

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 for one day on February 3, 2012, at the OSSE Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____ in _____ grade and has been determined eligible as a child with a disability under IDEA with a classification of multiple disabilities ("MD") including Other Health Impairment ("OHI") for Attention Deficit Hyperactivity Disorder ("ADHD"). During the 2010-2011 school year ("SY") the student attended a District of Columbia public school hereinafter referred to as "School A." The student currently attends a District of Columbia public charter school where he started at the beginning of SY 2011-2012, hereinafter referred to as "School B." The student's current individualized educational program ("IEP") developed at School B on November 21, 2011, prescribes the following services: 5 hours per week of specialized instruction outside the general education setting and 5 hours per week in general education. The IEP also prescribes the following related services: 30 minutes per week of behavioral support services and 1 hour per week of speech-language pathology. The student's previous IEP developed at School A on October 8, 2010, prescribed the following services: 8 hours of specialized instruction per week in a general education setting and 30 minutes per week of behavioral support services. The student's primary disability classification in this IEP was OHI.

On November 29, 2011, Petitioner filed a due process complaint alleging, *inter alia*, that the student's IEP when he attended School A was inappropriate and DCPS failed to conduct triennial evaluations. Petitioner seeks as relief compensatory education in the form of DCPS funding a reading assessment by Lindamood Bell and independent tutoring for services the student's allegedly was not provided from October 2010 to June 2011.

DCPS filed a written response to the complaint on December 13, 2011. DCPS asserts that it used existing data and classroom assessments to develop the student's April 7, 2010, and October 8, 2010, IEPs and that DCPS made repeated attempts to have the parent attend the IEP meeting(s) to no avail. DCPS also asserts that the student's IEPs when he attended a DCPS school were reasonably calculated to provide educational benefit and should not be judged retrospectively on data developed after he left.

At the December 27, 2011, resolution meeting the parties did not resolve the issues alleged in the complaint. The parties agreed to end the resolution period and to immediately proceed to hearing. Thus, the 45-day timeline ends and the HOD is due on February 10, 2012.

A pre-hearing conference was conducted on January 18, 2012, at which the issues to be adjudicated were discussed and determined. On January 23, 2012, the Hearing Officer issued a pre-hearing order.

ISSUES: ²

The issues adjudicated are:

- (1) Did DCPS deny the student a Free and Appropriate Education (“FAPE”) by failing to conduct triennial evaluations in SY 2010-2011 by not conducting an updated psychological and speech and language evaluation? ³
- (2) Did DCPS deny the student a FAPE by failing to provide the student an appropriate October 8, 2010, IEP by not including sufficient hours of specialized instruction, not including specialized instruction outside of the general education setting and not including speech- language services?
- (3) Did DCPS deny the student a FAPE by failing to include the parent in the student’s October 8, 2010, IEP meeting? ⁴

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties’ disclosures (Petitioner’s Exhibits 1-29 and DCPS Exhibit 1-12) that were admitted into the record and are listed in Appendix A. Any documents not admitted into the record are so noted in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: ⁵

1. The student is age in grade and has been determined eligible as a child with a disability under IDEA with a disability classification of MD including OHI for ADHD. (Petitioner’s Exhibit 2, Parent’s testimony)

² The alleged violations and/or issues listed in the complaint do not directly correspond to the issues outlined here. The Hearing Officer restated the issues in the pre-hearing order and at the outset of the hearing and the parties agreed that these were the issues to be adjudicated.

³ Petitioner asserts that a psychological and speech/language evaluation were conducted in October 2007 and should have been conducted again by October 2010.

⁴ Petitioner asserts the parent had concerns about the student’s lack of educational progress that was unexpressed because she did not attend the meeting and had she attended the concerns may have been addressed and the student may have been provided needed and additional services sooner and he might not be as behind educationally as he is.

⁵ 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 both parties separately the Hearing Officer may only cite one party’s exhibit.

