

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 December 5, 2017, and December 6, 2017, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2004.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____ and in grade _____.² The student resides in the District of Columbia and is a child with a disability pursuant to IDEA with the disability classification of speech language impairment (“SLI”).

The student (“Student”) currently attends a public charter school located in the District of Columbia (“School A”). School A is its own local education agency (“LEA”). Student has attended School A since school year (“SY”) 2013-2014.

During SY 2014-2015 School A determined Student eligible for special education and on June 1, 2016, and June 4, 2017, conducted annual reviews of Student’s individualized educational program (“IEP”). School A retained Student at the end of SY 2016-2017 and Student is repeating the grade for SY 2017-2018.

Student’s father (“Petitioner”) did not realize Student had been retained until the first day of SY 2017-2018 when Student came home and informed Petitioner. Petitioner requested a meeting with School A to discuss the retention. On September 6, 2017, School A convened a meeting with Petitioner at which Petitioner questioned the retention and requested that Student be placed in the grade Student should have been had Student not been retained. School A refused.

On September 25, 2017, Petitioner filed his due process complaint alleging, inter alia, that School A failed to develop appropriate IEPs for Student on June 1, 2016, and June 5, 2017.

Relief Sought:

Petitioner seeks as relief that the Hearing Officer find the LEA has denied the student a Free Appropriate Public Education (“FAPE”), and order School A to (1) fund independent evaluations: comprehensive psychological, educational, and speech/language assessments, (2) convene an appropriate IEP team within 14 days of receipt of the evaluation reports to determine the student’s eligibility, and review and revise the student’s IEP adding extended school year (“ESY”) services, math goals and related services, and (3) fund an award of compensatory education.³

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

³ In the complaint Petitioner also requested that the student be placed in the next grade. Petitioner’s counsel stated

LEA Response to the Complaint:

The LEA filed a response to the complaint on October 2, 2017. The LEA denies that there has been any failure to provide the student with a FAPE. Specifically, the LEA asserts that the IEPs proposed for Student were appropriate and reasonably calculated to enable Student to make appropriate educational progress at the time they were developed. The LEA contends Student did not qualify for ESY services based upon data available to the team. The LEA asserts the student did not require specialized instruction at the time the IEPs were developed. The LEA contends the IEPs were appropriately reviewed and revised to meet the student's needs and any lack of progress was due to Student's poor attendance and the fact that Student was sleeping in class. The LEA also asserts Student's disability classification is appropriate and it has initiated reevaluation and will revisit Student's classification upon completion of reevaluations.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on October 3, 2017. The parties did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing in this matter. The 45-day period began on October 21, 2017, and ends [and the Hearing Officer's Determination ("HOD") was originally due] on December 5, 2017. Respondent submitted an unopposed motion to extend the HOD due date to allow for the hearing dates requested because of witness unavailability for the initial hearing dates proposed. The motion was granted and the HOD is now due December 19, 2017. The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on October 23, 2017, and issued a pre-hearing order ("PHO") on October 26, 2017, outlining, inter alia, the issues to be adjudicated.

ISSUES:⁴

The issues adjudicated are:

1. Whether the LEA denied the student a FAPE by failing to develop an appropriate IEP on (a) June 1, 2016, because the IEP did not include specialized instruction and annual goals in reading and/or ESY services; and/or (b) on June 5, 2017, because the IEP did not include specialized instruction and annual goals in math, and/or ESY services.
2. Whether the LEA denied the student a FAPE by failing to provide the student with an appropriate disability classification, pursuant to 34 C.F.R. §300.8(a)(1) as of June 1, 2016.⁵

during the PHC that instead Petitioner is seeking compensatory education that would enable the student to be placed two grades ahead by the start of SY 2018-2019.

⁴ The Hearing Officer restated the issues at the outset of the hearing and the parties agreed that these were the issue to be adjudicated.

⁵ Petitioner asserts student should have had a disability classification of multiple disabilities ("MD") including SLI and specific learning disability ("SLD") as of June 1, 2016.

