

District of Columbia
Office of the State Superintendent of Education

OSSE
Student Hearing Office
September 17, 2013

Office of Review and Compliance
Student Hearing Office
810 First Street, NE – Second Floor
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

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 Dates: September 4, 2013 September 6, 2013</p> <p><u>Representatives:</u> 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 two days on September 4, 2013, and September 6, 2013, at the Office of the State Superintendent (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006 on the first day and Hearing Room 2003 on the second day.

BACKGROUND AND PROCEDURAL HISTORY:

The student resides with [redacted] parent in the District of Columbia and currently attends a District of Columbia Public Schools (“DCPS”) high school (“School A”). The student began attending School A during school year (“SY”) 2011-2012 in ninth grade. The student was initially identified with a disability under IDEA in March 2007 while attending a DCPS elementary school. original disability classification was intellectual disability (“ID”) until it was recently changed in March 2013. Prior to attending School A the student attended a DCPS middle school (“School B”) where [redacted] was in seventh grade during SY 2010-2011. DCPS moved to the student to ninth grade for SY 2011-2012 without him ever having been in eighth grade.

The student was retained in ninth grade at the end of SY 2011-2012 and repeated ninth grade during SY 2012-2013. In late June 2012 DCPS conducted a psychological evaluation of the student that assessed [redacted] general cognitive functioning as extremely low. Because of the student’s relatively high perceptual reasoning scores and high adaptive functioning, the DCPS psychologist recommended that the student’s disability classification be changed from ID. However, a team did not review that evaluation until March 2013. In March 2013 the student’s classification was changed from ID to specific learning disability (“SLD”).

The student most recent individualized educational program (“IEP”) prior to this due process complaint being filed, was developed on March 7, 2013, and prescribed the following weekly services: 21 hours of specialized instruction (14 of those hours inside general education and 7 outside general education) and the following monthly related services: 60 minutes of behavioral support and 60 minutes of speech-language pathology, both inside general education. The student’s least restrictive environment (“LRE”) reflected that only 7 hours of specialized instruction would be provided outside general education.

On July 3, 2013, Petitioner filed the due process complaint. In the due process complaint Petitioner alleged, inter alia, that DCPS denied the student a free and appropriate public education (“FAPE”) by incorrectly identifying him as a student with ID classification and failing to properly identify him as SLD until March 7, 2013,² and thus failing to develop and implement

² Petitioner originally alleged that this issue should be adjudicated back to March 2007 when the student was first determined eligible. However, the Hearing Officer concluded in a pre-hearing order no exception to the 2-year limitation was met.

an appropriate IEP since July 3, 2011, by failing to provide the student appropriate specialized instruction, appropriate related services, and appropriate transition services.

In addition, Petitioner alleged that the student's 2008-2009 IEP provided for an hour of speech and language services weekly and DCPS decreased the level of speech and language services. Petitioner alleges no prior written notice was provided to the parent to explain the change in the student's speech language services in February 2009 and March 2011 and that exceptions to the 2-year period of limitation allow these claim to be pursued.³ Lastly, Petitioner alleged in that DCPS failed to conduct triennial evaluations of the student, specifically a psychological and speech and language evaluation when the evaluations were due to be conducted in 2010.

DCPS counsel filed a timely response to the complaint on July 12, 2013. DCPS denied all alleged denials of a FAPE to the student. DCPS asserted that all allegations and claims arising before July 3, 2011, should be barred by the 2-year limitations as outlined at 34 C.F.R. §300.507(2), as the exceptions of §300.511(f), do not apply.

A resolution meeting was convened on July 16, 2013, which resulted in DCPS authorizing evaluation(s)⁴ and independent tutoring services to the student. At the July 16, 2013, meeting the parties also developed and agreed to a prospective IEP for the student.⁵ However, all issues were not resolved so as to dispose of the complaint in its entirety and the parties chose to proceed to hearing on the issues cited below. Petitioner seeks specific relief of an order directing DCPS to place and fund the student's attendance at a private out of general education school and compensatory education services to include credit recovery and intensive remediation tutoring services.

