the classroom at School D she was left with the impression that the other students in the classroom were operating significantly below the student's level of functioning. The parent believes that that academically the student is currently operating at the same level as a regular student and has mastered a number of academic skills. In her opinion based upon her observations of the classroom at School D the teacher did not use positive reinforcement, yelled at the students and did not establish eye contact with the students. The student's parent voiced her concerns about the School D classroom to DCPS in December 2013 and in May 2014. Other than School B in April 2013 and then School D during SY 2013-2014, DCPS did not provide any other school options for the student to attend. (Parent's testimony)
34. After her visit to School D the student's parent decided not to enroll the student at School D and the student remained at his private day care. The student's parents did not believe School D was an appropriate placement because they believe it did not have ABA therapy and did not meet the student's needs. (Parent's testimony)
35. On April 1, 2014, DCPS sent a letter the student's parent stating that as of that date she had not accepted DCPS' offer of a FAPE in the student's least restrictive environment ("LRE") and as a result the available seat for the student in the Autism classroom at School D was no longer available. The letter informed the student's parent that if she wanted to move forward with initiating special education services for the student to contact DCPS. (Respondent's Exhibit 18)

36. On April 9, 2014, the student's parent revoked her consent for DCPS to provide the student special education services. (Parent's testimony, Respondent's Exhibit 19)
37. In May 2014 DCPS provided the student's parent the services revocation form and she signed the form declining School D. The student's parent did not realize in either instance when she signed the revocation of services form in April 2013 and in May 2014 that she had the ability to challenge either of the schools by DCPS in a due process hearing.<sup>6</sup> (Parent's testimony)
38. There was no evidence presented that following the parent signing the revocation of services form in May 2013 that DCPS issued or the student's parents received a PWN acknowledging and/or affirming the revocation of consent to provide special education services. (Hearing Record)
39. The student's parents unilaterally placed the student at School A at the start of SY 2014-2015 and he continues to attend School A now. The student's tuition and costs at School A for SY 2014-2015 is \$20,000 and the student's parents have paid School A that amount. The student's parent investigated other private schools in the area and the cost of School A is about the same. (Parent's testimony)
40. School A has provided the student the specialized instruction prescribed in his IEP. Every time the student needs a specialized instructor School A has a therapist on board to help the student and to work with his classroom teacher. The student's parent has observed the student's class at School A. The student's class at School A has four students. The teachers asked if they can challenge the student and continue academic programs for the kindergarten level and the parent has agreed. The student has made good progress and met his goals for his first year. Because School A's goal is for the student to become independent and participate independently in class he needs less specialized instruction than when he first arrived at School A. (Parent's testimony, Petitioner's Exhibit 17-9)
41. The student's mother does not agree with all the evaluations that DCPS conducted of the student including the classroom observations that DCPS conducted that were reported in the December 9, 2013, eligibility and IEP meeting. (Parent's testimony Respondent's Exhibits 16-2, 16-3)
42. On May 28, 2015, Petitioners' attorney sent an email to DCPS informing DCPS that the student's parents had unilaterally placed the student at School A, requested records and noted that the parents were exercising their right to an independent evaluation ("IEE"). (Petitioner's Exhibit 21-1)
43. On May 28, 2015, Petitioners' attorney sent a letter to DCPS requesting access to the student's educational records and stating that the student's parents were exercising their

---

<sup>6</sup> Petitioners did not assert in the due process complaint, and it was not an issue to be adjudicated, that the parent had or had not been provided her procedural safeguards notice by DCPS during either the April 2013 or December 2013 evaluation and eligibility process.

right pursuant to 34 C.F.R. §300.502 to independent evaluation(s). The letter requested authorization for the following independent evaluations: comprehensive psychological, occupational therapy, speech language, and applied behavior analysis evaluations. (Petitioner's Exhibit 21-2, 21-4, 21-6)