2. The student was first found eligible and his first IEP was developed while he was attending school in Montgomery County, Maryland on October 22, 2008, when the student was in fourth grade. (Petitioner's Exhibit 7)
3. Montgomery County Schools conducted a psychological evaluation and an educational evaluation of the student in October 2007. The student's cognitive abilities were found to be in the borderline range with a full scale IQ of 70. With regard to academic achievement the student's reading abilities were found to be in the very low range at .2 (point 2) percentile. His written expression abilities were in the low average range at the 15th percentile and his math abilities were average at the 25th percentile. The student was determined eligible and provided an IEP that prescribed that he receive 10 hours per week of specialized instruction in general education and 6 hours of specialized instruction outside general education. The student was provided counseling services but no speech language services. (Petitioner's Exhibits 7-14, 11-3, 12-4)
4. Montgomery County Schools also conducted a speech language evaluation in October 2007. The evaluator concluded the student's speech language development was within normal limits. However, the student did demonstrate a weakness in oral expression especially syntax. The evaluator concluded the student's weaknesses in oral communication could be addressed with accommodations and instruction in the general education classroom. No direct speech language services were recommended and none were included in his IEP. (Petitioner's Exhibits 7, 8-5)
5. During the 2010-2011 school year ("SY") the student attended School A in the sixth grade. The student currently attends a District of Columbia public charter school, School B, where he started at the beginning of SY 2011-2012. (Student's testimony)
6. The student's current IEP, developed at School B on November 21, 2011, prescribes the following services: 5 hours per week of specialized instruction outside general education and 5 hours per week in general education. The IEP also prescribes the following related services: 30 minutes per week of behavioral support services and 1 hour per week of speech-language pathology. (Petitioner's Exhibit 2-8)
7. The student's previous IEP developed at School A on October 8, 2010, prescribed 10 hours of specialized instruction in a general education setting in the areas of reading, written expression and math. The student's primary disability classification in this IEP was OHI. (DCPS Exhibit 6-8)
8. The student's previous IEP developed at School A on April 7, 2010, prescribed the following services: 8 hours of specialized instruction per week in a general education setting and 30 minutes per week of behavioral support services. The parent did not attend the IEP meeting but the IEP indicates that the student's grandmother attended the meeting. (DCPS Exhibit 8-1, 8-5)
9. The student's DCPS IEPs' present levels of performance cognitively, academically and behaviorally reflect the results of the student's initial psychological evaluation conducted by Montgomery County, Maryland. (Petitioner's Exhibit 6-2, 6-3, 11-4, 11-5, 12-3)

10. The student's DCPS IEP progress reports from April 2010 and July 2011 state that the student was progressing relative to most of his IEP goals in each advisory of SY 2009-2010 and SY 2010-2011. On his second advisory report card during SY 2010-2011 the student earned the grades of "C" or "B" in all subjects. (DCPS Exhibit 9, 10, 11)
11. While the student attended School A he experienced academic difficulty. The student found that other students were disruptive in his classroom which caused the student difficulty in accessing the curriculum. The student acknowledged that during his sixth grade year at School A he could only read simple words and would frequently have to stop and look at words carefully and attempt to sound them out. The student believed his teachers at School A did not assist him with his deficits and let him attempt difficult work on his own. The student believes his reading did not get much better during the sixth grade at School A. He would often attempt to read material and not be able to respond to questions in writing about what he read. He struggled the entire school year. The student would become frustrated each time he attempted reading in the classroom. The student believes he did not learn much in reading and little in writing in the sixth grade at School A. (Student's testimony)
12. During summer 2011 the student was involved in academic work at a summer camp program. He was asked to read out loud and he got some help with his reading weaknesses. The student was afraid other students would laugh when he read aloud. At his current school the student still does not believe he is reading well and believes tutoring would assist him in developing his reading abilities. The student acknowledges he is better at math than reading because he received tutoring in math a few years ago. Reading is as difficult for him now in his current school as it was at School A but he is getting more attention and help from his current teacher. The student is currently pulled out of the general education classroom every day from 11:00 am to noon and a teacher works with him in a small group of students. He is working on reading, writing and responding. (Student's testimony)
13. The student remembers that at School A he was pulled out of class for instruction a few days per week to work on sounds although his IEP did not call for pull-out services. But the student does not believe this assistance helped him with his weaknesses. (Student's testimony)
14. The parent believed the student was operating on a first grade reading level in the sixth grade at School A. The parent does not believe the student made any progress in reading during his fifth and sixth grade year at School A. However, she acknowledges he made progress in math. The student could write only simple sentences. The parent believed the teachers did not provide the student sufficient assistance and support at School A to address his reading deficits. The parent requested additional support from DCPS for the student in the form of mentoring to no avail. (Parent's testimony)
15. The parent did not attend the student's April 7, 2010, IEP meeting, although the IEP indicates she participated by telephone. The parent denies that her signature is on the IEP but remembers that the School A special education coordinator would send her invitations to the meetings. The school sent the IEP home by the student but the parent

