

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

PETITIONER, on behalf of)	
STUDENT, ¹)	Date Issued: September 19, 2015
)	
Petitioners,)	Hearing Officer: Peter B. Vaden
)	
v.)	Case No: 2015-0244
)	
DISTRICT OF COLUMBIA)	Hearing Date: September 3, 2015
PUBLIC SCHOOLS,)	
)	Office of Dispute Resolution, Room 2004
Respondent.)	Washington, D.C.
)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or GUARDIAN), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.). In her due process complaint, Petitioner alleged that respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not offering appropriate Individualized Education Plans (IEP) at IEP meetings on November 6, 2013 and October 15, 2014 and by not evaluating Student in all areas of suspected disabilities.

¹ Personal identification information is provided in Appendix A.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on July 17, 2015, named DCPS as respondent. The undersigned Hearing Officer was appointed on July 20, 2015. The parties met for a resolution session on July 30, 2015, but did not reach an agreement. The 45-day period for issuance of this Hearing Officer Determination began on August 17, 2015. On August 4, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before this Impartial Hearing Officer on September 3, 2015 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Guardian testified and called MARYLAND SPECIAL EDUCATION TEACHER as an expert witness. DCPS called RESOURCE ROOM TEACHER as its only witness. Petitioner's Exhibits P-4 through P-18, P-20 through P-23, P-28, P-31, P-34 and P-35 were admitted into evidence without objection. Exhibits P-19, P-26, and P-30 were admitted over DCPS' objections. Exhibits P-1, P-2, P-3, P-24, P-25, P-27, P-29, P-32, P-33 and P-36 were withdrawn. DCPS' Exhibits R-1 through R-10 were admitted into evidence without objection. Exhibit R-13 was admitted over Petitioner's objection. Exhibits R-11 and R-12 were not offered. Counsel for Petitioner made an opening statement. Counsel for both parties made closing arguments. At the request of Petitioner's Counsel, the parties were granted leave until September 9, 2015 to file post-hearing written argument. Counsel for both parties filed written closing arguments.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the August 4, 2015

Prehearing Order:

1. Whether since spring 2013, DCPS has failed to afford the parent full access to Student's educational records as required by the IDEA;
2. Whether DCPS failed to ensure that appropriate IEPs were developed for Student at meetings on November 6, 2014 and October 15, 2014, in that Student's IEPs lacked sufficient hours of Specialized Instruction outside general education, lacked appropriate goals in writing and mathematics, lacked appropriate social emotional goals and behavior supports, lacked speech-language and communications goals and services and lacked ESY services and because the IEPs did not address Student's ADHD disability;
3. Whether since 2013, DCPS has failed to evaluate Student in all areas of suspected disabilities, including behavioral and attentional functioning.

For relief, Petitioner initially requested that the Hearing Officer order DCPS (i) to fund independent evaluations to include a comprehensive psychological, including clinical and behavioral testing - BASC rating scale, Connors, ADHD, and/or Social History, and Occupational Therapy (OT) evaluation, as well as any other evaluations/assessments required to ensure Student receives a FAPE and to convene an MDT/IEP meeting within 10 days of receiving the last of the assessments to review and revise as appropriate Student's IEP; (ii) to develop and implement an appropriate IEP, with appropriate goals, areas of concern, related services and sufficient hours of Specialized Instruction outside of general education; (iii) to ensure that Student is determined eligible for ESY; (iv) to ensure that the Guardian is provided full access to Student's educational records; and (v) to reimburse Petitioner the costs for Student's

summer 2015 reading program. In addition, Petitioner sought an award of compensatory education for the denials of FAPE alleged in the due process complaint.

At the beginning of the due process hearing on September 3, 2015, counsel for the parties stipulated on the record that as of September 2, 2015, Student had enrolled in PUBLIC CHARTER SCHOOL and had withdrawn from DCPS. Public Charter School has elected to be treated as an “LEA Charter,” *i.e.*, as its own LEA for purposes of Part B of the IDEA. *See* 5E DCMR § 923.3. Therefore, with respect to Student, as of September 2, 2015, Public Charter School has the responsibility for meeting the IDEA requirements applicable to an LEA. Counsel also stipulated that as of the hearing date, DCPS has provided funding authorization for the Guardian to obtain Independent Educational Evaluation (IEE) assessments of Student, including a comprehensive psychological evaluation, functional behavioral assessment (FBA) and a social history report. Petitioner’s Counsel also agreed that DCPS had provided the Guardian access to Student’s educational records. As a result of these developments, Petitioner has withdrawn Issue 1 (failure to provide access to educational records). Petitioner has also withdrawn her request for funding for an IEE OT assessment.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer’s Findings of Fact are as follows:

1. Student, an AGE boy, resides with Guardian in the District of Columbia. The birth parents’ parental rights have been terminated. Guardian is Student’s aunt and she has been granted full guardianship by the D.C. courts. Testimony of Guardian.
2. Student attended CITY ELEMENTARY SCHOOL 1 for Kindergarten and 1st Grade. His Kindergarten end-of-year progress report indicated he was outstanding in

math and either very good or satisfactory in all other areas. In 1st Grade, Student consistently approached standard (basic) in mathematics, science, social studies and art. His progress in English language arts did not meet the standards (below basic). Exhibit P-10.

3. A psychological evaluation of Student conducted was by a Early S.T.A.G.E.S. in June 2009. That examiner reported, *inter alia*, that Student remained interested to participate throughout the evaluation, that he appeared attentive to the tasks presented, that he demonstrated high tolerance for frustration, and that he did not require encouragement or reinforcement to remain on task. Exhibit P-11.

4. In July 2013, Student was evaluated for speech and language needs. The speech pathologist observed Student in the classroom and reported that he worked independently at his desk and was well focused for the entirety of the lesson. Exhibit P-9.

5. In September 2013, DCPS SCHOOL PSYCHOLOGIST conducted a psychological evaluation of Student. Student was administered the Reynolds Intellectual Assessment Scales (RIAS). He received a Below Average score (89) on the RIAS Composite Intelligence Index. Student's educational achievement was tested using the Woodcock-Johnson Tests of Achievement - Third Edition (WJ III). Student's scores were in the Low range for Broad Reading, in the Average range for Broad Mathematics and in the Low range for Broad Written Language. School Psychologist concluded that Student's test results and other data provided support for his educational classification of Specific Learning Disability (SLD). Exhibit P-10.

6. DCPS School Psychologist observed Student in two classes. She noted that in the first class, Student moved around in his seat, kicking his legs, sliding down, and turning around to talk to another student, but that several other children had equivalent levels of

activity. She reported that when redirected by the teacher, Student complied. DCPS School Psychologist reported that in the second class, Student sat still, appearing to be attentive without fidgeting. Exhibit P-10.

7. In October 2013, Student's was determined eligible for special education and related services under the primary disability classification SLD. Exhibit P-5.

8. Student's initial IEP was developed at CITY ELEMENTARY SCHOOL 2 on November 6 2013. Guardian and EDUCATIONAL ADVOCATE attended the meeting. Prior to the meeting, Student's classroom teacher prepared a memorandum describing his strengths and weaknesses. The classroom teacher noted Student's difficulty with reading fluency and comprehension. She also wrote that Student needed a lot of support with written expression. The teacher reported that Student had more success with mathematical calculation, but still needed a lot of one-on-one guidance when problem solving. Behaviorally, Student was reported to be respectful and cooperative in class, and that when he got off task, he immediately corrected his behaviors when redirected. The IEP identified Reading as an area of concern and provided one hour per day of Special Education Services in a pull-out (outside general education) setting. Exhibit P-5.

9. At the November 6, 2013 IEP meeting, the IEP team agreed that Written Expression goals should be included in Student's IEP. Educational Advocate expressed that one hour per day of special education services was not enough. After a discussion of how the program was set up at City Elementary School 2, the supports Student already was receiving inside his classroom, and the progress he had made, Guardian agreed with the teachers that one hour per day of special education services was appropriate. Exhibit R-2.

10. On December 3, 2013, this Hearing Officer issued a Hearing Officer Determination in a prior case (Case No. 2013-0550) concerning this student. The issue in the prior case was whether DCPS had denied Student a FAPE by failing to evaluate Student for special education eligibility when allegedly requested by Guardian in the 2012-2013 school year. In that decision, I found that DCPS denied Student a FAPE by not developing his initial IEP until November 6, 2013, over three weeks past the deadline for initiating services mandated by the D.C. Code. As compensatory education, I ordered DCPS to provide Student 10 hours of after school academic tutoring. Exhibit P-28.

