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 Office of the State Superintendent of Education
 Office of Review and Compliance
 Office of Dispute Resolution
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Confidential

<p>Parent on Behalf of Student,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”),</p> <p>Respondent.</p> <p>Case # 2018-0137</p> <p>Date Issued: August 13, 2018</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: July 24, 2018 July 30, 2018 August 1, 2018 August 7, 2018</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ This “Corrected” HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, August 13, 2018, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

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 on July 24, 2018, July 30, 2018, August 1, 2018, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 112 and the parties made oral closing arguments by telephone on August 7, 2018.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is age _____ and in grade _____.² Student resides with Student’s parent (“Petitioner”) in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of specific learning disability (“SLD”). District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”).

On May 30, 2018, Petitioner filed the current due process complaint asserting, inter alia, that DCPS failed to provide Student with compensatory education based on denials of FAPE determined in a November 24, 2017, Hearing Officer’s Determination (“HOD”) and that the individualized educational program (“IEP”) DCPS developed for Student subsequent to that HOD is inappropriate.

Relief Sought:

Petitioner seeks as relief:

- a) A finding that Student has been denied a FAPE;
- b) An order directing DCPS to amend Student’s IEP to provide as follows: not less than 27.5 hours of specialized instruction outside of the general education setting; revised academic goals, present levels of performance (“PLOS”) and baselines; 240 minutes a month of speech therapy to include services both in and out of the classroom; 240 minutes of occupational therapy; the accommodations provided in Student’s recent occupational therapy evaluation; the assistive technology (“AT”) recommended in Student’s recent evaluation; placement in a classroom with a small student/teacher ratio, and therapeutic supports and interventions to address Student’s individualized needs and a revised transition plan;
- c) An order directing that DCPS shall place and fund the student in a suitable nonpublic school;
- d) An order directing that DCPS provide Student with compensatory education for denials of FAPE that have occurred and/or DCPS to fund a compensatory education evaluation;

² The student’s current age and grade are indicated in Appendix B.

- e) Other relief as the Hearing Officer deems just and reasonable.

LEA Response to the Complaint:

The LEA filed a response to the complaint on June 7, 2018. The LEA denies that there has been any failure to provide the student with a FAPE. In its response DCPS asserts, inter alia, the following:

This is the second due process complaint filed by Petitioner during school year (“SY”) 2017-2018. As of the date of the due process hearing, DCPS was in the process of reevaluating Student. The Hearing Officer issued an HOD November 24, 2017, noting that “[a]nticipating [the] procedural hurdle over making a compensatory education assessment prior to completion of Student’s evaluations and the meeting of Student’s IEP team, the Hearing Officer proposed to Petitioner and Petitioner’s counsel at the start of the due process hearing on November 16, 2017, that Petitioner withdraw her complaint without prejudice and re-file after the evaluations were completed and the Student’s IEP team met. Petitioner declined this option.” After finding that the June 1, 2017, IEP denied Student a FAPE, the Hearing Officer denied Petitioner’s request for compensatory education without prejudice.

DCPS asserts the prior HOD already adjudicated the appropriateness of the 2017 IEP and that compensatory education is not a claim under the IDEA, but rather an equitable remedy tethered to a specific denial of FAPE and accompanying educational deficit. Petitioner’s “attempt to split a cause of action,” is improper and should not be permitted. In any event, DCPS has offered to compensate Petitioner and no further relief is warranted.

Subsequent to the HOD, DCPS amended Student’s previous psychological evaluation to include an adaptive measure. DCPS also authorized an independent neuropsychological based on Petitioner’s disagreement with DCPS’ reevaluation. Student’s IEP team convened on March 16, 2018. The team determined that Student qualified for special education and related services as a child with a specific learning disability. DCPS agreed to include goals and services in relation to Student’s social emotional and behavioral needs. The IEP team reconvened on April 18, 2018, and developed Student’s IEP to prescribe specialized instruction and related services.

At the meeting, Petitioner’s educational advocate refused to answer any questions as to her objections to the IEP and repeatedly refused to provide recommended goals or changes to the level of other services and instead offered to send an email following the meeting. On May 21, 2018, over one month after the April 18, 2018 IEP meeting, Petitioner’s educational advocate sent an email to DCPS documenting her objections to the IEP. The advocate proposed no alternative goals to be added to the IEP. DCPS responded on that same day to offer a follow-up meeting. On May 29, 2018, Petitioner’s educational advocate spoke with the LEA Representative for School A, who again proposed a follow-up IEP meeting to address the concerns the advocate raised in her dissent letter.

The LEA Representative followed up by email on May 30, 2018 and offered two meeting dates. DCPS was, and is, amenable to revising Student’s IEP. The parties met on June 6, 2018, and DCPS agreed to amend Student’s IEP to include a dedicated laptop for assistive technology and extended school year (“ESY”) services. Additionally, the team agreed to revise the present

levels of performance to include current assessment data. The amended IEP is reasonably calculated to provide educational benefits to Student. DCPS has placed Student in Student's least restrictive environment ("LRE") in accordance with the IDEA's mandate.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on June 6, 2018, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on July 8, 2018, and ends [and the Hearing Officer's Determination ("HOD") is due] on August 13, 2018.

The undersigned Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on June 26, 2018, and issued a pre-hearing order ("PHO") on June 29, 2018, outlining, inter alia, the issues to be adjudicated.