The parties did not agree to waive the remainder of the resolution period. Thus, the 45-day timeline began to run on August 3, 2013, and ends, and the Hearing Officer's Determination ("HOD") is due on September 16, 2013. The Hearing Officer conducted pre-hearing conferences on July 25, 2013⁶, August 12, 2013, and August 13, 2013, during which the issues to be adjudicated were discussed and determined. On August 20, 2013, the Hearing Officer issued the final pre-hearing order outlining, inter alia, the issues to be adjudicated.⁷

³ Petitioner asserted that exception(s) to the 2-year limitation applied. In contrast to the other assertion of an exception, the facts at pre-hearing on this issue was not clear. Petitioner and was allowed an opportunity at hearing to present evidence of that the exception(s) applied.

⁴ Speech and language evaluation and vocational assessment were agreed upon.

⁵ On July 16, 2013, the parties developed a prospective IEP for the student with 21 hours of specialized instruction and 1 hour of each related service per week outside general education. The LRE section states that these are the services at are to be provided outside general education. The parties agreed that this IEP is appropriate and Petitioner is asking by way of remedy for the student's placement with public funding at private school and/or educational program.

⁶ During the initial PHC the parties expressed hope that all issues in the complaint would be resolved. However, by the August 12 2013, the parties had not come to agreement on the student's prospective location of services, and thus the case proceeded to hearing.

⁷ This was a revised PHO after the Hearing Officer ruled on pending motion to dismiss claims beyond the 2-year

Prior to the hearing the parties submitted joint stipulations. The hearing convened on September 4, 2013, and concluded on September 6, 2013. Following the hearing, the parties each submitted to the Hearing Officer proposed findings of fact on or before September 11, 2013.⁸

ISSUES ADJUDICATED⁹:

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by incorrectly identifying him as a student with an ID disability and failing to properly identify him as student with a SLD until March 7, 2013,¹⁰ and thus failing to develop and implement an appropriate IEP since July 3, 2011, by failing to provide the student appropriate specialized instruction, appropriate related services, and appropriate transition services¹¹.
2. Whether DCPS denied the student a FAPE by failing to provide prior written notice for decreasing the amount of speech language services provided to the student in February 2009 and March 2011.¹²
3. Whether DCPS denied the student a FAPE by failing to timely re-evaluate the student in 2010 by failing to conduct a psychological and speech and language evaluation.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-58¹³, and Respondent's Exhibits 1-30) that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

period of limitation and set forth the issues to be adjudicated after ruling on the motion.

⁸ The joint stipulations are included as findings of fact. The Hearing Officer reviewed, but did not necessarily adopt the proposed findings of fact of each party and made independent factual and credibility determinations that resulted in the final findings of fact in this HOD.

⁹ 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 and at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

¹⁰ Petitioner originally alleged that this issue should have been adjudicated back to March 2007 when the student was first determined eligible. However, the Hearing Officer concluded that the claim cannot precede two years prior to the date the complaint was filed: July 3, 2011.

¹¹ March 2011 IEP is the first IEP with transition services – check the law about when the transition needs to be in place – what was the effect – did it only occurred from the sixteenth birthday. March 2012 is when turned 16.

¹² This issue will only be adjudicated and relief available for claims prior to July 3, 2011, if Petitioner presents sufficient evidence that the exception to the two-year period of limitation applies.

¹³ DCPS objected to some of Petitioner's documents at and the start of the hearing Petitioner withdrew the following documents: #s 6, 7, 9 10 and they were thus not admitted. In addition, the Hearing Officer did not admit

