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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><br><p>Case # 2015-0386</p><br><p>Date Issued: March 6, 2016</p> | <p>HEARING OFFICER'S<br/>DETERMINATION</p> <p>Hearing Dates:<br/>February 1, 2016<br/>February 2, 2016<br/>February 8, 2016<br/>February 24, 2016</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner:<br/>Elizabeth Jester, Esq.<br/>P.O. Box 1165<br/>Great Falls, Va. 22066</p> <p>Counsel for Respondent:<br/>Tanya Chor, 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 1, 2016, February 2, 2016, February 8, 2016, and concluded on February 24, 2016, in Hearing Room 2006, on 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.

## **BACKGROUND AND PROCEDURAL HISTORY:**

On December 2, 2015, Petitioner filed a due process complaint alleging, inter alia, that DCPS has denied the student a free appropriate public education (“FAPE”) by convening an IEP meeting on March 10, 2015, without the participation of the parent; failing to have an individualized educational program (“IEP”) in place for the student at the beginning of SY 2015-2016; failing to develop appropriate IEPs with appropriate specialized instruction and related services for two year prior to the complaint being filed; failing to provide the student with a full-time special education services and a placement in a separate school and failing to conduct a speech language evaluation.

Petitioner seeks as relief that the Hearing Officer find DCPS denied the student a FAPE and order the student’s IEP reflect 32 hours of specialized instruction and related services outside the general education setting in a separate school. Petitioner requests that the student be placed at a private special education school with transportation. Petitioner also requests the Hearing Officer order DCPS to fund a speech and language evaluation and compensatory education.

On December 11, 2015, DCPS filed a timely response to Petitioner’s complaint in which it denied that it failed to provide the student with a FAPE. DCPS contended the student has a long history of attendance problems and the student has been appropriately evaluated and provided appropriate programming and the student’s IEP that revised on December 4, 2015, is appropriate as is the school that the student is assigned that can implement her IEP.

A resolution meeting occurred on December 17, 2015. The parties did not reach any agreement on the issues and did not mutually agree to proceed directly to hearing. The 45-day period began on January 2, 2016, and originally ended [and the Hearing Officer’s Determination (“HOD”) was due] on February 15, 2016.

The Hearing began on February 1, 2016, and was scheduled to conclude on February 2, 2016. Petitioner exceeded the expected time to present her case and Respondent did not have enough time remaining to put forward its case and on February 2, 2016. Respondent submitted a motion to continue the hearing and extend the HOD due that was granted over Petitioner’s objection. On the next day of hearing Respondent still did not complete its case and submitted a second motion of continuance and extension of the HOD due date that was granted over Petitioner’s objection. The HOD is now due March 6, 2016.

The Hearing Officer convened a pre-hearing conference (“PHC”) on the complaint December 22, 2015, and issued a pre-hearing order (“PHO”) on December 28, 2015, outlining, inter alia, the issues to be adjudicated.

**ISSUES:**<sup>2</sup>

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

1. Whether DCPS denied the student a FAPE by convening an IEP meeting on March 10, 2015, and failing to include and allow the participation of the parent thus rendering the March 10, 2015 not valid.
2. Whether DCPS denied the student a FAPE by failing to have a valid IEP (that the parent had participated in developing) in place for the student at the beginning of SY 2015-2016;
3. Whether DCPS denied the student a FAPE by failing to develop appropriate IEPs during SY 2013-2014 and/or SY 2014-2015 because the IEPs failed to provide sufficient specialized instruction outside general education and sufficient behavior support services and sufficient IEP goals.
4. Whether DCPS denied the student a FAPE by failing to provide the student with a placement in a full-time special education program in a separate school during and/or SY 2013-2014 and/or SY 2014-2015 and 2015-2016.
5. Whether DCPS denied the student a FAPE by failing at the November 2015 meeting to provide the student during SY 2015-2016 with a full-time special education services and a placement in a full-time special education program in a separate school without first obtaining “Central Office” approval despite the student’s team determining that the such a placement was appropriate.
6. Whether DCPS denied the student a FAPE by failing to provide a copy of the student’s IEP to her teacher(s) resulting in the inability of the teacher(s) to implement the student’s IEP by providing the services, accommodations and support required pursuant to the IEP.
7. Whether DCPS denied the student a FAPE by failing to conduct a speech language evaluation following the parent request that the evaluation be conducted in June 2014 and September 2014.

