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Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
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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>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: October 8, 2013</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 October 8, 2013, at the Office of the State Superintendent (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age nine, resides with his parent in the District of Columbia, and is a student with a disability under IDEA with a classification of multiple disabilities (“MD”) including emotional disability (“ED”) and other hearing impairment (“OHI”).

The student attended a District of Columbia public charter school (“School A”) for Pre-K, kindergarten and 1st grade during school year (“SY”) 2010-2011. In April 2011 while the student was at School A DCPS proposed an individualized educational program (“IEP”) that the parent disagreed with and requested the DCPS least restrict environment (“LRE”) team make a determination on her request for a full-time out of general education placement. Petitioner asserted DCPS never made the LRE determination.

On August 11, 2011, the student’s parent notified DCPS she was unilaterally placing the student at School B where he attended in SY 2011-2012 and SY 2012-2013 for 2nd and 3rd grade respectively. On June 27, 2012, the parent, through counsel notified DCPS she as placing the student at School B for SY 2012-2013 and seeking public funding and reimbursement for SY 2011-2012.

On December 6, 2012, the student’s parent registered the student with the DCPS Parochial and Religious Office (“PRO”) and requested evaluation(s). An initial screening meeting was held March 7, 2013. On March 18, 2013, Petitioner filed a due process complaint that was ultimately settled resolving the parent’s claims for SY 2011-2012 and 2012-2013.

On May 9, 2013, a DCPS IEP team reviewed recent evaluations and concluded the student continued to be eligible. Petitioner asserts that DCPS indicated during the May 9, 2013, IEP team meeting that it would not draft an IEP unless the student was attending a DCPS school but would draft an individualized service plan (“ISP”).

DCPS inquired of the parent during Summer 2013 whether the student would attend a DCPS school for SY 2013-2014 so that DCPS could prepare a transition plan from School B to DCPS for the student. Petitioner asserts that the student’s parent indicated a willingness to place the student in DCPS but wanted an IEP developed first and when that was not forthcoming from DCPS the parent informed DCPS the student would continue at School B for SY 2013-2014.

On July 31, 2013, Petitioner filed the current complaint asserting DCPS failed to provide the student an IEP educational placement and location of services for SY 2013-2014. Petitioner seeks as relief an order directing DCPS place and fund the student at School B for SY 2013-2014.

DCPS filed a response to the complaint on August 13, 2013. DCPS denied any alleged denial of a FAPE and asserted that DCPS fulfilled its obligation to the student when it offered the ISP and the parent has no intention of placing the student in a DCPS school and is not entitled for public funding for School B SY 2013-2014 and the case should be dismissed.

A resolution meeting was held on August 13, 2013, and all matters were not resolved. The parties expressed no desire to proceed directly to hearing; instead they expressed a desire to allow the full 30-day resolution period to expire before the 45-day timeline begins. The 45-day period began on August 31, 2013, and ends (and the Hearing Officer's Determination ("HOD") was originally due) on October 14, 2013.

The parties agreed to the following hearing dates: October 8, 2013, and Wednesday, October 9, 2013. On September 6, 2013, Petitioner submitted a motion for continuance and extension of the HOD due date for the hearing to be held on these dates. Petitioner's counsel was not available on the original hearing dates proposed: October 3, 2013, and October 4, 2013. The motion for continuance and extension of the HOD due date was granted and the HOD is now due on October 24, 2013.

The Hearing Officer conducted pre-hearing conferences ("PHC") in this matter on August 27, 2013, and August 29, 2013, by telephone with both counsel participating and issued a pre-hearing conference order on September 10, 2013, stating, inter alia, the issue to be adjudicated at hearing.

The parties appeared for hearing on October 8, 2013. At the outset of the hearing the Hearing Officer considered arguments on Respondent's motion to dismiss and Petitioner's motion for summary adjudication. The Hearing Officer denied both of the motions.

