

OSSE
Office of Dispute Resolution
December 11, 2023

Parent on Behalf of Student, ¹	HEARING OFFICER’S DETERMINATION
Petitioner,	Hearing Date: November 21, 2023
v.	Counsel for Each Party listed in Appendix A
District of Columbia Public Schools (Local Education Agency “LEA”)	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
Respondent.	
Case # 2023-0186	
Date Issued: December 11, 2023	

¹ 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 5-A30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing (“Student”) resides with Student's parent (“Petitioner”) in the District of Columbia, and the District of Columbia Public Schools (“DCPS”) is Student's local education agency (“LEA”). Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of other health impairment (“OHI”) and specific learning disability (“LSD”).

Petitioner filed a due process complaint (“DPC”) on September 27, 2023, alleged that DCPS denied Student a free appropriate public education (“FAPE”) because, inter alia, the Student’s individualized educational program (“IEP”) and resulting placement were inappropriate and DCPS violated a prior hearing officer’s determination (“HOD”).

Relief Sought:

Petitioner seeks as relief that DCPS be found to have denied Student a FAPE and that DCPS be ordered to immediately revise Student’s IEP and placement to provide for a full-time specific learning support (“SLS”) program and appropriate behavioral interventions and award Student compensatory education and related transportation.

LEA Response to the Complaint:

DCPS filed a response to the complaint on October 6, 2023. In its response, DCPS stated, inter alia, the following:

DCPS received the independent education evaluation (“IEE”) report from Petitioner and/or the assessor on or about August 15, 2023. School year (“SY”) 2023-2024 started on August 28, 2023. DCPS is required for a student's FAPE to ensure an appropriate evaluation procedure for review and/or revision of any student's IEP. DCPS needed sufficient time to review the IEE report, interpret the information, and share that with relevant team members. The IEP team met on August 25, 2023, to discuss this and other matters for Student’s FAPE. DCPS then completed its review expediently and an IEP team meeting is scheduled and confirmed for October 17, 2023. If there is a delay determined, the delay is procedural as opposed to substantive.

A hearing officer determination (“HOD”) was issued on May 25, 2023, where the presiding impartial hearing officer (“IHO”) likely anticipated an IEE report would be completed and available well before the time it was provided to DCPS. The February, March, and May 2023 IEPs were not at issue before the hearing officer, nor did Respondent DCPS have an opportunity to defend those

IEPs. Notwithstanding this, the IHO engaged in dicta in his HOD regarding the May 2023 IEP hours of instruction. Student has been offered FAPE. There has been no violation of IDEA.

Resolution Meeting and Pre-Hearing Conference:

Petitioner and DCPS participated in a resolution meeting on October 13, 2023. The parties did not mutually agree to shorten the 30-day resolution period. The due process complaint (“DPC”) was filed on September 27, 2023. The 45-day period began on October 27, 2023, and ends [and the HOD is due on December 11, 2023.

The undersigned IHO (or “Hearing Officer”) conducted a pre-hearing conference and issued a pre-hearing order (“PHO”) on October 18, 2023, outlining, inter alia, the issue to be adjudicated.

ISSUE: ²

The issue adjudicated is:

Did DCPS deny Student a FAPE by failing to provide Student an appropriate IEP, placement, and/or location of services pursuant to Student's 2/14/2023, 3/9/2023, and 5/2/2023 IEPs and/or did DCPS deny Student a FAPE by failing to timely review evaluations and revise Student’s IEP as appropriate in violation of the HOD issued on 5/25/2023?

DUE PROCESS HEARING:

The Due Process Hearing was convened on November 21, 2023. The hearing was conducted via video teleconference.

RELEVANT EVIDENCE CONSIDERED:

This IHO considered the testimony of the witnesses and the documents submitted in each party’s disclosures (Petitioner’s Exhibits 1 through 18 and Respondent’s Exhibits 1 through 52) that were admitted into the record and are listed in Appendix 2.³ The witnesses testifying on behalf of each party are listed in Appendix B.⁴

² The Hearing Officer restated the issue at the hearing, and the parties agreed that this was the issue to be adjudicated.

³ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and in Appendix A.

