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Office of the State Superintendent of Education
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OSSE
Student Hearing Office
September 03, 2013

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Case #</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: August 14, 2013</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner:</p> <p>Counsel for DCPS:</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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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 August 14, 2013, at the Office of the State Superintendent (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student was in 8th grade during school year (“SY”) 2012-2013 and attends a District of Columbia Public Charter School (“School A”) for which DCPS is the local educational agency (“LEA”). The student’s current individualized educational program (“IEP”) was developed on January 16, 2013, at School A and prescribes the following weekly services: 15 hours of specialized instruction inside general education and 1 hour of behavioral support services outside general education.

Prior to attending School A the student attended another D.C. Public Charter School (“School B”) for 7th grade. The student’s IEP at School B, developed on January 19, 2012, prescribed the following weekly services: 15 hours of specialized instruction: 11 hours inside general education and 4 hours outside general education, and 1 hour of behavioral support services outside general education.

On February 12, 2012, an independent comprehensive psychological evaluation was completed for the student. The evaluation confirmed the student’s diagnosis of Attention Deficit Hyperactivity Disorder (“ADHD”) and depression and noted that the student was on medication to address symptoms associated with these diagnoses.

The evaluator determined the student had average cognitive and academic abilities. The evaluator noted the student was not demonstrating or experiencing any emotional concerns but noted the student was having significant difficulty with focusing in the classroom, keeping work organized and keeping track of assignments. The evaluator recommended the student be provided classroom intervention to assist in developing more effective techniques to manage attention and recognize when loses focus.

The student was promoted from 7th to 8th grade at the end of SY 2011-2012. The student’s parent enrolled at School A at the start of SY 2012-2013. School A only offers inclusion specialized instruction in general education. In October 2013 School A adjusted the student’s IEP to reflect that the specialized instruction would be delivered in general education and the parent agreed to the change in the IEP without an IEP meeting.

In January 2013, School A conducted the student’s annual IEP meeting and the student’s parent participated by telephone. The student’s teachers indicated the student was making progress

toward IEP goals and the student's specialized instruction was continued at the same level in the general education setting. Although the parent was concerned that the student was struggling academically as reflected in report card grades she did not request any changes in the student's IEP and/or services.

At the end of SY 2012-2013 the student passed four of six academic courses and had to attend summer school to take English and Science which passed in summer school and was then promoted to 9th grade.

On , Petitioner filed this due process complaint. Petitioner asserted the student's current IEP and placement with inclusion services only is inappropriate. Petitioner asserted the student is in need of an IEP and placement that prescribes some or all services outside general education to address academic deficits and inattention. Petitioner seeks an order directing DCPS to amend the student's IEP accordingly and determine an appropriate placement² and fund the compensatory education.

DCPS filed a response to the complaint on July 1, 2013, and denied any alleged denial of a free and appropriate public education ("FAPE") and specifically asserted that the student's IEP and placement are appropriate and calculated to provide educational benefit at the time developed.

A resolution meeting was not held. The parties did not agree to waive the resolution period. Thus, the 45-day timeline began to run on July 19, 2013, and ends, and the Hearing Officer's Determination ("HOD") is due, on September 2, 2013.

ISSUE: ³

The issue adjudicated is:

Whether DCPS denied the student a FAPE by failing to provide the student an appropriate IEP and placement with some or all services provided outside general education and appropriate behavioral support services.⁴

² Petitioner originally sought to have the student placed in a private full-time out of general education school. At the hearing Petitioner abandoned this request.

³ The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order do not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) in the pre-hearing conference order at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated. Petitioner had originally alleged that DCPS failed to conduct triennial evaluation(s). However, after the complaint was filed Petitioner obtained the student's 2012 psychological re-evaluation. Thus, the issue of the alleged failure to re-evaluate was eliminated and not included in the list of issues to be adjudicated.

⁴ During the pre-hearing conference Petitioner's counsel withdrew all other issues alleged at the complaint. Following the PHC and at the outset of the hearing Petitioner's counsel noted that although the remedy originally sought was full time out of general education placement the issue adjudicated was whether all-inclusion specialized instruction and the student's behavioral support services were appropriate. The parties agreed at the outset of the hearing that the issue stated above was the issue to be adjudicated.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties’ disclosures (Petitioner’s Exhibits 1-13 and DCPS Exhibit 1-10) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT:⁵