did not sign the IEP because she did not agree with the level of services in the IEP. Had she attended the parent would have requested the student receive more individualized attention and one to one academic services and a smaller classroom. The parent remembers being told by DCPS that it was too early to conduct another evaluation of the student and the parent is not aware that DCPS conducted reevaluations during SY 2010-2011. The student was last evaluated when he attended school in Montgomery County Maryland. (Parent's testimony, DCPS Exhibit 8-1)

16. Starting August 27, 2010, DCPS personnel began contacting the parent requesting that she attend an IEP meeting. Contact with the parent was made on September 3, 2010, and the parent agreed to attend the meeting. On September 10, 2010, DCPS sent a letter of invitation for the parent to attend an IEP meeting on September 24, 2010. However, the meeting was rescheduled. On September 24, 2010, DCPS sent a subsequent letter of invitation to the parent with an IEP meeting date of October 8, 2010. (DCPS Exhibits 3-1, 4-1, 5-1)
17. DCPS updated the student's IEP on October 8, 2010. The student's services were continued with 8 hours of specialized instruction in the general education setting and 120 minutes per month of behavior support services. The parent did not attend the IEP meeting. DCPS did not conduct a psychological reevaluation of the student while he attended School A. (DCPS Exhibit 6-1, 6-8)
18. When the student began attending his current school, School B, the school conducted an updated psychological evaluation and educational evaluation on October 7, 2011. The student's cognitive abilities were found to be in the low average range with a full scale IQ of 89. With regard to academic achievement the student's reading abilities were found to be in the borderline range with a grade equivalency of 2.9. His written expression abilities were in the low average range with a grade equivalency of 3.9. His math abilities were average at grade equivalency of 5.9. (Petitioner's Exhibit 9-3, 9-4, 9-5)
19. School B also conducted a speech and language evaluation of the student in October 2011 which determined the student has below average receptive and expressive language skills and recommended the student receive direct speech-language services. (Petitioner's Exhibit 10-6)
20. As a result of the evaluations School B amended the student's IEP to prescribe the student receive 5 hours per week of specialized instruction in general education and 5 hours of specialized instruction outside general education, 30 minutes of behavioral support services per week and 1 hour of speech-language pathology per week. Because the student was testing below average the IEP team agreed to increase the student's specialized instruction and provide some instruction outside the general education setting. (Ms. Darden's testimony, Petitioner's Exhibit 2-8)
21. The parent's educational advocate developed a compensatory education plan which recommends 70 hours of speech-language services and 200 hours of tutoring and a Linda Mood Bell reading assessment. The plan was based on an assumption that the student should have been provided speech-language services by DCPS and that 200 hours of

tutoring is a reasonable number of hours to compensate the student for (a) two school years he was not provided sufficient specialized instruction and (b) to bring the student to grade level in reading. The advocate hoped to have the student receive as much help as possible through this proposed compensatory education plan. testimony, Petitioner's Exhibit 20)

CONCLUSIONS OF LAW:⁶

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.