⁴ Petitioner presented two witnesses: (1) Student's parent ("Petitioner") and (2) Petitioner’s Educational Advocate who was designated as expert witnesses. Respondent presented three witnesses designated as expert witnesses: (1) Student’s School A Special Education Teacher, (2) School A Social Worker, and (3) School A Special Education Teacher/LEA Representative. The Hearing Officer found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the conclusions of law.

SUMMARY OF DECISION:

Respondent held the burden of persuasion on the issue adjudicated after Petitioner established a prima facie case. Based on the evidence adduced, the Hearing Officer concluded that Respondent did not sustain the burden of persuasion by a preponderance of the evidence. The IHO directed DCPS to issue Petitioner Student's current IEP consistent with the services and LRE determined to be appropriate at the October 17, 2023, IEP meeting to place Student in a self-contained special education program and awarded Petitioner compensatory education for the time that Student was without an appropriate IEP and placement.

FINDINGS OF FACT:⁵

1. Student resides with Student's parent, Petitioner in the District of Columbia, and DCPS is Student's LEA. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of multiple disabilities ("MD"), including specific learning disability ("SLD") and other health impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD"). (Parent's testimony, Witness 1's testimony, Petitioner's Exhibit 14)
2. Student was first determined eligible for special education on April 8, 2020, with the disability classification of OHI. Student's initial IEP was developed on May 6, 2020, and prescribed 10 hours per week of specialized instruction outside general education to address academic concerns in math, reading, and written expression. Student's reading ability as measured in Student's initial evaluations was below kindergarten level. (Respondent's Exhibit 1-5)
3. Student's IEP was updated on March 30, 2021, and then March 4, 2022. When the March 4, 2022, IEP was developed the IEP team determined that Student's reading fluency was at least three grades below Student's grade at the time, and Student could not read independently. The IEP team continued Student's specialized instruction at 10 hours per week outside general education. (Respondent's Exhibit 1-7)
4. On January 20, 2023, Petitioner filed a DPC against DCPS alleging, inter alia, that DCPS failed to implement Student's IEP and failed to develop an appropriate IEP on March 4, 2022. The hearing on that DPC was conducted on May 9, 2023, with an HOD issued on May 25, 2023. The IHO concluded, inter alia, that DCPS denied Student a FAPE by failing to develop an appropriate IEP because Student's March 4, 2022, IEP prescribed only 10 hours per week of specialized instruction. (Respondent's Exhibit 1)

⁵ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

5. After Petitioner filed the January 20, 2023, DPC, but before the hearing was held and the HOD issued, DCPS convened an annual review of Student's IEP on February 14, 2023. The resulting IEP included goals in math, reading, written expression, emotional, social, and behavioral development, and occupational therapy ("OT"). The IEP prescribed 12.5 hours per week of specialized instruction outside general education, 30 minutes per month of behavioral support services ("BSS"), and 90 minutes per month of OT. (Petitioner's Exhibit 11)
6. Then, on March 9, 2023, DCPS amended Student's IEP to add extended school year ("ESY") services. Otherwise, Student's IEP remained unchanged. (Petitioner's Exhibit 12)
7. DCPS conducted a triennial psychological evaluation in March and April 2023, with an evaluation report dated April 11, 2023. On the Kaufman Test of Educational Achievement, Third Edition (KTEA-3) Student had the following scores:

Subtest	Standard Score	Grade Equivalent	Classification
Letter & Word Recognition	50	K.6	Very Low
Reading Comprehension	58	K.8	Low
Math Concepts & Application	81	2.8	Below Average
Math Computation	78	2.6	Below Average
Written Expression	58	1.0	Low
Spelling	52	K.9	Very Low
Academic Skills Battery	62	00	Low

8. The evaluator noted the following:

"Based on these results, [Student's] strengths are in the areas of Math Concepts & Applications (81) and Math Computation (78) Areas of weakness were Letter-Word Recognition (50), Reading Comprehension (58) Written Expression (58) and Spelling (52). Despite strength or weakness, [Student's] academic functioning equivalent to that of a Kindergarten to 2nd grade student. [Student's] has compromised ability to identify letters and read grade-appropriate words, read symbols, words, sentences, and passages appropriate to [Student] or [Student's] grade level, is in the Low to Very Low range of functioning. Overall, [Student's] scores on this measure indicate Low functioning and will continue to require extensive additional academic supports. Reading & ELA tasks above kindergarten grade will be difficult for [Student's]. [Student's] ability to write single letters and spell words, write words and sentences, and [Student's] ability to solve math problems that relate to real-life situations, use number concepts, arithmetic, time, money, and measurement requires only slightly less support. [Student's] overall academic functioning hovers around the kindergarten level".

