District of Columbia
Office of the State Superintendent of Education

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OSSE
STUDENT HEARING OFFICE
2012 AUG 16 AM 9: 12

Confidential

STUDENT[1], Petitioner, v. District of Columbia Public Schools ("DCPS") Respondent.	HEARING OFFICER'S DETERMINATION Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened for one day on August 8, 2012, at the OSSE Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2004.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age in grade attending a District of Columbia public charter school, hereinafter referred to as "School A," for which the District of Columbia Public Schools ("DCPS") is the local education agency ("LEA"). The student has been determined by DCPS to be a child with a disability under IDEA with a disability classification of specific learning disability ("LSD").

The student began attending School A at the start of school year ("SY") 2011-2012. Prior to attending School A the student attended a DCPS middle school, hereinafter referred to as "School B" for sixth, seventh and eighth grade.

The student's individualized educational program ("IEP") while he attended School B, developed on January 13, 2011, prescribed that the student be provided 10 hours per week of specialized instruction in general education.

During SY 2010-2011 the student earned low grades and ended the year failing several courses including eighth grade English, Science, World History/Geography. The student was promoted to ninth grade after attending summer school during the summer of 2011.

The student began attending School A with the January 13, 2011, IEP in effect. On November 15, 2011, School A convened an IEP meeting to review recent psychological and educational evaluations. The November 15, 2011, IEP team left the student's IEP goals unchanged from the January 13, 2011, IEP, but the student's hours of specialized instruction were increased from 10 hours per week to 25 hours per week, with all hours delivered in general education. The IEP team also added 1 hour of weekly behavioral support services to be delivered outside of general education, and added emotional, social and behavioral development goals to the student's IEP.

The student struggled academically at School A during SY 2011-2012 and on April 17, 2012, School A convened an IEP meeting to address the student's suspension from school and his poor academic performance. The IEP goals were amended. The parent and her educational advocate requested at this meeting that the student be provided specialized instruction outside general education. School A did not agree and refused to amend the student's IEP to include specialized instruction outside general education. The student received failing grades at the end of SY 2011-2012 in most of his courses and has been retained in ninth grade.

On June 1, 2012, Petitioner filed this due process complaint alleging, inter alia, DCPS had denied the student a free and appropriate public education ("FAPE") by failing to provide the

student an appropriate IEP. Petitioner seeks as relief that the Hearing Officer order the student's IEP be changed to include 25 hours of specialized instruction out of general education and DCPS be directed to include appropriate present levels of academic and functional performance in the student's IEP. Petitioner also seeks compensatory education of 364 hours of independent tutoring and 52 hours of independent counseling.

DCPS filed a response to the complaint on June 9, 2012. DCPS asserted that the student's IEPs were appropriate and designed to confer educational benefit and the student hours of specialized instruction were increased from 10 hours to 25 hours per week to address academic concerns. DCPS maintained that the level of services was appropriate but his absences and tardiness negatively impacted his academic performance. DCPS maintained that the student was not denied a FAPE.

A resolution meeting was held June 29, 2012. No agreement between the parties was reached. The parties agreed the resolution period would continue the full 30 days. Thus, the 45-day timeline ends (and the HOD is due) on August 15, 2012.

A pre-hearing conference was conducted July 10, 2012, at which the issues to be adjudicated were discussed and determined. On July 13, 2012, the Hearing Officer issued a pre-hearing order outlining, inter alia, the issues to be adjudicated.

ISSUES: [2]

The issues to be adjudicated are:[3]

1. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP on January 13, 2011, by failing to include measurable goals and appropriate present levels of academic achievement in reading and math and present levels of social/emotional functioning.

2. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP at the November 15, 2011, IEP meeting by failing to include measurable goals and appropriate present levels of academic achievement in reading and math and present levels of social/emotional functioning.

3. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP for the student at the November 15, 2011, IEP meeting by failing to prescribe sufficient hours (25 hours per week) of specialized instruction outside general education.

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

[3] During the pre-hearing conference Petitioner's counsel withdrew the claim of failure to provide transportation services and seeking reimbursement for transportation costs. During the due process hearing, at the end of Respondent's case, Petitioner's counsel withdrew issue #6 listed the PHO: failure to implement the student's November 15, 2011, IEP.

4. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP at the April 17, 2012, IEP meeting by failing to include measurable goals and appropriate present levels of academic achievement in reading and math and present levels of social/emotional functioning.

5. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP at the April 17, 2012, IEP meeting by failing to prescribe sufficient hours (25 hours per week) of specialized instruction outside general education.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-25 and DCPS Exhibit 1-12) that were admitted into the record and are listed in Appendix A. Any documents not admitted into the record are so noted in Appendix A. Witnesses are listed in Appendix B. DCPS disclosed witnesses, however, presented no witnesses at the hearing to refute the testimony presented by Petitioner's witnesses.

FINDINGS OF FACT: [4]

1. The student is age in grade attending School A, a District of Columbia public charter school, for which DCPS is the LEA. The student has been determined by DCPS to be a child with a disability under IDEA with a disability classification of SLD. (Petitioner's Exhibit 7-1)

2. The student began attending School A at the start of SY 2011-2012. Prior to attending School A the student attended School B, a DCPS middle school for sixth, seventh and eighth grade. (Grandparent's testimony)

3. During SY 2010-2011 the student earned low grades and ended the year failing several courses including eighth grade English, Science, World History/Geography. The student was promoted to ninth grade after attending summer school during the summer of 2011. (Parent's testimony, Petitioner's Exhibit 13)

[4] 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.

4. The student received the following grades during SY 2010-2011 while at School B: Petitioner's Exhibit 13)

Subject:	Adv 1	Adv 2	Adv 3	Adv 4	Exam	Final
Spanish I		L	D	D+	C+	D+
English 8		D	F	F		F
MS Support 8		C	C	A		A
Science 8		F	F	F		F
Pre-Algebra	C	D	F	D		D
US History/Geography	F	F	D	F		F
Computer Applications	B					B
Health & Physical Ed. 8		D				D
Art 8			F			F
Beginning Band 6				A		A

5. The student's IEP while he attended School B, developed on January 13, 2011, prescribed that the student be provided 10 hours per week of specialized instruction in general education with academic goals in math, reading and written expression. (Petitioner's Exhibit 11-5)

6. The January 13, 2011, IEP included information in the Present Levels of Performance ("PLOP") and Annual Goals section in the area of math, reading and written expression. As to math the PLOP section contained the following statement: "[the student's] scores and weakness in the area of mathematics impacts his overall math skills." The Needs sections for math stated the following: "[the student's] mathematics scores are in the low range." In the area of reading and written expression the PLOP and Needs sections contained similarly generalized statements regarding those subject areas as was stated for math. (Petitioner's Exhibit 11-2, 11-3, 11-4)

7. The January 13, 2011, IEP included three math goals[1] with anticipated date of achievement of January 12, 2012.[5] The baseline for each of the math goals stated the

(1) Given 10 problems the student will be able to solve 5 word problems involving adding and subtracting whole numbers and fractions with three or more digits (with regrouping) with 80% accuracy or higher as measured by assessments. (2) Given 10 problems the student will be able to solve problems by recalling multiplication facts to multiply and divide two digits in finding the product and the quotient with 80% accuracy. (3) Given a matching

following: "Assessment scores." The IEP included four reading goals.[6] The baseline for each of the reading goals stated the following: "Assessment scores." The IEP included three written expression goals.[7] The baseline for each of the written expression goals stated the following: "Assessment scores." All the academic goals indicated how the goals were to be measured and at what frequency. (Petitioner's Exhibit 11-2, 11-3, 11-4)

8. The January 13, 2011, IEP included a section entitled "Classroom Accommodations and State Assessment (DC-CAS) Participation" contained the following accommodations: Presentation: repetition of directions, simplification of oral directions; Setting: preferential seating, small group testing, location with minimal distractions, Timing and Scheduling: test administered over several days, extended time of subtests and breaks during subtest. (Petitioner's Exhibit 11-7)

9. On October 20, 2011, when the student was age 14 years, 2 months and in 9th grade, a DCPS psychologist conducted a psychological evaluation and an educational evaluation of the student. The psychological evaluation report concluded the student had average cognitive abilities and no indications of behavioral or emotional difficulties. However, the evaluator noted based on information provided by the student's teachers that the student needed continual prompting to start and complete work and had trouble keeping up with the work presented in class and completing homework. (Petitioner's Exhibit 6-5, 6-8)

10. On the Woodcock Johnson-III conducted as a part of the October 2011 educational evaluation student had the following scores:

(Petitioner's Exhibit 5-3)

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vocabulary activity involving 10 vocabulary math terms, [the student] will be able to match vocabulary terms with definitions with 80% mastery or higher as measured by assessments.

