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OSSE
 Office of Dispute Resolution
 March 14, 2018

Confidential

<p>Parent on Behalf of Student,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“LEA”)</p> <p>Respondent.</p> <p>Case # 2017-0341</p> <p>Date Issued: March 7, 2018</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: February 20, 2018 February 21, 2018</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ This “Corrected” HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, March 7, 2018, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on February 20, 2018, and February 21, 2018, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 111. The parties submitted written closing arguments on March 2, 2018.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is age _____ and in grade _____.² The student resides with Student’s parent (“Petitioner”) in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of other health impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”). District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”). Student attends a DCPS school (“School A”), where Student began attending in school year (“SY”) 2015-2016. On December 22, 2017, Petitioner filed her due process complaint alleging, inter alia, that DCPS provided student an inappropriate individualized educational program (“IEP”) during both SY 2016-2017 and SY 2017-2018.

Relief Sought:

Petitioner seeks as relief that the Hearing Officer find the LEA has denied Student a free appropriate public education (“FAPE”). Petitioner asks that the Hearing Officer order DCPS to convene an IEP meeting to review and revise the IEP to incorporate the recommendations of the November 2015 auditory processing assessment and the June 2016 neuropsychological evaluation. Petitioner requests that DCPS revise Student’s IEP to prescribe: (1) specialized instruction outside general education for math and all English Language Arts (“ELA”), (2) specialized instruction inside general education for all other academic classes, and (3) provide related services in speech language and behavior support services with accompanying annual goals for each.³ Petitioner also asks that the IEP be revised to include updated present levels of performance in math and requests an award of compensatory education.

LEA Response to the Complaint:

DCPS filed a response to the complaint on January 17, 2017. DCPS asserts that it has provided the student with a FAPE and Student’s IEPs and placements proposed by DCPS for each school year in question represented the student’s least restrictive environment (“LRE”).

³ At the outset of the hearing Petitioner’s counsel offered this clarification and refinement of the relief sought regarding Student’s specialized instruction and Student’s least restrictive environment.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on January 17, 2018, and the parties did not resolve the complaint.⁴ The parties did not mutually agree to proceed directly to hearing. The 45-day period began on January 22, 2018, and ends [and the Hearing Officer's Determination ("HOD") is due] on March 7, 2018.

The undersigned Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on January 26, 2018, and issued a pre-hearing order ("PHO") on January 31, 2018, outlining, inter alia, the issues to be adjudicated.

ISSUES:⁵

The issues adjudicated are:

1. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on February 25, 2016, because, despite available school-wide assessment and evaluation data for Student, the IEP did not contain: (a) annual goals in math and/or speech and language, and (b) related services in the form of speech and language.
2. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP in September 2016 and October 2016, because, despite available school-wide assessment and evaluation data for the student, the IEP(s): (a) did not contain related services for speech and language and/or behavior support services; (b) data on student's school wide assessments for SY 2015-2016; (b) eliminated pullout special education instruction in reading; (c) reduced student's total hours of special education services, and (d) failed to incorporate the recommendations of a June 2016 independent neuropsychological evaluation for speech language services.
3. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP in October 2017 and/or failed to review and revise the student's IEP, because, despite available assessment and evaluation data for the student, the IEP: (a) failed to increase the Student's level of services,⁶ (b) did not include speech and language related services and annual goals in the area of speech and language; (c) failed to incorporate the

⁴ Although the complaint was not resolved, DCPS counsel represented that DCPS has agreed to conduct a speech language evaluation and an auditory processing evaluation and Petitioner has granted written consent for those evaluations to be conducted.

⁵ The Hearing Officer restated the issues at the hearing and the parties agreed that these were the issues to be adjudicated.

⁶ As stated previously, at the outset of the hearing Petitioner's counsel offered clarification and refinement of the relief sought regarding Student's specialized instruction and Student's least restrictive environment.

recommendations of the June 2016 neuropsychological evaluation for speech language services, (d) contained inadequate present levels of performance (“PLOP”) in the area of math.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party’s disclosures (Petitioner’s Exhibits 1 through 56 and Respondent’s Exhibits 1 through 14) that were admitted into the record and are listed in Appendix A.⁷ The witnesses testifying on behalf of each party are listed in Appendix B.⁸ The Hearing Officer also considered the parties’ written closing arguments submitted on March 2, 2018.