(Petitioner's Exhibit 8)

9. On May 2, 2023, again before the hearing was held on the January 20, 2023, DPC and before the HOD on that DPC issued, DCPS convened another annual review of Student's IEP. The team considered the recent triennial evaluation. The resulting IEP included math, reading, written expression, and emotional, social, and behavioral development goals. The IEP prescribed 12.5 hours per week of specialized instruction outside general education and 30 minutes per month of BSS. During each of the three IEP meetings, in January, March, and on May 2, 2023, it was reported that Student's had shown growth in self-esteem. Consequently, there was no increase in Student's BSS services. (Witness 3's testimony, Petitioner's Exhibit 13)
10. The hearing on Petitioner's January 20, 2023, DPC was held on May 9, 2023, and resulted in the May 25, 2023, HOD. In that HOD, the IHO stated the following:

"When the City School IEP team met to review Student's IEP on March 4, 2022, the IEP team reported that Student continued to demonstrate a weakness in Academic Fluency, which was in the Low Range and still ranked at the beginning Kindergarten grade level. Although Student had made minimal academic progress since the initial IEP was developed in May 2020, the March 4, 2022, IEP team decided to continue Student's Specialized Instruction Services unchanged, at 10 hours per week, outside general education."

(Respondent's Exhibit 1-15)

11. The IHO concluded that:

"DCPS has not offered "cogent and responsive explanation" for the decision of the March 4, 2022, IEP team to maintain Student's Specialized Instruction Services at 10 hours per week even though Student had achieved slight academic progress between May 2020 when his/her initial IEP was developed and the March 4, 2022, annual IEP meeting.... I conclude that DCPS has not met its burden of persuasion that the City School IEP team's decision to provide for only 10 hours per week of Specialized Instruction Services in Student's March 4, 2022 IEP was appropriate."

(Respondent's Exhibit 1-16)

12. The IHO went on to state:

"After Petitioner filed his/her request for a due process hearing in December 2022, on February 14, 2023, Student's IEP team increased Student's Specialized Instruction Services from 10 hours to 12.5 hours per week, outside general education. Student's IEP team met again on May 2, 2023, to

review the psychological reevaluation. At the May 2023 meeting, Student's specialized instruction hours were left unchanged at 12.5 hours per week.”

(Respondent's Exhibit 1-20)

13. At the time of the hearing for the January 20, 2023, DPC, the most recent IEP that DCPS had developed for Student was dated May 2, 2023, and the appropriateness of that IEP was not before that IHO. Nonetheless, the IHO stated in a footnote in the HOD the following:

“While the appropriateness of the May 2, 2023, IEP is not before this hearing officer, based on the evidence at the due process hearing, it is not evident that 12.4 hours per week of specialized instruction services will suffice to meet Student's present individualized needs.”

(Respondent's Exhibit 1-20)

14. The IHO went on to state:

“DCPS' recent psychological evaluation shows that after three years of special education services, Student's overall academic functioning still hovered around the Kindergarten level. At this point in time, more data is needed to determine an appropriate educational placement for Student. Pursuant to 33 C.F.R. § 300.502(d), I will order DCPS, to fund an independent psycho-educational reevaluation of Student. The independent evaluator shall be tasked with reevaluating Student with appropriate instruments and making recommendations for Student's programming and educational placement, for consideration by Student's IEP team, for the 2023-2024 school year.”

