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**Confidential**

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| <p>Parent on Behalf of Student<sup>1</sup>,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools<br/>("DCPS") ["LEA"]</p> <p>Respondent.</p> <p>Case # 2015-0395</p> <p>Date Issued: February 29, 2016</p> | <p>HEARING OFFICER'S<br/>DETERMINATION</p> <p>Hearing Date:<br/>February 5, 2016</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner:<br/>Roberta Gambale, Esq.<br/>James E. Brown &amp; Associates<br/>1220 L Street, N.W. Suite 700<br/>Washington, D.C. 20005</p> <p>Counsel for Respondent:<br/>Steven Rubenstein, Esq.<br/>District of Columbia<br/>Office of the General Counsel<br/>1200 First Street, NE<br/>Washington, DC 20002</p> <p><u>Hearing Officer:</u><br/><u>Coles B. Ruff, Esq.</u></p> |
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<sup>1</sup> Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to

## **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 February 5, 2016, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

## **BACKGROUND AND PROCEDURAL HISTORY:**

Petitioner alleges the District of Columbia Public Schools (“DCPS”) failed to provide the student a free appropriate public education (“FAPE”) because the student’s individualized educational programs over the past two calendar years prescribed too few hours of specialized instruction. Specifically, Petitioner alleges the student’s May 23, 2014, individualized educational program (“IEP”) was inappropriate in light of the student’s low reading level and spelling deficiencies; his November 6, 2014, IEP was inappropriate in light of the student’s deficits in reading, writing and mathematics; his September 16, 2015, IEP was inappropriate in light of the student’s deficits in reading, writing and mathematics, and finally, his November 12, 2015, IEP was inappropriate in light of the student’s math and reading deficits.<sup>2</sup>

Petitioner seeks as relief that the Hearing Officer find DCPS denied the student a FAPE and order DCPS to immediately revise the student’s IEP to provide specialized instruction for all academic subjects and with the instruction in English and Language Arts (“ELA”) and math outside general education.<sup>3</sup> Petitioner also requests that the Hearing Officer award the student compensatory education.

On December 21, 2015, DCPS filed a timely response to Petitioner’s complaint in which it denied that it failed to provide the student a FAPE. DCPS contended that all the student’s IEPs that are identified in the due process complaint were reasonably calculated to provide the student with educational benefit at the time they were developed. DCPS contended that on December 11, 2015, it issued an authorization for the independent speech and language evaluation.

The parties participated in a resolution meeting that occurred on January 7, 2016. The parties did not resolve the issues and did not mutually agree to proceed immediately to a hearing. The 45-day period began on January 16, 2016, and ends [and the Hearing Officer’s Determination (“HOD”) is due] on February 29, 2016.

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<sup>2</sup> Petitioner’s counsel clarified at the outset of the hearing that Petitioner was not longer asserting this IEP was also inappropriate due to the lack of speech language services.

<sup>3</sup> At the outset of the hearing Petitioner’s counsel clarified that Petitioner is no seeking a full time out of general education IEP. In the complaint Petitioner also requested that once the student’s IEP is amended to prescribe the requested services, if the student’s current educational setting is unable to implement the revised IEP, that DCPS identify a suitable location for the implementation of the student’s IEP within five calendar days or fund a private placement identified Petitioner.

The Hearing Officer convened a pre-hearing conference (“PHC”) on December 12, 2015, and issued a pre-hearing order (“PHO”) on December 15, 2015, outlining, inter alia, the issues to be adjudicated.

**ISSUES:** <sup>4</sup>

**The issue(s) to be adjudicated are:**

1. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP on May 23, 2014, because the IEP did not prescribe specialized instruction in all academic areas, particularly in light of the student’s low reading level and spelling deficiencies.
2. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP on November 6, 2014, because the IEP did not prescribe specialized instruction in all academic areas, particularly in light of the student’s deficits in reading, writing and mathematics.
3. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP on September 16, 2015, because the IEP did not prescribe specialized instruction in all academic areas, particularly in light of the student’s deficits in reading, writing and mathematics.
4. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP on November 12, 2015, because the IEP did not prescribe specialized instruction in all academic areas, particularly in light of the student’s math and reading deficits.

**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 42 and Respondent’s Exhibits 1 through 24) that were admitted into the record and are listed in Appendix A). <sup>5</sup> Witnesses are listed in Appendix B.