SUMMARY OF DECISION:

Petitioner held the burden of production on all issues to be adjudicated and met a prima facie case on issues #1, #2 and #3. The burden of persuasion then fell to Respondent. The Hearing Officer concluded Respondent sustained the burden of persuasion by a preponderance of the evidence on all issues except as to issue #1(a) regarding math goals. As result, the Hearing Officer concluded DCPS denied Student a FAPE in that regard and awarded Petitioner a portion of the compensatory education requested.

FINDINGS OF FACT:⁹

1. Student resides with Petitioner in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of OHI due to ADHD. DCPS is Student’s LEA. (Petitioner’s Exhibit 4-1)
2. Student attends School A, where Student began attending in SY 2015-2016. (Petitioner’s Exhibit 8-1)
3. In May 2015 DCPS conducted a speech language evaluation. The evaluator conducted assessments¹⁰, an observation and Student and teacher interviews. Student’s expressive

⁷ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

⁸ Petitioner presented four witnesses: (1) Student’s mother (Petitioner) and the following individuals who were designated as expert witnesses: (2), an independent audiologist/speech language pathologist, (3) an educational advocate employed by the law firm representing Petitioner, (4) an educational advocate/psychologist employed by the law firm representing Petitioner. Respondent presented six witnesses most of whom were designated as experts: (1) a DCPS speech language pathologist, (2) A DCPS social worker, (3) a DCPS special education teacher, (4) a DCPS audiologist, (5) another DCPS special education teacher and (6) a DCPS general education teacher.

⁹ The evidence (documentary and/or testimony) that is the source of the Findings of Fact (“FOF”) is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party’s exhibit.

and receptive language skills as scored by the CELF-5 were rated as average except in following instructions and sentence recall. Student's ability to follow complex, multistep directions, and Student's ability to listen to sentences of increasing length and complexity and repeat them were both rated as low average at the 16th percentile. The evaluator determined that all of Student's scores on the CELF-5 were within one standard deviation from the mean, indicating Student had average language abilities compared to same age peers. The evaluator noted that in December 2013 it had been determined that Student no longer demonstrated a mixed receptive-expressive language disorder and no other communication concerns were observed or reported. The evaluator concluded that all formal and informal test results indicated that Student's articulation, fluency, hearing, voice, vocabulary and language abilities were normal, similar to same aged peers and no speech language services were warranted. (Witness 4's testimony, Petitioner's Exhibit 24-1, 24-4, 24-5, 24-6)

4. In May 2015 DCPS conducted a psychological reevaluation. The evaluator noted that Student's cognitive functioning was average in evaluations conducted in 2011 and 2013. Consequently, the evaluator only conducted an intellectual screening test on which Student scored Average. Student's overall academic achievement scores in reading and math were approximately two years below Student's age level. Student performed better in math than in reading. Student's written expression scores were average except in the area of spelling, which was below average. Behavioral data revealed Student presented with inattention in the classroom. The evaluator recommended that Student continue to receive special education services under the OHI classification. (Petitioner's Exhibit 23-1, 23-5, 23-6, 23-7, 23-10)
5. In June 2015 DCPS conducted an audiological evaluation to assess Student for an auditory processing disorder ("APD"). Student scored normal in five of six tests of the auditory processing assessments conducted. The student demonstrated a deficit in one area: binaural integration, specifically processing different information presented to the two ears at the same time. Based upon the level of deficit measured, Student met the technical qualification for an APD. However, the DCPS audiologist concluded based on the testing that Student's overall composite score on the assessment was within the "Normal" range for Student's age. He recommended, among other things, a hearing screening as needed, auditory therapy for binaural integration processing and that Student be retested for APD every two to three years to monitor the binaural integration deficit. The evaluator did not, however, recommend Student receive speech language services to address the APD diagnosed or the deficits identified. (Witness 8's testimony, Petitioner's Exhibit 22-1, 22-4, 22-5 22-6)
6. DCPS granted Petitioner an authorization to obtain an independent auditory processing evaluation that was conducted in November 2015. The evaluator concluded Student had normal hearing and no problems in the following areas: recognition, discrimination and repetition of words, sentences and phoneme strings, and no problems with auditory recognition and awareness, auditory hypersensitivity or auditory distractibility. However,