3. Whether the LEA denied the student a FAPE by failing to review and revise the student's IEPs to address any lack of progress toward annual goals or anticipated needs pursuant to 34 C.F.R. §300.324(b) by the end of the second term of SY 2015-2016, and/or by the end of the second term of SY 2016-2017.
4. Whether the LEA denied the student a FAPE by failing to reevaluate the student as warranted pursuant to 34 C.F.R. §300.303(a)(1) by conducting a psycho-educational evaluation by the end of the second term of SY 2015-2016, and/or by the end of the second term of SY 2016-2017.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 20 and LEA Exhibits 1 through 36) that were admitted into the record and are listed in Appendix A.⁶ Witnesses' identifying information is listed in Appendix B.⁷

SUMMARY OF DECISION:

Petitioner held the burden of production on all issues adjudicated. Petitioner held the burden of persuasion on issues: #2, #3, and #4. Respondent held the burden of persuasion on issue #1 after Petitioner established a prima facie case. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issues #2 and #4, but sustained the burden of persuasion on issue #3. Respondent, LEA, did not sustain the burden of persuasion by a preponderance of the evidence on issue #1. The Hearing Officer granted Petitioner compensatory education for the denials of FAPE determined and directed School A to complete evaluations of Student and review and revise Student's IEP.

FINDINGS OF FACT:⁸

1. The student resides in the District of Columbia and is a child with a disability pursuant to IDEA with a disability classification of SLI. (Petitioner's Exhibit 2-1)

⁶ Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

⁷ Petitioner presented four witnesses: Petitioner, Student's stepmother, an educational advocate and a school psychologist. Respondent presented six witnesses: three teachers, a school psychologist, a speech language pathologist and the LEA representative and director for student and family support.

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 (or the page number of the entire disclosure document) 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.

2. Student currently attends School A, a public charter school located in the District of Columbia that is its own LEA. Student has attended School A since SY 2013-2014. (Petitioner's testimony, Petitioner's Exhibit 2-1)
3. On February 12, 2015, School A acknowledged that Student had been referred for initial evaluation to determine if Student was a child with a disability. School A also issued a prior written notice ("PWN") that Student would be evaluated for speech and language concerns. Petitioner signed a form consenting to Student being evaluated to determine eligibility for special education and to determine educational needs. (LEA Exhibits 1, 2, 3)
4. On February 12, 2015, School A developed a document entitled an Analysis of Existing Data ("ADA") that listed the information reviewed to determine the next steps in the evaluation process. The ADA noted that Student had been assessed with Fluharty-2 Speech and Language Screening Test on October 17, 2014, and that Student's articulation was above average but receptive and expressive language skills were below average. (LEA Exhibit 4)
5. On March 19 and 23, 2015, School A conducted a speech language evaluation. The evaluation included an observation by the evaluator and the following assessments: Peabody Picture Vocabulary Test-4 and Clinical Evaluation of Language Fundamentals-4 ("CELF-4"). The evaluator concluded Student presented with average receptive language skills and below average expressive language skills and recommended Student would benefit from speech and language services.
6. On June 4, 2015, School A determined Student eligible for special education with the SLI disability classification. In determining Student's disability eligibility School A did not assess Student's cognitive functioning or academic achievement. (LEA Exhibit 6-1, 6-2, 6-5, 6-6, 6-8)
7. On June 4, 2015, School A issued a PWN stating Student was found eligible and had an expressive language disability that requires the support of special education services in order for Student to have access to, and make progress in, the general education curriculum. (LEA Exhibit 7-1)
8. On June 4, 2015, School A developed Student's initial IEP that included three speech language goals and prescribed 30 minutes per week of speech language services outside general education. Petitioner consented to provision of the services in the IEP. (LEA Exhibits 8-1, 8-4, 9-1)
9. School A reported Student's progress during SY 2015-2016 in quarterly report cards and quarterly IEP progress reports. The report card reflected Student's progress in Literacy, Math, Social-Emotional Learning, Attendance and included Teacher Comments. Student's literacy was measured principally using the "Step" Assessment each quarter. Student's literacy and math was also measured using the nationally normed NWEA MAP Assessment administered three times per year using a computer-based assessment. The