[6] (1) Given 10 vocabulary words with multiple meanings, [the student] will be able to use the dictionary to define the word with the correct meaning and be able to use the word correctly in sentences with 80% accuracy as measured by assessments. (2) Given reading selections on grade level [the student] will be able to read and respond to (who, when, why, how, where, etc.) ten questions verbally and in writing with 80% mastery or higher as measured by assessments. (3) Given selected reading passages to read and answer constructed responses, [the student] will be able to answer constructed response questions with details as measured by specific criteria based on the given rubric with at least a score of a 3 or 4 as measured by assessments. (4) Given reading selections on ability level, [the student] will be able to read and answer comprehension questions with 3 out of 5 times correctly as measured by assessments.

[7] (1) Given 10 sentences to proofread and correct grammar, [the student] will be able to correct sentences with 80% accuracy as measured by assessments. (2) Given various topics to write about, [the student] will be able to write at least 5 or more sentences related to each of the given topic[s] 3 out of 5 trials as measured by assessments. (3) Given written language task to assist [the student] in increasing his time in completing task, he will be able to increase his time consistently 3 ou[t] of 5 times as measured by observations.

	Standard Score	RPI[8]	Age Eq.	Grade Eq.
Broad Reading	90	74/90	11-10	6.5
Broad Math	63	23/90	8-10	3.5
Broad Written Language	83	64/90	10-8	5.3
Math Calculation Skills	61	29/90	8-10	3.5
Written Expression	86	72/90	11-1	5.7
Academic Skills	82	49/90	10-8	5.3
Academic Fluency	67	44/90	9-1	3.7
Academic Applications	85	66/90	10-7	5.2

11. When the student began attending School A his January 13, 2011, IEP was in effect. On November 15, 2011, School A convened an IEP meeting to review the two recent evaluations conducted by DCPS in October 2011: the psychological evaluation and the educational evaluation. The DCPS school psychologist reviewed the evaluation with the team and the team concluded the student continued to meet the criteria of SLD classification and for continued specialized instruction. The student's IEP team at the November 15, 2011, meeting did not change the student's goals in math, reading or written expression, but the achievement dates for all goals were extended to November 13, 2012. The student's hours of specialized instruction were increased from 10 hours per week to 25 hours per week, with all hours delivered in general education. The IEP team also added 1 hour of weekly behavioral support services to be delivered outside of general education, and added emotional, social and behavioral development goals to the student's IEP. (Petitioner's Exhibit 9-2, 9-3, 9-4, 9-5)

12. The student struggled academically at School A during SY 2011-2012 and on April 17, 2012, School A convened an IEP meeting to address the student's suspension from school and concerns about the student's poor academic performance. (Petitioner's Exhibits 8)

13. At the April 17, 2012, IEP meeting the team amended the student's IEP to specifically state in the PLOP for all areas the numerical scores the student received in the October

[8] RPI: The relative proficiency index - proficiency with similar tasks that average individuals in the comparison group (grade) would perform with 90% proficiency.

2011 evaluation. However, the student's academic goals in all areas and his social emotional and behavioral goals were not changed, except that the anticipated achievement dates were extended to April 17, 2013. There was discussion among the team of the student's poor academic performance because he was missing assignments and not consistently attending the after school eighth period where he could be provided additional services to make up missed assignments. The parent requested that the student's specialized instruction be provided outside of general education. School A staff did not agree and refused to amend the student's IEP to include specialized instruction outside general education. The School A staff stated that school could not provide pull out services only inclusion services. (Mr. Daniel's testimony, Petitioner's Exhibits 7-2, 7-3, 7-4, 7-5, 7-6, 8-1, 8-2, 9-2, 9-3, 9-4)