ISSUES:³

The issues adjudicated are:

1. Whether Student should be provided with compensatory education as a result of DCPS' failure to comprehensively evaluate Student and/or provide Student with an appropriate IEP or placement on or about June 1, 2017, as determined by the November 24, 2017, HOD.⁴
2. Whether Student should be provided with compensatory education as a result of DCPS' failure to provide Student with an appropriate IEP or placement during the SY 2017-2018, following issuance of the November 24, 2017, HOD up to April 18, 2018, when Student's IEP was reviewed and updated.
3. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP or placement when DCPS reviewed and updated Student's IEP on April 18, 2018.⁵

³ The Hearing Officer restated the issues at the hearing and the parties agreed that these were the issues to be adjudicated.

⁴ Petitioner alleges that in the HOD issued on November 24, 2017, the Hearing Officer concluded DCPS failed to conduct a comprehensive initial evaluation of Student during the spring of 2017 and, as a result, also failed to provide Student with an appropriate IEP or placement on June 1, 2017. Petitioner's request for compensatory education based on denials of FAPE was denied without prejudice pending the completion of additional evaluations including an independent neuropsychological evaluation. Petitioner attempted to also adjudicate whether DCPS failed to provide the student with a behavior plan as a part of the June 1, 2017, IEP. The PHO included references to a behavior intervention plan ("BIP"). The Hearing Officer ruled at the outset of the hearing there would be no adjudication of any issues concerning the appropriateness of the June 1, 2017, IEP as the inadequacies of that IEP were limited to those found in the November 24, 2017, HOD. Therefore, the Hearing Officer eliminated the BIP as an issue in this hearing.

⁵ Petitioner asserts that Student's April 18, 2018 IEP: 1) lacked appropriate present level of performance information, baseline data, and goals; 2) failed to provide Student with a sufficient amount of specialized instruction or related services based on deficits and needs; 3) failed to provide all the assistive technology and/or

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 45 and Respondent's Exhibits 1 through 25) that were admitted into the record and are listed in Appendix 2.⁶ The witnesses testifying on behalf of each party are listed in Appendix B.⁷

SUMMARY OF DECISION:

Petitioner had both the burden of production and persuasion on the following issues: # 1 and #2. Respondent held the burden of persuasion on issue #3, after Petitioner made a prima facie case. The Hearing Officer concluded that Petitioner met the burden of persuasion on issues #1 and #2 and the Hearing Officer ordered DCPS to provide Student compensatory education that the Hearing Officer concluded Student was due. The Hearing Officer concluded DCPS sustained the burden of persuasion on issue #3 and dismissed that issue with prejudice.

FINDINGS OF FACT:⁸

1. Student resides with Petitioner in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of SLD. DCPS is Student's LEA. (Petitioner's Exhibit 1-1)
2. Student attends a DCPS school ("School A") where Student has attended since school year ("SY") 2014-2015. (Petitioner's testimony, Respondent's Exhibit 1-4, 1-23)
3. On April 14, 2017, a DCPS psychologist conducted a comprehensive psychological evaluation of Student to consider Student's academic and social-emotional concerns. (Respondent's Exhibit 1-6)

accommodations Student required; 4) failed to provide Student with direct occupational therapy, despite evaluation findings; 5) failed to contain an adequate transition plan; 6) failed to provide Student with ESY, where it was clearly warranted; 7) does not adequately describe the type of setting that Student requires to fully access Student's education, and 8) does not provide Student with an appropriate LRE/or placement.

⁶ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁷ Petitioner presented four witnesses: (1) Student's parent ("Petitioner"), (2) Student, (3) an independent psychologist who supervised an evaluation of Student, and (4) Petitioner's educational advocate employed by the law firm representing Petitioner. Respondent presented five witnesses: (1) an expert in Assistive Technology, (2) a DCPS special education teacher/case manager, (3) a second DCPS special education teacher, (4) a DCPS occupational therapist, and (5) a DCPS LEA representative from the DCPS school Student attends.

⁸ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. 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 more than one party separately, the Hearing Officer may only cite one party's exhibit.

4. Student was initially determined eligible for special education on May 31, 2017, and an initial IEP was developed for Student on June 1, 2017, that prescribed 4 hours per week of specialized instruction in the general education classroom. (Respondent's Exhibit 1-7)
5. On August 29, 2017, Petitioner filed a due process complaint, alleging, inter alia, that Student's June 1, 2017, IEP was inappropriate. The due process complaint was decided in an HOD issued on November 24, 2017. (Respondent's Exhibit 1-1)
6. School A held a resolution meeting on September 13, 2017. Petitioner's educational advocate participated in the meeting by telephone. School A agreed to conduct evaluations of the student including a speech-language evaluation and an occupational therapy ("OT") evaluation. School A also agreed to increase Student's specialized instruction outside general education to 6 hours per week, and for Student to continue working with a counseling group. Petitioner's advocate agreed to the increase in specialized instruction but expressed that she believed Student required more hours of specialized instruction. (Witness 1's testimony, Parent's testimony, Petitioner's Exhibit 5-1, 5-2)
7. In addition to the services prescribed by Student's IEP of 4 hours per week of inclusion services, School A provided Student with two 3 hours sessions per week of internet-based Personalized Learning Time ("PLT") from a special education teacher in a class composed solely of special education students. (Respondent's Exhibit 1-9)
8. School A amended Student's IEP to increase specialized instruction by 6 hours per week outside the general education setting, and to add behavior support services. (Witness 5's testimony)
9. Student's grades for the first term of SY 2017-2018 were A's and B's, except for a C in Biology. During the first term, Student accrued 13 days absent and 9 days tardy. (Respondent's Exhibit 1-9)
10. DCPS conducted a speech and language evaluation, with an evaluation report dated October 9, 2017. The evaluation found that Student demonstrated age appropriate articulation, fluency, voice, and pragmatic language skills. Student's expressive language abilities were below average for Student's grade (SS=73). Student's Oral Language Composite Score was also below the average range for Student's age (SS=78). Student demonstrated deficits in the areas of phonological processing and rapid symbolic naming, which are consistent with reports that Student has difficulty reading and decoding new words. (Respondent's Exhibit 4-1, 4-10)
11. On October 16, 2017, DCPS conducted an audiological and auditory processing disorder evaluation, with an evaluation report dated October 24, 2017. The evaluator determined, as a result of the assessments administered, interviews with Student's teachers, and observations of Student, that Student had normal hearing and normal auditory processing. The evaluator recommended strategies to be used by, and with, Student at school and at

home to assist Student in understanding directions when given, and to better focus Student's attention. (Respondent's Exhibit 7-1,7-2, 7-8, 7-9)