¹⁰ The assessments were: Receptive One Word Picture Vocabulary Test-4 (ROWPVT-4), Expressive One Word Picture Vocabulary Test-4 (EOWPVT-4) and Clinical Evaluations of Language Fundamentals-5 (CELF-5).

the evaluator concluded Student had significant problems with auditory overloading when presented with increasing amounts of auditory information, auditory memory and auditory organization and sequencing. The evaluator concluded Student had ADP because of deficits with auditory integration at both the phonological and lexical (linguistic) levels in what the evaluator called an “underlying sound-symbol association integrative processing deficit.” The independent evaluator did not include any assessment scores from any testing he used to determine Student had deficits at the sound and word level. (Witness 1’s testimony, Witness 4’s testimony, Petitioner’s Exhibit 20-8, 20-9, 21-1, 21-4, 21-5, 21-6, 21-7, 21-11, 21-12)

7. The independent evaluator recommended Student’s self-regulation issues assessed through a neuropsychological evaluation. To address executive functioning difficulties, the evaluator recommended that Student’s sensory processing and sensory motor integration abilities be assessed through an occupational therapy evaluation. He recommended that a speech language pathologist or reading specialist or special education teacher provide Student assistance with reading or phonological sound-symbol association. He recommended that a speech language pathologist perform the lexical work with Student. (Witness 1’s testimony, Petitioner’s Exhibit 21-7, 21-8, 21-9)
8. In January 2016 a DCPS audiologist conducted a review of the independent auditory processing evaluation and noted, among other things, that the independent evaluator had recommended that a neuropsychological evaluation be conducted to look at Student’s self-regulation and executive functioning issues, auditory integration therapy to help with Student’s self-regulation and general listening skills, and specific interventions by a speech language pathologist working on sound-symbol associations at both phonemic and lexical levels. (Petitioner’s Exhibit 20-1, 20-9)
9. School A conducted an annual review of Student’s IEP on February 25, 2016. Petitioner participated in the meeting along with her educational advocate. The IEP developed contained goals in the areas of reading and written expression and required nine (9) hours per week of specialized instruction inside the general education setting: 1 hour per week in written expression, 4 hours per week in reading, 4 hours per week in math, and two (2) hours per week outside of the general education setting in no specific academic area. Despite prescribing specialized instruction in math, the IEP did not include any math goals. The IEP did not prescribe any related services. The “Other Classroom Aids and Services” section included activities that could be used with an auditory learning and tactile/kinesthetic learner. The IEP also included accommodations to be used in the classroom and in testing that included among other things, use of noise buffers or headphones and repetition of directions. (Petitioner’s Exhibit 8-1, 8-4, 8-5, 8-6, 8-7, 8-8, 8-9, 8-11)
10. Student’s IEP progress report for end of SY 2015-2016 indicates Student made progress relative to reading and written expression goals in the last two quarters of the school year. There was no indication in the progress report of Student’s progress, or lack thereof, relative to the specialized instruction in math School A was providing student as prescribed by Student’s February 25, 2016, IEP. (Petitioner’s Exhibit 15)