(Respondent's Exhibit 1-20)

15. The IHO ordered that Student be provided compensatory education of 150 hours of tutoring and ordered that DCPS engage an independent psychologist to conduct psychoeducational reevaluation of Student and that DCPS review the evaluation and revise Student's IEP as appropriate before the start of the next school year: SY 2023-2024.⁶ On June 2, 2023, DCPS issued an authorization letter for Petitioner to obtain

⁶ The HOD ordered the following:

“Subject to the parent's providing written consent, within 20 business days of the date of this decision, DCPS shall engage a qualified independent psychologist to conduct a psychoeducational reevaluation of Student with the charge to make recommendations for Student's ongoing educational programming and placement for consideration by Student's IEP team. At the discretion of the independent evaluator, the evaluator may rely upon previously conducted tests to assess Student's intellectual, educational, and emotional functioning or may administer new assessments. DCPS shall ensure that the evaluation is timely completed to allow Student's IEP team to review the evaluation and revise Student's IEP as appropriate in

150 hours of independent tutoring in compliance with the HOD. (Respondent's Exhibits 1-21, 51)

16. Pursuant to the May 25, 2023, HOD, an independent comprehensive psychological reevaluation ("IEE") was conducted on July 25, 2023, with an evaluation report dated August 9, 2023. The following results were included in the report:

- As measured by the WISC-V, Student's overall FSIQ score fell in the Very Low Range when compared to other children his/her age (FSIQ = 76). As measured by the WIAT-IV, Student's Total Achievement Composite Score (61) was measured in the Extremely Low range of functioning with a Reading SS Of 63, Written Expression SS of 54, and Mathematics SS of 77.
- As measured by the BASC-3, Student demonstrated clinically significant challenges with Internalizing Problems (72, 96th percentile) particularly in the area of Depression (78, 98th percentile).
- As measured through 2 Projective tests, Student appears to struggle with healthy interpersonal relationships, which may contribute to ineffective adjustment and poor judgment.

(Petitioner's Exhibit 9)

17. The evaluator concluded the following:

"Based on the results of this current evaluation, to include observational data and parent report, [Student's] profile appears to be consistent with a learning disability (based upon the discrepancy model) as there **is** a discrepancy between achievement and measured ability of two years below his/her chronological age and/or at least 1.5 standard deviations below his/her cognitive ability."

"Based on parent feedback, via the BASC - 3 and Conners - 4, [Student's] profile continues to be consistent with symptoms associated with a diagnosis of ADHD, predominantly Inattentive Presentation. It is important to note that ADHD is commonly associated with reduced behavioral inhibition, effortful control, or constraint; negative emotionality; and/or elevated novelty seeking, which might explain [Student's] current behavioral, social, and emotional presentation."

(Petitioner's Exhibit 9)

time for the start of the 2023-2024 school year. DCPS shall consult with the parent and her representatives on the selection of an appropriate evaluator..."

18. DCPS received the IEE on August 15, 2023. On August 25, 2023, three days before the first day of the start of SY 2023-2024, DCPS convened a meeting to review the independent evaluation. At the meeting, Petitioner reiterated his/her request for a full-time placement in an SLS classroom and noted that the independent evaluation supported an SLD classification. The DCPS psychologist, however, acknowledged that she had yet to review the independent evaluation and was, therefore, unprepared to discuss its substance or respond to Petitioner's requests. DCPS proposed that the meeting be reconvened to give DCPS a chance to prepare properly. (Mother's testimony, Witness 4's testimony, Petitioner's Exhibit 15, Respondent's Exhibit 44)

19. On August 29, 2023, DCPS sent a meeting invitation for October 17, 2023. On August 30, 2023, Petitioner's counsel sent DCPS a dissent letter prepared by Petitioner's educational advocate, which memorialized Petitioner's concerns with the process. The dissent letter stated the following:

"[...the DCPS School Psychologist in charge of evaluations, confirmed receipt of the evaluation but expressed that she had not yet examined its contents...Regarding the HOD Case #2023-0007, the stipulated requirement was to hold the meeting before the commencement of the 2023-2024 School Year. However, DCPS was not ready to partake in the meeting and has proposed October 17, 2023, as an alternative date. The first day of school for the 2023-2024 School Year was August 28, 2023. Petitioner is requesting a meeting to be scheduled within 10 school days... The evaluation substantiates classifications for Specific Learning Disability and Other Health Impairment (ADHD)...."