Step assessment aligned with School A curriculum, whereas the MAP Assessment did not. Student's math performance was also assessed with the Math Interim Assessment, which evaluated Student's progress on the common core standards in each of the four terms. Student's social emotional learning was rated in six areas: (1) identifying feelings and personal traits, (2) managing feelings, (3) following limits and expectations, (4) interacting with peers, (5) balancing needs and rights of self and others, and (6) solving social problems. (Petitioner's Exhibits 5, 6)

10. At the start of SY 2015-2016 Student started far below grade level in reading skills and made modest progress during the year in reading. Student began the year at Step 5 in reading level, which was at the 2nd percentile for students in that grade. At the end of second term Student was measured at Step 6, which was at the 2nd percentile for that grade. At the end of the third term Student was at Step 7, which was at the 11th percentile for that grade. Student ended the year at Step 7. (Petitioner's Exhibit 5-1)
11. During SY 2015-2016 on the MAP Assessment Student's literacy performance scores declined over the year. Student was measured at the 43rd percentile at the beginning of the year, at the 27th percentile at mid-year and at the 26th percentile at the end of year. On the MAP math assessment student showed progress. Student started the year at 37th percentile in math, 31st percentile mid-year and 50th percentile at the end of year and met the end of year goal for math. On the Math Interim Assessment, Student at the end of the first term had 54% correct, 52% correct at the end of second term, 63% correct at the end of third term and 83% correct at the end of year. (Petitioner's Exhibit 5-1)
12. During SY 2015-2016 Student's ratings on the social emotional learning were average. Student missed 3% of instructional time during the first term due to tardies and absences and early dismissals. Student lost 1% of instructional time during the second term, lost 7% of instructional time during the third term and lost 11% of instructional time in the 4th term. The teacher comments noted Student's strengths were respectfulness and motivation to succeed. The student's area of growth was remaining focused throughout the day. At the end of SY 2015-2016 Student was promoted to the next grade. (Petitioner's Exhibit 5-1, 5-2)
13. During SY 2015-2016 Student mastered two of the three IEP speech language goals and made progress on the third. (Petitioner's Exhibit 6)
14. Student's report cards reflect that on assessments School A conducted of Student at the end of year and beginning of year for SY 2015-2016, SY 2016-2017 and SY 2017-2018 Student did not regress in skill level as measured by those assessments over summer months when school was not in session. (LEA Exhibits 20, 22, 24)
15. On June 1, 2016, School A updated Student's IEP and included two new speech and language goals and prescribed Student be provided 60 minutes per month of speech language pathology outside general education and 15 minutes per month of speech language therapy inside general education. The IEP did not prescribe any specialized

instruction and did not prescribe ESY services. (Petitioner's Exhibits 1-1, 1-4, 1-5, 1-7, 1-8, 1-9)