11. Student's performance on a citywide assessment in math for SY 2015-2016 showed that Student was performing below grade level. Student's end of year report card indicates Student earned a final grade of "B" in math. (Petitioner's Exhibits 33, 37)
12. An independent neuropsychological evaluation was completed in June 2016, principally to determine whether Student had ADHD or whether Student's inattention might result from another explanation. Student's cognitive functioning was determined to be average. Student's academic achievement scores placed Student below average in reading and math and average in written expression. The evaluator noted Student's weakness with working short-term memory. The evaluator diagnosed Student with ADHD and a Specific Learning Disorder with an impairment in reading. The evaluation referred to the APD diagnosis, but recommended teaching methods to better help Student understand instructions in the classroom. The evaluation did not recommended Student be provided speech language services. The evaluation recommended that student be provided a learning environment with fewer students to help Student stay focused and retain information rather than Student being removed from the classroom to receive pull out services. (Petitioner's Exhibit 19-1, 19-3, 19-4, 19-8, 19-9, 19-12)
13. DCPS convened a meeting to review the independent neuropsychological evaluation and confirmed the student's disability classification of OHI due to ADHD after a review of the independent neuropsychological evaluation. (Petitioner's Exhibits 9, 48)
14. On September 19, 2016, School A convened an IEP annual review meeting. Petitioner attended with her educational advocate. Student's IEP was finalized in October 13, 2016. It included goals in the areas of reading, written expression and added goals in math. The IEP added three goals in the area emotional, social and behavioral development associated with Student's executive functioning and organizational skills. These goals included (1) a check of Student's binder for organization, (2) recording homework assignments on a daily planning sheet, and (3) visiting Student's locker to help ensure Student could quickly find materials needed for the next class. The IEP did not include behavior support services as a related service. Student's special education teacher provided Student services related to the IEP emotional, social and behavioral development IEP goals. (Witness 6's testimony, Witness 7's testimony, Petitioner's Exhibits 7-1, 6-1, 6-3, 6-4, 6-5, 6-6, 6-7,6-8, 6-9)
15. The October 13 2016, IEP prescribed 9 hours per week of specialized instruction inside general education, with 4 hours each in reading and math and 1 hour in written expression. The IEP included data from student's iReady scores in math from September 2016 and Scholastic Reading Inventory scores in reading from September 2016. The IEP cited Student's 2015 achievement testing in written expression. The IEP did not prescribe any related services. The "Other Classroom Aids and Services" section included activities that could be used with an auditory learning and tactile/kinesthetic learner. The IEP also included accommodations to be used in the classroom and in testing that included among other things, use of noise buffers or headphones and

repetition of directions. The IEP also included a post-secondary transition plan. (Petitioner's Exhibit 6-10, 6-11, 6-13, 6-15)

16. During SY 2015-2016 Student was provided a reading intervention class outside general education. Student's reading progressed to the level that Student no longer needed the reading intervention. Consequently Student's special education teacher recommended that the instruction outside general education be eliminated from Student's IEP. After the pullout services for reading were removed Student was able to master two of three reading goals. (Witness 7's testimony, Respondent's Exhibit 8-3)
17. In spring 2017 Student performed below average in citywide standardized testing in math at the 29th percentile of students in Student's grade attending School A. Student's score increased six points higher than the previous school year testing, from 705 to 711. (Petitioner's Exhibits 32, 33)
18. Student's IEP progress report for SY 2016-2017 indicates that Student's emotional, social and behavioral development IEP goals were being implemented by Student's special education teacher and that Student made progress relative to the goals during each reporting period. (Petitioner's Exhibit 12-5, 12-6)
19. On October 13, 2017, School A convened an IEP annual review meeting. Petitioner participated along with her attorney and educational advocate. Student also joined the meeting after it began. The team discussed Student's academic performance and IEP goals. Petitioner's attorney raised concerns that the goals were similar to those of the previous IEP and requested that the student be provided speech language services. Petitioner's educational advocate recommended APD be addressed in the IEP, that Student be provided pull out instruction services and behavior support services. (Witness 3's testimony, Petitioner's Exhibits 46-1, 46-7, 47)
20. On October 23, 2017, School A convened another IEP meeting to review the IEP goals and the transition plan. The team agreed that DCPS would conduct another speech language evaluation and add behavior support services to the IEP. (Petitioner's Exhibit 45)
21. School A amended Student's IEP, dated October 27, 2017, to among other things changed the present levels of performance ("PLOP") and goals and related services. The PLOP for math cites Student's iReady math score from September 2017 and placed student two grade levels below the current grade. The PLOP also includes detail of Student's performance relative to each area that was covered in the iReady assessment. The IEP prescribed 9 hours per week of specialized instruction inside general education, with 4 hours each in reading and math and 1 hour in written expression and 120 minutes per month of behavior support services. The IEP goals in the area emotional, social and behavioral development associated with Student's executive functioning and organizational skills remained the same. (Petitioner's Exhibit 4-1, 4-4, 4-9)