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<sup>2</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. There was much discussion. 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.

## 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 47 and Respondent's Exhibits 1 through 75) that were admitted into the record and are listed in Appendix A).<sup>3</sup> Witnesses are listed in Appendix B. The record was closed with filing of the parties' written closing arguments on March 4, 2016.

## FINDINGS OF FACT:<sup>4</sup>

1. The student is age \_\_\_\_ and in grade \_\_\_\_\_<sup>5</sup> currently attends a District of Columbia Public Schools ("DCPS") high school ("School A") where she has attended since the start of school year ("SY") 2013-2014. The student has been retained twice at School A. (Petitioner's Exhibits 23, 38)
2. The student is currently eligible to receive special education and related services with a disability classification of other health impairment ("OHI") for Attention Deficit Hyperactivity Disorder ("ADHD") (Petitioner's Exhibit 1-1)
3. Prior to attending School the student attended a DCPS middle school where she had an IEP developed on March 18, 2013, that prescribed that the student be provided 15 hours of specialized instruction per week in general education. The student's disability classification at the time was specific learning disability ("SLD"). This was the student's IEP when she began attending School A. The IEP was updated on March 13, 2014, when the student's special education services were changed to the following: 11 hours per week of specialized instruction inside general education and 4 hours per week outside general education in math. The student was also prescribed 120 minutes per month of behavioral support services. (Petitioner's Exhibits 10-1, 10-13, 14-1, 14-10)
4. In February 2014 School A conducted an educational evaluation of the student the assessment revealed the student's overall academic skills were low and her scores placed her generally at the fourth to fifth grade level. (Petitioner's Exhibit 34-2, 34-7)
5. In April 2014, Petitioner, through counsel, filed a due process complaint that resulted in a HOD issued July 12, 2014, that concluded DCPS denied the student a FAPE and ordered DCPS to, inter alia, evaluate the student and modify the student's IEP as appropriate. (Respondent's Exhibit 47-9, 47-10, 47-11, 47-12)

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<sup>3</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.

<sup>4</sup> The evidence that is the source of the Finding of Fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

<sup>5</sup> See Appendix B for student's age and current grade.

6. School A convened several multidisciplinary team (“MDT”) meetings over SY 2014-2015 principally to discuss various evaluations that had been or were to be conducted. (Respondent’s Exhibits 48A, 54)
7. In October 2014 School A conducted a functional behavior assessment and developed a behavior intervention plan (“BIP”) to address the student dis-engagement in the academic setting, poor attendance and mood instability. (Petitioner’s Exhibits 26, 27)
8. The student is shy and withdrawn and has been hospitalized for suicidal actions. The student sees a psychiatrist twice per month. In January 2015 the student’s treating psychiatrist prepared a report that noted the student’s diagnosis of Major Depressive Disorder and ADHD. The psychiatrist noted that the student reported being bullied at school and isolated and teased by her peers and experiencing periods of sadness and self injury. The psychiatrist recommended the student be provided a therapeutic school setting with built in therapeutic support. This report was provided to School A. (Parent’s testimony, Petitioners Exhibit 25)
9. The student’s IEP was due to expire on March 12, 2015. School A staff made repeated phone calls to the student’s parent about the student’s upcoming IEP meeting. School A staff proposed by email to the parent and her attorney to convene an IEP meeting for the student and offered the following dates to convene the meeting: March 6, 2015, or March 9, 2015. School A proposed two separate meetings one to discuss the student’s IEP and another to discuss to review the student’s recent psychosocial evaluation. The parent’s attorney responded that she was not available on those dates and asked that all matters be discussed in a single meeting. The attorney proposed two dates: March 17, 2015, and March 18, 2015. (Respondent’s Exhibits 31-2, 36-17, 36-18, 36-19)
10. The School A representative responded and explained why two meetings were necessary and pointed out that the student’s IEP expired on March 12, 2015, and her eligibility expired on June 7, 2015. The School A representative proposed another date for the IEP meeting: March 10, 2015. The parent’s attorney in an email objected to the IEP meeting being held without the parent and suggested that the parent would waive the date for the IEP expiration and convene a meeting after March 12, 2015. (Respondent’s Exhibit 31-1, 31-2, Petitioner’s Exhibit 41)
11. On March 10, 2015, School A the School A staff contacted the student’s parent by telephone.<sup>6</sup> School A proceeded with the student’s IEP meeting in her absence. School A convened the student’s IEP meeting that day to update the student’s IEP. Neither the parent nor her attorney was present. The student’s IEP specialized instruction services were not changed but behavioral support services were added at 120 minutes per month. The student has provided behavioral support services to address the student’s social emotional concerns and improve her school attendance. (Petitioner’s Exhibit 4-1, 4-13, Respondent’s Exhibit 36-20, Witness 7’s testimony)