(Petitioner's Exhibit 15)

20. On September 26, 2023, a DCPS psychologist reviewed the IEE. DCPS provided the IEE review to Petitioner on October 12, 2023. (Witness 4's testimony, Petitioner's Exhibit 10, Respondent's Exhibit 37)

21. On October 17, 2023, DCPS convened an eligibility/IEP team meeting to review the IEE. The meeting notes have the following title "HOD required Meeting." Based upon the evaluation results the team changed Student's disability classification to MD, including SLD and OHI. The meeting notes state the following:

"LRE:

- Team agreed that student's specialized instruction hours should be increased to 20 hours/week
- Student should be in a self-contained classroom – recommend SLS for student
- [Name] asks if [School A] has an SLS program and if that is the classroom that student will be in
- [Name] says she's not sure cannot guarantee LOS.

- [Name] explains that team is proposing SLS placement, but location will be determined by a couple of factors: program, proximity to student's home, and capacity (seat availability); DCPS will issue an LOS once that is identified for student.
- Team agreed to reconvene for the IEP with updated data, PLOPS, goals, baselines.
- [Name] offered to send updated draft to parent/counsel and if they determine they would like to reconvene, they can meet again. If they do not want to meet again, the team can finalize that updated draft and send that out without a meeting."

(Witness 4's testimony, Respondent's Exhibit 50)

22. On Tuesday, November 14, 2023, DCPS sent Petitioner and her counsel the IEP developed at the October 17, 2023 meeting and a prior written notice that the IEP would be implemented from October 17, 2023. There was a delay in providing a finalized IEP and the location of service for Student's location of service because of glitches in the new OSSE special education database system. (Witness 4's testimony, Petitioner's Exhibit 52)
23. As of the date of the due process hearing, the Student had not yet been provided a location of services in an SLS program in DCPS. (Mother's testimony, Witness 1's testimony)
24. Student's special education teacher participated in the October 17, 2023, IEP meeting and the previous three IEP meetings. He candidly noted that academically, Student has grown frustrated from years of not being able to read. Student can decode, but Student missed basic skills progressing through the lower elementary grades, which has snowballed. In a word, "Student is literate." Student made progress with the reading programs and assessments available at School A. However, School A does not have the interventions that Student needs to make the necessary progress in reading: a reading specialist or reading program. Student has developed a pattern of not putting forth effort regardless of the educational setting, whether whole class or small group instruction. Without the necessary reading interventions, even a self-contained program may not meet Student's needs. (Witness 2's testimony)
25. Year after year, despite Student having an IEP, Student has remained reading on a kindergarten level. Student has recently been working with an independent tutor. The tutor works with Student at Student's functional reading and math levels for approximately 9 hours per week. Student is making progress academically and has begun to take responsibility and accountability for Student's academic progress. Students would benefit from additional tutoring services to be closer to, if not on, grade level. (Mother's testimony)
26. Petitioner's educational advocate prepared a compensatory education proposal based upon the alleged failure by DCPS to provide Student and appropriate IEP since the February 14, 2023, IEP. The advocate calculated that Student should have received approximately 90 hours per month of specialized instruction rather than the

approximately 50 hours Student did receive, for a total of 360 hours of missed specialized instruction over 9 months. The advocate proposed the following services as compensatory education: 270 hours of academic tutoring, transportation services for the tutoring, and 10 hours of BSS. She did not consider the prior compensatory education that Student received and has not yet used. She did not observe Student, nor speak to Student's teachers or tutor before developing this plan. (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").

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 the 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. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, Petitioner will proceed on the first on the day of the hearing and has the burden of production. Once Petitioner presents a prima facie case, Respondent has the burden of persuasion on the issue to be adjudicated. The burden of persuasion shall be met by a preponderance of the evidence. ⁷ The burden of persuasion shall be

⁷ 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

met by a preponderance of the evidence. The normal standard is a 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).