22. On November 21, 2017, Petitioner's educational advocate forwarded a letter to DCPS, on Petitioner's behalf, which stated her problems with the IEP. The letter included, inter alia, issues raised at the IEP meeting regarding the PLOP for math and objecting to the IEP not prescribing speech language services. (Petitioner's Exhibit 50)
23. Based on reading assessments administered by School A, from September 12, 2016, to December 13, 2017, Student's reading assessment score increased from 868 to 1192, a change from basic to advanced. (Respondent's Exhibit 6)
24. At the start of SY 2017-2018 Student was operating one to two grade levels below in math based on math iReady assessments conducted in September 2017. Student is currently operating two grade levels below Student's current grade in math on iReady assessments conducted in February 2018. (Petitioner's Exhibits 26, 27)
25. A DCPS speech language pathologist observed Student in English class and reviewed the evaluations conducted of Student including the 2015 speech language evaluation, the two ADP evaluations and the neuropsychological evaluation. During the observation Student worked well with peers, as asking peers questions and asked the teacher pointed questions and worked to keep on track and complete classwork. (Witness 4's testimony)
26. Student is currently accessing the general education curriculum in the general education setting. Student's recent report card reflects that Student is passing all classes with above average grades except in math, in which Student has a "C". (Witness 5's testimony, Witness 9's testimony, Respondent's Exhibit 2)
27. The student was previously exited from speech language services. Petitioner believes Student articulates well but she is concerned about the diagnosed APD. Although Student is on honor roll, Petitioner believes that Student seems to still struggle with reading at home and Student's test scores need improvement. Petitioner has engaged a tutor to assist Student in math. Student's organization has improved and Petitioner knew that teachers were working with Student on organization and reported Student's performance in this area. (Petitioner's testimony)
28. A DCPS speech language pathologist is currently conducting a speech language evaluation of Student. The evaluation is not yet complete and will be reviewed by an IEP team when completed. (Witness 4's testimony)
29. The compensatory education plan proposed by Petitioner's educational advocate recommended the following: 160 hours of independent tutoring, 72 hours of counseling and 72 hours of speech language services. (Witness 2's testimony, Petitioner's Exhibits 11-5, 52)

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. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO and during the hearing, Petitioner had the burden of production on all issues. Respondent shall hold the burden of persuasion on the following issues #1, #2 and #3. The burden of persuasion fell to Respondent on issues #1, #2 and #3 after Petitioners met a prima facie case.¹¹ The normal standard is preponderance of the evidence. See, e.g. *N.G. v. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

¹¹ DC Code § 38-2571.03 (6) provides:

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

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

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

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

ISSUE 1: Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on February 25, 2016, because, despite available school-wide assessment and evaluation data for Student, the IEP did not contain: (a) annual goals in math and/or speech and language, and (b) related services in the form of speech and language.

Conclusion: Respondent did not sustain the burden of persuasion by a preponderance of the evidence that Student's February 25, 2016, IEP was appropriate. Specifically, the Hearing Officer concludes the IEP was inappropriate because it did not prescribe math goals. However, there was insufficient evidence that the IEP was inappropriate because it did not include speech language as a related service or speech language goals.

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."

To meet its substantive obligation under the IDEA, a school must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017). Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id.*; See also *A.H. ex rel. J.H. v. Dept. of Educ. Of City of New York*, 394 Fed. App's 718, 721 (2d. Cir. 2010) (holding that a school district fulfilled its substantive obligations under the IDEA to provide an IEP likely to produce progression even though it failed to account for student's distractibility during transitions and difficulty interacting with large groups of children in lunch and recess environments). Even where students have profound special needs, courts have found it important for there to be some mainstreaming, albeit with supplemental aids and services. See, e.g., *Oberti v. Board of Educ.*, 995 F.2d 1204 (3d Cir. 1993).