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<sup>4</sup> The alleged violation(s) and/or issue(s) listed in the complaint or in the PHO do not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that the issues as listed in this HOD are the issue(s) to be adjudicated. At Hearing the parties clarified and agreed that the speech language services portion of issue # 4 as stated in the PHO should be and was removed based on DCPS granting Petitioner an independent evaluation authorization. (Petitioner’s Exhibit 35-3)

<sup>5</sup> Any documents that were objected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

## FINDINGS OF FACT:

1. The student is age \_\_\_\_ and in grade \_\_\_\_\_<sup>6</sup> and currently attends a DCPS [REDACTED] school (“School A”) where he has attended since the start of school year (“SY”) 2014-2015. (Parent’s testimony, Petitioner’s Exhibit 1-1)
2. The student is currently eligible to receive special education and has been receiving services with a disability classification of specific learning disability (“SLD”) (Petitioner’s Exhibit 1-1)
3. Prior to attending School A the student attended a DCPS [REDACTED] school (“School B”). While the student was attending School B DCPS conducted a psychological evaluation of the student in the fall of 2011 when the student was in [REDACTED] grade. The evaluator determined the student’s cognitive functioning was in the low-average range. The student’s academic achievement was below grade level. His broad reading standard score on the Woodcock Johnson-III Tests of Achievement (“WJ-III”) was 81 within the low-average range with a grade equivalency of 1.8. The student’s broad math standard score was 91, within the average range with a grade equivalency of 2.3 and his written expression standard score was 73 in the borderline range with a grade equivalency of 1.4. (Petitioner’s Exhibit 7-1, 7-7, 7-10, 7-11, 7-20)
4. During [REDACTED] grade the student’s IEP prescribed 5 hours per week of specialized instruction inside general education and included academic goals in reading and written expression. The student received reading, reading comprehension and writing interventions using the Wilson Reads program, a highly structured reading and writing program that focuses the intervention on decoding and encoding words to build sight word vocabulary and reading fluency. (Petitioner’s Exhibits 6-2, 6-3 6-7, 7-4)
5. On May 23, 2014, School B developed an IEP for the student while he was in [REDACTED] grade that required he receive 8 hours per week of specialized instruction in general education and 1 hour per month of speech and language therapy outside general education. The IEP had goals in math, reading, written expression and communication/speech language. (Petitioner’s Exhibit 5-1, 5-6 through 5-12, 5-14)
6. The student’s May 23, 2014, IEP present levels of performance for reading indicated that on an oral reading fluency assessment the student’s score was one third of what is expected for a student in [REDACTED] grade and his reading comprehension was on a 2<sup>nd</sup> grade level.<sup>7</sup> (Petitioner’s Exhibit 5-1, 5-6)

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<sup>6</sup> See Appendix B for student’s age and current grade.

<sup>7</sup> The present levels section included the following: “The student’s reading comprehension was at a Level K at the beginning of the year and the goal for [REDACTED] grade [sic] at the end of the year is to be at least at a letter W.” “...[the student] was able to read 53 words per minute with 90% accuracy. A [REDACTED] grade student at the end of the year should be reading at least 130 minute [sic] with at least 99% accuracy. (Petitioner’s Exhibit 5-6)

7. In April 2014 the student took the DC CAS assessment and scored “Basic” in math and science proficiency and “Below Basic” in reading. The student’s IEP progress report for SY 2013-2014, dated April 10, 2014, indicated the student mastered three of his four math goals in the third reporting period and he was progressing on the fourth math goal. The student did not master, but was progressing on, all of his reading and written expression goals. The student’s IEP progress report dated June 18, 2014, indicated that a new math goal was introduced and the student continued to progress on the math, reading and written expression goals that had not yet been mastered.<sup>8</sup> (Respondent’s Exhibits 3, 5, 22-1)
8. The student moved onto School A at for SY 2014-2015 and on November 6, 2014, School A updated the student’s IEP. The student’s speech and language therapy services were reduced from 1 hour per week to 15 minutes of consultation services per month. The November 6, 2014, IEP contained one new communication goal.<sup>9</sup> (Petitioner’s Exhibit 4-12, 4-13)
9. At the November 6, 2014, IEP meeting the team discussed the student’s academic deficits and acknowledged the student was reading at a second grade level, that his math skills ranged from fourth to seventh grade, and that on a writing assessment he wrote only three sentences in 60 minutes with little detail. The team agreed the student needed more instruction in reading than in math or written expression and designated specific instructional areas for specialized instruction hours to better focus on the student’s needs and to help ensure he could access the curriculum. (Witness 2’s testimony Respondent’s Exhibit 8-1, 8-2)
10. In November 6, 2014, IEP the student’s total hours of specialized instruction remained the same but specific hours for specific subject areas were delineated as follows: 4.5 hours per week in reading, 2 hours per week in math, and 1.5 hours per week in written expression. All the specialized instruction continued to be provided in the general education setting. The student’s IEP academic goals remained the same as in his previous IEP. (Petitioner’s Exhibit 4-1, 4-3 through 4-12, 4-13, Respondent’s Exhibit 8-2)
11. At the November 6, 2014, meeting the School A members of the team believed the level of instruction prescribed allowed the student to be in his least restrictive environment (“LRE”) as he had been demonstrating he could do the classroom work with support. No team members, including the student’s parent, raised issues about the student’s LRE or