14. The student's special education math teacher participated in the April 17, 2012, IEP meeting. She noted the student was frequently distracted and off task in the class room and needed additional prompting to start work and processing time in order to respond. She also noted that the student needed additional support with basic math calculations and that he would participate in 8th period after school where he could work more with her. The student was encouraged to attend Saturday Academy from 9 am to 1 pm on Saturdays where he could also be provided additional time with the special education teacher and instruction could be provided one to one. (Petitioner's Exhibits 10-2, 16)

15. The least restrictive environment ("LRE") section of the student's January 13, 2011, IEP does not indicate that any services will be provided outside general education. The November 15, 2011, and April 17, 2012, IEPs both indicate in the LRE section that only behavioral support services will be provided outside general education. (Petitioner's Exhibits 11-6, 9-6, 7-8)

16. The student received failing grades at the end of SY 2011-2012 in most of his courses and was retained in ninth grade. (Grandparent's testimony, Parent's testimony)

17. At School A the student received the following grades during SY 2011-2012:

(Petitioner's Exhibit 19)

Subject:	Q1	Q2	Q3	X1	X2
Algebra Concepts I	C	F	F	F	F
Algebra I	B-	F	F	B-	F
Collegiate Prep Advisory	B	C-	C-	F	B-
Earth Science	F	F	F	F	F
English I	F	F	F	NG[9]	NG

[9] NG = No grade given &/or recorded

Home Room	NG	NG	NG	NG	NG
Language and Composition I	F	F	I	A	C+
Music	F	F	NG	F	F
Art	NG	NG	F	NG	NG
World History I	F	F	I	NG	F

18. The student believes that he was doing well at School A until he was suspended for not attending after school instruction and/or detention. During the SY 2011-2012 the student was frequently late to school and his first class of the day and often had to make up work in the after school. The student believes was getting failing grades because he was getting suspended so many times from school he could not make up the work he missed. The student attended summer school during the summer of 2012 in attempt to be promoted to 10th grade. He passed both his classes in summer school during summer 2012. His summer school English 1 class had 10 students and his Algebra class had seven or eight students. (Student's testimony)

19. Although the student has average cognitive abilities his academic performance is far below his abilities. The general education setting the student was provided at School A during SY 2011-2012 does seem to have worked based on the student's academic performance and the student's seems to warrant more one to one attention in the classroom. (Dr. Land's testimony[10])

20. Petitioner presented a proposed compensatory education to compensate the student for the services that Petitioner alleges the student should have been provided at School A and School B. The developer of the proposed plan presumed the student did not receive specialized instruction at School A as the IEP prescribed and presumed that all our of specialized instruction (25 per week) should have been provided outside general education since November 2011 and asserts, therefore, the student should be provided 364 hours of independent tutoring and 52 hours of independent mentoring and counseling. (Mr. Roman's testimony, Petitioner's Exhibit 23)

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

[10] This witness was designated as an expert in school psychology.

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.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [11] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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

To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003).

Issue 1: Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP on January 13, 2011, by failing to include measurable goals and appropriate present levels of academic achievement in reading and math and present levels of social/emotional functioning.

Conclusion: There was insufficient evidence presented by Petitioner that the January 13, 2011, IEP goals were not measurable and that the present levels were inappropriate. Petitioner failed to sustain the burden of proof on this issue by a preponderance of the evidence.

The IDEA ensures that "all children with disabilities have available to them a free appropriate pubic education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. §1400(d)(1)(A). The IDEA guarantees children with disabilities the right to a FAPE. Id. In seeking an appropriate education for students with disabilities, the child's parents, teachers, school officials, and other professionals collaborate to develop an IEP to meet the child's unique needs. See 20 U.S.C. §1414(d)(1)(B). "The IEP must, at a minimum,' provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir.2005) (quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458U.S. 176, 203 (1982)). Local school officials utilize the IEP to assess the student's needs and

[11] 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.

assign a commensurate environment. See 20 U.S.C. § 1414(d)(1)(A).

The IEP team, consisting of the student's parents, teachers, and other local education personnel, examines the student's educational history, progress, recent evaluations, and parental concerns prior to implementing a free appropriate public education for the student. Id. To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003).