THE ISSUE ADJUDICATED:

Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing to offer the student an appropriate IEP and placement for SY 2013-2014, and as result should the student be placed at School B for SY 2013-2014 with public funding.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's ("P") Exhibits 1 through 32 and DCPS Exhibit 1 through 8) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT:²

1. The student is age nine and is a child with disability under IDEA. He attended [School A] for Pre-K, kindergarten and 1st grade and [School B] for 2nd and 3rd grade. (Stipulation)
2. In April 2011 while the student was at [School A] proposed an IEP that the parent disagreed with and requested the DCPS LRE team make a determination on her request for a full-time out of general education placement. (Stipulation)
3. On December 6, 2012, the parent registered the student with the DCPS PRO office and requested evaluation(s). An initial screening meeting was held March 7, 2013. On March 18, 2013, Petitioner filed a due process complaint that was ultimately settled resolving the parent's claims for SY 2011-2012 and 2012-2013. (Stipulation)
4. On May 9, 2013, a DCPS IEP team reviewed recent evaluations and concluded the student continued to be eligible. (Stipulation)
5. The student was evaluated in a variety of areas and the team identified his areas of strengths and weaknesses. He qualified under MD classification with ED and OHI. (Witness 1's testimony)
6. After the eligibility was completed the parent asked for an IEP and DCPS stated they would not provide one unless the student was enrolled in a DCPS school. (Witness 1's testimony)
7. DCPS inquired of the parent during Summer 2013 whether the student would attend a DCPS school so that DCPS could prepare a transition plan from [School B] to DCPS for the student. (Stipulation)
8. There has been no IEP proposed. (Stipulation)
9. DCPS indicated that it would not draft an IEP unless the student was attending a DCPS school but would draft an ISP. (Parent's testimony)
10. During Summer 2013 the student's parent indicated to DCPS a willingness to place the student in DCPS school but wanted an IEP developed first. When that was not forthcoming from DCPS the parent informed DCPS the student would continue at School B for SY 2013-2014. Petitioner is seeking public funding for the student at School B for the current school year. (Parent's testimony)

² 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.

11. The student currently attends to School B. School B is a special education school that serves students with special needs including students with learning disabilities, students on the autistic spectrum and students with limited physical disabilities. There are no non-disabled students at School B. Students are funded through either private payment or through local educational agencies and D.C. funds approximately 75% of the students. (Witness 1's testimony)
12. School B's program of instruction is guided by the DCPS academic standards and specialized instruction is designed using programs and best practices to address academic deficits in reading, written language and math. School B has a student to teacher ratio of no more than 10 students to one certified teacher and assistant teacher per classroom. The school offers "pull-out" and "push-in" related services. The standard admissions process was followed for this student and the School B staff believes the school can meet the student's educational needs. (Witness 1's testimony)
13. School offers behavioral support by licensed social workers and speech pathology by licensed speech pathologists. Tuition at School B is \$39,400 annually and related services are billed hourly separately at the OSSE approved rates. School B has a certificate of approval ("COA") from OSSE. (Witness 1's testimony)
14. The parent has an enrollment agreement with School B but has not made payments in the current school. She has a balance due of \$9000. The agreement period is August 1, 2013, to June 1, 2014, and the parent will continued to be billed at a monthly rate. Related services are billed at the OSSE rate in addition to the tuition. In early October 2013 a School B team met with the student's parent and developed and the parent approved a new educational plan for the current school year. (Witness 1's testimony)
15. In addition to specialized instruction the student is receiving both individual and group behavior support services. The student would benefit from occupational therapy and speech/language services. He has difficulty with handwriting and his expressive language is underdeveloped. (Witness 1's testimony)
16. At School B the student has made academic and behavioral progress. Last school year the student coped with his feelings in more negative ways and made occasional threats of self-injury. This school year he is staying in the classroom, waiting his turn and has increased his work production. He has mastered some of the goals from his previous educational plan and is currently operating a 3rd grade level in the math. The student's progress in written expression has been more challenging. He is writing sentences but the goal is for him to expand and vary his sentence structure and production in the coming school year. (Witness 1's testimony, Petitioner's Exhibit 9)

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. ³ *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 offer the student an appropriate IEP and placement for SY 2013-2014, and as result should the student be placed at School B for SY 2013-2014 with public funding.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS was required to develop an IEP for the student and propose and educational placement and failed to do and thereby demined the student a FAPE.

The Individuals with Disabilities Education Improvement Act ("IDEA") of 2004 requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means: [S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...”20 U.S.C. § 1401(9), 34 C.F.R. § 300.17, 30 DCMR Sec. § 3001.1.

Special education is defined as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.” 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1. The FAPE requirement is satisfied when the State provides personalized

³ 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.

instruction that is reasonable calculated to permit the child to benefit educationally. See *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982).

“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).