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<sup>6</sup> The correspondence notes indicated the parent gave verbal consent to proceed with the meeting. However, the student’s parent denied that she granted consent when she testified at the hearing.

12. On March 10, 2015, DCPS issued a prior written notice (“PWN”) to the student’s parent indicating the student’s disability classification remained SLD. (Petitioner’s Exhibit 5, Respondent’s Exhibit 36-20)
13. In April 2015, School A conducted another educational evaluation. The results of the evaluation indicated the student’s academic skills ranged from an early 3<sup>rd</sup> grade level to a late 6<sup>th</sup> grade level. (Petitioner’s Exhibit 24-2)
14. On April 20, 2015, the parent’s counsel confirmed that she and the parent would attend the student’s IEP meeting scheduled for April 28, 2015. (Respondent’s Exhibit 35-1)
15. On April 28, 2015, School A convened an IEP meeting for the student that the student’s parent did not attend but her attorney did. The agenda for the meeting indicates that the purpose of the meeting was for “IEP or Eligibility.” The parent was contacted but stated she was unavailable and that her attorney would act on her behalf. The team reviewed the student’s psychiatric evaluation. There was also discussion of the student’s progress at School A and the parent’s attorney requested on behalf of the parent that the student be provided a small therapeutic setting. The rest of the team disagreed and stated the student is able to complete work when she comes to school. The team determined the student continued to remain eligible under the SLD disability classification. The team did not review the student’s IEP services the changes made the student’s IEP at the March 10, 2015, meeting and there was no request made to do so. (Respondent’s Exhibit 55)
16. In September 2015 an independent comprehensive psychological evaluation was conducted. The evaluation revealed that the student has borderline full scale IQ of 78. The student’s reading scores were average except for reading comprehension that was below average, her oral expression scores were average and her written expression and math scores were generally low average. The evaluator noted diagnoses of learning disorders, ADHD and Major Depressive Disorder. The evaluator concluded that the student is not capable of keeping pace with her non-disabled peers and noted the student’s attention difficulties and emotional issues including depression negatively affect the student’s ability perform in an academic setting. The evaluator recommended the student be in full time out of general education placement. (Witness 1’s testimony, Respondent’s Exhibit 56-10, 56-15)
17. In November 2015 a DCPS psychologist conducted a review of the independent psychological evaluation. The review noted that the student continued to have academic difficulties due to attendance problems and not turning in her work and she was failing most of her classes. The evaluation review noted that the student’s academic difficulties were also attributed to her emotional issues of frustration, low motivation, depression and difficulty staying focused. The evaluation review noted the student meets the criteria for OHI due to ADHD and Major Depressive Disorder. (Witness 5’s testimony Respondent’s Exhibit 59-9, 59-10, 59-13)