11. Student's IEP team met on October 15, 2014 for an annual IEP review meeting. An annual goal for writing was added to the IEP. Student's Special Education Services were increased to 10 hours per week outside general education. Exhibit P-4. On February 20, 2015, Student's IEP was amended without an IEP meeting to add accommodations for small group testing and reading aloud of test questions. Exhibit P-4, Testimony of Resource Room Teacher.

12. On Text Reading and Comprehension (TRC) assessments administered to Student in the 2013-2014 and 2014-2015 school years, Student's scores were:

	<u>Beginning of Year</u>	<u>Middle of Year</u>	<u>End of Year</u>
2013-2014	B (Below Proficient)	E (Far Below Proficient)	I (Far Below Proficient)
2014-2015	B (Far Below Proficient)	D (Far Below Proficient)	J (Far Below Proficient)

Exhibit R-5.

13. DCPS' 2015 ESY program was a 5 hour per day program that ran from July 6 through 31, 2015, a four week period. Hearing Officer Notice.

14. Student's final term grades for the 2013-2014 school year were Below Basic in Reading and in Writing and Language. He was at Basic or above for all other courses. Exhibit P-14. Student's final term grades for the 2014-2015 school year were Below Basic in Reading, Writing and Language and Math. He was at Basic or above for all other courses. Exhibit P-13.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

ANALYSIS

A.

Has DCPS, since 2013, failed to evaluate Student in all areas of suspected disabilities, including behavioral and attentional functioning?

Petitioner contends that since Student's initial special eligibility evaluation in 2013, DCPS failed to evaluate Student for behavioral disabilities, specifically to assess his attention deficits. Petitioner argues that based upon Student's reported diagnosis of ADHD in his medical history, DCPS' September 2013 psychological evaluation should have included assessments to evaluate Student's attention issues and social emotional status.

DCPS responds that there was no cause to evaluate Student for behavior or attention issues.

U.S. Department of Education regulations require that, as part of an initial special education evaluation and as part of any reevaluation, a local education agency (LEA) must administer such assessments as may be needed to produce the data needed to determine (i) whether a child is a child with a disability and (ii) what are the educational needs of the child. *See* 34 CFR § 300.305(a), (c). The LEA must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, communicative status and motor abilities. 34 CFR § 300.304(c)(4). Decisions regarding the areas to be assessed are determined by the suspected needs of the child. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46643 (August 14, 2006). “[W]hile an evaluation should be tailored to the specific problems a potentially disabled student is having, it need not be designed to identify and diagnose every possible disability.” *D.K. v. Abington School Dist.*, 696 F.3d 233, 249 (3rd Cir.2012).

I find that the due process hearing evidence does not establish that at the time Student was evaluated in 2013, he had suspected behavioral or attention needs which adversely affected his educational performance. The earliest assessment of Student in the evidentiary record is a psychological evaluation conducted by an Early S.T.A.G.E.S. school psychologist in June 2009. That examiner reported, *inter alia*, that Student remained interested to participate throughout the evaluation, that he appeared attentive to the tasks presented, that he demonstrated high tolerance for frustration, and that he did not require encouragement or reinforcement to remain on task. In July 2013, Student was evaluated for

speech and language needs. The speech pathologist observed Student in the classroom and reported that he worked independently at his desk and was well focused for the entirety of the lesson. DCPS School Psychologist conducted a new psychological evaluation of Student in September 2013. She observed Student in two classes. She noted that in the first class, Student moved around in his seat, kicking his legs, sliding down, and turning around to talk to another student, but that several other children had equivalent levels of activity. She reported that when redirected by the teacher, Student complied. DCPS School Psychologist reported that in the second class, Student sat still, appearing to be attentive without fidgeting. At the due process hearing, Resource Room Teacher testified that Student never exhibited behavior problems in school and that if he became distracted in the general education setting, Student could be easily redirected, with a touch on his shoulder.

In sum, while Student was observed to be fidgety in the classroom, the evidence does not establish that Student's behavior or attention issues adversely affected his educational performance or have impeded his learning or that of other children. *See* 34 CFR §§ 300.8(b)(9)(ii), 300.324(a)(2)(i). I conclude that Petitioner has not met her burden of proof to show that Student's emotional or attentional needs were areas of suspected disabilities which DCPS was obliged to assess. *Cf. D.K., supra* ("The School District was not required to jump to the conclusion that [child's] misbehavior denoted a disability or disorder because hyperactivity, difficulty following instructions, and tantrums are not atypical during early primary school years." *Id.* at 251.)