16. School A reported Student's progress during SY 2016-2017 in quarterly report cards and quarterly IEP progress reports. The report card reflected Student's progress in Literacy, Math, Social-Emotional Learning, Attendance and included Teacher Comments. Student's literacy was measured principally using the "Step" Assessment each quarter. Student's literacy and math was also measured using the nationally normed NWEA MAP Assessment administered three times per year using a computer-based assessment. Student's literacy and math performance was also assessed with the Achievement Network (ANET) Assessment. Student's social emotional learning was rated in four areas: (1) managing schoolwork, (2) managing classroom behavior, (3) managing social interactions in class, (4) demonstrating diligence in schoolwork. (Petitioner's Exhibits 4, 7)
17. At the start of SY 2016-2017 Student started far below grade level in reading skills and made little progress during the year in reading. Student began the year at Step 7 in reading level. At the end of second term Student was measured at STEP 8. Student's reading level stagnated and at the end of the third term Student was again at STEP 8. Student ended the year at STEP 8, and remained far below grade level in reading. (Petitioner's Exhibit 4-1)
18. During SY 2016-2017 on the MAP Assessment Student's literacy performance scores declined over the year. Student was measured at the 30th percentile at the beginning of the year, at the 22nd percentile at mid-year and at the 14th percentile at the end of year. On the MAP math assessment student showed progress. Student started the year at the 37th percentile in math, 31st percentile mid-year and 50th percentile at the end of year and met the end of year goal for math. On the ANET, Student's literacy and math performance declined over the year. At the end of the first term Student's literacy was measured at the 25th percentile, at the 14th percentile at the end of second term, at the 6th percentile at the end of third term and at the 7th percentile at the end of year. On the ANET, at the end of the first term Student's math performance was measured at the 65th percentile, at the 19th percentile at the end of second term, at the 15th percentile at the end of third term and at the 7th percentile at the end of year. (Petitioner's Exhibit 5-1)
19. During SY 2016-2017 Student's ratings on the social emotional learning declined from the beginning of the year to the end of the year. Student missed 3% of instructional time during the first term due to tardies and absences. Student lost 5% of instructional time during the second term, lost 2% of instructional time during the third term and lost 13% of instructional time in the 4th term. The teacher comments noted Student's strength was cheerfulness. Student's area of growth was remaining focused in small group rotations and feeling more confident when engaging in group discussions and answering questions. At the end of SY 2016-2017 Student was retained and not promoted to the next grade. (Petitioner's Exhibit 4-1, 4-2)

20. During SY 2016-2017 Student mastered one of the two IEP speech language goals and made progress on the second. At the start of the fourth term Student's speech language goals were changed and increased to five goals that were not introduced during the fourth term. (Petitioner's Exhibit 7)
21. On February 1, 2017, School A issued a letter to Student's parent that indicated that Student was as of mid-year below School A's grade benchmarks and there was the potential Student would be retained in the same grade the following school year. (Petitioner's Exhibit 11)
22. School A provided student extra supports for more than two quarters before the end of SY 2016-2017, including Leveled Literacy Intervention and additional Guided Reading support that were later added to the Student's IEP. The intervention included instruction from School A's special education teacher. (Witness 5's testimony, Petitioner's Exhibit 16)
23. On April 5, 2017, near the end of the third term, School A issued another letter to Student's parent that indicated Student was currently far below School A's grade benchmarks and it was likely that Student would be retained in the same grade the following school year.
24. On June 5, 2017, School A convened an IEP meeting for Student. During the June 5, 2017, IEP meeting the team classified the student as SLI and adopted Student's annual IEP that contained present levels and goals in the areas of reading and communications and speech and language. The team added specialized instruction to Student's IEP of 30 minutes per day outside of the general education setting for reading and increased speech and language services to 90 minutes per month outside of the general education setting. The team noted that Student did not qualify for ESY services. Aside from a notation that the student "could benefit from" repetition of directions, clarification of information and re-teaching of vocabulary, the IEP had no other classroom aids, services or accommodations. (Petitioner's Exhibits 2-1, 2-3, 2-4, 2-5, 2-6, 2-7, 2-9, 2-14, 9)
25. On June 5, 2017, School A issued a prior written notice ("PWN") describing the changes made to Student's IEP noting that all team members were in agreement with the decisions about the IEP. (LEA Exhibit 14)
26. Student's stepmother participated in the June 5, 2017, IEP meeting on behalf of Petitioner because he was not able to make the meeting. The School A special education teacher participated in the meeting by telephone and stated she has been working with Student for a while but there are things she worked on with Student that were not on the IEP. The special education teacher stated Student made some progress on some things but not others but would continue to work on them. The classroom teacher mentioned that Student might be retained and the team asked the Stepmother her thoughts on the retention and she stated that she did not know if it was appropriate but she would have to speak to Student's father (Petitioner) about it. The Stepmother did not believe that the final decision about retention had been made at that meeting. The Stepmother never

mentioned to Petitioner the discussion at the June 5, 2017, meeting that Student might be retained. (Stepmother's testimony)