ISSUE: Did DCPS deny Student a FAPE by failing to provide Student an appropriate IEP, placement, and/or location of services pursuant to Student's 2/14/2023, 3/9/2023, and 5/2/2023, IEPs and/or did DCPS deny Student a FAPE by failing to timely review evaluations and revise Student's IEP as appropriate in violation of the HOD issued on 5/25/2023?

Conclusion: Respondent did not sustain the burden of persuasion by a preponderance of the evidence of a denial of a FAPE by DCPS failing to provide Student an appropriate IEP, placement, and/or location of services pursuant to Student's 2/14/2023, 3/9/2023, and 5/2/2023, IEPs. The IHO did not conclude that DCPS denied Student a FAPE by violating the 5/25/2023, HOD.

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

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.

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. *Endrew 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 *Endrew 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 *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

In developing an IEP, the Supreme Court has explained that IDEA’s mandate to place a disabled student in their least restrictive environment must be balanced with the requirement that an IEP be “reasonably calculated to enable a child to make progress appropriate in light of [their] circumstances.” *Endrew F.*, 137 S. Ct. at 999, 1101.

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.

The legal standard under the IDEA is that DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). See also *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

In her DPC, Petitioner alleged: (a) Student's February 14, 2023, March 9, 2023, and May 2,

2023 IEPs were not appropriate because they did not: (1) provide for sufficient specialized instruction and behavioral interventions; (2) place the Student in an SLS classroom; and/or (3) include specific goals and accommodations to address the Student's deficits.

In addition to Petitioner's testimony about Student's long-standing academic deficits, Petitioner's educational advocate testified about the recent evaluation results and offered her expert opinion that the IEPs that DCPS developed in February, March, and May of 2023, were deficient.

There was insufficient evidence presented, however, about the IEPs goals and accommodations for the IHO to conclude that even a prima facie case was met regarding goals and accommodations, much less to conclude that the IEPs at issue were deficient in this regard.

Petitioner's advocate also testified that the IEPs did not adequately address Student's academic needs with sufficient specialized instruction, and they lacked sufficient BSS. Regarding BSS services, DCPS's witnesses, including Student's special education teacher and the School B social worker credibly testified that Student's self-esteem had risen significantly, and Student displayed no significant emotional or behavioral concerns when the February, March and May IEPs were developed. Their direct observation and interaction with the Student were far more credible in this regard than that of Petitioner's educational advocate. Consequently, the IHO concludes that these IEPs were not deficient because they did not provide for any increase in BSS services beyond 30 minutes per month.

The evidence adduced was quite different regarding sufficient specialized instruction and the lack of an appropriate LRE or placement. The evidence demonstrates that when the February 2023 IEP was developed and at every IEP juncture after that, Student continued to function three or more grade levels below Student's current grade. Yet Student remained in a general education setting with 10 hours and then 12.5 of specialized instruction per week. Although at the time Student's disability classification remained OHI for ADHD, until the recent psychological evaluation and IEP/eligibility meeting, even absent updated evaluations, it was patently clear that the instruction and academic interventions that Student was being provided were insufficient to address Student's needs.

With the recent evaluation results and diagnosis that has led to the additional disability of SLD, DCPS has determined that the appropriate program for Student is an SLS self-contained program. Before that evaluation, there was insufficient data perhaps for a team to conclude that an SLS classroom was appropriate; however, it should have been clear, even at the February 2023, IEP meeting, that Student needed increased specialized instruction and specific reading interventions that were not provided, and based on DCPS' witness's testimony, were not available at School A.

That witness noted the duration and level of deficiency of the Student's educational program and candidly testified that Student missed basic skills progressing through the lower elementary

grades, which has snowballed. In a word, "Student is literate." As that witness also noted, although Student has made progress with the reading programs and assessments available at School A, School A does not have the interventions that Student needs to make the necessary progress in reading: a reading specialist or reading program.

Consequently, the IHO concludes that Student's February 2023, and each IEP after that, up until Student's most recent IEP developed on October 17, 2023, Student was in an inappropriate educational placement with an insufficient level of specialized instruction. Given Student's level of academic deficits, particularly in reading, DCPS should have significantly increased Student's specialized instruction beyond 10 hours per week and beyond the 12.5 hours per week provided in the May 2, 2023, IEP. The IHO concludes that all three IEPs at issue were not reasonably calculated to enable a Student to make progress appropriate in light of Student's circumstances, and denied Student a FAPE.