12. On October 19, 2017, DCPS conducted an occupational therapy ("OT") evaluation, with an evaluation report dated October 27, 2017. The evaluator found that Student presents with Average fine motor and neuromuscular skills, including range of motion, muscle tone, strength, motor planning, functional mobility, sensory processing skills and handwriting legibility. The Student had Below Average visual motor, visual perceptual and motor coordination skills. The evaluator recommended, among other things, that Student have the use of computer keyboarding for written assignments when appropriate in the classroom setting. (Witness 7's testimony, Respondent's Exhibit 3-4, 3-5)
13. On October 20, 2017, DCPS conducted a functional behavioral assessment ("FBA") of Student that noted Student's excessive absences/tardiness, feeling overwhelmed, loss of focus in class, and irritability. The FBA identified a need for Student to develop self-advocacy skills as well as the need for a behavior plan and behavior support services. (Respondent's Exhibit 5-1, 5-5)
14. DCPS developed a behavior intervention plan ("BIP") dated October 27, 2017. (Petitioner's Exhibit 6)
15. A hearing was conducted on Petitioner's August 29, 2017, due process complaint on November 16, 2017, and November 17, 2017, with an HOD issued on November 24, 2017. In the November 24, 2017, HOD, the Hearing Officer determined two denials of FAPE: (1) DCPS' initial evaluation of Student was not sufficiently comprehensive (2) Student's initial IEP was not designed to meet Student's unique needs. (Respondent's Exhibit 1-1, 1-3, 1-12, 1-13, 1-14, 1-15, 1-16)
16. The Hearing Officer concluded DCPS' April 14, 2017, psychological evaluation was inadequate because it did not include complete assessments of Student's adaptive functioning. However, the Hearing Officer concluded that Petitioner had failed to meet the burden of proving that other evaluations Petitioner alleged DCPS should have conducted in addition to its April 14, 2017, psychological evaluation should have been performed as a part of Student's initial evaluation for special education. (Respondent's Exhibit 1-1, 1-3, 1-12, 1-13, 1-14, 1-15, 1-16)
17. The Hearing Officer in the November 24, 2017, HOD concluded that pending completion of new evaluations, it was premature to address the other alleged inadequacies of Student's [June] 1, 2017, initial IEP, and premature to determine an award of compensatory education. (Respondent's Exhibit 1-3, 1-12, 1-15, 1-16)
18. The Hearing Officer denied Petitioner's request for compensatory education "without prejudice to her right to seek a compensatory education award in a new proceeding after the additional evaluations are completed and reviewed by Student's IEP team and any needed revisions [to] Student's IEP are made." (Respondent's Exhibit 1-21)

19. The November 24, 2017, HOD ordered DCPS to conduct evaluation(s) or accept the findings of the independent educational evaluation (“IEE”) neuropsychological evaluation to be obtained by Student’s parent and convene an IEP team meeting to review the additional information and update Student’s IEP. (Respondent’s Exhibit 1-21)
20. The November 24, 2017, HOD also ordered: “Petitioner’s request for compensatory education award for the denials of FAPE determined in this decision is denied without prejudice so that the IEE evaluations funded by DCPS and the psychological reevaluation ordered in this decision may be completed to allow time for Student’s IEP team to review these new assessments and the evaluations already completed by DCPS to revise Student’s IEP as appropriate.” (Respondent’s Exhibit 1-21, 1-22)
21. On December 5, 2017, DCPS issued an Amended Comprehensive Psychological Evaluation dated December 6, 2017. The evaluator concluded that the adaptive functioning assessment did not reveal Student had deficits in adaptive functioning and ruled out intellectual disability (“ID”) classification. (Respondent’s Exhibit 2-1, 2-16)
22. In December 2017, and January 2018, an independent neuropsychological evaluation (“IEE”) was conducted of Student, with an evaluation report dated February 25, 2018. The evaluator reviewed, among other things, DCPS’ April 2017 psychological evaluation that assessed Student’s intellectual functioning and her FSIQ as 70, in the Very Low range. The independent evaluator interviewed Student and Petitioner and administered assessments to measure Student’s cognitive and academic functioning, social-emotional, behavioral and executive functioning. The independent evaluator found that Student’s cognitive functioning was Borderline Intellectual Functioning consistent with the assessment conducted by DCPS in April 2017. (Witness 2’s testimony, Petitioner’s Exhibit 17-1, 17-2, 17-18)
23. The independent evaluator noted Student experienced trauma early in life and expressed high levels of anxiety most days, feeling down due to grief, negative thoughts and lack of motivation. The evaluator diagnosed Student with Post-Traumatic Stress Disorder (“PTSD”). Student’s academic achievement scores placed Student five or more years behind in age equivalency in all academic areas. The evaluator concluded Student’s overall executive functioning was impaired and Student had difficulty sustaining attention to tasks. (Witness 2’s testimony, Petitioner’s Exhibit 17-10, 17-11, 17-16, 17-19, 17-20, 17-21, 17-22)
24. The independent evaluator concluded Student met the criteria of SLD as well as emotional disability due to Student’s cognitive impairment and deficits in academic skills. The evaluator concluded Student was in need of a highly-structured specialized class with a small student to teacher ratio classroom setting that would minimize stimulus overload, maximize Student’s ability to sustain attention, where Student would be provided counseling, and where Student’s behavior would be closely monitored. The evaluator also recommended Student’s use of a computer and appropriate software. (Witness 2’s testimony, Petitioner’s Exhibit 17-10, 17-11, 17-16, 17-19, 17-20, 17-21, 17-22)