44. The parents' counsel made several contacts with DCPS in June 2015 and July 2015 and was provided some of the student's educational records. The student's parents were eventually advised that the student would need to be reevaluated by DCPS before independent evaluations could be performed. (Petitioner's Exhibits 22-1, 23-1, 23-2, 24-1, 25-2, 26-1)
45. On July 6, 2015, Petitioner's filed the current due process complaint. (Petitioner's Exhibit 1)
46. On July 24, 2015, DCPS sent the parent a letter of invitation proposing meeting dates along with a PWN stating that DCPS would begin initial evaluations of the student. A copy of the procedural safeguards was included with the letter. (Witness 3's testimony, Respondent's Exhibit 20-1, 20-2, 20-3, 20-4)
47. Because the parent had signed a revocation of services form in May 2014 DCPS considered the student a general education student and believes that the student's evaluation and eligibility process must begin again. When the student's parents informed DCPS in May 2015 that they wanted to access FAPE for the student DCPS treated the request as a request for initial evaluation and eligibility determination. DCPS therefore issued the parent's a PWN and a letter of invitation with meeting dates for the parent and DCPS to meet to begin the evaluation and eligibility process. To date the student's parents have not met with DCPS or agreed to a date to begin the evaluation and eligibility process. (Witness 3's testimony, Respondent's Exhibit 20-1, 20-2)

### **CONCLUSIONS OF LAW:**

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.<sup>7</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. 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 significantly impeding the parent's opportunity to participate in the decision-making process regarding the provision of FAPE by pre-determining the student's placement at School B on April 3, 2013, a day prior to the student's April 4, 2013, eligibility/IEP meeting.

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

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

First, Petitioners failed to establish that the claim alleged in this issue (that the parent was denied meaningful participation in the decision making process on April 4, 2013, regarding provision of FAPE to the student) was a claim that falls within the timeline allowed pursuant to 34 C.F.R. §300.507(a)(2)

The evidence demonstrates that the date of the meeting at which Petitioners claim DCPS impeded the parent's opportunity to participate in the decision-making process regarding the student's education placement, April 3, 2013, including the date of the meeting when student's

---

<sup>7</sup> The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

eligibility was first determined and his initial IEP developed, precedes the two-year period of limitation under which a claim pursuant to 34 C.F.R. §300.507 and 34 C.F.R. §300.511 can be brought in due process hearing.<sup>8</sup>

Petitioner neither asserted nor proved any exception to this two-year period of limitation.<sup>9</sup> Although Petitioner's counsel argued during the hearing that the issue of the student's placement that was determined at the meeting and that was being challenged remained an issue available to be adjudicated, as the Hearing Officer pointed out during the Hearing, the claim as to the challenge of the student's placement and the decision regarding the placement could only be challenged as of a date two years prior to the date the current due process complaint was filed. Therefore, the Hearing Officer concludes that this issue is barred absent any argument and evidence of an exception being asserted to the two-year period of limitation.

In addition, the evidence in this case demonstrates that the parent fully participated in the April 4, 2013, eligibility and IEP meeting.<sup>10</sup> Although the evidence indicates that DCPS issued a letter to the parent identifying the location that the student's IEP would be implemented dated a day prior the actual eligibility meeting, the Hearing Officer is not convinced that this letter serves to negate the fact that at the meeting the parent fully participated and apparently at that meeting agreed with and consented to the student's IEP and placement in a self-contained autism classroom as the IEP prescribed.

The fact that the parent later observed that classroom to which the student was assigned and concluded based on her observations that the classroom in her opinion would not meet the student's needs did not negate that fact that she fully participated in the selection of the special education setting in which the student would receive his special education services.

**ISSUE 2:** Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate placement at School B (as of two years prior to the date the complaint was filed) and School D on December 9, 2013, by (a) not prescribing a separate special education school for the student or, in the alternative, (b) failing to provide the student with an appropriate IEP on April 4, 2013, and December 9, 2013, that prescribed a separate special education school.

**Conclusion:** Petitioners did not sustain the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE by either failing to provide the student an appropriate

---

<sup>8</sup> 34 C.F.R. § 300.507 Filing a due process complaint. (a) General. (1) A parent or a public agency may file a due process complaint on any of the matters described in Sec. 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child). (2) The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in Sec. 300.511(f) apply to the timeline in this section.

<sup>9</sup> During the PHC Petitioners' counsel clearly stated that Petitioner is not seeking to assert claims beyond the two-year period of limitation and asserted that the violations alleged in the complaint occurred within two years prior to the date the complaint was filed.

<sup>10</sup> FOF #s 11, 14

placement or in the alternative failing to provide the student an appropriate IEP because the either the placement proposed or the student's April 4, 2013, IEP did not prescribe a separate special education school.