Alternatively, Petitioner asserted that DCPS denied Student a FAPE by not complying with the May 25, 2023, HOD to review the IEE and update Student's IEP before the start of SY 2023-2024. DCPS asserted that the IHO lacked jurisdiction to consider an alleged violation of and an attempt to enforce an HOD. Based on the IHO research, that question remains unsettled.⁸

Despite the dispute in authority as to whether the filing of another DPC can enforce an HOD, the IHO would not have found in favor of Petitioner regarding this claim. The evidence demonstrates that the IEE was not completed and provided to DCPS until August 15, 2023. Although DCPS convened a meeting with Petitioner on August 25, 2023, before the start of the school year to comply with the HOD, the short window in which the IEE was completed and provided to DCPS did not reasonably allow for compliance with the timeframe that the IHO mandated.

At the August 25, 2023, meeting, or shortly after that, DCPS set a new date for the IEE review and the resulting eligibility meeting and updated of Student's disability classification, IEP and LRE. DCPS complied with the alternative date provided and convened the meeting on October 17, 2023. The IHO does not consider, based on these facts, that the delay in DCPS' compliance with the HOD reflected bad faith or disregard for the directives of the HOD.

Remedy:

⁸ The United States Department of Education, which has responsibility for the federal administration and enforcement of the IDEA, has identified another avenue for enforcing a Hearing Officer's decision. Since, under the IDEA, any "matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" can be the basis of a Due Process Complaint, parties facing a lack of compliance "might be able to" bring another due process complaint to enforce the prior decision and, if necessary, seek judicial review of any denial of needed relief in that proceeding. *Id.*, *Concurring Opinion: B.D. v. District of Columbia*, 813 F.3d 792. (D.C. Cir. 2016) at. 803-804.

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.

When a hearing officer finds denial of FAPE, he has "broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education.... [A]n award of compensatory education 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." *B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

Petitioner's advocate proposed as compensatory education 270 hours of academic tutoring and transportation services for the tutoring. However, the advocate had not observed Student, nor spoken to Student's teachers or tutor regarding what services would have put Student in the stead Student might have been had Student had an appropriate placement with the appropriate level of specialized instruction since January 2023. Petitioner's testimony helped identify that the tutoring services that were previously awarded are being used and that Student is making academic progress as a result. Petitioner also noted that at Student's current rate of use, perhaps as much as half the awarded services have been used.

Consequently, the IHO will use the level of specialized instruction previously awarded by the IHO as a basis for the compensatory award. In the alternative, if Petitioner chooses to forego that award, the IHO directs DCPS to provide Petitioner, in lieu of that award, authorization to obtain an independent educational evaluation to determine compensatory education for the denial of FAPE determined herein and seek the resulting compensatory education award from DCPS directly and through due process if necessary.

Petitioner's advocate requested 10 hours of BSS services. However, the IHO did not find that Student's BSS services were lacking. Accordingly, the IHO does not award the requested BSS services as compensatory education.

ORDER:

1. DCPS shall, within ten (10) business days of the issuance of this order, if it has not already done so, issue Petitioner a finalized IEP that denotes the services that the October 17, 2023, IEP team determined that Student would be provided of a least 20 hour of specialized

instruction outside general education, along with the agreed upon increase in BSS services, and provide and place Student in an appropriate self-contained special education program that can implement Student's October 17, 2023, IEP.

2. DCPS shall, within ten (10) business days of issuance of this order, grant Petitioner authorization to obtain 150 hours of independent tutoring at the OSSE approved rate. In the alternative, if Petitioner chooses to forego that award, DCPS shall provide Petitioner in lieu of that award, authorization to obtain an independent educational evaluation at the OSSE approved rate to determine compensatory education for the denial of FAPE determined herein and to seek the resulting compensatory education award from DCPS directly and through due process if necessary.
3. 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 11, 2023

Copies to: Counsel for Petitioner
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