1. The student is child with a disability pursuant to IDEA with a disability classification of other health impairment (“OHI”) for ADHD. The student resides with parents and siblings in the District of Columbia. The student began attending School A in 8th grade at the start of SY 2012-2013. (Parent’s testimony, Petitioner Exhibit 2-1)
2. Prior to attending School A the student attended School B, where an IEP was developed on January 19, 2012. That IEP prescribed 11 hours of specialized instruction per week inside general education and 4 hours outside general education, and 1 hour of behavioral support services outside general education. (Petitioner’s Exhibit 3-1, 3-7)
3. During SY 2011-2012 at School B the student earned the following grades in the following subjects:⁶ (Petitioner’s Exhibits 6-1, 7-1)

Subject:	Adv 1	Adv 2 (Progress Report)
Social Studies 7	C-	C-
Science 7	D+	F
English 7	B	F
Technology	B-	C
MS Art	C-	C
Math	C	C

4. On February 12, 2012, an independent comprehensive psychological evaluation was completed for the student. The evaluation confirmed the student’s diagnosis of ADHD and depression and noted that the student was on medication to address symptoms

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.

⁶ There were no other grade reports from School B admitted into the record. The advisory 2 progress report were not final grades for the advisory. Thus, it is unclear what final grades the student earned for the second, third and fourth advisories and on final end of year report card. The teacher comments in the first advisory report card noted the student had missing/incomplete assignments in Science and Art. During the first advisory the student was absent 9 out of 45 days or 20%.

associated with these diagnoses. The evaluator determined the student had average cognitive abilities with working memory in the borderline range. (Petitioner's Exhibit 10-2)

5. The student's academic abilities were measured as average with reading comprehension and reading fluency at the 5.7 grade level. The student's written expression and math abilities were also average. The evaluator noted the student was not demonstrating or experiencing any emotional distress or concerns but noted the student was having significant difficulty with focusing in the classroom, keeping work organized and keeping track of assignments. The evaluator recommended the classroom intervention to assist in developing more effective techniques to manage attention and recognize when loses focus. The evaluator did not recommend a change the student's specialized instruction or a change in least restrictive environment ("LRE"). (Petitioner's Exhibit 10-5, 10-9, 10-10, 10-11)
6. The student struggled academically at School B. However, at the end of SY 2011-2012 the student was promoted to eighth grade. Because the student had difficulties at School B the parent made a decision to change schools for the following year. (Parent's testimony)
7. The student's parent applied for the student to attend School A and was accepted and enrolled at the start of SY 2012-2013. In October 2013 School A sent the student's parent a letter of invitation to attend a 30-day review meeting to review the student's educational program and progress. On October 12, 2013, the parent signed a form agreeing that the student's IEP would be amended without convening an IEP meeting. The IEP was thereafter amended to prescribe that all specialized instruction was being provided in the general education setting. The parent agreed with the services and was hopeful it would work. (Parent's testimony, Respondent's Exhibits 2, 3)
8. The student's IEP prescribes the following weekly services: 15 hours of specialized instruction inside general education and 1 hour of behavioral support services outside general education. (Petitioner's Exhibit 2-1, 2-6, 2-7)
9. From the time the student started attending School A the school staff stayed in close contact with the parent and informed her regularly on how the student was performing academically and informed her when was not turning in homework. The parent felt based on this regular communication that the school staff were genuinely interested in the student's academic progress and were making continual efforts toward academic success. (Parent's testimony)
10. The student's English and math classes were co-taught by a general education and a special education teacher and the student received reading development instruction from a reading specialist. The student's classes had between 18 and 22 students. (Witness 3's testimony)

11. During SY 2012-2013 the student's sibling helped with homework and spoke with teachers at School A periodically by telephone regarding the student's academic progress. The student was struggling with classes and English and Science teacher called and stated that was distracted in class and not turning in assignments. The teachers and the sibling agreed they would work together with the student to address these concerns. The student sees an outside professional regarding ADHD and takes medication for it and seems to have difficulty retaining information. (Sibling's testimony)
12. The parent participated in the January 16, 2013, IEP meeting for the student by telephone. The IEP documents and procedural safeguards were thereafter mailed to the parent. During the meeting the teachers indicated the student had mastered some of current goals in reading math and written expression and the goals would be updated and because had no behavioral problems social/emotional goal would remain the same. The student's special education services and LRE remained unchanged. The parent did not request any changes to the IEP goals or services. Although the parent was concerned that the student was not performing as well academically as she hoped she agreed with the IEP as developed at the January 16, 2013, meeting. The parent did not realize that she could ask for changes to IEP or really what changes to ask for. (Parent's testimony, Respondent's Exhibit 5)
13. During the January 16, 2013, meeting the student's teachers stated that "the student does excellent class work and participates great; however, homework completion is an issue and impacts grades. is currently passing all classes except Math Lab which has a "F" in 62% and C in other subjects and a B in English." The parent stated the student could not attend the homework center until she made arrangements for someone to pick up from school in the evening. The MDT agreed to hold a final meeting by the end of the school year to check on the student's progress. (Respondent's Exhibit 5)
14. The student's current IEP has academic goals in the areas of Math, Reading, Written Expression and Emotional, Social, Behavior Development ("ESBD"). The IEP has the following comments in the area of ESBD: "Teachers reported that [the student's] social emotional skills reflect cooperativeness and willingness to try; however, should continue to work on limiting distractions and motivating to complete all home work assignments." "Due to inattentive behaviors and difficulty remaining focused and on task, [the student] requires some verbal prompts, redirection, and positive reinforcement in order to increase class participation. [The student's] increase in academic performance is an indicator that is beginning to understand how these behaviors impact academics." (Petitioner's Exhibit 2-4, 2-5)
15. The IEP has one ESBD goal: "improve attentiveness during structured activities as evidenced by remaining focused with minimal supervision or intervention in 3 out of 4 opportunities." The goal is measured through observation at each nine-week interval. The IEP states that the student's "behavioral support service will be continued in order to increase [the student's attending skills and understanding of how behavior can negatively impact academic performance." (Petitioner's Exhibit 2-4, 2-5)