Petitioner asserts with regard to Student's February 25, 2016, IEP, the IEP was not appropriate because the IEP team did not add annual goals in math despite the fact that student was performing more than one grade level below Student's grade and did not add speech language services or speech language annual goals.

The evidence demonstrates that the February 25, 2016, IEP prescribed four hours of specialized instruction in math inside the general education setting. However, there were no math goals included to direct Student's progress relative to the math instruction provided. The evidence demonstrates based upon Student's 2015 academic achievement testing Student was operating approximately two grade levels below in math.

The IEP contained goals in reading and written expression and required nine (9) hours per week of specialized instruction inside the general education setting: 1 hour per week in written expression, 4 hours per week in reading, 4 hours per week in math, and two (2) hours per week outside of the general education setting with no specific area specified. The evidence demonstrates from Student's IEP progress report for end of SY 2016-2017 Student made progress relative to reading and written expression goals. However, there is no indication in the progress report of student's progress, or lack thereof, relative to the specialized instruction in math School A was providing student as prescribed by Student's February 25, 2016, IEP.

Student's performance on a citywide assessment in math for SY 2015-2016 showed that Student was performing below grade level. Although Student's end of year report card showed that Student earned a final grade of "B" in math, that grade is less of an objective measure of Student's performance in math than the citywide assessment. It is difficult to determine the level of impact the IEP having no math goals contributed to Student's below grade level performance on the citywide testing. However, Petitioner met a prima facie case that Student's February 25, 2016, IEP was inappropriate because it contained no math goals.

Although DCPS presented testimony from Student's current math teacher and current and former special education teachers, their testimony did not address Student's math performance during SY 2016-2017. There was insufficient evidence presented by Respondent to sustain the burden of persuasion by preponderance that the lack of math goals did not render the February 25, 2016, IEP inappropriate. The evidence demonstrates that Student continues to be significantly below grade level in math. Consequently, the Hearing Officer concludes that Student's February 25, 2016, IEP was not reasonably calculated to enable Student to make progress appropriate in light of the Student's circumstances and DCPS denied Student a FAPE as a result.

Petitioner also alleged that the February 25, 2016, IEP was inappropriate because it did not prescribe speech language as a related service and did not include speech language goals. The speech language evaluation DCPS conducted in May 2015 revealed that Student's expressive and receptive language skills were average except in following instructions and sentence recall. However, in those two areas Student's performance on the assessment was only one standard deviation from the mean. That evaluation concluded Student had average language abilities compared to same age peers.

The DCPS speech language pathologist credibly testified that based on the assessment results Student did not qualify for speech language services. The Hearing Officer found her testimony regarding whether Student qualified for speech language services more credible than that of Petitioner's expert witness, first because Petitioner's witness' testimony was not based on a

speech language evaluation he conducted. Rather, it was based on an evaluation he conducted to determine whether Student had an auditory processing disorder.

The evidence demonstrates that DCPS conducted an auditory processing evaluation that concluded Student met the technical qualification for APD but did not conclude Student required speech language services to address the deficits identified. DCPS granted Petitioner an independent APD evaluation and that independent evaluator concluded for different reasons than the DCPS evaluation that Student had an APD. The independent evaluator recommended additional evaluations and that Student be provided services from a speech language pathologist relative to sound-symbol associations at both phonemic and lexical levels. The Hearing Officer was not convinced by this witnesses' testimony that Student requires speech language services to address this concern. Both the DCPS speech pathologist and the DCPS audiologist credibly testified that there was no specific test data in the independent evaluation report that supported the evaluator's conclusion that Student required the services he recommended be provided by a speech language pathologist.

Rather, the DCPS speech language pathologist credibly testified that the areas of concern this independent evaluator recommended be provided by a speech language pathologist are more aptly provided by a special education teacher. This opinion is bolstered by the fact that Petitioner's independent neuropsychological evaluation, although citing the diagnosed ADP in one of its recommendations, recommended teaching methods to address the ADP to better help Student understand instructions in the classroom; it did not recommend speech language services. Consequently, the Hearing Officer concludes that there was insufficient evidence presented that Student's February 25, 2016, IEP was inappropriate because it did not prescribe speech language as a related service and did not include speech language goals.