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<sup>8</sup> The student’s June 19, 2014, progress report noted had progressed in his reading from a level “K” at the beginning of █ grade to a level “S” at the end of the year. (Respondent’s Exhibit 5-5)

<sup>9</sup> The present level of performance for communication/speech language stated: [The student]...had made good progress towards his language goal. After listening to a grade level book he is able to provide the main idea and details of a given chapter when given visual cues and occasional verbal prompts with 100% accuracy. The student’s new goal was the following: [The student] will maintain his language skills by being able to summarize a grade level text that was read to him by providing the main idea and details of the passage with 80% accuracy in the general education setting when [sic] visual cues over three consecutive data collections days.

that the LRE needed to be changed to provide for instruction outside general education. (Witness 2's testimony Respondent's Exhibits 8-1, 8-2,)

12. The student's IEP progress reports for June 2015 indicated that in every advisory the student was progressing in his math goals and by the fourth advisory reporting period the student mastered his math goals and had mastered one of his two written expression goals. The June 2015 progress report also indicated that the student mastered two of his five reading goals<sup>10</sup> by the fourth advisory reporting period but was still progressing on the other three goals. (Respondent's Exhibit 11-1, 11-2, 11-3, 11-9)
13. The student's June 2015 report card has a note that indicates that on September 24, 2013, the student scored at the first grade reading level on a SRI reading assessment. However, the student's SRI reading scores improved over time; 316 (second grade) in September 2015 and 443 in January 2016. However, each of the three scores placed the student at the first percentile. A sixth grade reading level is a score of 800 or above and a seventh grade reading level is a score of 850 or above. (Petitioner's Exhibit 12-3, Respondent's Exhibits 19-4, 20-1)
14. During SY 2014-2015 the student passed all his classes except his computer class that he failed in the last advisory as a result of not completing homework. (Witness 2's testimony, Respondent's Exhibit 12)
15. The student earned the following grades for each quarter in the following subjects during SY 2014-2015:

| <u>Subjects</u> | <u>Adv. 1</u> | <u>Adv. 2</u> | <u>Adv. 3</u> | <u>Adv. 4</u> | <u>Final Grade</u> |
|-----------------|---------------|---------------|---------------|---------------|--------------------|
| Language Arts   | B+            | B +           | C             | B             | B                  |
| Humanities      | B -           | B -           | B -           | B -           | B -                |
| Mathematics     | C             | C -           | C +           | C -           | C -                |
| World Geography | D             | B             | A             | D             | D                  |
| Elective        | B +           | D +           | B -           | D             | D                  |
| Science         | C             | B -           | C -           | C -           | C -                |
| Music           | B             | B             |               |               | B                  |
| Computer Skills | P             | F             |               |               | F                  |

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<sup>10</sup> The student mastered the following reading goals: (1) [The student] will be able to ask and answer questions to demonstrate understanding of a leveled text, referring explicitly to the text as the basis for the answers with at least 80% accuracy and (2) [The student] will be able to engage effectively in a range of collaborative discussion up to grade level topics, building on other's ideas and expressing his own clearly with 70 % accuracy.

(Petitioner's Exhibits 12-1, 12-2)

16. On September 17, 2015, School A convened an annual review meeting for the student's IEP. The student's parent participated in the meeting. The student's IEP academic goals<sup>11</sup> were updated and his hours of specialized instruction remained the same with the same distribution of subject areas as the student's previous IEP with all hours inside general education. (Petitioner's Exhibit 3-1, 3-9)
17. On November 12, 2015, DCPS convened an IEP meeting to review the student's speech and language evaluation and review the student's draft IEP. The student's parent and her educational advocate ("the advocate") participated in the meeting. The advocate participated by telephone. Prior to the meeting the advocate had never spoken with or met the student, did not speak to the student's teachers outside the IEP meeting and had never seen the student in any educational setting. (Witness 1's testimony)
18. During the November 12, 2015, meeting after reviewing the speech and language evaluation the team discontinued the student's speech and language services over the parent's objections. (Witness 1's testimony)
19. The present levels of performance in the November 12, 2015, IEP for math note that a September 2, 2015 i-Ready Diagnostic and Instruction Assessment indicated the student was performing more than one grade level below his current grade in mathematics. The present levels of performance for reading noted the student's September 16, 2015, Scholastic Reading Inventory assessment resulted in a score significantly below his grade level. (Petitioner's Exhibit 1-3, 1-4)
20. During the November 12, 2015, meeting the student's parent acknowledged to the School A staff that she was more pleased with the student's performance during SY 2014-2015 than he has been during the current school year. The School A staff discussed obtaining a specialized reading program that could be used with the student but the school did not yet have the program. The student's parent and her educational advocate requested that the student receive "pullout" specialized instruction out of general education. However, they did not ask that any specific number of hours of instruction be provided outside general education. (Witness 1's testimony, Parent's testimony, Petitioner's Exhibit 1-17)
21. The November 12, 2015, IEP team had a conversation about the student's ability to do the work in the classroom with supports. Because the student was having trouble completing assignments and keeping up with homework and because of the advocate's