27. On June 12, 2017, School A's staff member met with Student's Stepmother and informed her that Student would be retained in the same grade the following school year. (Witness 8's testimony)⁹
28. Student participated in the School A end of year ceremony and received a certificate of completion. Student's parents were provided Student's final report card that indicated Student had been retained. (Stepmother's testimony, Father's testimony)
29. Student was no longer residing with Petitioner but living with Student's Stepmother and siblings. Petitioner did not notice that Student's report cards indicated Student was operating below grade level and did not attend parent teacher conferences during SY 2016-2017. (Stepmother's testimony, Father's testimony)
30. Student returned to School A at the start of SY 2017-2018 and was placed in the same grade Student had been in the previous school year. Although School A had provided the letters indicating student might be retained and the Stepmother attended a meeting at which she was informed Student would be retained and retention was mentioned at the June 5, 2017, IEP meeting, Petitioner became aware for the first time Student had been retained after the start of the school year. (Stepmother's testimony, Father's testimony)
31. On September 6, 2017, School A convened a meeting to discuss Student's progress and review the IEP. Petitioner voiced his complaints about the student being retained and requested that Student be promoted. School A did not comply with the request. The School A LEA representative and a general education teacher supported the retention. (Father's testimony, Petitioner's Exhibit 8)
32. On September 7, 2017, School A prepared an AED and forwarded it to Petitioner. The AED indicated the student struggles with written and oral answers to comprehension questions and reveals the student made progress in Student's oral language, but has difficulties applying those skills to reading tasks. (Petitioner's Exhibit 17)
33. On September 10, 2017, Petitioner signed the consent form agreeing to School A reevaluating Student. (LEA Exhibit 18)
34. On September 15, 2017, School A issued a PWN that proposed to reevaluate the student to determine Student's eligibility for special education and the "disability basis" of that eligibility. (Petitioner's Exhibit 16)

⁹ Student's stepmother testified that she had never seen the letters indicating the student might be retained. The Hearing Officer did not credit this testimony that the first time she knew student was retained was the start of the SY 2017-2018. The witness was hesitant in this part of her testimony. The Hearing Officer was incredulous that the Student's final report card stated student was retained and the parents had not read the report card or seen that statement.

35. School A has evaluated Student but has not yet obtained Petitioner's input to finalize the evaluation report so that an IEP team can review the evaluations. (Witness 7's testimony)
36. Since the start of SY 2017-2018 Student has been more reserved and withdrawn in Student's behavior at home. The student's parents have encouraged Student to interact more with students in the classroom. Student interacted more with peers in the previous school year but has found a small group of students in the current class with whom to interact. (Stepmother's testimony)
37. Petitioner's educational advocate proposed compensatory education for the alleged denials of a FAPE. The advocate requested 150 hours of academic tutoring as compensatory education based on her review of Student's educational data and estimating Student would benefit from 1 to 2 hours of tutoring per week for 2 years. The advocate opined that with modification of Student's IEP to provide specialized instruction in all academic areas coupled with the recommended compensatory education Student should be able to be placed in the correct grade sometime in the future. (Witness 1's testimony, Petitioner's Exhibit 18)

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").

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

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.

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)

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). In this case, Petitioner will proceed first on the day of the hearing and carry the burden of production on all issues to be adjudicated. Petitioner has both the burden of production and persuasion on the following issues above: #2, #3, & #4. Respondent shall hold the burden of persuasion on the following issues #1. 10 The normal standard is preponderance of the evidence. See, e.g. *N.G. v. District of Columbia* 556 F. Supp. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether the LEA denied the student a FAPE by failing to develop an appropriate IEP on (a) June 1, 2016, because the IEP did not include specialized instruction and annual goals in reading and/or ESY services; and/or (b) on June 5, 2017, because the IEP did not include specialized instruction and annual goals in math, and/or ESY services.

Conclusion: Respondent did not sustain 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

¹⁰ 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.

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.”

Pursuant to 34 C.F.R. §300.324(b)(1), DCPS must ensure that...the IEP Team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals...and in the general education curriculum, if appropriate; the results of any reevaluation conducted ...; information about the child provided to, or by, the parents...; the child's anticipated needs; or other matters. The evidence in this case demonstrates that School A conducted timely annual reviews of Student’s IEP.