The evidence demonstrates that DCPS developed an IEP that prescribed that all the student's instruction and related services were to be delivered outside of general education and that the severity of the student's needs required that he be in a small group Autism classroom that utilizes ABA.

The parent testified that after DCPS proposed that the student's IEP be implemented at, and assigned the student to a classroom in, School B she visited the classroom on four occasions during the same week in the morning during 9:00 a.m. and 11:00 a.m. when she was told by the classroom teacher that academic instruction would typically be delivered. The parent also testified that the classroom teacher told the parent that the teacher did not have time for academics and the assistant teacher spoke in what the parent considered poor English. Based upon these observations and conversations the parent concluded the classroom at School B was inappropriate for the student.

There was no contention by Petitioners nor any evidence presented that the IEP goals, services or any other specific part of the IEP was inappropriate except for Petitioners' assertion that the student should have been placed in a separate special education school on the continuum of placements prescribed by IDEA.<sup>11</sup> In addition, there was no evidence presented that the student was in need of total seclusion from general education students or that self-contained special education classroom that the student's IEP prescribed could not be located in a general education school building. The parent's testimony alone did not support a finding that either the student's April 4, 2013, IEP or the placement prescribed by that IEP was inappropriate for the student.

The parent's testimony supported only the fact that the parent was dissatisfied with quality of English spoken by the assistant teacher and that she observed no academics being presented in the classroom during the time she visited the classroom during a single week and she was allegedly told by the teacher that she had no time to do academics with the students in the classroom.

At the time the April 4, 2013, IEP was proposed the student had not yet reached his third birthday and was slated to be in an ungraded program. The student's IEP included goals in the

---

<sup>11</sup> Pursuant to 34 C.F.R. § 300.115 Continuum of alternative placements. (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. (b) The continuum required in paragraph (a) of this section must-- (1) Include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. Pursuant to DC Code § 38-2561.02. (c) Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

following areas: adaptive/daily living skills, communication/speech language and motor skills/physical development. The IEP did not have any academic goals.<sup>12</sup> The fact that the parent saw no academic instruction in the classroom during the time she visited points out that she may have wanted different or additional instruction than she observed being presented. However, the parent's testimony, even though there was no testimony presented by Respondent regarding School B, was insufficient for the Hearing Officer to conclude that the student's IEP was inappropriate or that the classroom at School B to which the student had been assigned could not implement the student's IEP or was otherwise inappropriate.

In addition, the evidence demonstrates that Petitioner signed a revocation of consent for services in May 2013 and that DCPS issued a PWN affirming the revocation.<sup>13</sup> Pursuant to IDEA once the parent revokes consent to the provision of services the agency may not continue to provide special education and related services to the child, but must provide prior written notice in accordance with Sec.300.503 before ceasing the provision of special education and related services... and will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services...<sup>14</sup>

Although Petitioner(s) asserted that they did not provide an informed revocation of consent and did not realize she was declining anything by signing the forms but the schools offered, the Hearing Officer was not convinced by this assertion. The Hearing Officer did not find the parent's testimony about the procedural safeguards notice credible or probative. Her recollection about the procedural safeguards notice and what documents she signed other than the revocation of consent was sketchy. The Hearing Officer therefore concludes that parent revocation of consent to services was an informed consent despite her testimony that she was not aware at the time that she could have challenged the schools proposed by DCPS in due process hearing or that by signing the form she was declining anything other than the school(s) DCPS proposed.

With regard to the Petitioners' claim that the student's December 9, 2013, placement or in the alternative IEP was inappropriate because it did not prescribe a separate special education school, the Hearing Officer concludes Petitioner sustained the burden of proof that the school placement offered to the parents at School D was inappropriate.

---

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

<sup>13</sup> FOF #s 21, 22

<sup>14</sup> 34 C.F.R. § 300.300 (b)(4) If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency-- (i) May not continue to provide special education and related services to the child, but must provide prior written notice in accordance with Sec.300.503 before ceasing the provision of special education and related services; (ii) May not use the procedures in subpart E of this part (including the mediation procedures under Sec.300.506 or the due process procedures under Sec.300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child; (iii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and (iv) Is not required to convene an IEP Team meeting or develop an IEP under Sec. 300.320 and 300.324 for the child for further provision of special education and related services.