B.

At IEP meetings on November 6, 2013 and October 15, 2014, did DCPS fail to offer Student appropriate IEPs in that the plans lacked sufficient hours of specialized instruction outside general education, lacked appropriate goals in writing and mathematics, lacked appropriate social emotional goals and behavior supports, lacked speech-language and communications goals and services and lacked Extended School Year services and because the IEPs did not address Student's ADHD disability?

Petitioner contends that Student's initial and revised IEPs developed at City Elementary School 2 were inadequate for want of appropriate annual goals, for insufficient specialized instruction and related behavioral support services and for failure to offer Extended School Year (ESY) services. Petitioner seeks compensatory education for Student, who has now transferred to another LEA, for the alleged denials of FAPE when DCPS was his LEA. DCPS maintains that both the 2013 initial IEP and the 2014 revised IEP were appropriate for Student.

To determine whether an IEP is adequate to provide a FAPE, a hearing officer must determine “[f]irst, has the [District] complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the [District] has complied with the obligations imposed by Congress and the courts can require no more.” *A.M. v. District of Columbia*, 2013 WL 1248999, 11 (D.D.C.2013), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (*Rowley*). Petitioner has not raised an IDEA procedural issue with respect to the development of Student’s IEPs. Therefore, I turn to the second prong of the *Rowley* inquiry: Were DCPS’ initial and revised IEPs reasonably calculated to enable Student to receive educational benefits?

In *K.S. v. District of Columbia*, 962 F.Supp.2d 216 (D.D.C.2013), U.S. District Judge Boasberg reviewed case law precedents on the requirements for an appropriate IEP:

The IEP must be formulated in accordance with the terms of IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Rowley*, 458 U.S. at 204, 102 S.Ct. 3034. IDEA also requires that children with disabilities be placed in

the “least restrictive environment” so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. *See* [20 U.S.C.] § 1412(a)(5)(A). . . . IDEA provides a “basic floor of opportunity” for students, *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034, rather than “a potential-maximizing education.” *Id.* at 197 n. 21, 102 S.Ct. 3034; *see also Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991) (inquiry is not whether another placement may be “more appropriate or better able to serve the child”) (emphasis in original); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir.2009) (IDEA does not guarantee “the best possible education, nor one that will maximize the student’s educational potential”; instead, it requires only that the benefit “cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.”) (quoting *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir.1997)). Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

K.S. 962 F.Supp.2d at 200-221. “[B]ecause the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student.” *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66-67 (D.D.C. 2008)(quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008) (internal quotation marks and citation omitted).

Initial November 6, 2013 IEP

i. Annual Goals

Student’s initial IEP was developed at an IEP team meeting at City Elementary School 2 on November 6, 2013. Guardian and EDUCATIONAL ADVOCATE attended the meeting. Prior to the meeting, Student’s classroom teacher prepared a memorandum describing his strengths and weaknesses. The classroom teacher noted Student’s difficulty with reading fluency and comprehension. She also wrote that Student needed a lot of support with written expression. The teacher reported that

Student had more success with mathematical calculation, but still needed a lot of one-on-one guidance when problem solving. Behaviorally, Student was reported to be respectful and cooperative in class, and that when he got off task he immediately corrected his behaviors when redirected. On educational achievement testing in the September 2013 psychological evaluation, Student's scores fell in the Low range in Broad Reading and Broad Written Language and in the Average range in Broad Math.

The IDEA requires that each student's IEP must include a statement of measurable annual goals, including academic and functional goals, designed to,

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability.

See 34 CFR § 300.320(a)(2)(i). *See, also, Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598 (1988) (IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.)

I agree with Petitioner that the lack of Written Expression goals in Student's initial IEP was an inappropriate omission. Student received "Below Basic" grades on Reading and Writing/Language for the first term of the 2013-2014 school year and he scored in the Low range for both disciplines on the educational achievement part of the fall 2013 psychological evaluation. Further, the November 6, 2013 IEP team agreed that writing goals should be included in his IEP. I find, therefore, that the failure to include annual goals for Written Expression in the November 6, 2013 IEP was a procedural

defect. However, only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See Lesesne, ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). While the lack of Written Expression annual goals in the November 6, 2013 IEP was a deficiency, Petitioner has not provided evidence that the omission deprived Student of his ability to receive some meaningful educational benefit from the IEP or resulted in a loss of educational opportunity. *See, e.g., L.M., ex rel. M.M. v. Downingtown Area School Dist.*, 2015 WL 1725091, 16 (E.D.Pa. Apr. 15, 2015).