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.

⁶ During the Hearing, at the end of Petitioner's case DCPS counsel moved for a directed finding. DCPS Counsel asserted Petitioner presented nothing that indicated DCPS should have conducted a speech-language re-evaluation. Counsel also asserted the student's April 2010 and October 2010 IEPs clarified what evaluations were relied upon to update the IEPs. DCPS counsel also asserted Petitioner had not proven harm to the student for the psychological evaluation not being conducted. DCPS counsel pointed out there was no testimony as to the parent's non-attendance at the October 2010 IEP meeting. As to compensatory education, DCPS counsel asserted in her motion that the plan was not based on the standards outlined in *Reid*. The Hearing Officer concluded in response to the motion that the burden had not been met as to the speech language evaluation and failure to include speech language services in the IEPs. However, as to all other claims and issues the Hearing Officer concluded DCPS would have to proceed with its case. DCPS counsel relied upon the documents in evidence and testimony of Petitioners witnesses for its case in chief and presented no DCPS witnesses.

⁷ 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.

ISSUE 1: Did DCPS deny the student a FAPE by failing to conduct triennial evaluations in SY 2010-2011 by not conducting an updated psychological and speech and language evaluation during?

Conclusion: DCPS should have conducted a psychological evaluation of the student by October 2010 and the student was harmed as a result. Petitioner sustained the burden of proof by a preponderance of the evidence.

34 C.F.R. 300.303 provides:

- (a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with Sec. 300.304 through 300.311--
 - (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
 - (2) If the child's parent or teacher requests a reevaluation.
- (b) Limitation. A reevaluation conducted under paragraph (a) of this section--
 - (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and
 - (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

The evidence demonstrates that a speech language evaluation was conducted when the student was attending Montgomery County Public Schools. That evaluation did not recommend speech-language services but concluded the student's oral expression deficits could be addressed in the general education classroom without direct services. The student's initial IEP did not include speech-language services and thus they were not included in any subsequent IEP that DCPS developed while the student attended School A. Petitioner asserts that because a speech language evaluation was conducted at School B in October 2011 and speech-language services were recommended by the evaluation and included in the student's current IEP DCPS should have conducted a speech-language evaluation and included speech-language services in the student's IEP. The Hearing officer does not find Petitioner's argument in this regard persuasive. There was no evidence presented, save the subsequent School B evaluation, that DCPS had any indication that the student was in need of these services. Neither the parent's, nor the student's testimony, nor any document in evidence in existence when the student attended DCPS would have put DCPS on notice that such a reevaluation was to be conducted. Had the student been receiving speech-language services in the IEP he brought with him to DCPS from Montgomery County then perhaps DCPS would have been required to reevaluate in this area. However, absent these services on the IEP or some indication the student was suffering from speech-language deficits contemporaneous with the student's attendance at a DCPS school there was no obligation by DCPS to conduct a speech-language reevaluation. Consequently, the Hearing

Officer concludes Petitioner did not meet the burden of proof of a denial of FAPE because DCPS did not conduct a speech-language evaluation of the student in October 2010.

However, with regard to the triennial psychological evaluation, the student's DCPS IEPs' present levels of performance cognitively, academically and behaviorally reflect the results of the student's initial psychological evaluation conducted by Montgomery County, Maryland. Although DCPS counsel asserts that DCPS used other data in preparing these IEPs the evidence does not reflect this. The parent credibly testified that she inquired of DCPS when the student would be reevaluated and was told it was too early. The student credibly⁸ testified that he significantly struggled with his reading the entire time he attended School A. It appears from the student's most recent evaluation conducted in October 2011, the student is only operating on a third grade level but is currently in the seventh grade. The student's testimony was compelling as to his struggles at School A. That testimony was not refuted by any DCPS testimony. This student was clearly harmed. Thus, the Hearing Officer concludes DCPS denied the student a FAPE by not timely conducting a psychological/educational reevaluation by October 2010. Had such an evaluation been conducted the student perhaps would have made more significant progress in reading.