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

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

Although Petitioner asserted that the present levels in the student's IEP were inappropriate and the goals were not measurable, there was no testimony by any witness for Petitioner as to the goals in the January 13, 2011, IEP. Petitioner aptly points out that the present levels simply stated that the student was operating below level and referenced assessment scores as baselines for the goals without indicating from where the scores came. Although the student received relatively poor grades during SY 2010-2011 while attending School B, he was able to attend summer school and be promoted. There was insufficient evidence in this instance that any lack of reference to specific assessments was the cause of the student's low grades that school year.

As to the student's academic goals in this IEP, the goals clearly stated what skill was to be achieved by when and how the student's progress relative to the goal would be measured. The student had no emotional, social or behavioral support goals and/or services in this IEP, thus no present levels for this area were warranted. Accordingly, the Hearing Officer concludes there was insufficient evidence presented by Petitioner that the January 13, 2011, IEP goals were not measurable and that the present levels were inappropriate. Petitioner failed to sustain the burden of proof on this issue by a preponderance of the evidence.

Issue 2: Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP at the November 15, 2011, IEP meeting by failing to include measurable goals and appropriate present levels of academic achievement in reading and math and present levels of social/emotional functioning.

Conclusion: There was insufficient evidence presented by Petitioner that the November 15, 2011, IEP goals were not measurable and that the present levels were inappropriate. Petitioner failed to sustain the burden of proof on this issue by a preponderance of the evidence.

The evidence demonstrates that School A reviewed the student's October 2011, psychological and educational evaluations at the November 15, 2011, IEP meeting and as a result changed the present levels for all academic areas and changed the baselines for the academic goals. In addition, the IEP team added emotional, social and behavioral support services and goals for the first time. The present levels and baselines clearly state the numerical scores and the student's specific level of functioning in all areas mentioned in the IEP. Although the date of the assessment is not mentioned in the IEP, it is reasonable to conclude the most recent evaluation of October 2011 is what is referred to in the IEP. Although the academic goals remained unchanged after this November 15, 2011, meeting, there was no specific testimony offered by any of Petitioner's witnesses that these goals were inappropriate. The achievement dates for the goals were extended. There was insufficient evidence presented by Petitioner that the November 15, 2011, IEP goals were not measurable and that the present levels were inappropriate. Petitioner failed to sustain the burden of proof on this issue by a preponderance of the evidence.

Issue 3: Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP for the student at the November 15, 2011, IEP meeting by failing to prescribe sufficient hours (25 hours per week) of specialized instruction outside general education.

Conclusion: There was insufficient evidence presented that as of the November 15, 2011, IEP meeting that the student was in need of specialized instruction outside the general education setting. Petitioner failed to sustain the burden of proof by a preponderance of the evidence.

School A convened the student's November 15, 2011, IEP meeting to review the October 2011, evaluations. Based upon these evaluations the IEP team changed to the student IEP by increasing the student's hours of specialized 10 hours per week to 25 hours per week and added emotional, social and behavioral support services and goals consistent with the findings in the evaluation of the student's low achievement scores and social/emotional issues. Although it appears that the student had received some failing grades in his first quarter at School A, at this juncture in the school year it seems to the Hearing Officer reasonable that the IEP team significantly increased the student's hours of specialized instruction first before providing all instruction outside general education. Petitioner provided no testimony from any witness from which the Hearing Officer could reasonably conclude that at this stage of the student's first academic year at School A he needed to be totally removed from special education.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved

satisfactorily." 34C.F.R. § 300.550; see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

There was insufficient evidence presented that as of the November 15, 2011, IEP meeting that the student was in need of specialized instruction outside the general education setting. Petitioner failed to sustain the burden of proof by a preponderance of the evidence.

Issue 4: Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP at the April 17, 2012, IEP meeting by failing to include measurable goals and appropriate present levels of academic achievement in reading and math and present levels of social/emotional functioning.

Conclusion: There was insufficient evidence presented by Petitioner that the April 17, 2012, IEP goals were not measurable and that the present levels were inappropriate. Petitioner failed to sustain the burden of proof by a preponderance of the evidence.