However, there was insufficient proof that the IEP and the placement in a self contained classroom was inappropriate or that the student required a separate special education school. As outlined in the reasoning and conclusions above regarding the April 4, 2013, IEP there was insufficient evidence that the IEP itself or the placement it prescribed was inappropriate.

Rather, the classroom to which the student was assigned was inappropriate because it could not implement the student's IEP. The Hearing Officer found the parent's testimony credible that she was told by the teacher in the classroom to which the student was assigned at School D that the classroom would only deliver 20 hours per week of instruction. There was no evidence to counter the parent's testimony in this regard. The student's December 9, 2013, IEP clearly prescribed 26 hours of specialized instruction per week. Based upon the parent's testimony the Hearing Officer concludes that the classroom to which the student was assigned could not implement the student's IEP and was inappropriate and his assignment to that classroom was a denial of a FAPE.

Petitioners have asked that as part of relief they be reimbursed for the costs of the student attending School A. The evidence demonstrates that the student has made progress at School A and the instruction prescribed in his IEP is being implemented there. Consequently, the Hearing Officer concludes there is sufficient evidence as well as evidence of reasonable costs that justifies the parents' reimbursement for the costs of the student attending School A during SY 2013-2014.

Petitioners have also requested as relief prospective placement at School A. However, the parent testified that the student has made such progress that he is in need of less specialized instruction than he originally received at School A, and given the fact that Petitioners have not yet participated in a meeting with DCPS to review the student's progress and needs and to review his IEP, the Hearing Officer cannot conclude that the student's continued placement at School A is warranted or appropriate.

Therefore, the Hearing Officer directs in the order below that parties participate in a meeting at which the student's IEP will be reviewed and DCPS will propose an educational placement and school location where the student's IEP can be implemented.

**ISSUE 3:** Whether DCPS denied the student a FAPE by failing to authorize independent evaluations following Petitioner's May 28, 2015, written request through counsel.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE by failing to promptly comply with Petitioner's request for independent evaluation(s).

Pursuant to 34 C.F.R § 300.502 a parent may request independent evaluations at public expense.<sup>15</sup>

---

<sup>15</sup> 34 C.F.R § 300.502(a) General. (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section. (2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section. (3) For the purposes of this subpart-- (i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and (ii) Public expense means that the

Based upon the evidence the Hearing Officer concludes that DCPS had not issued a PWN fully effectuating the parent's revocation of special education services and that DCPS' obligation to provide the student a FAPE following the December 9, 2013, meeting, continued despite the parent having signed a second revocation form.

The Hearing Officer concludes that the parent continued to have the right pursuant to 34 C.F.R. 502 to request and be provided independent evaluations barring any action by DCPS to defend its own evaluations in a due process hearing.

The evidence demonstrates that DCPS took the position based upon the May 2014 revocation of consent form signed by the parent that the student's evaluation and eligibility determination started anew and that the notice DCPS received from Petitioner's counsel requesting the IEE was in effect a request for DCPS to conduct initial evaluations of the student and determine his eligibility for special education services.

The email correspondence between Petitioners' counsel and DCPS prior to the current due process complaint being filed demonstrates some confusion by DCPS as whether the parent at that juncture was entitled to the requested IEEs. Petitioner's counsel's emails were quite clear that the parents were asserting their right to an IEE pursuant to 34 C.F.R. 300.502.

---

public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with Sec. 300.103. (b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to Sec. Sec. 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

(5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

(c) If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation--

(1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.

Although in that letter there was no indication that the parent disagreed with any of the evaluations DCPS had previously conducted, the evidence in the case demonstrates that at the December 9, 2015, meeting the student's parent disagreed with the observations results that were shared at the meeting regarding the student's classroom performance and functioning.

Albeit there is typically a particular evaluation or assessment that is disagreed with or an area of concern that has not been addressed in an agency evaluation that is the basis of a request for independent evaluation(s), there is no clear mandate expressed in 34 C.F.R. 300.502 that the parent must explain the nature of the disagreement prior to making the request for independent evaluations.

To reiterate, although DCPS considered its position reasonable that an new round of initial agency evaluations were necessary based upon the revocation of services, the evidence demonstrates that DCPS did not fully comply with the requirements of 34 C.F.R. 300.300 by issuing a PWN affirming the revocation and the Hearing Officer has concluded that the revocation of services was not effectuated.