FINDINGS OF FACT:¹⁴

1. The student resides with parent in the District of Columbia and currently attends School A. The student began attending School A during school year SY 2011-2012 in ninth grade. Prior to attending School A the student attended School B. (Parent's testimony)
2. The student is age 17-year and currently eligible for special education services under an SLD classification. The student has earned 6.5 Carnegie Unit credits, and requires an additional 17.5 credits to graduate with a high school diploma. (Stipulation)
3. DCPS held an initial special education eligibility meeting for student on March 26, 2007. The student was found eligible for special education services under an ID classification on March 26, 2007. (Stipulation)
4. Prior to the second advisory of the SY 2006-2007, neither DCPS nor Petitioner initiated a referral for student to be evaluated for special education eligibility. (Stipulation)
5. Petitioner received a copy of OSSE's District of Columbia Notice of Procedural Safeguards at the March 26, 2007, eligibility meeting. (Stipulation)
6. DCPS convened an IEP meeting for the student at School B on February 13, 2009. The student's parent participated by telephone and signed the IEP in February 18, 2009, indicating that agreed with the contents of the IEP and had a opportunity to be involved in its development and receipt a copy of the IEP and the procedural safeguards and parent rights pertaining to special education. (Respondent's Exhibit 1-1, Petitioner's Exhibit 8)
7. On February 13, 2009, DCPS reduced student's amount of speech and language services on IEP from 60 minutes per week to 30 minutes per week, and reduced student's hours of specialized instruction from 20 hours per week to 15 hours per week. Petitioner attended this meeting via telephone. (Stipulation)
8. DCPS convened re-eligibility meetings on behalf of student in June and September 2010. The student's parent participated in the meetings by telephone and agreed with DCPS' decision that student remained eligible for special education services under the ID classification. (Respondent's Exhibits 2-1, 3-1, 3-2)
9. DCPS reviewed multiple assessments as part of its re-evaluation process, including all existing data, classroom-based assessments, student homework samples, report cards,

Petitioner's Exhibit #57. All other Petitioner's disclosed documents were admitted. All of Respondent's disclosed documents were admitted.

¹⁴ 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.

progress reports, and reports from individual teachers. DCPS determined no additional assessments were necessary at that time to determine eligibility for special education services or to assist in IEP development. (Respondent's Exhibit 2-4)

10. Formal testing is not required in every circumstance and a review of existing data and informal samples can be sufficient to determine student's needs. Updated cognitive testing is not typically completed for ID students during the re-evaluation process unless it is requested by the parent or if the IEP team has reason to believe the classification may have changed. (Witness 3's testimony, Witness 4's testimony)
11. The student attended School B during SY 2010-11 in seventh grade. During that school year the student was present 175 out of 180 days. (Respondent's Exhibit 2-4)
12. DCPS convened an IEP meeting for the student at School B on March 29, 2011. The student's parent participated by telephone and signed the IEP a day later indicating that he agreed with the contents of the IEP and had a opportunity to be involved in its development and receipt a copy of the IEP and the procedural safeguards and parent rights pertaining to special education. (Petitioner's Exhibit 16-1)
13. On March 29, 2011, DCPS reduced student's amount of speech and language services on IEP from 30 minutes per week to 30 minutes per month in a consultation setting. (Stipulation)
14. The student's March 29, 2011, IEP, developed at School B provided him with 15 hours per week of specialized instruction outside of general education, 30 minutes per month of speech therapy, and behavioral counseling services. The IEP also included post-secondary transition plan. The responsible entity for the services in the plan was the student's parent. (Respondent's Exhibit 4-6, 4-10)
15. DCPS placed the student in ninth grade for SY 2011-2012 without him having been in eighth grade and he began attending School A. (Parent's testimony)
16. The student's IEP was next revised at School A on March 21, 2012. The student's hours of instruction and related services remained unchanged. The student's parent attended the meeting in person. The IEP also included a post-secondary transition plan which included specific actions the student was going to take toward his post secondary goals. (Respondent's Exhibit 7-1, 7-6, 7-10)
17. The student was retained in ninth grade at the end of SY 2011-2012. (Parent's testimony)
18. DCPS agreed to conduct updated cognitive testing because the student was uncomfortable with his classification and he presented with average adaptive functioning. (Witness 3's testimony)
19. In late June 2012 DCPS conducted a psychological evaluation to reassess the student's disability classification. The DCPS psychologist assessed the student's general cognitive

functioning as extremely low. However, because of relatively high perceptual reasoning and adaptive functioning the psychologist recommended that the student's disability classification be changed from ID. However, a team did not review the evaluation until March 2013 when the student classification was changed from ID to SLD. (Witness 3's testimony, Petitioner's Exhibit 4)