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<sup>11</sup> The student's two new reading goals are as follows: (1) By 9/16/2016, after independently reading a grade level informational text, [the student] will construct a concept map that identifies the type of text structure represented and describes [sic] how at least 3 text features (e.g., graphics, headers, captions) relate to the text's main ideas in 4 out of 5 passages." And (2) By 9/16/2015 when given grade-level text, [the student] will write a summary of 2 of the ext's central ideas with 3 supporting details for each that explain how the central ideas develop over the course of the text as measured by a (teacher-created rubric)." It is not clear from the record whether the student ever mastered the other two reading goals from his previous IEP that were also removed from his most recent IEP: (1) "[...decode words up to 4 -6 sounds with short vowel sounds with at least 90% accuracy." and (2) "...decode words up to 4 -6 sounds with long vowel sounds with at least 80% accuracy (vowel consonant e pattern)."

concern that the student have pullout specialized instruction, the School A team members concluded that it made sense for the student to be pulled out of the general education classroom to work on organization. Thus, the team prescribed one of hour of specialized instruction outside general education in the student's November 12, 2015, IEP. (Witness 2's testimony)

22. The student's November 12, 2015, requires he receive 7 hours per week of specialized instruction within general education and 1 hour of specialized instruction in reading outside of the general education setting. The specialized instruction in general education had the following distribution per subject area: 3 hours per week in reading, 2 hours per week in math, 2 hours per week in written expression. (Witness 1's testimony, Petitioner's Exhibit 1-1, 1-8)
23. The student participated in the November 12, 2015 meeting and was asked by his special education teacher about things he had learned. The student needed to be guided by the teacher when he answered questions and was not focused during the meeting. (Parent's testimony, Witness 1's testimony)
24. At the conclusion of the November 12, 2015, meeting the advocate believed that the team had agreed that the student would to receive 1 hour per day of specialized instruction outside general education, and that the team could reconvene after an advisory to see if that level of specialized instruction was sufficient and readjust the instruction if necessary. However, the advocate later realized when she received the final IEP that team determined the student's level of services would be: 7 hours per week of specialized instruction within general education and 1 hour of specialized instruction in reading outside of the general education setting. (Witness 1's testimony, Petitioner's Exhibit 1-1, 1-8)
25. On December 2, 2015, the advocate sent a letter of dissent to School A objecting to the IEP and the level of pull out services and her justification for the amount of services she believed the student should receive. The advocate based her request on her analysis of a DCPS matrix used to assist in determining the level of specialized instruction.<sup>12</sup> (Witness 1's testimony, Respondent's Exhibit 17-2)
26. After receiving the advocate's letter the School A special education coordinator ("SEC") offered to reconvene the student's IEP meeting to address concerns that the parent had and the concerns expressed in the advocate's letter. (Witness 1's testimony, Respondent's Exhibit 17-2)

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<sup>12</sup> The advocate testified that this matrix was not used by the team during the student's November 12, 2015, meeting in arriving at the level of specialized instruction for the student and the student's records were not available to the advocate prior to the November 12, 2015, IEP meeting or before she prepared the matrix she attached to her letter of dissent. The advocate testified that she was not aware whether the matrix has been updated but testified that it was the matrix form DCPS used in meetings the advocate had for other students. (Witness 1's testimony)