Petitioner's claim that Student's initial IEP required annual goals for social-emotional-behavioral/ADHD and speech-language/communications areas of concern was not supported by the evidence. The record establishes that at the time the initial IEP was formulated, Student did not exhibit behavior problems or attention issues for which behavioral support services were required. With regard to speech-language and communications needs, in her July 2013 speech/language evaluation report, the speech language pathologist reported that Student only had a mild/borderline language disorder which would not prevent him from accessing or gaining benefit from the general education curriculum.

ii. Special Education Services

The draft IEP prepared for the November 6, 2013 IEP meeting contained annual goals for Reading only and provided that Student would receive one hour per day of Special Education Services outside general education. At the due process hearing, Petitioner's expert, Maryland Special Education Teacher, opined that Student's IEPs should have provided 15 hours of Specialized Instruction in Reading, Written Expression and Mathematics. I discount Maryland Special Education Teacher's

opinion, because she has never met Student or spoken with his teachers or the evaluators who had assessed him. Also Maryland Special Education Teacher conceded on cross-examination that as of November 2013, Student did not need Mathematics goals on his IEP and may not have needed Written Expression goals.

At the November 6, 2013 IEP meeting, Educational Advocate requested more hours of Specialized Instruction for Student, but after being told how the program was set up at City Elementary School 2 and the supports Student was receiving inside his general education classroom, Guardian agreed with the teachers that one hour per day of Specialized Instruction was appropriate. The final IEP provided one hour per day (five hours per week) of Special Education Services. I find Petitioner has failed to show that five hours per weeks of Specialized Instruction was inadequate, based upon the information available to the IEP team at the time the initial IEP was drafted. *See, e.g., District of Columbia v. Walker*, 2015 WL 3646779, 6 (D.D.C. Jun. 12, 2015). (Adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.)

iii. Extended School Year

IEP Extended School Year (ESY) services are necessary to a FAPE when the benefits a child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months. *MM ex rel. DM v. School Dist. of Greenville County*, 303 F.3d 523, 537-538 (4th Cir. 2002). ESY Services are required under the IDEA only when such regression will substantially thwart the goal of “meaningful progress.” *Id.* (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir.1988).) Petitioner has adduced no evidence that when Student’s initial IEP was formulated in November 2013, the IEP team had information or data to predict that Student’s gains under the initial IEP would

be jeopardized if he were not provided ESY services. I find that Petitioner has not established that the initial IEP was inadequate for want of ESY services.

In summary, I find that the November 6, 2013 IEP was procedurally deficient for the failure of Student's IEP team to include annual goals for Written Expression. Petitioner has not established that this procedural defect resulted in loss of educational opportunity or seriously deprived Guardian of her IEP participation rights, and hence the defect is not "actionable." I find that Petitioner has not established that the initial IEP was otherwise inadequate at the time it was formulated. *See Walker, supra.*

The October 15, 2014 IEP

i. Annual Goals

As discussed above, Student's IEP team determined in November 2013 that Student's IEP should include annual goals for Written Expression. Student's revised October 15, 2014 IEP contains annual goals for Reading and a new annual goal for Writing. Petitioner adduced no evidence that these annual goals were not appropriate for Student. As with the November 6, 2013 IEP, the evidence does not support Petitioner's claim that Student's IEP required annual goals for social-emotional-behavioral, ADHD or speech-language/communications areas of concern. I find that Petitioner has not established that annual goals in the October 15, 2014 IEP were not reasonably calculated to meet Student's needs that result from his disability. *See 34 CFR § 300.320(a)(2)(i), supra.*

ii. Special Education Services

The October 15, 2014 IEP also increased Student's Special Education Services from 1 hour per day (five hours per week) to ten hours per week. Maryland Special Education Teacher opined that Student should have been provided 15 hours per week of