25. On February 26, 2018, an independent assistive technology assessment was conducted. The evaluation report recommended Student's use of a smartphone to assist in personal organization, and use of the calendar function for appointment reminders. The report recommended that Student receive a personal laptop computer for use at school and home to access the curriculum, complete school-based assignments and provide access to dictation due to Student's slow handwriting. In addition, the evaluation recommended Student be provided the following software: text to speech, speech to text, word predication, editing feedback, text simplification with a link to a free website to simplify language to facilitate Student's comprehension, access to visual dictionaries, a typing program, electronic books, math manipulatives, and training on the use of the devices and software were recommended. (Petitioner's Exhibit 13-1, 13-10, 13-11, 13-12)
26. On March 16, 2018, a DCPS psychologist conducted a review of the neuropsychological IEE. (Respondent's Exhibit 8-1)
27. On March 16, 2018, School A convened an IEP meeting to begin review of Student's evaluations. Petitioner participated in the meeting along with her attorney. Petitioner's educational advocate participated by telephone. The team began reviewing some of the evaluations that had been conducted but did not complete the review of all evaluations and rescheduled the meeting. (Respondent's Exhibit 9, Petitioner's Exhibit 3-1)
28. On April 18, 2018, DCPS reconvened the IEP meeting to complete the review of the remaining evaluations and to address Student's IEP. Petitioner's educational advocate attended the meeting. Petitioner and her attorney participated by telephone. During the meeting Petitioner's advocate asked that Student be allowed to use a smartphone at school to assist in organization skills. DCPS did not agree. (Witness 1's testimony, Respondent's Exhibit 12-1, 12-3, 12-4)
29. A DCPS OT specialist participated in the April 18, 2018, meeting and noted that the OT evaluation did not indicate Student presented with any OT deficits. She noted that Student's writing speed is slower; however, in the classroom setting that does not impact Student. Because of Petitioner's concerns about sensory deficits, the DCPS OT agreed to provide consultative services to monitor this area of concern. The OT specialist recommended 60 minutes per month of OT consultations. (Witness 7's testimony, Respondent's Exhibit 12-6)
30. During the April 18, 2018, meeting the team reviewed the independent assistive technology ("AT") evaluation. Based on the review of the evaluation and Student's records, DCPS' AT specialist recommended that the IEP team consider including AT speech to text and text to speech, as a classroom accommodation to increase Student's comprehension and written expression in class and during testing. She also recommended Student's IEP goals be updated to include AT in reading and writing where the goals included reading comprehension and writing fluency. DCPS' AT specialist noted that the supports and software recommended in the independent AT evaluation were currently available to Student at School A and recommended Student be

provided training on the use of the AT devices and supports. DCPS' AT specialist also recommended Student have the use of a dedicated laptop computer. DCPS' AT specialist believed the recommendation for Student's use of the smartphone could be achieved through other organizational tools available in the classroom at School A. School A agreed to provide Student use of a laptop and to train Student on the programs the following school year. However, the finalized IEP document did not include any AT services or devices. (Witness 4's testimony, Witness 1's testimony, Respondent's Exhibits 10, 11-2, 12-1, 12-2 12-3, 12-4)

31. The IEP developed on April 18, 2018, included goals in the areas of math, reading, written expression, speech language, emotional/social/behavioral development and motor skills/physical development. The IEP prescribed 4 hours of specialized instruction per week inside the general education setting and 6 hours of specialized instruction outside the general education setting as well as 60 minutes per month of behavioral support services ("BSS"), 60 minutes per month of speech and language both outside the general education setting, 60 minutes per month for consultations performed by the occupational therapist, and 15 minutes per month of consultations performed by the speech and language pathologist. The IEP goals, PLOPS, and baselines included data from Student's August 2017 evaluations. The IEP did not prescribe extended school year ("ESY") services, or any AT services or devices. (Respondent's Exhibits 11-1, 11-2, 11-3, 11-4, 11-6, 11-13, 11-14)
32. During the April 18, 2018, IEP meeting Petitioner's advocate agreed with the goals and services for speech and language services but requested that Student have a placement with all services outside general education. DCPS did not agree. (Witness 1's testimony)
33. During the April 18, 2018, meeting Petitioner's attorney requested that Student receive 200 hours of tutoring and mentoring services as well as a laptop computer and software as compensatory education. DCPS did not agree to provide the laptop computer as a form of compensatory education. (Respondent's Exhibit 12-5)
34. On May 3, 2018, DCPS offered Petitioner the following as compensatory education: 50 hours of independent tutoring, 20 hours independent mentoring, and 10 hours of independent speech language services. DCPS invited Petitioner to make a counter offer of compensatory education or to seek a compensatory education award in a new proceeding, quoting language from the November 27, 2017, HOD. (Respondent's Exhibit 13-1)
35. On May 17, 2018, Petitioner's educational advocate sent a letter to School A outlining concerns about Student's IEP that was developed at the April 18, 2018, meeting citing that the PLOPs for math, reading and written expression goals did not have current data. The advocate also requested, among other things, that Student's IEP prescribe Student's placement in a full time, non-public, special education school with 240 minutes per month of speech language services, 240 minutes per month of direct OT services, all AT devices and training recommended in the AT-IEE evaluation, ESY services, and an updated postsecondary transition plan. (Petitioner's Exhibit 38-1, 38-2, 38-3)