27. School A is open to having a conversation about more hours of specialized instruction and willing to add a few more hours outside general education in reading to identify the gaps that are making the student test on such a low reading level. (Witness 2's testimony, Respondent's Exhibit 17-2)
28. The student's special education teacher has worked with the student for the past 14 months in the student's general education classes. The special education teacher "pushes into" the student's ELA, writing and math general education classes. He is in the student's math class twice per week for 90 minutes and in his ELA class twice per week for 90 minutes and with the student in his writing block once per week. The special education teacher does not "push into" the student's other classes but has provided every teacher a copy of the accommodations and any specific needs the student has and he meets with them weekly. The special education teacher pulls the student out 1 hour per week to work on organizational skills first thing in morning Monday through Thursday for 15 minutes for a total of one hour per week. (Witness 3's testimony)
29. The student has not mastered [REDACTED] grade math objectives but has demonstrated the ability to perform the computations, ratios, multiplying and dividing. He has performed the task of identifying and solving for single variable independently on occasion but still at times requires a verbal prompt. The student has excellent written expression skills at times but it is not consistent and has problems getting started but when prompted can respond appropriately. Generally the student has been able to access the material and provide responses that are appropriate for his grade level. In the special education teacher's opinion the student's greatest challenge that impacts his grades is turning in assignments. (Witness 3's testimony)
30. The student has not met all his reading goals. The student is still not able to read 60 words per minute with 90% accuracy but is improving on that skill. The special education teacher uses differentiated reading material with student. The student has the ability to ask questions when he sees words he is not familiar with and use context clues to identify words he does not recognize. The student still has difficulties in comprehending all the material that is presented and the special education teacher helps assist him with the material in the classroom. The student has become more adept at deciphering for himself the context of the material. (Witness 3's testimony)
31. The School A SEC has observed the student in his classroom during SY 2015-2016. She also observed him in English class and Latin last school year and she speaks with the student's special education teachers daily and his general education teachers each week. The SEC is of the opinion that the student does not need more instruction outside general education and the student's teachers have not expressed that the student needs more hours of instruction outside general education. The School A staff is concerned that if the student is pulled outside general education he will do less quality work. (Witness 2's testimony)
32. The student earned the following grades for first advisory in the following subjects during SY 2015-2016:

| <u>Subjects</u>         | <u>Adv.1</u> |
|-------------------------|--------------|
| █ Grade Math            | D            |
| English █               | C            |
| Humanities █            | B -          |
| Latin 1                 | P            |
| Science █               | C -          |
| World Hist. & Geography | D            |
| Academic Enrichment     | S            |
| Art █                   | B            |

(Respondent's Exhibit 19-1, 19-2)

33. The student's parent receives weekly reports from School A that indicate the student is not doing well in the majority of his classes mainly because of incomplete work. The parent believes the student is given extra credit assignments before the final reporting to help boost his grades. The student has confided in his parent the reason he is failing most of his classes is because he doesn't understand the work. (Parent's testimony)
34. The student's interim report indicated that as of January 7, 2016, the student was on track to fail most of his classes and earn the following grades in the following subjects:

| <u>Subjects</u>         | <u>Adv. 2</u> |
|-------------------------|---------------|
| █ Grade Math            | F             |
| English █               | C -           |
| Latin 1                 | F             |
| Science █               | F             |
| World Hist. & Geography | F             |
| Art █                   | A             |

(Petitioner's Exhibit 17-1)

35. The student demonstrates significant deficits in reading at home and has difficulty reading simple directions on food packages. Based on the information School A has shared with the parent the student's reading level has not improved changed since he had

been attending School A and is virtually the same as it was when he attended School B. (Parent's testimony)

36. The advocate, who was qualified as an expert witness, believes the student should have been provided some hours in a resource classroom outside general education on every IEP from May 2014 to address his academic deficits and the most recent IEP should have provided the student at least 15 hours per week outside general education. The advocate had not talked with the student's teachers, had not worked with the student and solely based her opinion on the data that was in the student's IEP and educational records. (Witness 1's testimony, Petitioner's Exhibit 2-6, 2-7)
37. The advocate recommended 43 hours of specialized tutoring at 1 hour per week for 43 weeks (one school year) as compensatory education services for all the denials of FAPE alleged. The advocate reviewed the student's prior achievement history report that indicates he is capable of making progress if given proper support. The advocate believes that with this level of compensatory services the student should be able to gain least one year progress academically if not more. (Witness's 1's testimony, Petitioner's Exhibits 19, 40-4)

#### **CONCLUSIONS OF LAW:**

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

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

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE 1:** Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP on May 23, 2014, because the IEP did not prescribe specialized instruction in all academic areas, particularly in light of the student’s low reading level and spelling deficiencies.

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

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.