ISSUE 2: Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP in September 2016 and October 2016, because, despite available school-wide assessment and evaluation data for the student, the IEP(s): (a) did not contain related services for speech and language and/or behavior support services; (b) data on student's school wide assessments for SY 2015-2016; (b) eliminated pullout special education instruction in reading; (c) reduced student's total hours of special education services, and (d) failed to incorporate the recommendations of a June 2016 independent neuropsychological evaluation for speech language services.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that Student's October 13, 2016, IEP was reasonably calculated to enable Student to make progress appropriate in light of the Student's circumstances.

Petitioner first asserts the IEP is inappropriate because it did not contain related services for speech and language and/or behavior support services.

The evidence demonstrates that School A convened an IEP meeting in September 2016, that resulted in a finalized IEP dated October 13, 2016. The evidence demonstrates that at the September 15, 2016, meeting the team reviewed the independent neuropsychological evaluation. There is no evidence that the evaluation recommended speech language services. There was no

evidence that at the September 15, 2016, meeting there was any additional request for, or discussion of, speech language services for Student. For the reasons discussed in issue # 1 above as to speech language services, the Hearing Officer concludes that there were no changed circumstances or facts that would have warranted the September 15, 2016, IEP team adding speech language services to Student's IEP.

As to Petitioner's claim about behavioral support services, the team agreed that Student required emotional, social and behavioral development goals to assist Student with organization; however, there is no indication that the team determined that Student required behavior support services to implement these goals. To the contrary, Student's special education teacher for SY 2016-2017 credibly testified that it was agreed that she would administer these new goals on Student's IEP. She credibly testified that she worked with Student on these goals and that Student made progress relative to these goals as a result. Consequently, the Hearing Officer concludes that Student's October 13, 2016, IEP was not inappropriate because it did not include behavior support services as a related service.

The September 15, 2016, IEP team also added math goals to the IEP team and removed the 2 hours of specialized instruction outside general education that had been in Student's prior IEP. The evidence demonstrates that Student's prior IEP did not specify the area in which the instruction outside general education was being delivered. However, Student's special education teacher for SY 2016-2017 credibly testified that Student had been provided a reading program outside general education. She also credibly testified that Student's reading skills improved steadily during the school year resulting in Student testing out of reading intervention program such that Student no longer needed reading intervention outside general education.

Although Petitioner's educational advocates who were designated as expert witnesses asserted Student needed and continues to need specialized instruction outside general education, the Hearing Officer was not convinced by their testimony. I found the testimony of Student's special education teacher far more credible because of her experience of direct instruction to Student and because Student's reading scores since SY 2016-2017 have steadily increased. Student's specialized instruction in math, reading and written expression otherwise remained the same. Consequently, the Hearing Officer does not conclude that Student's October 13, 2016, IEP was inappropriate because pullout special education instruction in reading was eliminated or that Student's total hours of special education services were reduced.

Petitioner asserts in this issue as well that the IEP is inappropriate because it did not include school wide assessment data. The evidence demonstrates that Student's October 13, 2016, IEP included data from Student's iReady scores in math from September 2016 and Scholastic Reading Inventory scores in reading from September 2016. The IEP cited Student's 2015 achievement testing in written expression. Although Student's IEP apparently did not reference any citywide testing scores, there was no evidence presented that convinces the Hearing Officer that the lack of such data rendered the IEP inappropriate.

Lastly, Petitioner asserts the IEP is inappropriate because it failed to incorporate the recommendations of a June 2016 independent neuropsychological evaluation for speech language services. As already discussed, the evidence demonstrates that the independent

neuropsychological did not recommend Student receive speech language services. Also as already discussed, there was no evidence that at the September 15, 2016, meeting there was a basis for the IEP team to add speech language services to Student's IEP. For the foregoing reasons, the Hearing Officer concludes that Student's October 13, 2016, IEP was reasonably calculated to enable Student to make progress appropriate in light of the Student's circumstances.