18. During the first advisory of SY 2015-2016 the student failed all of her courses except one that she passed with a “C-.” The student’s first advisory report card noted that she was a total of 17 days absent and 8 days tardy. (Respondent’s Exhibit 60)
19. On November 16, 2015, School A convened a meeting to review the independent psychological evaluation. The student’s parent and her attorney attended. The team reviewed the evaluation and discussed changing the student’s disability classification. The parent’s attorney on the parent behalf disagreed with the SLD classification being dropped and requested that a speech language evaluation be conducted because it was recommended in the independent psychological evaluation. The team agreed to reconvene on December 3, 2015, to update the student’s IEP. (Respondent’s Exhibit 64)
20. On December 3, 2015, School A convened an IEP/Eligibility meeting. The parent attended and her attorney participated by telephone. The team discussed changing the student’s disability classification to OHI and discussed class schedule changes for the student. School A requested consent to conduct a FBA. The student’s IEP was updated as of that date to reflect the new disability classification and additional services. During the meeting the student’s parent again requested that the student be placed in a separate special education school and was informed that such a change could not occur without a review by DCPS least restrictive environment (“LRE”) team. (Parent’s testimony, Respondent’s Exhibits 67-1, 68-1, 70-1)
21. The student’s December 3, 2015, IEP reflects the following services: 20 hours of specialized instruction outside general education, 5 hours per day [sic]<sup>7</sup> of specialized instruction inside general education, and 240 minutes of behavioral support services per month. (Petitioner’s Exhibit 1-12)
22. In the IEP meetings the parent has attended in the past two years at School A the she has repeatedly asked for the student to be provided more services and a setting with a lower student to teacher ratio. She has also repeatedly asked for a speech language evaluation. However, the student’s IEP remained the same until December 2015. In November 2015 meeting the team reviewed the evaluation and said they could not go beyond a certain amount of hours without going through the LRE process but the team at that meeting agreed the student needed additional services. One of the teacher’s in the meeting acknowledged the student did not have a copy of the student’s IEP. At the December the team indicated that the student could not be placed at a separate school without authorization from DCPS central office. (Parent’s testimony, Respondent’s Exhibit 64-3)
23. Since attending School A the student has had attendance problems. Petitioner’s expert witness speculated that the student absences are related to her vulnerable self-esteem and emotional functioning and because of these feelings she does not want to go to school. (Witness 1’s testimony, Exhibit 39)

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<sup>7</sup> This was an error noted by a DCPS witness and should be 5 hours per week rather than per day.

24. The student finds school frustrating because she often does not understand what is going on in class and will leave class and go the social worker an class entire period. The current social worker is helpful to the student and she sees her twice per week for official sessions. The student does better in classes with fewer students. When she gets depressed she stays home and does so two or three days per week. (Student's testimony)
25. Petitioner's independent psychologist who was qualified as an expert witness reviewed the student's educational assessments from February 2014, April 2015 and her own educational assessment of the student in September 2015 and concluded the student made little academic progress over this period. The witness expressed an opinion that given the student's academic deficits and the level of her emotional functioning it would it be in appropriate for her to be in a general education setting. The witness opined that the student's low math schools and low reading comprehension scores indicates she is not equipped to understand what is going on in a age equivalent general education classroom.
26. The independent psychologist also opined that the student's current IEP goals are quite challenging and above the student's current academic functioning. She expressed her opinion that the student should be in a full time special education setting with a low student to teacher ratio with a strong emotional support services. The evaluator recommended a speech and language evaluation to find out whether there are language difficulties impacting the student's poor academic performance. She also expressed the opinion that the student having been placed in a general education setting over the past two years where she has not been successful has reflected negatively on her self-esteem. (Witness 1's testimony, Petitioner's Exhibit 23, 24, 34)
27. Petitioner educational consultant who testified as an expert witness interviewed the student's parent and the student and observed the student in two of her classes at School A in June 2015 and October 2015 and reviewed the student's educational records and IEPs. The consultant offered her opinion that the student's last three IEPs were inappropriate because they lack the level of instruction necessary to address her academic deficits and the academic goals were and are inappropriate because they do not contain sufficient detail to ensure the student's deficits are addressed. The consultant opined that the student should be in a full time out of general education placement and having been in a general education setting caused her academic and emotional harm. (Witness 2's testimony)
28. The student has visited and been accepted at a private separate special education school ("School B"). School B has certificate of approval ("COA") from OSSE and serves students from pre-kindergarten to twelfth grade with a variety of disability classifications including SLD and OHI. School B currently has 85 students in its high school program. The student can start School B immediately and would be in need of transportation services. The average class size at School B is eight students to one adult teacher. All content teachers are special education certified and the specialty teachers are dual certified in their area of specialty. The structure of the School B program provides accommodations to assist students who have attention and organization difficulties. School B has no nondisabled students. The rate for tuition and related services are

specified by OSSE and the tuition rate is approximately \$44,000 per year. Related services hourly rates vary and behavior support services are billed at \$109 per hour for individual support. Related services are provided including speech/language, behavior support, occupational therapy, and physical therapy. School B offers a credit recovery program as part of the school day as well as outside the day. Within the school day is covered in the tuition. Credit recovery is 1/6 the cost of tuition or \$6,100 for the year if done after the school day. School B has certified special education teacher and certified related service providers. (Witness 3's testimony, Petitioner's Exhibit 43)