To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child. “The IEP is the “centerpiece” of the IDEA’s system for delivering education to disabled children,” *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

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

Requirements of the IDEA are satisfied when a school district provides individualized education and services sufficient to provide disabled children with some educational benefit. *Blackmon v. Springfield R-XII Sch. Dist.* 198 F.3d 648, at 653 (8<sup>th</sup> Cir. 1999)

34 C.F.R. § 300.324 requires that “each agency must ensure that... the IEP team... revises the IEP, as appropriate, to address...the results of any reevaluation conducted under § 300.303.” The IEP must also be revised to address any lack of expected progress toward annual goals and in the general education curriculum, information about the child provided to, or by, the parents, the child’s anticipated needs, and other matters. 34 C.F.R. § 300.324(b)(1)(ii)

The evidence demonstrates that while the student was attending School B at least since [REDACTED] grade, his IEPs prescribed specialized instruction solely inside general education including the student’s the student’s May 23, 2014, IEP.<sup>13</sup> Although the student’s May 23, 2014, IEP present

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<sup>13</sup> FOF # 4, 5

levels of performance for reading indicated the student's oral reading fluency score was one third of what is expected for a student in ■■■ grade and his reading comprehension was on a 2<sup>nd</sup> grade level, his IEP progress reports clearly indicate the student was progressing in and mastering some of his math goals and progressing in his reading and written expression goals.<sup>14</sup>

The student's IEP progress report for ■■■ grade, dated April 10, 2014, indicated the student mastered three of his four math goals in the third reporting period and he was progressing on the fourth math goal. The student did not master, but was progressing on, all of his reading and written expression goals. The student's IEP progress report dated June 18, 2014, indicated that a new math goal was introduced and the student continued to progress on his math, reading and written expression goals that had not yet been mastered.<sup>15</sup>

Petitioner primary evidence regarding this IEP was Petitioner's advocate's opinion testimony. Although the advocate posited that the student as of the May 23, 2014, IEP should have had some specialized instruction outside general education, the Hearing Officer did not find that her testimony sufficient to demonstrate that the student's IEP was not reasonably calculated to provide educational benefit simply because the IEP did not prescribe specialized instruction outside general education. The advocate, although qualified as an expert witness, had not talked with the student's teachers, had not worked with the student and solely based her opinion on the data that was in the student's IEP and other educational records.<sup>16</sup>

On the other hand, the student's April 2014 DC CAS scores indicated the student was "Basic" in math and science proficiency, although he was "Below Basic" in reading proficiency. And as stated, the student's progress reports indicated the student was making progress, particularly in math and to some extent in reading as the student's went from a level "K" reading at the beginning of ■■■ grade to level "S" by the end of ■■■ grade. The student's IEP progress reports prior to the drafting of the May 23, 2014, IEP clearly demonstrated that the student was making academic progress.<sup>17</sup>

Consequently, the Hearing Officer did not find the advocate's testimony regarding the May 2014, IEP more convincing that the documentation in the student's IEP progress reports that indicated he was making progress. That progress was sufficient basis in the Hearing Officer's opinion to find that the student's May 23, 2014, IEP team's actions were reasonable in prescribing the level and setting of specialized instruction that it did. Consequently, the Hearing Officer concludes that Petitioner failed to demonstrate by a preponderance of the evidence that

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<sup>14</sup> FOF # 6, 7

<sup>15</sup> FOF # 7

<sup>16</sup> FOF #s 17, 36

<sup>17</sup> FOF # 7 including footnote 8 - Although there was no evidence as to what these levels specifically mean in terms of reading skills, based upon the comments in the student's present levels of performance, he was making progress in reading in the direction of a level W, which is considered to be on grade level.

the student's May 23, 2014, IEP was not reasonably calculated to provide the student educational benefit.

**ISSUE 2:** Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP on November 6, 2014, because the IEP did not prescribe specialized instruction in all academic areas, particularly in light of the student's deficits in reading, writing and mathematics.

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

In the issue above the Hearing Officer determined that the IEP School B developed for the student in May 2014 was reasonably calculated to provide the student educational benefit. The student enrolled in School A three months later at the start of the next school year: SY 2014-2015. School A convened and IEP team meeting on November 6, 2014, to update the student's IEP.

The evidence demonstrates that at the time of this meeting based on the student's DC CAS scores and IEP progress reports that the student was operating at the "Basic" level of proficiency in math and science and he had mastered some of his math goals and was making progress in his other IEP goals. The team acknowledged the student was behind academically particularly in reading. Although the team did not increase the student's level of specialized instruction and did not provide him instruction outside general education, the team did prescribe specific subject areas for the student's specialized instruction to better address his deficits, particularly in reading.

The team developed an IEP that provided for 4.5 hours of specialized instruction in reading per week, 2 hours of specialized instruction in math and 1.5 hours per week of specialized instruction in written expression, all within the general education setting. The team reasonably believed the IEP they developed represented the LRE for the student.<sup>18</sup> There was no indication that at the time of the meeting any team member including the parent thought the student's educational setting should be more restrictive or should include instruction outside special education.