16. During the third advisory the student improved conduct in English class. The teacher comments stated: “When buckles down and gets work done is one of my most productive students. Quarter 4 will be crucial to success in class...While is grade is not what it needs to be, I am very pleased with consistent improvement on test scores.” (Respondent’s Exhibit 7)
17. The student’s parent and sibling believe that after the January 16, 2013, meeting the student’s progress did not really improve and continued to struggle with homework and assignments. Neither the parent nor the sibling, however, have been to School A to observe the student in the classroom. The parent is not sure what the student needs in order to be more successful academically than was at School A during SY 2012-2013, but she would like DCPS to consider placing the student in a school that has classrooms with fewer students so is less distracted and where can have access to vocational programs and services. The student has difficulty with organization and may benefit in the future from the use communication log between School A and home to help keep up with assignments and to ensure turns in homework. (Parent’s testimony, Sibling’s testimony)
18. During SY 2012-2013 at School A the student passed four of the six courses took. failed two of courses at the end of the school year: English 8 and Physical Science. earned the following percentage grades⁷ in the following subjects in each of the four advisories and on final end of year grades:

(Petitioner’s Exhibits 8-1)

Subject:	Adv 1	Adv 2	Adv 3	Adv 4	Final Exam	Final Grade
English 8	44	71	63	76	23	55
Pre-Algebra	66	64	83	78	38	70
Physical Science	59	42	62	80	68	62
American History	95	82	88	83	86	87
Math Lab	73	72	71	77		73
Reading	74	74	83	81		78

19. At the end of SY 2012-2013 the student was promoted to ninth grade contingent upon completing summer school and passing the two courses had failed. The student

⁷ 90% to 100% is considered an “A”. 80% to 89% is considered a “B”. 70% to 79% is considered a “C”. Any grade below 69% is considered an “F”.

was able to pass the two courses in summer school and was promoted to ninth grade at School A for SY 2013-2014. (Parent's testimony)

20. The student's DC CAS scores were recently reported to School A and the student scored "Proficient" in math (a few points away from "Advanced" rating) and scored "Basic" in English (a few points way from "Proficient" rating). For the upcoming school year, SY 2013-2014, in addition to the specialized instruction, the student will have available to teacher inventions in 20 minute blocks during the school day in English, math, reading and writing. These services will be available to all students in addition to the homework center after school. (Witness 3's testimony)
21. On May 9, 2013, School A attempted convene an IEP meeting for the student. The parent was not aware of the meeting. A letter of invitation to a subsequent meeting has been sent and the parent is due to attend an IEP meeting to review the student's IEP and placement at the end of August 2013 (after the date of the due process hearing). (Parent's testimony, Witness 3's testimony, Respondent's Exhibits 6, 9)
22. The student's parent has been provided an educational advocate employed by her attorney's office. The educational advocate is a former teacher and met with the student on August 1, 2013, and conducted some informal assessments with the student. The student sustained focused on the activities was provided but took a significant amount of time to complete some of the activities. (Witness 1's testimony, Petitioner's Exhibit 9)
23. Petitioner engaged the services of an individual to design a compensatory education plan for the denials of FAPE alleged in the due process complaint. Based upon the fact that the student was receiving only inclusion services rather than a full-time out of general education setting, the plan recommended the student be provided 6 hour of tutoring for 24 weeks in the areas of reading, math and written expression and 1 hour of behavioral support services over 24 weeks. (Witness 2's testimony, Petitioner's Exhibit 11-2)

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. ⁸ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). 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: Whether DCPS denied the student a FAPE by failing to provide the student an appropriate IEP and placement with some or all services provided outside general education and appropriate behavioral support services.