29. The consultant proposed a compensatory education plan that proposed parent training 1.5 to 2 hours weekly over a 2-year period to assist the parent in understanding and helping to address the student's disability. The consultant also recommended the student be provided credit recovery during school and after school in 2-year period with tutoring. (Witness 2's testimony, Petitioner's Exhibit 47)
30. The student's School A case manager makes certain that the student's IEP is updated annually the student and made certain that all the student's teachers are aware of the student's IEP have the appropriate portions of the IEP they need and are helping the student be successful. The student's case manager has observed that when the student began to attend school more regularly her academics improved and once transportation was in place for the student her attendance improved for a while but did not sustain. School A initiated truancy proceeding for the student during SY 2014-2015 and there was some improvement in the student's attendance and academic performance as a result. (Witness 4's testimony)
31. School A moved forward with requesting a more restrictive environment for the student and amended the student's IEP with additional support both academically and behaviorally at the December 2015 IEP meeting. DCPS' LRE process is a tool to assist in determining a student's least restrictive environment is met and if School A is unable to provide appropriate services to a student the LRE process assists in identifying a school location that can. The LRE process determines the location where services will be provided. At the student's IEP meetings in November and December 2015 the parent was still seeking another placement and reiterated her desire for the student not to attend School B. (Witness 6's testimony)

## **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. *7 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 convening an IEP meeting on March 10, 2015, and failing to include and allow the participation of the parent thus rendering the March 10, 2015 not valid.

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

Pursuant to 34 C.F.R. § 300.322 (a) Public agency responsibility-general. Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including-- (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place.

The evidence demonstrates that an IEP meeting was convened on March 10, 2015, at which the student's IEP was updated, as the student's IEP was due to expire prior to the date that Petitioner and her counsel could be present for an IEP meeting. Thus, DCPS proceeded with the IEP meeting to update the student's IEP without the parent. The IEP instructional services remained unchanged but behavior support services were added to the IEP.

There was an IEP meeting convened the next month at which the student's evaluation was reviewed and the parent's attorney attended. That meeting was an IEP meeting but the evidence does not reflect that the changes to the IEP services were discussed at that meeting. So technically, the parent did not have the opportunity to discuss the student's IEP services and it would have been prudent in complying the spirit of IDEA for the student's IEP to have been fully discussed at the April 2015 meeting since the parent was not able to attend the March 10,

2015, meeting. Consequently, the Hearing Officer concludes that the failure to include the parent in a discussion of the student's IEP and its full contents either at the March 10, 2015, or the April 2015 meeting impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE.

**ISSUE 2:** Whether DCPS denied the student a FAPE by failing to have a valid IEP (that the parent had participated in developing) in place for the student at the beginning of SY 2015-2016;

Pursuant to 34 C.F.R. § 300.323 (a) General. At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in Sec. 300.320.

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

Based upon the conclusions made in the issue above the Hearing Office concludes that the student's March 10, 2015, IEP was technically not valid because it lacked the parent's participation. Albeit, the evidence demonstrates that the student was provided the services that the IEP dated March 10, 2015, prescribed, including the behavioral support services that were added at the March 10, 2015, meeting, because DCPS impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE in developing the March 10, 2015, IEP, the Hearing Officer concludes that Petitioner sustained the burden of proof by a preponderance of the evidence on this issue.

**ISSUE 3:** Whether DCPS denied the student a FAPE by failing to develop appropriate IEPs during SY 2012-2013 and/or SY 2013-2014 and/or SY 2014-2015<sup>8</sup> because the IEPs failed to provide sufficient specialized instruction outside general education and sufficient behavior support services and sufficient IEP goals.