Additionally, pursuant to D.C. MUN. REGS. tit. 5, § 3010.2 (2003), DCPS “shall implement an IEP as soon as possible after the meeting where the IEP is developed...” Pursuant to 34 C.F.R. § 300.115(a), DCPS “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

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.

DCPS has asserted that it fulfilled its obligation to the student when it offered the ISP and the parent has no intention of placing the student in a DCPS school and is not entitled to public funding for School B SY 2013-2014. However, the evidence belies this assertion.⁴ The parent credibly testified⁵ that she requested that an IEP be developed and indicated a willingness to consider a DCPS school once an IEP was developed.

In a recent U.S. District Court decision DCPS’ position that a parent must first enroll a student in a DCPS school before DCPS is required to develop an IEP was found to be unworkable. *District of Columbia v. Vinyard* (D.D.C. 2013) 62 IDELR 13 In that case DCPS argued that pursuant to 34 C.F.R. § 300.137(a) and 20 U.S.C. § 1412(a)(10), the District is under no obligation to create an IEP for the student until he enrolls in a public school.

In *Vinyard* the Court stated:

“ [DCPS] cannot seriously argue that the plain text of section 300.137(a)---a regulation promulgated by the Department of Education---requires a child be enrolled in public school before the local educational agency is required to *create* an IEP when the Questions and Answers document published by an office of the Department of Education construes the regulation differently.... The agency guidance contemplates that once a parentally placed private school child is identified as a student with disabilities under the IDEA, the local educational agency will offer the child a FAPE, i.e., an IEP, at which point the parents either (1) “accept the offer of FAPE and enroll

⁴ Findings of Fact (“FOF”) #s 6, 7, 8, 9, 10

⁵ The witness was forthright in her testimony. DCPS presented no evidence to refute her testimony and it was partially corroborated by Witness 1.

the child in a public school,” at which point the local educational agency “is obligated to make FAPE available to the child”; or (2) the parents “make clear [their] intent to keep the child enrolled in the private . . . school,” and the local educational agency “is not required to make FAPE available to the child.” *Id.* By the Department of Education’s own interpretation of the governing regulations, the *receipt* of services pursuant to an IEP is predicated on a child enrolling in a public school, but an *offer* of an IEP is not.”

“ 20 U.S.C. § 1412(a)(10), addresses “Children enrolled in private schools by their parents,” does not require the District to provide a FAPE to parentally placed private school students. The Court agrees that the District is not required to *implement* an IEP for a student whose parents unilaterally maintain a student’s enrollment at a private school when an IEP provides for a public placement. But nothing in this section authorizes the school district to ignore a parent’s request that an IEP be developed for a child simply because the child is presently enrolled in a private school... the District of Columbia was obligated to offer [the student] a new IEP when his parents made the request before the 2011-2012 school year. The District admittedly failed to do so, and thus denied [the student] a free appropriate public education for the 2011-2012 school year.”

The evidence in the case at hand⁶ demonstrates that Petitioner requested that student be provided an IEP at the May 9, 2013, meeting and later during the Summer 2013 the parent indicated a willingness to consider placing in a DCPS school. But DCPS required she do that first before it developed an IEP and offered an educational placement for her to consider. Although the IEP team had determined that the student was eligible DCPS did not develop an IEP, as it was required to do. As was the case *Vinyard* DCPS has incorrectly insisted that the student first enroll in a DCPS school before it developed an IEP and as in *Vinyard* DCPS has denied this student a FAPE. In response to DCPS failure to develop an IEP and propose a placement the parent was justified in maintaining the student at School B.

The evidence⁷ demonstrates that School B can provide the student with educational benefit and meets the requirements that the Hearing Officer must weigh in considering an educational placement proposed a parent. *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) Thus, the Hearing Officer concludes DCPS shall be required to reimburse or pay the tuition that the parent has thus far obligated to pay School B.

⁶ FOF #s 4, 5, 6, 7, 8, 9, 10

⁷ FOF #s 11, 12, 13, 14, 15 16

ORDER:⁸

1. DCPS shall within ten (10) calendar days of the issuance of this Order place and fund the student at the School B for SY 2013-2014 and is responsible for the student's tuition and related services since the start of SY 2013-2014.
2. DCPS shall, within thirty (30) calendar days of the issuance of this Order convene an IEP meeting and develop an IEP for the student.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: October 24, 2013

⁸ Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.