Specialized Instruction. However, Resource Room Teacher opined that Student did not need – and it would have been a disservice to him – to be pulled out of the general education classroom for 15 hours per week. Resource Room Teacher has been working with Student since the end of the 2013-2014 school year. Maryland Special Education Teacher has never met or assessed the child. I found Resource Room Teacher’s opinion as to Student’s special education needs to be more credible than the opinion of Maryland Special Education Teacher.

iii. Extended School Year

I find that Petitioner did meet her burden of proof to establish that Student’s IEP team should have included ESY services in Student’s October 15, 2014 IEP. In her testimony, Resource Room Teacher affirmed that Student needs constant repetition in reading – and that if he is not reading and not reinforced, he will fail. Resource Room Teacher’s assertion is validated by Student’s regression in reading during the 2014 summer vacation. Over the 2013-2014 school year, after Student’s initial IEP was implemented, Student’s Text Reading and Comprehension (TRC) score improved from Level B to Level I. However, Student was not provided ESY services in summer 2014 and by the beginning of the following school year, his TRC score regressed back to Level B. By the middle of the 2014-2015 school year, Student still had not recovered in reading. Therefore, both the testimony of Resource Room Teacher and the objective measures from the TRC scores, before and after the 2014 summer vacation, establish that without ESY services, Student’s gains in Reading during the regular school year would likely be “significantly jeopardized” over summer break. I find that the IEP team should have included ESY services in Student’s October 15, 2014 IEP and its failure to do so was a denial of FAPE.

Compensatory Education Remedy

For her remedy in this case, the Guardian requests that Student be awarded compensatory education. (Because Student has transferred to Public Charter School, a separate LEA, DCPS is no longer charged with updating Student's ongoing IEP.) If a parent has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake "a fact-specific exercise of discretion" designed to identify those compensatory services that will compensate the student for that denial. Compensatory education is educational service that is intended to compensate a disabled student, who has been denied the individualized education guaranteed by the IDEA. The proper amount of compensatory education, if any, depends upon how much more progress a student might have shown if he had received the required special education services and the type and amount of services that would place the student in the same position he would have occupied but for the school district's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005)).

In this decision, I have concluded that DCPS denied Student a FAPE by failing to provide for ESY services in his October 15, 2014 IEP. Although Student is no longer served by DCPS, I may still order DCPS to provide compensatory education for a denial of FAPE which occurred when DCPS was his LEA. *See L.R.L. ex rel. Lomax v. District of Columbia*, 896 F.Supp.2d 69, 76 (D.D.C.2012) ("It would turn the statutory purpose on its head to exempt from the 'guaranteed procedural safeguards' and obligation to provide a FAPE, any LEA that has so failed in fulfilling its statutory responsibilities that a parent is forced to remove a disabled child to another LEA.") DCPS' 2015 ESY program was a 5 hour per day program that ran from July 6 through 31, 2015, a four

week session. Student therefore missed some 100 hours of ESY programming.

Although the evidence does not establish a quantum for the harm Student suffered from not receiving ESY services in summer 2015, the record does show that without ESY the prior summer, Student experienced very significant regression in his reading scores.

In her testimony, Maryland Special Education Teacher recommended a compensatory education award to include, *inter alia*, 120 hours of tutoring. This proposed award would compensate Student not only for not receiving ESY, but also for not receiving some 355 hours of additional Specialized Instruction which the expert opined was appropriate. Since it was not established that the Special Education Services in Student's IEPs were inadequate, I find that an appropriate compensatory education award, to remedy the failure to provide ESY services, would be to halve Maryland Special Education Teacher's recommended tutoring award. I will order DCPS to provide Student, as compensatory education, 60 hours of 1:1 academic tutoring. *Cf. Cousins v. District of Columbia*, 880 F.Supp.2d 142, 148 (D.D.C.2012) (Petitioner is not required "to have a perfect case to be entitled to compensatory education.")²

ORDER

1. As compensatory education for the denial of FAPE in this case, DCPS shall provide Student 60 hours of one-on-one independent academic tutoring in Reading or such other academic subjects as Petitioner and DCPS may reasonably agree. These tutoring services must be used by the end of the 2015-2016 school year or shall be forfeited; and

2. All other relief requested by the Petitioner herein is denied.

² In her original prayer for relief, Petitioner requested that DCPS be ordered to reimburse her for the costs of Student's summer 2015 reading program. No evidence about this program or its costs was introduced at the due process hearing.

Date: September 19, 2015

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(I).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE - SPED
DCPS Resolution Team