The present levels and baselines clearly state the numerical scores and the student's specific level of functioning in all areas mentioned in the IEP. Although the date of the assessment is not mentioned in the IEP, it is reasonable to conclude the most recent evaluation of October 2011 is what is referred to in the IEP. Although the academic goals remained unchanged after this April 17, 2012, meeting there was no specific testimony offered by any of Petitioner's witnesses that these goals were inappropriate. The achievement dates for the goals were extended. There was insufficient evidence presented by Petitioner that the April 17, 2012, IEP goals were not measurable and that the present levels were inappropriate. Petitioner failed to sustain the burden of proof on this issue by a preponderance of the evidence.

Issue 5: Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP at the April 17, 2012, IEP meeting by failing to prescribe sufficient hours (25 hours per week) of specialized instruction outside general education.

Conclusion: By the time of the April 17, 2012, meeting it was apparent that the student continued to perform poorly academically despite the increased services that had been provided by the November 15, 2011, IEP. There was sufficient evidence, unrebutted by DCPS, that the student was in need of specialized instruction outside the general education setting. Petitioner sustained the burden of proof by a preponderance of the evidence.

School A convened the student's April 17, 2011, IEP meeting to address the student's suspension from school and his continued poor academic performance. Based upon the October 2011 evaluations the IEP team changed to the student's IEP in November 2011 by increasing the student's hours of specialized 10 hours per week to 25 hours per week and added emotional, social and behavioral support services and goals. Despite this increase in services it appears that the student continue to perform poorly and received failing grades in vast majority of his classes. The student's teachers at this April 17, 2012, meeting clearly indicated the student needed

continual prompting in the classroom and had difficulty with class assignments and completing homework. The student was clearly failing and School A, and thus DCPS, did nothing differently at this juncture to arrest the student's spirally academic decline at School A. The student failed ninth grade. Although the student acknowledged he was frequently tardy to class he credibly testified that he made best efforts to make up the work and pass his classes in order to be promoted. The student apparently was able to successfully complete some of the course in summer school where he was in classes with far fewer students than in his classes at School A.

The evidence demonstrates the student has average cognitive abilities but his academic scores indicate he is multiple grade levels behind in reading, math and written expression. School A put together what seemed, as of November 15, 2011, a reasonable academic program for the student. But with the student continued school failure that school year, the Hearing Officer finds it unreasonable in the face of the parent's clear request that the student be provided specialized instruction outside general education and a class setting with fewer students, for School A and DCPS to not have agreed to that request and placed the student in a more restrictive setting as of the April 17, 2012, IEP meeting. DCPS put forth no witnesses to refute the parent's, grandparent's, advocate's and student's credible testimony that the student was making efforts to be successful but did not have sufficient supports as of this juncture in the 2011-2012 school year to be successful. Consequently, the Hearing Officer concludes that DCPS' failure to provide the student specialized instruction outside the general education setting harmed this student academically and contributed to his failure of ninth grade and was a denial of a FAPE. The Hearing Officer will thus direct DCPS to amend the student's IEP to include specialized instruction outside the general education setting and order that DCPS provide the student compensatory education for not providing him such services as of April 17, 2012.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. "the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid, 401 F.3d 522 & 524.* To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

The testimony and documents offered by Petitioner with regard to compensatory education did match the level of services the Hearing Officer concluded the student should have received since April 17, 2012, and Petitioner did not specifically prove the total number of hours the student missed warranted the tutoring and counseling hours requested as is required under *Reid.* In addition, there was no finding that the student was deprived any services in the emotional, social or behavioral area as was requested by Petitioner in the proposed plan.

Despite the fact that Petitioner presented insufficient evidence as to compensatory education, it is

inequitable for the student to be provided nothing. Based upon the student's severe academic deficits and DCPS' failure to amend the student's IEP to include services outside general education after the April 17, 2012, IEP meeting, the Hearing Officer orders that DCPS provide what the Hearing Officer considers a reasonable award of tutoring services as compensatory education for the denial of FAPE found.

ORDER:

1. DCPS shall within ten (10) business days of the issuance convene an IEP meeting to develop an IEP consistent with the findings of this HOD and prescribing 25 hours of specialized instruction in an out of general education setting, and determine an appropriate educational placement and location of services for the student for SY 2012-2013.

2. DCPS shall fund 60 hours of independent tutoring at the DCPS prescribed rates as compensatory education for the student not having his specialized instruction in a out of general education setting since April 17, 2012.

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: August 15, 2012