20. The DCPS psychologist recommended in the 2012 psychological evaluation that the student's disability be changed to SLD because assessment did not meet the criteria of ID. The evaluation indicated that the student needed intensive academic interventions to address severe academic deficits. (Respondent's Witness 3 testimony, Petitioner's Exhibit 4-15)
21. DCPS convened a re-eligibility meeting on behalf of student on March 7, 2013. Petitioner attended this meeting in person. DCPS reviewed multiple assessments as part of its re-evaluation process, including a current Woodcock Johnson III, progress reports, the June 26, 2012, psychological assessment, work samples, classroom-based assessments, teacher and related service provider reports, and a speech/language data review conducted on June 29, 2012. DCPS determined no additional assessments were necessary at that time to determine eligibility for special education services or to assist in IEP development. (Parent's testimony, Respondent's Exhibits. 17, 19, Witness 4's testimony)
22. On March 7, 2013, DCPS revised student's special education eligibility classification to SLD following a review of a "Confidential Psychological Evaluation" report completed by the [School B] psychologist, [Witness 3] on June 26, 2012. (Stipulation)
23. A disability classification usually only serves to find a student's eligible for special education services. Once found eligible, an IEP is developed based on the student's individualized academic and social/emotional needs, not on a particular classification. (Witness 3's testimony)
24. The student's IEP was revised on March 7, 2013. DCPS increased student's hours of specialized instruction to 21 hours per week from 15 hours per week in order to provide student with more time for reading remediation. (Respondent's Exhibits 19, 20)
25. DCPS also increased student's speech services from 30 minutes per month to 60 minutes per month at the March 7, 2013, IEP meeting because student had only attended four of sessions the entire school year, and the speech pathologist believed increasing opportunities receive services would lead to the provision of more consistent therapy. (Witness 4's testimony)
26. The student's developed on March 7, 2013, prescribed the following weekly services: 21 hours of specialized instruction (14 of those hours inside general education and 7 outside general education) and the following monthly related services: 60 minutes of behavioral support and 60 minutes of speech-language pathology, both inside general education. The student's least restrictive environment ("LRE") reflected that only 7 hours of specialized

instruction would be provided outside general education. (Respondent's Exhibit 20-1, 20-9, 20-10)

27. Since the beginning of the 2011-12 SY, the student's first year attending School A, has never been placed in any classes with only other students classified as ID. School A has one such self-contained ID classroom and the student has never been taught in that classroom or by that teacher. The student generally seems to have benefited from attending classes with general education peers. (Witness 5's testimony)
28. The student is able to communicate effectively in class and has mastered pragmatic communication goals. Typically, as students move into high school, speech therapy services are directed towards practical classroom applications and are more blended into the academic curriculum. (Witness 4's testimony)
29. The student had a total of 283 class period absences during SY 2011-2012, of which 203 were unexcused. (Witness 5's testimony, Respondent's Exhibit 13)
30. Student had a total of 381 class period absences during SY 2012-2013, of which 303 were unexcused. The student was counted as "present" during 97.5 of 181 total school days. (Respondent's Exhibit 25)
31. In order to be marked as present for the day, a student need only attend two out of four class periods. (Witness 5's testimony)
32. The student's poor attendance during SY 2012-2013 was due to feeling unsafe walking to and from school, not having a clean uniform, and dealing with family issues outside of school. However, the student received a uniform from School A staff during the second week of school. (Student's testimony)
33. The student's need for a new uniform was never brought up at any of student's IEP meetings. If students at School A require help obtaining a uniform they are generally directed to appropriate school personnel for assistance in obtaining a uniform. (Witness 5's testimony)
34. The student's school attendance became worse during the second semester of SY 2012-2013 than it was during the first semester. The student passed all of academic courses during the first semester, and failed all of academic courses during the second semester. (Student's testimony, Respondent's Exhibits. 22, 23, 25)
35. When student did come to class, could understand the work presented to him and made progress on IEP goals during SY 2012-2013. (Student's testimony, Respondent's Exhibit 21)
36. DCPS conducted home visits and made phone calls home regarding student's attendance during SY 2012-2013 SY. Attendance was the number one concern addressed at each of

student's IEP meetings during the previous two school years. (Witness 5's testimony, Respondent's Exhibit 26)