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

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200 (1982), the Hearing Officer must first look to whether the State complied with the procedures set forth in the IDEA, and second, whether an individualized educational program developed through the IDEA's procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. *Id.* at 206-07

The court judges the IEP prospectively and looks to the IEP's goals and methodology at the time of its implementation." *Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008); *District of Columbia v. Walker*, 2015 WL 3646779, \*6 (D.D.C. Jun.

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<sup>8</sup> This issue in essence asserts that the student's IEPs while at School A for the two calendar years prior to the date the complaint was filed were/are inappropriate. These IEPs are dated: March 13, 2013, March 13, 2014, and March 10, 2015, December 3, 2015.

12, 2015) (the “adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.”).

The overwhelming evidence presented demonstrates that the student’s time since she began attending School A has been a disaster. She has remained in the same grade since she began attending three years ago and earned few credits. Although DCPS asserted that the student’s attendance is a major reason the student has not made any significant progress the evidence demonstrates that the student felt overwhelmed in the general education classes she was thrust into despite her significant and documented academic deficits. School B was aware of the student’s severe emotional concerns and took action to add behavior support services to the student’s IEP. However, despite educational assessments DCPS conducted that demonstrated the student was operating on an elementary academic level, she remained in general education classes except for math.

The expert testimony provided by Petitioner was probative and convincing that the student’s IEPs while she was attending School B were inappropriate because they lacked sufficient specialized instruction outside general education and inappropriate academic goals and that at latest once the student’s independent psychological evaluation was completed and reviewed in November 2015, it was abundantly apparent that the student’s was in need of a significantly more restrictive setting to wit: a separate special education school.

Although DCPS asserted that the changes to boost the student’s specialized instruction to 20 hours per week was sufficient, the Hearing Officer concludes based upon the evidence, principally the testimony from Petitioner’s expert witnesses, that this change was a late attempt correct a long period of the student being provided inadequate services in an inappropriate educational setting. Consequently, the Hearing Officer concludes that the student’s IEPs that were in effect after the student was first retained at School A (at the start of SY 2014-2015) were inappropriate and not reasonably calculated to provide the student educational benefit given her lack of academic progress in her first year at School A. Thus, the student was denied a FAPE.

**ISSUE 4:** Whether DCPS denied the student a FAPE by failing to provide the student with a placement in a full-time special education program in a separate school during and/or SY 2013-2014 and/or SY 2014-2015 and 2015-2016.

Pursuant to 34 C.F.R. § 300.115(a), DCPS “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. This continuum of alternative placements must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. Additionally, when determining the Least Restrictive Environment of a student, “in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.” 34 C.F.R. § 300.116(d).

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

Based upon the conclusion in the issue above that the student had inappropriate IEPs for SY 2015-2016 the Hearing Officer also concludes the student as of the latest IEP should have been in a separate day school, even though prior to this date some less restrictive setting other than a separate day school could have perhaps made a difference for the student.

**ISSUE 5:** Whether DCPS denied the student a FAPE by failing at the November 2015 meeting to provide the student during SY 2015-2016 with a full-time special education services and a placement in a full-time special education program in a separate school without first obtaining “Central Office” approval despite the student’s team determining that the such a placement was appropriate.

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

IDEA requires that “consistent with § 300.501(c), each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.” 34 C.F.R. §300.327. This requirement is also contained in 34 C.F.R. § 300.501(b) (“the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to – (1) the identification, evaluation, and the educational placement of the child.”). In this case the placement decision should include the student.

The student’s parent’s asserted that at the November and December 2015 meeting the School A team indicated that it could not provide the student the placement the parent requested without DCPS central office approval. However, the evidence is unclear that this was in fact the case. The DCPS witnesses testified that the School A team member developed an IEP that it believed would meet the student’s needs. Although the meeting notes make reference to a LRE process and contacting DCPS, the Hearing Officer does not conclude that evidence was sufficient to demonstrate that it was necessary for the School A team to check with DCPS for anything other than a location if they determined that School A could not meet the student’s needs. Consequently, the Hearing Officer concludes there was insufficient evidence to sustain the burden of proof on this issue.

**ISSUE 6:** Whether DCPS denied the student a FAPE by failing to provide a copy of the student’s IEP to her teacher(s) resulting in the inability of the teacher(s) to implement the student’s IEP by providing the services, accommodations and support required pursuant to the IEP.