36. Although Student's reading level remained far below basic, Student had made some growth in the reading functioning between August 2017 and May 2018. (Witness 5's testimony, Respondent's Exhibit 15-1)
37. Student benefits from prompting, visual aids, and needs help in writing assignments. Student is sociable and enjoys being with non-disabled peers. Student is generally able to grasp information presented in the classroom, but due to Student's excessive absences and frequent lateness to class, Student often falls behind in content and assignments. With regular attendance Student would have performed better academically. (Witness 6's testimony)
38. At the end of SY 2017-2018, Student passed all classes and was promoted to the next grade, despite Student having had 50 days absent during SY 2017-2018 and 49 days of being tardy to school. Student also made progress on IEP goals in the fourth quarter of SY 2017-2018, after Student's IEP was amended following the April 18, 2018, IEP meeting. Student benefits from being with non-disabled peers during the school day who work on grade level to assist Student in completing in class assignments. Student would benefit more from the combination general education/special education setting and would have done better academically had Student's attendance been better during SY 2017-2018. Student would have benefited from ESY for summer 2018, but the April 18, 2018, IEP did not include ESY. (Witness 5's testimony, Respondent's Exhibits 16, 20-1, 20-2, 20-3, 21-1)
39. Technology allows Student greater access to the curriculum. Student's teachers indicate that Student can use text to speech software, has access to a laptop computer at the school, and uses it frequently throughout the school day. The April 18, 2018, IEP team determined Student would benefit from being able to take the laptop computer home and it was added to the IEP services and to the supplemental aids section of the IEP on July 5, 2018. There was no prior request from Student's parent before then to take the laptop computer home and no indication there was any harm from Student not taking the computer home before home use was approved. (Witness 4's testimony, Witness 5's testimony)
40. On June 26, 2018, DCPS issued, and Petitioner signed and agreed to, an IEP amendment that changed Student's assistive technology to add a dedicated laptop computer, edited PLOPS and annual goals, baselines and anticipated date of achievement, evaluation procedures, and ESY services. (Respondent's Exhibit 18-1, 19-1)
41. On July 5, 2018, DCPS amended Student's IEP to include ESY goals and initiated transportation services for Student to attend ESY. The IEP was also amended to include PLOPs and baseline data from both Student's August 2017 and December 2017 evaluations. DCPS communicated to Petitioner's counsel Student's transportation arrangements and Student's ESY location. However, Student did not attend ESY during summer 2018 because Student worked a summer job. (Parent's testimony, Petitioner's

Exhibit 36-1, Respondent's Exhibit 23-1, 23-3, 23-7, 23-8, 23-9, 23-10, 23-11, 23-12, 23-13)

42. Student's emotional wellbeing has been significantly impaired by the deaths of several close family members. Student was provided weekly behavior/emotional support services by the School A social worker during SY 2017-2018. However, Student does not feel Student gets enough attention in the classroom at School A and does not get sufficient help in Math and History. Student often feels stressed and frustrated because teachers appear to pay more attention to other students who are being disruptive. Student desires more help and attention in a classroom with fewer students and/or more teachers in the classroom to provide more help. (Parent's testimony, Student's testimony)
43. Student has been interviewed by, and accepted to attend, a non-public, special education, separate day school ("School B"). School B has an OSSE certificate of approval ("C. of A"). School B reviewed Student's records and schedule and interview to discuss Student's needs and then determine if they can provide the best program for Student. School B then sent a letter of acceptance. If Student were placed at School B, Student would be in a classroom with a teacher to student ratio of 2 teachers per classroom of no more than 10 students. (Witness 3's testimony)
44. School B can provide Student with the related services of speech and language, counseling with social workers, and occupational therapy. Teachers have a minimum of a bachelor's degree and either have, or have applied for, special education certification. 85 to 90 of School B's students have an SLD disability classification. There are no non-disabled students on the campus. School B can offer Student reading intervention programs including Read Naturally, i-Ready, Lexia and Spier and can offer math programs including Touch Math and on Cloud Nine. School B uses textbooks that simplify the content for low-reading ability. Student can access these intervention programs both at home, and at school. School B provides behavior support services from school social workers to meet student's social emotional needs. However, Student's current IEP requires access to non-disabled peers that School B cannot offer. (Witness 3's testimony)
45. Petitioner's educational advocate developed a proposed compensatory education plan that sought to compensate student for the denials of FAPE found in the November 24, 2017, HOD, as well as the alleged failure to provide Student with an appropriate IEP and placement following the April 18, 2018, IEP meeting. The advocate requested the following: 300 hours of independent tutoring services, 40 hours of independent counseling services, funding in a non-public, separate school, a laptop computer and educational software to assist with remediation of reading and math, 100 hours of mentoring, AT training, and a flip-laptop computer. (Petitioner's Exhibit 42-1, 42-8)

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. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner held both the burden of production and persuasion on issues #1 and #2. Respondent held the burden of persuasion on issue #3 after Petitioner established a prima facie case on issue #3.⁹ 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) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

⁹ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

ISSUE 1: Whether Student should be provided with compensatory education as a result of DCPS' failure to comprehensively evaluate Student and/or provide Student with an appropriate IEP or placement on or about June 1, 2017, as determined by the November 24, 2017, HOD.

Conclusion: Petitioner sustained the burden of persuasion that Student is entitled to compensatory education for the denials of FAPE found in the November 24, 2017, HOD from June 1, 2017, until the HOD was issued on November 24, 2017. However, the Hearing Officer did not conclude that the compensatory education Petitioner proposed met the *Reid* standard and the Hearing Officer granted Student compensatory education that the Hearing Officer believed Student was appropriately due.