37. On July 16, 2013, Petitioner attended a Resolution Session Meeting ("RSM") for the instant complaint. The meeting was held at DCPS' central office. DCPS had a full IEP team present at the meeting. In an effort to settle the instant dispute, DCPS revised student's IEP at the meeting to include the same hours of specialized instruction, but to provide them all outside of general education. (Respondent's Exhibits 27, 28)
38. DCPS also agreed to conduct speech and vocational assessments at the beginning of the SY 2013-2014. (Stipulation; Respondent's Exhibit 28)
39. The student's parent agrees with the contents of the current IEP and is aware that the IEP provides student's core academic classes outside of general education, but that student can take electives and eat lunch with general education peers. (Parent's testimony, Respondent's Exhibit 28)
40. The student's primary concern with DCPS' proposal for the student for SY 2013-2014 as expressed at the July 16, 2013, RSM, was the proposed location of services. did not want the student to attend School A as feared for safety walking to and from the school. Petitioner asked DCPS to put student at either of two other DPCS high schools because there was no indication that those schools were associated with gang violence. (Parent's testimony)
41. Petitioner proposed at the hearing that the student be placed at or be provided tutoring hours at Seeds of Tomorrow ("SOT"), an after school educational center. SOT provides tutoring services to DCPS students who have been awarded compensatory education, and credit recovery through an online program that students can access when they visit the center. It is not an accredited school. It does not have an OSSE certificate of approval as an approved nonpublic special education day school. It does not have any DCPS students "placed and funded" as their location of services. It is not exclusive to special education students. The program is structured to provide individualized curriculum for students to meet IEP goals, receive compensatory education and enroll in credit recovery courses. At SOT the student may have access to nondisabled peers. (Witness 1's testimony, Petitioner's Exhibit 32)
42. The student has visited and been accepted to ("KDS"). KDS Petitioner has proposed that the student be placed at KDS. KDS is a program is structured to provide individualized curriculum for the student to meet IEP goals, receive compensatory education, enroll in credit recovery courses and can provide full-time related service providers. The school also provides curriculum, transition services, and extracurricular activities structured around the interests of the student, i.e. basketball, music and art classes. KDS is a full-time, special education only day school. Its students receive all classes and lunch in the special education setting. If student were to attend KDS an IEP meeting would be held in short order and the IEP would be revised

to fit the school's capabilities as a full-time outside of general education services. (Witness 2's testimony)

43. Petitioner's compensatory education plan was developed after a record review and an hour-long interview with the student. No attempts were made to contact student's teachers or related service providers for input into the plan, although the compensatory education witness stated it "would be nice" to have that input. (Witness 1's testimony, Petitioner's Exhibit 32)
44. School A is capable of implementing student's June 16, 2013, IEP during the SY 2013-2014 and student is able to enroll and begin attending immediately. (Witness 5's testimony)
45. Petitioner participated in a resolution session meeting ("RSM") for the instant complaint on July 16, 2013. At that meeting, both Petitioner and DCPS agreed to a revised IEP providing student with 21 hours per week of specialized instruction, 60 minutes per month of speech and language services, and 60 minutes per month of behavioral counseling services. (Stipulation)
46. Petitioner informed DCPS of safety concerns at the school proposed by DCPS following the July 16, 2013, resolution meeting and asked for reconsideration of location of services. DCPS did not provide Petitioner with additional DCPS schools that could appropriately implement the student's IEP and that the parent did not believe would be a danger to the student's safety. (Respondent's Exhibit 29)
47. At the July 16, 2013 RSM, DCPS indicated it would potentially make further revisions to student's IEP upon completion of a speech and language evaluation and a vocational evaluation conducted on the student. (Stipulation)
48. On August 14, 2013, DCPS issued a letter authorizing student to receive, at DCPS' expense, 75 hours of independent tutoring to be provided by a vendor of Petitioner's choosing. (Stipulation)