Consequently, DCPS was obligated based upon the May 28, 2015, request for the IEE to either grant the request without unreasonable delay or file for due process hearing to defend its own evaluations. DCPS did neither. Thus, the Hearing Officer concludes DCPS denied the student a FAPE by not complying with the parents' request for independent evaluations and directs in the order below that DCPS fund the requested independent evaluations.

### **Compensatory Education**

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

Petitioner did not present a compensatory education plan in writing or present a witness or documentary evidence to support a finding with respect to compensatory education. Because there was no evidence presented from which the Hearing Officer can conclude what, if any, compensatory education is appropriate for the student, the Hearing Officer makes no finding or conclusion as to any compensatory education due the student for any time during SY 2013-2014.<sup>16</sup>

---

<sup>16</sup> The Hearing Officer concluded that DCPS was obligated to provide student a FAPE after development of the December 9, 2015, IEP. Thus, the period at most that any compensatory education could possibly have been due the student, if proved by appropriate evidence, is limited to the second semester of SY 2013-2014.

**ORDER:<sup>17</sup>**

1. The student is hereby deemed eligible as a child with a disability pursuant to IDEA with the disability of classification of autism spectrum disorder (Autism) based upon DCPS finding the student eligible at the December 9, 2013, eligibility meeting.
2. Within ten (10) school days of this issuance of this order DCPS shall convene, and Petitioners shall attend, a MDT meeting to review the student's evaluations and/or current educational and behavioral data and update the student's IEP and determine what if any additional evaluations or areas of assessment are appropriate, including discussing the independent evaluations authorized by this order.
3. At the MDT meeting directed to be convened pursuant to the provision above and following an update of the student's IEP the MDT shall determine an educational placement and location of services for the student where the student's IEP will be implemented for SY 2015-2016.
4. DCPS shall issue a PWN and/or a location of service letter within five (5) calendar days of the MDT meeting described above indicating the student's education placement and location of services where the student's IEP will be implemented for SY 2015-2016.
5. DCPS shall reimburse Petitioner's the cost of the tuition at School A for SY 2014-2015 in an amount not to exceed \$20,000 upon Petitioners providing DCPS appropriate proof of payment of the tuition and/or costs for the student attending School A for SY 2014-2015.
6. DCPS, upon Petitioners providing DCPS appropriate proof of payment of the tuition and/or costs, shall also reimburse Petitioners the tuition and/or costs (at a pro-rata daily rate) for the student's attendance at School A from the start of SY 2015-2016 until the date DCPS issues pursuant to this order a PWN and/or LOS letter informing Petitioners of the educational placement and location of services that is being offered to the student for SY 2015-2106.<sup>18</sup>

---

<sup>17</sup> 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.

<sup>18</sup> In ordering reimbursement for any tuition and costs for SY 2015-2016 the Hearing Officer makes no conclusion that School A is the student's current placement for "stay-put" or any other purpose. The Hearing Officer has concluded based on the evidence that DCPS made a timely offer to Petitioner's to convene a meeting prior to the start of SY 2015-2016 at which an educational placement and location of services for the student for SY 2015-2016 could have been discussed and perhaps offered.

7. DCPS shall fund the following independent evaluations at the DCPS/OSSE prescribed rates: comprehensive psychological, occupational therapy, speech language and applied behavior analysis.
8. Within ten (10) school days of DCPS' receipt of the independent evaluations listed above, DCPS shall convene, and Petitioners shall attend, a MDT meeting to review the independent evaluations and update the student's an IEP as appropriate.
9. Because there was no evidence presented from which the Hearing Officer can conclude what, if any, compensatory education is appropriate for the student the Hearing Officer makes no finding or conclusion as to any compensatory education due the student for any time during SY 2013-2014.
10. 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*

---

**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: October 5, 2015**

Copies to: Nicholas Ostrem, Esq. & Douglas Tyrka, Esq. Petitioner's Counsel  
Daniel McCall, Esq. Respondent's Counsel  
Chief Hearing Officer  
[hearing.office@dc.gov](mailto:hearing.office@dc.gov), [due.process@dc.gov](mailto:due.process@dc.gov)  
[contact.resolution@dc.gov](mailto:contact.resolution@dc.gov)