Again, the evidence offered by Petitioner as to the inappropriateness of this IEP was the advocate's testimony. Again for the same reasons as stated above the Hearing Officer did not find that her testimony was any more convincing than the evidence that demonstrated the student was making educational progress at the time the November 6, 2014, IEP was developed.

Given that the student had begun to attend School A just three months prior to the date the November 6, 2014, IEP was developed and given that the team was attempting to ensure that the student remained in his LRE and made some adjustments to the student's IEP to better address the student's deficits particularly in reading, the Hearing Officer concludes that the IEP the team developed on November 6, 2014, was reasonably calculated to provide the student educational

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<sup>18</sup> FOF # 9, 10, 11

benefit. Consequently, the Hearing Officer concludes that Petitioner failed to demonstrate by a preponderance of the evidence that this IEP was inappropriate.

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

**ISSUE 3:** Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP on September 16, 2015, because the IEP did not prescribe specialized instruction in all academic areas, particularly in light of the student's deficits in reading, writing and mathematics.

The evidence demonstrates that during SY 2014-2015 while the student's November 6, 2014, IEP was in place the student mastered two of his five reading goals and mastered one of his two written expression goals.<sup>19</sup> At the end of SY 2014-2015 the student passed all his classes except one that he did not pass due to missing homework assignments.<sup>20</sup>

Based upon the student's progress relative to his IEP goals and the student's grades during that school year it seems reasonable to the Hearing Officer that at the time School A convened the September 6, 2015, IEP meeting the student was successful in the general education environment and it was reasonable given the student's progress and grades that the amount and the setting for the student's specialized instruction was continued and remained the same as his prior IEP.

There is no evidence that early in the school year of any grades or progress reports that indicated the student needed any greater amount of specialized instruction on instruction outside general education in order to effectively access his grade level curriculum. The testimony of the School A SEC as to why the team continued to prescribe that level of services and setting bolsters the documentary evidence that supports the a conclusion that the teams decision to continue the level and setting of the services provided to the student was reasonable as of September 6, 2015.

Again, the evidence offered by Petitioner as to the inappropriateness of this IEP was principally the advocate's testimony. Again, for the same reasons as stated above the Hearing Officer did not find that her testimony was more convincing than the evidence that demonstrated the student was making educational progress at the time the September 6, 2015, IEP was developed.

Given that the SY 2015-2016 had just begun and the student did not yet have any grades and the fact that the student's present levels of performance particularly in reading had not yet been updated, the Hearing Officer concludes that there was sufficient evidence that the student's September 6, 2015, IEP at the time it was developed was reasonably calculated to provide the student educational benefit. Consequently, the Hearing Officer concludes that Petitioner failed to demonstrate by a preponderance of the evidence that this IEP was inappropriate.

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<sup>19</sup> FOF # 12

<sup>20</sup> FOF # 14, 15

**ISSUE 4:** Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP on November 12, 2015, because the IEP did not prescribe specialized instruction in all academic areas, particularly in light of the student’s math and reading deficits.

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

The student’s present levels of performance included for the first time in the student’s November 12, 2015, IEP, cite a September 2, 2015 i-Ready Diagnostic and Instruction Assessment that indicated the student was performing more than one grade level below his current grade in mathematics. The present levels of performance for reading noted the student’s September 16, 2015, Scholastic Reading Inventory assessment resulted in a score below basic category and significantly below his grade level.<sup>21</sup>

During the November 12, 2015, meeting the student’s parent acknowledged to the School A staff that she was more pleased with the student’s performance during SY 2014-2015 at School A than during the current school year. The parent and her educational advocate requested that the student receive “pullout” specialized instruction out of general education. However, they did not ask that any specific number of hours of instruction be outside general education.<sup>22</sup>

The School A team members agreed to one of hour of specialized instruction outside general education in reading. However the evidence indicates that School A is not providing the student any outside general education support in reading. Rather, the student to be pulled out of the general education classroom to work on organization.<sup>23</sup> In addition, the School A staff discussed obtaining a specialized reading program that could be used with the student but the school did not yet have the program.<sup>24</sup>

Although the School A SEC testified that School A is willing to consider more hours for the student outside general education to focus on the student’s reading gaps, it does not appear that anything concrete was actually implemented to aggressively address the student’s reading deficits. Although over the last two years the student has made progress in reading goals he remains grade levels behind as documented by the more current present levels of performance added to the student’s November 12, 2015, IEP. The record does not indicate that he ever mastered his reading goals from a previous IEP with regard to decoding words.<sup>25</sup> The evidence tends to indicate that the student may still be generally functioning at or near second grade level in reading. As there does not appear to have been a comprehensive evaluation conducted of the student since 2011, his actually standardized functioning particularly in reading may need to be assessed.