CONCLUSIONS OF LAW:

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

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. ¹⁵ *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 1: Whether DCPS denied the student a FAPE by incorrectly identifying him as a student with an ID disability and failing to properly identify him as student with a SLD until March 7, 2013, and thus failing to develop and implement an appropriate IEP since July 3, 2011, by failing to provide the student appropriate specialized instruction, appropriate related services, and appropriate transition services¹⁶.

Conclusion: Petitioner did not sustain the burden of proof that the student’s ID disability classification not changing until March 7, 2013, resulted in the student being provided an inappropriate IEP from July 3, 2011. While DCPS recently reclassified the student as a student with SLD rather than ID, this does not retroactively render all of prior IEPs to be substantively inappropriate.

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.” *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009). Furthermore, an IEP should not be “automatically set aside . . . for failing to include a specific disability diagnosis or containing an incorrect diagnosis.” *Fort Osage R-1 School District v. Sims*, 641 F.3d 996, 1004 (8th Cir. 2011). Classification of the precise impairment listed within 20 U.S.C. § 1401(3)(A)(i) is “not critical in evaluating FAPE” and IDEA charges schools to develop an “appropriate education, not with coming up with the proper label.” *Pohorecki v. Anthony Wayne Local School District*, 637 F. Supp. 2d 547, 557 (N.D. Ohio 2009) (quoting *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997)).

In this case this student despite original ID classification was never placed in an ID self-contained classroom at School A. To the contrary, the student received special education

¹⁵ 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.

¹⁶ March 2011 IEP is the first IEP with transition services – check the law about when the transition needs to be in place – what was the effect – did it only occurred from the sixteenth birthday. March 2012 is when turned 16.

services and was also able to function with general education peers. The evidence indicates that the student's attendance was a major obstacle to him making academic progress and when attended school regularly made better grades and progress toward IEP goals.

The evidence demonstrates that the student's cognitive abilities were extremely low and there was no evidence that the student's ID disability when it was first determined when was found eligible was inappropriate. The DCPS psychologist credibly testified that the student's perceptual reasoning and adaptive abilities overtime resulted in an appropriate change in the student's classification. As that witness aptly points out once a student is found eligible under IDEA with a qualifying disability it is not the disability that drives the student's educational programming but the student's unique needs.

Also, the evidence does not support that because of the student disability classification the student related services were adversely affected. The DCPS speech pathologist credible testified that the student's speech language issues were being effectively addressed. The student was also being provided behavioral support services. Although Petitioner asserted that the student should have been and was not provided a behavior plan to address attendance, the evidence indicates that DCPS took action to address the student's truancy. The student and parent testified that at least in SY 2012-2013 some of the student's absences was due safety concerns for the student going to a from school and being in the neighborhood of School A.

This seems to be legitimate and rationale concerns for the parent but there was no indication that the parent ever sought any safety transfer or other means of addressing this issue. However, the evidence does not support that any action or inaction by DCPS was the direct cause for the student's non-attendance such and was denied a FAPE.

Lastly, Petitioner asserts that the student ID disability classification resulted inappropriate transition services. The evidence reflects that the student's IEP while attended School A included a transition plan. Albeit the initial plan seems to have been focused on action by the parent rather than the school, the second plan in the more recent IEP is more detailed and includes action to be taken by the student toward stated post-secondary goals. Although DCPS has agreed to conduct a vocational assessment and reconsider the student's IEP, the evidence presented, however, does indicate sufficient short comings in the student's transition plan related to former disability classification that rise to the level of a denial of FAPE.