The second, substantive, prong of the *Rowley* inquiry is whether the IEPs DCPS developed were 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 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).

Petitioner has asserted that Student’s IEPs developed on June 1, 2016, and June 5, 2017, were inappropriate, inter alia, because they did not prescribe ESY services.

34 C.F.R. 300.106 (a) provides: (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section. (2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with Sec. Sec. 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.

ESY services are provided a student who, after a significant break in school, such as summer break, is in jeopardy of losing critical skills or will experience skill regression or skill recoupment would require inordinate time. The evidence in this case indicates that at the June 1, 2016, and June 5, 2017, IEP meetings the team specifically reviewed the criteria for Student’s

qualification for ESY services and determined Student was not in need of ESY services. The evidence in this case demonstrates that Student's Step assessment after each summer break found student performing on the same level as Student was performing prior to the break. There was a single instance on a math assessment where the student's math percentile rank was lower at the start of the next school year than at the end of the previous year. However, the overwhelming weight of the evidence, including testimony of Student's School A teachers, indicates that Student was not in danger of losing critical skills, regressing or that an inordinate time was necessary to recover skills such that Student was in need of ESY services during summer 2016 or summer 2017. As to ESY services the Hearing Officer concludes there was insufficient evidence Student's IEPs were inappropriate.

Petitioner asserts that Student's June 1, 2016, IEP was inappropriate because it did not include goals and specialized instruction for reading. The evidence demonstrates that during SY 2015-2016 Student was making slow but steady progress as noted in Student's report card. Student's Step assessment indicated Student moved from Step 5 to Step 8 by the end of the year. Although Student was still far below grade level in reading, Student was making progress with the instruction that was being provided. Although Petitioner's expert witness testified that at this juncture Student's IEP should have included reading goals and specialized instruction in reading, her testimony was not as credible as the School A witnesses who worked with Student and who indicated that Student was making slow and steady progress and was not in need of specialized instruction in reading during SY 2015-2016. Consequently, the Hearing Officer concludes that the preponderance of evidence demonstrates that at the time Student's June 1, 2016, IEP was developed the IEP was reasonably calculated to provide Student educational benefit.

Petitioner also asserts that at the time Student's June 5, 2017, IEP was developed it was inappropriate because it did not include goals and specialized instruction in math. Student's 2016-2017 report card reflects that on the MAP assessment Student's math performance declined from the 29th percentile at the beginning of the year to the 7th percentile at the end of the year. Similarly on the ANET assessment, Student's math performance went from the 65th percentile at the beginning of the year to the 7th percentile at the end of the year.

Although the testimony from School A witnesses was that Student was retained at the end of SY 2016-2017 principally because of Student's poor reading performance, the evidence clearly indicates that Student's performance in math was a concern as well. Nonetheless, School A did not address math in Student's IEP. Although School A witnesses testified that math was not an area of concern that needed to be addressed in Student's IEP, in this regard, the Hearing Officer did not find that portion of School A witnesses' testimony persuasion, particularly in light of Student's declining math performance reflected on the SY 2016-2017 report card. Consequently, the Hearing Officer concludes that the preponderance of the evidence demonstrates that Student's SY June 5, 2017, IEP was not reasonably calculated to provide Student educational benefit in light of circumstances because it did not include goals and specialized instruction in math. Student was thus denied a FAPE.

ISSUE 2: Whether the LEA denied the student a FAPE by failing to provide the student with an appropriate disability classification, pursuant to 34 C.F.R. §300.8(a)(1) as of June 1, 2016.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

34 C.F.R. §300.8(a)(1) defines the disability classification under which a child is determined eligible for special education.¹¹

Petitioner alleges that Student should have been found eligible under the disability classification of multiple disabilities (“MD”) to include SLI and specific learning disability (“SLD”). Petitioner presented two expert witnesses, a school psychologist and educational consultant. The psychologist did not offer testimony regarding the student’s disability classification. The educational consultant testified that the student’s academic areas of concern in her opinion were indicative of a learning disability.