In the HOD issued on November 24, 2017, the Hearing Officer concluded DCPS failed to conduct a comprehensive initial evaluation during the spring of 2017 and, as a result, also failed to provide Student with an appropriate IEP on June 1, 2017. Petitioner's request for compensatory education based on denials of FAPE was denied without prejudice pending the completion of additional evaluations including an independent neuropsychological evaluation.

DCPS asserts that the prior HOD already adjudicated the appropriateness of the 2017 IEP and that compensatory education is not a claim under the IDEA, but rather an equitable remedy tethered to a specific denial of FAPE and accompanying educational deficit. Respondent cited *Gill v. District of Columbia*, 751 F. Supp. 2d 104 (D.D.C. 2010); and, *Henry v. District of Columbia*, 750 F. Supp. 2d 94 (D.D.C. 2010) to support its contention that Petitioner is precluded from seeking compensatory education in the current due process complaint based on the denial of FAPE found in a prior HOD. This Hearing Officer is unpersuaded by Respondent's arguments in this regard.

In both cases DCPS cites, the Court supports the proposition that a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse for not granting such an award. Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted). Indeed, "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mold each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid*, 401 F.3d at 523-24.

In the November 24 2017, HOD the Hearing Officer clearly stated "Petitioner's request for compensatory education award for the denials of FAPE determined in this decision is denied without prejudice so that the IEE evaluations funded by DCPS and the psychological reevaluation ordered in this decision may be completed to allow time for Student's IEP team to review these new assessments and the evaluations already completed by DCPS to revise Student's IEP as appropriate."

In *Lee v. District of Columbia*, USDC-DC, cv # 15-1802,¹ the Court held that a hearing officer cannot deny a compensatory education award simply because she is left wanting for more evidence. The Court in that decision stated:

“This focus on the student's individualized needs means that a hearing officer cannot deny a compensatory education award simply because she is left wanting for more evidence. "Once a plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with Reid, which sought to eliminate 'cookie-cutter' awards in favor of a 'qualitative focus on individual needs' of disabled students." *Stanton ex rel. K.T. v. District of Columbia*, 680 F. Supp. 2d 201, 207 (D.D.C. 2010) (quoting *Reid*, 401 F.3d at 524, 527). "Choosing instead to award plaintiff nothing does not represent the 'qualitative focus' on [the student's] 'individual needs' that Reid requires." *Id.* (applying *Reid*, 401 F.3d 516). In short, a hearing officer "cannot simply 'reject[] any award of compensatory education services[.]'" *Id.* (quoting *Brown v. District of Columbia*, 568 F. Supp. 2d 44, 54 (D.D.C. 2008)).

A hearing officer who finds that she needs more information to make the required individualized assessment has at least two options. She can provide the parties additional time to supplement the record. See *id.* Or, as the Court of Appeals emphasized in *B.D.*, she can order additional assessments as needed. See 817 F.3d at 800 (stating that "the district court or Hearing Officer should not hesitate to order" further assessments as needed). At bottom, the hearing officer must ascertain what information she needs to make the individualized assessment required under *Reid and B.D.*, and she possesses "broad discretion" under the IDEA's remedial provisions to obtain such information and to craft appropriate relief. See *Reid*, 401 F. 3d at 523.”

The current Hearing Officer notes that the District Court in *Lee v. District of Columbia* cited above clearly gives authority to a Hearing Officer to order such evaluations for purposes of determining compensatory education. If there were no remedy available to a party after the evaluation was obtained, then such an order from the Hearing Officer and/or the District Court would be meaningless. Consequently, the Hearing Officer rejects DCPS’ assertion that Petitioner cannot proceed on a claim for compensatory education from a prior HOD. The Hearing Officer concludes that Petitioner is due compensatory education for the denials of FAPE that were determined by the November 24, 2017, HOD.

In December 2017, and January 2018, additional evaluations were conducted including an independent neuropsychological evaluation IEE, with an evaluation report dated February 25, 2018. On March 16, 2018, School A convened an IEP meeting. Petitioner and her attorney participated in the meeting. The team began reviewing some of the evaluations that had been conducted. However, the team did not complete the review of all the evaluations and had to reschedule the meeting.

On April 18, 2018, DCPS reconvened the IEP meeting to complete the review of the remaining evaluations and to address Student’s IEP. Thus, it was not until April 18, 2018, that an IEP was finally developed and offered to Petitioner. Once Petitioner received the April 18, 2018, IEP Petitioner could take the action to obtain compensatory education allowed pursuant to the November 24, 2017, HOD.

Respondent’s counsel argued at hearing that during the period after the November 24, 2018, HOD until such time DCPS could reasonably comply with the HOD directives, there was a “No

FAPE Zone” during which DCPS could not be held responsible for any additional denials of FAPE to the student. Respondent’s counsel, however, cited no legal authority for such a concept of a “No FAPE Zone” and the Hearing Officer is not aware of any through the Hearing Officer’s own research.

The evidence demonstrates that the Hearing Officer in the November 24, 2017, HOD concluded Student’s June 1, 2017, IEP was inappropriate because it was not based on comprehensive evaluations. The Hearing Officer declined to consider whether that IEP was inappropriate for additional reasons asserted in the underlying due process complaint. The current Hearing Officer did not adjudicate the appropriateness of the June 1, 2017, IEP, but accepted its inappropriateness based on the sole reason cited in the November 24, 2017, HOD.

Student’s June 1, 2017, prescribed 4 hours per week of specialized instruction in the general education classroom. In addition to the services prescribed by Student’s IEP of 4 hours per week of inclusion services, the evidence demonstrates that Student was provided two 3 hours sessions per week of internet-based PLT by a special education teacher in a class composed only of special education students. However, at the time the HOD was issued, these additional services were not specifically prescribed by Student’s IEP.