"To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the IEP." *Houston Indep. School District v. Bobby R.* 200 F3d 341 (5th Circ. 2000). Petitioner did not provide evidence that the student has not consistently received pull-out instruction.

Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of proof that on this issue.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to provide prior written notice for decreasing the amount of speech language services provided to the student in February 2009 and

March 2011.

Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of the evidence. The Hearing Officer concludes that the Petitioner signed for and received procedural safeguards each time the student's IEP was amended and speech language services were reduced and there was insufficient evidence presented that any exception to the two-year period of limitation applies. Therefore, the Hearing Officer concludes that the claim that no prior notice was provided cannot be adjudicated.

Pursuant to 34 C.F.R. § 300.511(e):

A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or 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 requesting such a due process hearing under this part, in the time allowed by that State law.

And 34 C.F.R. § 300.511(f) states:

The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to--

- (1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or
- (2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

Petitioner asserts that because the parent was not provided procedural safeguard notice when the IEPs were amended to reduce the student's services, DCPS withheld information such that an exception applies. However, the evidence belies this assertion.

The student's parent attended every IEP meeting where student's IEP was revised that was held over the past three school years. At the conclusion of each IEP meeting, Petitioner was in agreement with the contents of student's IEP, including the proposed hours of specialized instruction, related services, and student's transition plan as reflected by her signature including her acknowledgment of receipt of the procedural safeguards. At each of student's IEP meetings, Petitioner was able to ask questions of the IEP team and provide input into the IEP development process. Petitioner never informed DCPS did not understand what was happening during the meetings, never requested any follow-up meetings to clarify earlier discussions, and never requested DCPS conduct additional evaluations on student.

Although Petitioner argued that parent was not provided procedural safeguards the parent did not remember much of what occurred in prior years regarding the student's IEP meetings and much of the parent's testimony was based on leading questions and the Petitioner's counsel was repeatedly admonished by the Hearing Officer regarding this. Therefore, her testimony about having received or not received the procedural safeguards was not credited.

Procedural safeguards must be provided to the parent at least once a year except that they must also be given to parents upon initial referral for an evaluation, receipt of the first state or due process complaint, in accordance with disciplinary procedures and upon request by the parent. See 34 C.F.R. §300.504(a).

With provision of the procedural safeguards Petitioner is deemed to have been put on notice of her rights to file a due process complaint. Because the time period for this claim is beyond 2 years prior to the date the complaint was filed the Hearing Officer concludes that the claim that no prior notice was provided cannot be adjudicated.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to timely re-evaluate the student in 2010 by failing to conduct a psychological and speech and language evaluation.

Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of the evidence on this issue.

34 C.F.R. § 300.303(a) makes clear that, “A local education agency (“LEA”) *shall ensure* that a re-evaluation of each child with a disability is conducted...if the child’s parents or teacher requests a re-evaluation.” and that the reevaluation must be conducted at least once every three years.

Petitioner asserts that DCPS did not conduct a formal psychological evaluation and a speech language evaluation of the student in 2010. However, Respondent presented credible testimony by its witnesses that DCPS timely reviewed informal assessments and other qualitative data in reviewing and updating the student’s IEPs. There is no requirement that the evaluations contemplated by 34 C.F.R. § 300.303(a) be the same type of evaluation(s) that were initially conducted of a student. Petitioner presented no credible testimony that sufficiently refuted that of the Respondent’s witnesses. Therefore, the Hearing Officer concludes that Petitioner did not sustain the burden of proof on this issue.

The parties have recently agreed to conduct additional evaluations and review the student’s IEP once the evaluations are completed. Petitioner has asserted legitimate concerns that the location(s) of service DCPS has proposed for the student may cause serious safety concerns. In light of the pending evaluations, the Hearing Officer advises the parties to immediately review the student’s location of services based upon these concerns for implementation of the student’s newly revised IEP and any changes that may be made to it after a review of the pending evaluations. Nonetheless, based upon the evidence presented in this case the Hearing Officer does not conclude that it has been sufficiently proved to date that the student was denied a FAPE.

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 16, 2013