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

The evidence demonstrates based upon the DCPS’ witnesses’ testimony that the student’s general education teachers were provided the relevant portions of the student’s IEP. The parent’s testimony that in an IEP meeting one of the student’s teachers had not seen the IEP was not sufficient to refute the testimony and clarification provided by the DCPS witness. Consequently, the Hearing Officer concludes that there was insufficient evidence to sustain the burden of proof on this issue.

**ISSUE 7:** Whether DCPS denied the student a FAPE by failing to conduct a speech language evaluation following the parent request that the evaluation be conducted in June 2014 and September 2014.

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

A public agency must ensure that a reevaluation of a child with a disability conducted in accordance with 34 C.F.R. §§ 300.304 through 300.311 is completed at least once every three years, or, if the child's parent or teacher requests one or the public agency determines one is warranted. 34 C.F.R. § 300.303. The IDEA does not mandate any particular assessment, as part of the evaluation or reevaluation process. See, e.g. *EL Haynes Public Charter School v. Frost*, 66 IDELR 287 (D.D.C, Sept, 11, 2015).

The evidence demonstraes that the student's parent repeatedly asked for a speech language evaluation to be conducted and that the evaluation was recommended in the student's recent independent psychological evaluation. The evaluation has not yet been agreed to by DCPS or conducted despite the repeated requests. DCPS did not offer sufficient evidence to demonstrate why the evaluation should not be conducted given the legitimate concerns raised in the student's recent evaluation. Consequently, the Hearing Officer concludes that DCPS' failure to conduct the requested evaluation impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE.

**Remedy:**

"[C]ourts have identified a set of considerations 'relevant' to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment." *Branham*, 427 F.3d at 12

Petitioner has requested as a remedy the student be placed at School B. The testimony of the witness as to School B demonstrates that School B can provide the student specialized instruction and related services and address her severe academic deficits and her documented social emotional concerns and meet her unique needs. Based upon the evidence presented the Hearing Officer concludes that the school proposed by the parent meets the factors that the Hearing Officer is to consider in determining a prospective placement for the student and will grant her placement at School B, a non-public separate school, for the remainder of SY 2015-2016 as the remedy and as part of the compensatory education to the student.

**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 for parent training was not sufficiently supported by the testimony by Petitioner's witness and there was no indication that the proposal for training supports the student in recouping what she missed as result of denials of FAPE. The witness also suggested credit recovery courses but did not indicate what courses or how many courses should be provided. There was insufficient evidence presented from which the Hearing Officer can conclude what amount of these services is appropriate. There was testimony that School B can provide credit recovery services in an after school program. However, the Hearing Officer is concerned that with the student's history of absenteeism from school it is uncertain that the student would even take advantage of such a service if it was provided. Although the compensatory education plan Petitioner presented is problematic, to award no compensatory education when a denial of a FAPE has been established would be inequitable. Consequently the Hearing Officer also will grant Petitioner a nominal amount of independent tutoring as compensatory education in addition to the student's prospective placement at School B.<sup>9</sup>

**ORDER:**<sup>10</sup>

1. DCPS shall, within ten (10) school days of issuance of this order place and fund the student at School C ( [REDACTED] ) for the remainder of SY 2015-2016 and amend the student's IEP LRE to reflect the change to a separate school. DCPS shall also provide the student transportation services.
2. DCPS shall, within sixty (60) calendar days of the issuance of this order, conduct a speech and language evaluation and convene a MDT meeting to review the evaluation.
3. DCPS shall within ten (10) school days of this issuance of this order provide the student as compensatory education 50 hours of independent tutoring at the DCPS/OSSE prescribed rates to be used by Petitioner by December 31, 2016.
4. All other requested relief is denied.

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<sup>9</sup> The Hearing Officer concludes that despite Petitioner's inability to establish appropriate compensatory education, to award nothing would be inequitable. (A party need not have a perfect case to be entitled to compensatory education. *Stanton v. D.C.* 680 F Supp. 201 (D.D.C. 2011). If a student is denied a FAPE a hearing officer may not "simply refuse" to grant a compensatory education award. *Henry v. D.C.* 55 IDELR (D.D.C. 2010))

<sup>10</sup> Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

**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: March 6, 2015**