ISSUE 3: Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP in October 2017 and/or failed to review and revise the student's IEP, because, despite available assessment and evaluation data for the student, the IEP: (a) failed to increase the Student's level of services, (b) did not include speech and language related services and annual goals in the area of speech and language; (c) failed to incorporate the recommendations of the June 2016 neuropsychological evaluation for speech language services, (d) contained inadequate PLOPs in the area of math.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that Student's October 27, 2017, IEP was reasonably calculated to enable Student to make progress appropriate in light of the Student's circumstances.

Petitioner asserts that Student's most recent IEP should include specialized instruction outside general education for math and for all ELA classes and specialized instruction inside general education for all other academic classes. Petitioner put forward testimony from educational advocates that Student requires this level of special education services to be successful. The Hearing Officer did not find their testimony in this regard credible. First, Student's most recent reading assessments indicate that Student has made significant progress in reading with the level of services School A has provided. In addition, Student's independent neuropsychological evaluation recommended Student not be given pullout instructional services. Finally, Student's recent report card reflects that Student is passing all classes with above average grades except in math.

Although the evidence indicates that Student remains challenged in the areas of math and written expression, Student's current special education teacher and general education math teacher credibly testified that Student is accessing the general education curriculum in the general education setting, and that removal from general educational setting would be detrimental. The Hearing Officer found these teachers' testimony far more convincing because of their direct contact with and instruction of Student during the current school year. Consequently, the Hearing Officer does not conclude that Student's current IEP is inappropriate because it does not prescribe more specialized instruction or instruction outside general education.

Petitioner again contends with regard to Student's current IEP that it is inappropriate because it lacks speech language services and did not incorporate the recommendation from the neuropsychological evaluation for speech language services. There is no evidence that there was any new data available to the team that developed the most recent IEP that would have warranted the team adding speech language services to Student's IEP. As previously noted, the neuropsychological evaluation did not recommend speech language services. There were no changed circumstances that would necessitate Student being provided speech language services. The evidence reveals that DCPS has agreed to conduct a new speech language evaluation that

has not yet been completed. The Hearing Officer concludes that absent any new data and based upon the discussion regarding the lack of demonstrated need for speech language services in the other two issues above, Student's October 27, 2017, IEP is not inappropriate because it lacks speech language services.

Finally, Petitioner asserts that the October 27, 2017, IEP is inappropriate because it contains inadequate PLOPs in the area of math. The evidence demonstrates that IEP PLOP for math cites Student's iReady math score from September 2017 and placed student two grade levels below the current grade. The PLOP also includes detail of Student's performance relative to each area that was covered in the iReady assessment. There was insufficient evidence presented that the math PLOP in this IEP were inappropriate. Consequently, based on the evidence adduced, this Hearing Officer concludes that Student's October 27, 2017, IEP was reasonably calculated to enable Student to make progress appropriate in light of the Student's circumstances.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.)

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

Petitioner proposed a compensatory education plan for the denials of FAPE alleged in the complaint. However, the Hearing Officer has determined denial of FAPE on a portion of one of the issues adjudicated. Thus, the Hearing Officer concludes the amount of services Petitioner requested as compensatory education are overstated and unreasonable as the plan presumably seeks compensation in all three academic areas as well as for related services. There was sufficient testimony that indicates that Student would benefit from tutoring, especially in the area of math. Therefore, the Hearing Officer will grant Petitioner one third of the amount of independent tutoring requested to cover that lack of IEP math goals in Student's February 2016 IEP, given that to award no compensatory education would be inequitable.¹²

¹² Once a plaintiff "has established that she is entitled to [a compensatory education] award, simply refusing to grant one clashes with *Reid*, which sought to eliminate 'cookie-cutter' awards in favor of a 'qualitative focus on individual needs' of disabled students." *Stanton ex rel. K.T. v. District of Columbia*, 680 F. Supp. 2d 201, 207 (D.D.C. 2010) (quoting *Reid*, 401 F.3d at 524, 527).

ORDER: ¹³

1. DCPS shall, within (15) school days of the issuance of this Order, provide Petitioner authorization for and fund 54 hours of independent tutoring at the OSSE.
2. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.

Hearing Officer

Date: March 7, 2018

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

¹³ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioners shall extend the timelines on a day for day basis.