Conclusion: Petitioner failed to demonstrate by a preponderance of the evidence that the student's IEP when amended on October 12, 2012, and reviewed and updated on January 16, 2013, was inappropriate either because it did not prescribe hours of specialized instruction outside general education or include additional behavioral supports.

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

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

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34C.F.R. § 300.550; see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

⁸ 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.

The evidence demonstrates that when the student entered School A had an IEP that prescribed 15 hours of specialized instruction per week with 4 of those hours provided outside general education.⁹ School A does not provide instruction outside general education and only provides inclusion instruction. Although the evidence is unclear that the parent was aware of this when she enrolled the student, she applied for the student to attend School A and was accepted¹⁰ and within thirty days of attendance the parent agreed to a change in the student's IEP to provide all instruction in an inclusion setting.¹¹

Even though for the first month the student attended School A the student's IEP was not changed there was no evidence of harm to the student.¹² The evidence indicates there was close communication between the home and school regarding the student's academic performance prior to the IEP change.¹³

A party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. Thus, a court reviewing failure-to-implement claims under IDEA must ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material." *Catalan et al., v. District of Columbia*, 478 F Supp 2^d 73 (2007), 47 IDELR 223.

The evidence demonstrates that the student's October 2012 and January 16, 2013, IEPs were reasonably calculated to provide the student educational benefit at the time they were developed.¹⁴

Despite the Petitioner's witnesses' testimony that the student was struggling academically and the assertion that the student should have been provided out of general education services, the evidence does not support that conclusion. The evaluation conducted of the student in February 2012 demonstrates that the student has average cognitive and academic abilities. Based upon the student's academic abilities and performance passing to 8th grade from School B, it was reasonable that School A would allow the student to be in its all inclusion special education program.

⁹ Finding of Fact ("FOF") #2

¹⁰ FOF # 7

¹¹ FOF # 7

¹² 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)

¹³ FOF # 9

¹⁴ FOF # 7, 12, 13

Although the student's parent may have expected much more academically from the student at School A during SY 2012-2013, was making educational progress and able to access the general education curriculum as evidenced by the teacher comments and the student's passing grades.¹⁵ The IEP team agreed to hold a meeting at the end of the year to assess the student's progress. Although the parent is now requesting, through the complaint, that the student be provided more specialized instruction and/or instruction outside general education, during the student's seventh and eighth grade years the student made educational progress as evidenced by mastering some of IEP goals and passing grade to grade¹⁶, although had to attend summer school at the end of SY 2012-2013.

Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of demonstrating that the student's January 16, 2013, IEP was inappropriate because it did not prescribe any or all specialized instruction outside general education.

In addition, the Hearing Officer concludes that Petitioner did not sustain the burden of demonstrating that the student's January 16, 2013, IEP was inappropriate because it did not include additional behavioral support services.

The evidence demonstrates that the student did not have disruptive behaviors; was cooperative and struggles were related to inattentiveness and disorganization, which IEP goal and related services addressed.¹⁷ Although there were other interventions that might have been helpful to the student such as the communication log that was suggested during the hearing, the absence of such an intervention does rise to the level of a denial of FAPE to the student. The student still made passing grades in all but two subjects and was able to pass those classes in summer school and be promoted to 9th grade.¹⁸

Although the parent is concerned that the student is not making greater academic progress, the parent noted that the School A staff is genuinely concerned about the student and progress and communicates regularly with the parent to help ensure the student's is successful. In addition, the student's most recent DC CAS scores, although not yet reported to the parent, indicate the student's is making academic progress at School A. This cooperative relationship can be built upon in SY 2013-2014 with the additional services that will be available to the student at School A.¹⁹

The student's academic performance, attention in class and organization should be monitored and a determination made during SY 2013-2014 as to whether the student's is making tangible

¹⁵ FOF #s 13, 16

¹⁶ FOF #s 6, 12, 13, 18, 19

¹⁷ FOF # 14, 15

¹⁸ FOF #s 18, 19

¹⁹ FOF # 20

gains. The student may ultimately be in need of more services or a more restrictive setting but as of the date the complaint was filed and the date of the hearing, this was not the case.

It was certainly reasonable for School A to have implemented, with this student, the IEP it created in October 2012 and updated in January 2013. The evidence demonstrates that School A was an appropriate placement for the student during SY 2012-2013 and that IEP was reasonably calculated to provide educational benefit. Therefore, the Hearing Officer concludes that Petitioner failed to sustain the burden of proof on this issue by a preponderance of the evidence.

ORDER:

The claims raised in the due process complaint are hereby dismissed with prejudice and all requested relief is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: September 2, 2013