Although the consultant’s testimony was based on her years of experience in education and from reviewing Student’s educational records and conducting an informal assessment of the Student, the Hearing Officer did not find her testimony alone sufficient to substantiate the claim that the Student should have the MD or SLD disability classification. The Hearing Officer takes administrative notice that the disability classification of student is typically determined after formal assessments have been conducted and reviewed by a team and then a determination is made by reviewing a disability checklist to see if a student meets the criteria for a disability classification. This expert witness had no background or qualifications in conducting psychological assessments and evaluations that are typically administered and reviewed in determining a student’s disability classification.

Consequently, the Hearing Officer concludes there was insufficient evidence from which to conclude Student should have the MD or SLD disability classification and concludes Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 3: Whether the LEA denied the student a FAPE by failing to review and revise the student’s IEPs to address any lack of progress toward annual goals or anticipated needs pursuant to 34 C.F.R. §300.324(b) by the end of the second term of SY 2015-2016, and/or by the end of the second term of SY 2016-2017.

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

34 C.F.R. §300.324(b)¹² requires that a student’s IEP be updated at least annually to determine

¹¹ 34 C.F.R. §300.8(a)(1) provides: (a) General. (1) Child with a disability means a child evaluated in accordance with Sec. Sec. 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

¹² 34 C.F.R. §300.324(b): Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team-- (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the

whether the annual goals for the child are being achieved and revise the IEP to address any lack of expected progress toward the annual goals and in the general education curriculum.

Petitioner asserts that School A should have reviewed and revised Student's IEP by the end of the second term of SY 2015-2016 and/or by the second term of SY 2016-2017 because of a lack of academic progress. However, the evidence reveals that during SY 2015-2016 Student was making slow but steady progress as noted in Student's report card. Student's Step assessment indicated Student moved from Step 5 to Step 8 by the end of the year, although Student was still far below grade level. During the same period although Student's MAP assessment indicated a decline in literacy, there was a clear increase in Student's math assessments. Based upon this evidence, the Hearing Officer concludes that there was insufficient evidence to conclude that Student's IEP should have been reviewed and revised prior to the scheduled annual review.

During SY 2016-2017, however, the evidence demonstrates that Student's reading performance stagnated and that in the second half of the school year School A introduced interventions that included reading instruction from a special education teacher. This additional instruction, however, was not added to Student's IEP and was introduced to Student without the benefit of a Petitioner being able to weigh in on the need or appropriateness of the additional services that School A chose to implement.

This evidence, coupled with Student's stagnant reading performance is sufficiently persuasive for the Hearing Officer to conclude that by the end of the second term of SY 2016-2017, School A should have convened an IEP meeting to review Student's lack of academic progress and review and revise Student's IEP as appropriate. Although School A implemented additional interventions and provided Student instruction from a special education teacher, Student nonetheless was not successful at the end of SY 2016-2017 and was retained. The Hearing Officer concludes that School A's failure to review and revise Student's IEP at the end of the second term of SY 2016-2017 was a denial of a FAPE.

ISSUE 4: Whether the LEA denied the student a FAPE by failing to reevaluate the student as warranted pursuant to 34 C.F.R. §300.303(a)(1) by conducting a psycho-educational evaluation by the end of the second term of SY 2015-2016, and/or by the end of the second term of SY 2016-2017.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

34 C.F.R. § 300.303(a) makes clear that, "A local education agency ("LEA") shall ensure that a re-evaluation of each child with a disability is conducted if a public agency determines that the educational or related services needs, including improved academic achievement and functional

annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address-- (A) Any lack of expected progress toward the annual goals described in Sec. 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under Sec. 300.303; (C) Information about the child provided to, or by, the parents, as described under Sec. 300.305(a)(2); (D) The child's anticipated needs; or (E) Other matters.

performance, of the child warrant a reevaluation; or...if the child's parents or teacher requests a re-evaluation." and that the reevaluation must be conducted at least once every three years. Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp. 2d. 254, 259, 261 (D.C.C. 2005).