The evidence demonstrates that at the time of the HOD, Student was making academic progress and made passing grades in the first term. In addition, once DCPS conducted adaptive assessments, it was determined that Student did not meet the eligibility criteria for ID. Once the IEE neuropsychological evaluation was completed that evaluation confirmed Student’s low cognitive functioning but did also not find Student met the criteria for ID. The IEE also determined that Student’s academic functioning was more than 5 years below Student’s current age. The IEE recommended, and Petitioner asserts, that Student’s special education services should have prescribed an LRE that totally removed Student from general education. However, the evidence of Student’s academic performance relative to grades earned belies that assertion. Student was able to pass all subjects despite excessive absences and tardiness. In addition, there was sufficient evidence that Student benefits from being with non-disabled peers.

The Hearing Officer in the November 24, 2017, HOD did not conclude that any other evaluations Petitioner asserted DCPS should have conducted as a part of initial evaluation were warranted at the time, thus any claim for compensatory education related to that HOD should not include related services that were the result of the additional evaluations. Therefore, the Hearing Officer concludes that Student is due, and should be awarded, compensatory education based on the Student’s initial psychological evaluation not being sufficiently comprehensive and due to an inappropriate IEP based on that evaluation. In the order below, the Hearing Officer grants Student compensatory education 50 hours of independent tutoring as result of an inappropriate IEP from November 24, 2017, until June 1, 2018.

ISSUE 2: Whether the student should be provided with compensatory education as a result of DCPS’ failure to provide Student with an appropriate IEP or placement during the SY 2017-2018 following issuance of the November 24, 2017, HOD up to April 18, 2018, when Student’s IEP was reviewed and updated.

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence on this issue.

Subsequent to the HOD, DCPS amended Student's IEP, and Petitioner agreed to the amendment, to increase Student's specialized instruction to 6 hours per week outside general education and to add behavioral support services. Petitioner's counsel appeared prior to the hearing to be unaware of the IEP amendment, and apparently presumed that the June 1, 2017, IEP was the IEP being implemented until the April 18, 2018, IEP was developed. However, the facts deduced during the hearing prove otherwise.

Petitioner, nonetheless, asserts that the IEP and placement Student should have had from June 1, 2018, until April 18, 2018, and thereafter, should have prescribed all instruction and behavioral support services outside general education in a non-public, special education day school. However, as discussed above the evidence does not support such a conclusion.

The student's IEP was updated on April 18, 2018, to include the following additional services: The IEP prescribed 4 hours of specialized instruction per week inside the general education setting; 6 hours outside the general education setting; 60 minutes per month of behavioral support services ("BSS") outside the general education setting; 60 minutes per month of speech and language outside the general education setting; 60 minutes per month of consultative services for occupational therapy, and 15 minutes per month of consultative services in speech and language.

The Hearing Officer concludes that based upon the changes that were made to the Student's IEP after the evaluations were conducted pursuant to the November 24, 2018, HOD Student is entitled to compensatory education for the additional services that were not implemented until the April 18, 2018, IEP was developed. Consequently, in the order below the Hearing Officer grants Student additional compensatory education of an additional 50 hours of independent tutoring and 30 hours of independent mentoring for the period from November 24, 2018, to April 18, 2018.

ISSUE 3: Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP or placement when DCPS reviewed and updated Student's IEP on April 18, 2018.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

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. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

“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).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.”

The second, substantive, prong of the *Rowley* inquiry is whether the IEP DCPS developed was reasonably calculated to enable Student to make progress appropriate in light of Student’s individual circumstances.

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the “educational benefits” requirement pronounced in *Rowley*. To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Andrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

The key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, the IEP offered was reasonably calculated to enable the specific student’s progress....“Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. 988.

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." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 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.")

“The IDEA requires that children with disabilities receive education in the regular classroom whenever possible” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

“Educational placement” means educational program, not the particular institution where that program is implemented.” *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003), 39 IDELR 182. A placement is not a physical location, but a program of educational services offered to the student. *Sherri A.D. v. Kirby*, 19 IDELR 339 (5th Cir. 1992).

A student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP. *See Roark v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006); *Spielberg v. Henrico Cty. Public Sch.*, 853 F.2d 256, 258 (4th Cir. 1988) ("Educational placement is based on the IEP, which is revised annually."); 34 C.F.R. § 300.116(b)(2).

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is determined at least annually and is based on the child's IEP. 34 CFR § 300.116(b) (1) (2).

Petitioner asserts that Student’s April 18, 2018 IEP: 1) lacked appropriate present level of performance information, baseline data, and goals; 2) failed to provide the student with a sufficient amount of specialized instruction or related services based on deficits and needs; 3) failed to provide all the assistive technology and/or accommodations Student required; 4) failed to provide Student with direct occupational therapy despite evaluation findings; 5) failed to contain an adequate transition plan; 6) failed to provide Student with ESY where it was clearly warranted; 7) does not adequately describe the type of setting that Student requires to fully access Student’s education and 8) does not provide Student with an appropriate LRE/or placement.

The evidence demonstrates that Student’s initial IEP that was developed June 1, 2017, prescribed 4 hours of specialized instruction outside the general education setting and no related services. The evidence demonstrates that after the November 24, 2017, HOD was issued School A amended Student’s IEP to reflect that Student was receiving 6 hours per week of specialized instruction outside the general education setting and behavioral support services. After DCPS conducted additional evaluations that had been initiated and completed prior to the November 24, 2017, HOD being issued, and after DCPS had conducted adaptive testing and granted Petitioner an IEE for a neuropsychological evaluation, DCPS convened a meeting in March 2018 to review the evaluations and to review and revise Student’s IEP.