ISSUE 2: Did DCPS deny the student a FAPE by failing to provide the student an appropriate October 8, 2010, IEP by not including sufficient hours of specialized instruction, not including specialized instruction outside of the general education setting and not including speech-language services?

Conclusion: The student's October 8, 2010, IEP was inappropriate because it was not based on current evaluations.

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also Scott v. District of Columbia, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

20 U.S.C. 1414(a)(i) defines Individualized Education Program as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes a statement of the child's present levels of academic achievement and functional performance." It includes measurable goals, statements of related services, assistive technology and other appropriate accommodations. It is developed by the IEP team which consists of the child's parent, general education teachers, LEA special education teachers and

⁸ The Hearing Officer found both the parent and student credible based on their demeanor.

anyone deemed as a necessary participant by reason of the services provided to the student. The IEP is the centerpiece or main ingredient of special education services.

The evidence demonstrates that the student's October 8, 2010, IEP was not based on a current psychological/educational evaluation. As discussed with regard to the issue above DCPS should have conducted a psychological/educational reevaluation of the student by October 2010. Because the student's IEP was not based on a current evaluation and the IEP's present levels of performance in the IEP did not reflect current assessments, the Hearing Officer concludes the student was harmed and was denied a FAPE. As previously stated, the student's testimony was compelling as to his struggles at School A. That testimony was not refuted by any DCPS testimony. The Hearing Officer thus concludes that the student's IEP developed October 8, 2010, was inappropriate. The failure of DCPS to provide the student an appropriate IEP in the instance cited above resulted in the student making little if any academic progress and denied him a FAPE.

ISSUE 3: Did DCPS deny the student a FAPE by failing to include the parent in the student's October 8, 2010, IEP meeting?

Conclusion: The evidence presented demonstrated that DCPS made repeated attempts to have the parent attend the student's October 2010 IEP meeting. There was not testimony or other evidence presented as to this meeting. Petitioner did not sustain the burden of proof in this regard.

IDEA requires that an LEA make efforts to ensure that a parent attends and participates in a student's IEP meeting. Although the parent testified that she was not included in the meeting the school attempted to have her participate in the meeting. Although the parent testified regarding the April 7, 2010, IEP meeting she provided no reasonable explanation as to why she was not present at the October 8, 2010, IEP meeting yet acknowledged she was invited to the meeting. DCPS presented sufficient documentary proof the parent was repeatedly invited. Consequently, the Hearing Officer does not conclude that Petitioner sustained the burden of proof by a preponderance of the evidence on this issue.

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 testimony and documents offered by Petitioner with regard to compensatory education did not specifically prove the total number of hours the student missed warranted the tutoring hours

requested. In fact, the testimony indicated that the compensatory education plan was developed to give the student the most services possible rather than address the specific services the student missed as is required under *Reid*.

Despite the fact that Petitioner presented insufficient evidence as to compensatory education, it is inequitable for the student to be provided nothing. Based upon the student's severe reading deficits and DCPS' failure to timely reevaluate, him, the Hearing Officer will thus order that DCPS fund the requested reading assessment and provide a nominal award of tutoring services as compensatory education for the denial of FAPE found.

ORDER:

1. DCPS shall within twenty (20) school days of the issuance fund a reading assessment at Lindamood Bell at the general rate that DCPS pays for the such an assessment to Lindamood Bell.
2. DCPS shall fund 10 hours of independent tutoring for the student at the DCPS prescribed rate.

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: February 10, 2012