34 C.F.R. §300.304 provides evaluation procedures that require that the agency use a variety of assessment tools, and it specifically states that the agency must not use any single measure or assessment as the sole criterion for determining if the child is a child with a disability and determining an appropriate program.¹³

The evidence demonstrates that when School A initially evaluated Student and determined eligibility School A conducted a speech language evaluation. The student was provided speech language services as special education and was not provided specialized instruction until the IEP was updated on June 5, 2017. At that time School A for the first time included reading goals in Student's IEP and added 30 minutes per day of specialized instruction. It does not appear from the evidence that School A conducted a psycho-educational evaluation at any point since Student has attended School A and prior to reading being added as an area of concern to Student's IEP. The evidence does not indicate that at any point in any of the IEP meetings that any team member including student's parent(s) requested that a psycho-educational evaluation be conducted.

Although Petitioner's expert witness testified that Student has not been assessed in the areas of academic need, the evidence belies this assertion. The evidence clearly indicates that School A regularly assessed Student's academic functioning both in reading, writing and math and reported those assessment results on Student's report cards. The Hearing Officer takes administrative notice that typically a psychological evaluation and academic achievement assessment is conducted in determining a student's educational needs, but as noted above, IDEA does not mandate the particular type of assessment that must be conducted in determining whether a child has a disability or determining a student's educational needs. Absent evidence that any member of Student's IEP team including Petitioner requested that a psycho-educational evaluation be conducted, the Hearing Officer concludes that there was insufficient evidence presented to sustain the burden of persuasion on this issue.

However, the evidence does demonstrate that Petitioner has consented to School A conducting updated evaluations of Student, consequently in the order below the Hearing Officer directs that

¹³ 34 C.F.R. § 300.304 Evaluation procedures. (a) Notice. The public agency must provide notice to the parents of a child with a disability, in accordance with § 300.503, that describes any evaluation procedures the agency proposes to conduct. (b) Conduct of evaluation. In conducting the evaluation, the public agency must— (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining— (i) Whether the child is a child with a disability under § 300.8; and (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities); (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. (c) Other evaluation procedures. Each public agency must ensure that— (4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

those evaluations be completed and reviewed by an IEP team.

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.)

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 Hearing Officer concluded Student's IEP should have been reviewed and revised by the end of the second term of SY 2016-2017 and that Student's IEP that was developed on June 5, 2017, was not reasonably calculated to provide educational benefit because it did not include goals and instruction in math. Petitioner's educational advocate proposed that Student be provided 150 hours of compensatory education. However, the proposal seeks to remedy denials of FAPE that were not sustained. The evidence does demonstrate that with Student's level of academic deficits Student would benefit from tutoring services. Consequently, and based on the evidence, the Hearing Officer concludes that Student should be provided compensatory services in the amount of 100 hours of independent tutoring, an amount the Hearing Officer deems reasonable to compensate Student for the missed services and to target placing Student in a place Student would have been but for the missed services.

Although Petitioner also sought as relief independent evaluations and that Student have an opportunity to be placed in a higher grade in the future, these were not remedies that the Hearing Officer deemed warranted based upon the denials of FAPE determined.

ORDER: ¹⁴

1. Petitioner's claim that Student should have had a different disability classification as of June 1, 2016, is hereby dismissed with prejudice.
2. Petitioner's claim that Student was denied a FAPE by School A failing to conduct a psycho-educational evaluation by the end of the second term of SY 2015-2016, and/or by the end of the second term of SY 2016-2017 is hereby dismissed with prejudice.

¹⁴ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

3. As relief for the denials of FAPE determined herein, School A shall, within ten (10) school days of the issuance of this order, provide Petitioner authorization for one-hundred (100) hours of independent tutoring at the OSSE prescribed rate.
4. Within fifteen (15) school days of the issuance of this order School A shall complete the evaluation(s) that Petitioner consented to School A conducting on September 10, 2017, and convene an IEP meeting to review and revise Student's IEP as appropriate, and to include math goal(s) and the amount of specialized instruction in math that the team deems appropriate.
5. 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: December 19, 2017

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