The resulting IEP was completed on April 18, 2018, and prescribed the same level and setting for specialized instruction: 6 hours per week outside the general education setting and 4 hours per week inside the general education setting. The IEP also included the related services of 60

minutes per month of BSS and 60 minutes per month of speech and language both outside the general education setting, 60 minutes per month of consultative services for occupational therapy, and 15 minutes per month of consultative services in speech and language.

On May 17, 2018, Petitioner's educational advocate sent a letter to School A outlining concerns about Student's IEP that was developed at the April 18, 2018, meeting and citing the PLOPs for math reading and written expression goals did not have current data and requesting among other things that Student's IEP prescribe Student's placement in a full-time, non-public, special education school, 240 minutes per month of speech language services, 240 minutes per month of direct OT services as well as the AT devices and trainings recommended in the AT-IEE evaluation, ESY services, and an updated post-secondary transition plan.

On June 26, 2018, DCPS issued, and Petitioner signed and agreed to, an IEP amendment that changed Student's assistive technology to add a dedicated laptop computer, edited PLOPs and annual goals, baselines, anticipated date of achievement, evaluation procedures and ESY services. On July 5, 2018, DCPS amended Student's IEP to include ESY services.

The evidence does not support a finding that Student's LRE is a placement totally removed from non-disabled peers. The evidence demonstrates that based on the level of specialized instruction Student was provided, Student was able to pass all classes and was promoted to the next grade. The Student's teachers credibly testified that Student was able to grasp the content with the supports that were provided in the classroom and through specialized instruction. Teachers also noted that Student's progress would have been even greater had Student attended school regularly and timely. Therefore, the Hearing Officer concludes that the evidence supports a finding that the level of specialized instruction and the LRE prescribed by the April 18, 2018, IEP were reasonable and calculated to provide Student with education benefit in light of Student's circumstances.

As to the other areas in which Petitioner asserts that Student's April 18, 2018, IEP is inappropriate, the evidence demonstrates that no requests for changes to the IEP except the LRE were made by Petitioner or her representative until a month following that meeting by letter and that another IEP meeting was convened in June 2018, that has resulted in an amended IEP that included ESY and the addition of the dedicated laptop computer. There was no evidence that Student suffered harm for the dedicated laptop or ESY not being prescribed in the April 18, 2018, IEP. Student was offered ESY during summer 2018, but chose not to attend.

As to the PLOPs and baselines, the Student's IEP was also amended subsequent to the April 18, 2018, IEP meeting to include more recent data. There was no evidence that the PLOP and baseline data that was in the April 18, 2018, IEP prior to the amended IEP caused Student harm such that it rose to the level of a denial of a FAPE.

Although Petitioner asserted that there were additional AT devices and software that Student required, the DCPS AT specialist as well as Student's teachers credibly testified that Student was able to use the computer and software and that other AT items that were suggested in the independent AT evaluation that Petitioner asserted should have been in Student's IEP were not necessary. There was insufficient evidence that the Student's transition plan in the IEP was

inappropriate and there was no evidence to support that Student was in need of direct OT services.

Although the April 18, 2018, IEP did not include the final elements Petitioner requested and DCPS agreed to add, the amendments to Student's IEP that were made in a reasonable time following Petitioner's May 2018 letter sent to School A following the April 18, 2018, meeting.

Consequently, the Hearing Officer concludes that the preponderance of the evidence demonstrates Student's April 18, 2018, IEP was reasonably calculated to provide Student educational benefit in light of Student's circumstances and Respondent sustained the burden of persuasion on this issue. This issue is dismissed with prejudice.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that Student was denied a FAPE by DCPS and has directed that DCPS, in the order below, remedy that denial.

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.

Petitioner's educational advocate requested 300 hours of independent tutoring services, 40 hours of independent counseling services, funding in a non-public, separate school, a laptop computer and educational software to assist with remediation of reading and math, 100 hours of mentoring, AT training and a flip-laptop computer. The evidence demonstrates that this request was based on an assumption that student should have been in a non-public placement and should have been provided items in the IEP that were far beyond what this Hearing Officer determined was proved by the evidence.

During the April 18, 2018, meeting Petitioner's attorney requested that student be provided 200 hours of tutoring and mentoring services and a laptop computer and software as compensatory education. DCPS did not agree to provide a laptop computer as compensatory education.

Following the April 18, 2018, meeting on May 3, 2018, DCPS offered Petitioner the following as compensatory education: 50 hours of independent tutoring, 20 hours independent mentoring and 10 hours of independent speech language services. DCPS invited Petitioner to make a counter

offer of compensatory education or to seek a compensatory education award in a new proceeding quoting language from the November 24, 2017, HOD.

Based upon the evidence of Student's deficits, services missed, the testimony of the Student's teachers about Student's educational performance and potential, and balancing the requests and offers made by each party for compensatory education, the Hearing Officer has determined that student would benefit from tutoring and mentoring services to compensate and ameliorate Student's lack of an appropriate IEP from June 1, 2017, to April 18, 2018, in the amount prescribed in the order below.

ORDER: ¹⁰

1. DCPS shall, within twenty (20) business days of the issuance of this order, authorize Petitioner to obtain, 100 hours of independent tutoring, and 30 hours independent mentoring at the OSSE approved rate.
2. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (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 13, 2018

Copies to: Counsel for Petitioner
 Counsel for LEA
 OSSE-SPED {due.process@dc.gov}
 ODR {hearing.office@dc.gov}
 contact.resolution@dc.gov

¹⁰ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioners shall extend the timelines on a day for day basis.