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<sup>21</sup> FOF # 19

<sup>22</sup> FOF # 20

<sup>23</sup> FOF #s 24, 28

<sup>24</sup> FOF # 20

<sup>25</sup> FOF #25 footnote 12

Despite the SEC and special education teacher testifying that the student does not need more hours outside general education to access the general education curriculum and too many hours outside general education may diminish the quality to the student's academic work, the student seems to continue to struggle in reading and has yet to establish solid independent reading skills.<sup>26</sup>

Although the student's first advisory grades for the current school year indicate that the student passed all his classes those grades are far from stellar and not as good as his grades from SY 2014-2015.<sup>27</sup> The student had Ds in two class and the student's parent testified she continues to receive weekly reports from School A that indicate the student is not doing well in the majority of his classes. The parent believes the student is given extra credit assignments before the final reporting to help boost his grades. The student has confided in his parent the reason he is failing most of his classes is because he doesn't understand the work.<sup>28</sup> In addition, the student's interim report albeit issued after the November 6, 2015, IEP meeting indicate the student was failing the majority of his classes in January 2016.<sup>29</sup>

Based upon the evidence in the record that of the updated present levels of performance that were added to the student's IEP on November 12, 2015, that indicate the student's has made little appreciable progress in reading, and the parent's testimony about the student's academic struggles this school year, the Hearing Officer concludes that the request made by the parent and her advocate for specialized instruction outside general education for the student was reasonable and that the student should have been provided some actual instruction in reading outside education. The evidence, albeit slight, of the student's reading deficits recently documented in his present levels of performance coupled with the student's academically struggles this current school year, tip the balance that the student should be provided more specialized instruction outside general education in reading than the team prescribed and certainly more than the student actually received. Consequently, the Hearing Officer concludes that the IEP that School A developed on November 6, 2015, was not reasonably calculated to provide the student educational benefit.

The evidence indicates that at the conclusion of the November 12, 2015, meeting the advocate believed that the team had agreed that the student would to receive 1 hour per day of specialized instruction outside general education, and that the team could reconvene after an advisory to see if that level of specialized instruction was sufficient and readjust the instruction if necessary.<sup>30</sup>

Although the advocate testified that based upon the matrix she used the student should have been provided 15 hours of specialized instruction, there was no clear evidence about the matrix or that it is currently being used by DCPS. Petitioner has requested the student be provided pull out instruction in English Reading and Math, however, the evidence does not support a conclusion the student needs any more instruction outside general education, at least at this juncture, than he his instruction in reading.

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<sup>26</sup> FOF # 30

<sup>27</sup> FOF #s 15, 32

<sup>28</sup> FOF # 33

<sup>29</sup> FOF # 34

<sup>30</sup> FOF # 24

The Hearing Officer finds a more reasonable approach is to provide the student what the School A SEC offered: to provide the student more pull out services to address the gaps in the student's reading skills first. More "pull out" hours can be considered after the effectiveness of a marginal increase in instruction outside general education is measured.

The student's IEP currently prescribes that the student be provided 4 hours per week of specialized instruction in reading. The Hearing Officer will thus order that the student be provided these four hours outside general education using a specialized reading program that the School A staff and the parent believe can reasonably be expected to significantly boost and improve the student's reading skills in short order. In addition, the one per week that the student's has been receiving to assist him in organizational skills shall be included in his IEP and maintained, as the evidence demonstrates that the student's poor academic performance in his general education classes this year is at least in part to his need for better organizational skills.

### **Compensatory Education**

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Reid, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526. The Hearing Officer concludes that the compensatory education proposal and request submitted by Petitioner is reasonable for the denial of FAPE determined by this decision and that student will benefit from the tutoring proposed to further address his reading deficits.

### **ORDER:**

1. DCPS shall, within ten (10) school days of issuance of this order revise the student's IEP to prescribe five hours per week of specialized instruction outside general education with four of those hours in the area of reading and shall ensure within thirty (30) calendar days that the student is provided an in-school specialized reading program that will address the student's reading deficits.
2. As compensatory education DCPS shall, within thirty (30) calendar days of the issuance of this order, provide Petitioner authorization for independent tutoring in the amount of 43 hours at the OSSE/DCPS prescribed rate. These services are to be used by Petitioner by December 31, 2016.

**APPEAL PROCESS:**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**

**Hearing Officer**

**Date: February 29, 2016**

Copies to:

Petitioner Representative: Roberta Gambale, Esq.

Respondent Representative: Steven Rubenstein, Esq.

OSSE-SPED (due.process@dc.gov)

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