

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 May 1, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2004.

BACKGROUND AND PROCEDURAL HISTORY:

The student is _____ at a DCPS school (“School A”). On January 23, 2014, Petitioner filed the due process complaint asserting, inter alia, DCPS inappropriately exited the student from special education services on December 12, 2012. Petitioner also alleged that the May 29, 2012, individualized educational program (“IEP”) DCPS developed and implemented prior to the student’s exit from special education was inappropriate because it did not prescribe sufficient specialized instruction and behavior support services. Petitioner originally sought as relief that the Hearing Officer reinstate the student’s eligibility and direct DCPS to develop an appropriate IEP and fund compensatory education.

DCPS filed a timely response to the complaint on February 4, 2014, and asserted: that an IEP team including the parent met on May 29, 2012, to review and revise the student’s IEP; that the team determined the student required two hours per week of specialized instruction in math in the general education setting, 240 minutes per month of speech language services outside of general education, and 60 minutes per month of behavioral support and the IEP was appropriate. The MDT met again on December 12, 2012, to determine the student’s continued eligibility for special education and related services and based on assessments and other data determined the student no longer qualified for services as a student with a disability. At the request of the parent, the team met again on June 11, 2013, to determine the student’s eligibility and again determined the student was ineligible but agreed that the student qualified under Section 504 of the ADA and developed a 504 plan for the student. The student’s behavior intervention plan (“BIP”) was updated at that meeting.

A resolution meeting was held February 3, 2014. Nothing was resolved. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on February 23, 2014, and originally ended (and the Hearing Officer’s Determination (“HOD”) is due) on April 8, 2014.

The Hearing Officer convened a pre-hearing conference on March 10, 2014, and issued a pre-conference order on March 13, 2014, outlining, inter alia, the issues to be adjudicated. On April 1, 2014, Petitioner’s counsel filed an unopposed motion to continue the hearing from the agreed upon hearing date of April 2, 2014, and extend the HOD due date for thirty (30) calendar days. The motion was granted and the HOD due date is now May 8, 2014.

After the complaint was filed DCPS conducted new evaluations of the student and determined

him eligible for special education services and developed an IEP. The student's new IEP was not challenged in this hearing by Petitioner.

ISSUES: ²

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP on May 29, 2012, because (1) it did not prescribe sufficient specialized instruction both inside and outside general education of 10 hours per week each, (2) failed to prescribe at least 60 minutes per week of behavior support and (3) failed to include 30 minutes of group counseling per week as recommended by the student's March 2012 psychological evaluation.
2. Whether DCPS denied the student a FAPE by inappropriately exiting the student from special education on December 12, 2012, by (1) failing to comprehensively evaluate the student prior to the exit, (2) failing to consider existing evaluative data prior the exit, and (3) failing to include the parent in the team's decision to exit the student.

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 26 and Respondent's Exhibits 1 through 15) that were all admitted into the record and are listed in Appendix A. Witnesses a listed in Appendix B.

FINDINGS OF FACT: ³

1. The student is attending School A. The student first enrolled at School A for pre-kindergarten and remained at School A for kindergarten. The student had an IEP at School A dated March 29, 2011, that classified him with developmental delay and prescribed specialized instruction in math and related services for speech therapy and behavioral support. At the start of school year ("SY") 2011-2012 the student's parent removed him from School A and enrolled him at a D.C. public charter school for first grade. During the time the student attended the public charter school his IEP was not implemented. The parent returned the student to School A in March 2012 where he completed first grade. (Petitioner's Exhibit 7-2, Parent's testimony)

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

³ The evidence that is the source of the Finding of Fact ("FOF") 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.

2. On March 19, 2012, while the student was age seven and in the first grade at School A an independent a psychological evaluation was conducted of the student. The evaluation determined the student had average cognitive functioning with a full scale IQ of 92. The student was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) and social emotional and behavioral concerns. The evaluator determined the student was in need of “specialized educational programming to address his symptoms manifestations of ADHD.” The evaluator recommended⁴ the student’s receive special education programming “to address hyperactivity, impulsivity, and attention deficits that interfere with his academic performance.” The evaluator recommended the student’s placement in a combination setting with pullout services for behavioral support and specialized instruction and small classes for major academic subjects based upon feedback the evaluator gleaned from teacher comments. The evaluation did not include assessment of the student’s academic functioning. (Witness 2’s testimony, Petitioner’s Exhibit 7-1, 7-4, 7-6, 7-7)
3. The psychologist who conducted the March 2012 evaluation also recommended the student be provided school based counseling of “at least 60 minutes weekly for individual sessions to address self-esteem, emotional expression, compliance, acceptance needs, and coping strategies.” The evaluator also recommended the student be provided school based group counseling of at least 30 minutes weekly for social skill development because of his young age at the time he was evaluated. (Petitioner’s Exhibit 7-7)
4. On March 26, 2012, an independent speech and language evaluation was conducted of the student. The evaluator determined the student’s receptive language performance was average but his expressive language skills were “significantly below his chronological age expectancy.” The evaluator concluded the student would benefit from language therapy to improve his expressive language skills. (Petitioner’s Exhibit 8-6)
5. An independent functional behavior assessment (“FBA”) was conducted of the student on May 14, 2012. The FBA recommended a behavior intervention plan (“BIP”) be developed to address the student’s targeted behaviors of aggression, withdrawing, refusing to follow directions and difficulty attending to tasks due to hyperactivity. The FBA also recommended the student participate in individual and family counseling. (Petitioner’s Exhibit 5-1, 5-4, 5-5)
6. After the student’s return to School A DCPS convened an IEP meeting for the student at School A on May 29, 2012. The student’s parent attended. A DCPS psychologist was among the DCPS staff members who participated in the meeting. The IEP developed on that date for the student included the goals in the following areas: (1) academic in the area of math, (2) communication/speech and language and (3) emotional, social and behavioral development. The services prescribed in the IEP were: 2 hours of specialized instruction in math inside general education per week, 240 minutes of speech language pathology per week, 60 minutes of behavior support services per month. The parent believed at the time the student needed more

⁴ The evaluation included a list of a total of ten recommendations. All the recommendations that were made in the evaluation are not specifically listed in these findings.

specialized instruction and services that the IEP prescribed. (Petitioner’s Exhibit 1-1, 1-2, 1-3, 1-4, 1-5, 1-6, 1-7, 1-8, Parent’s testimony)

7. The student was in second grade at School A for SY 2012-2013. The student’s report card for second grade for the first two advisories indicated the student was meeting the standards in English Language Arts and Math but his skill levels in all areas was rated as “developing” - higher than “beginning” level - the lowest rating. However, the student was not yet considered at the “secure” level which was the highest rating he could achieve. Some of the skills measured on the report card had not yet been introduced to the student and he was not rated in those areas. During the second advisory the teacher noted on the report card the student “needs extra help with reading.” (Petitioner’s Exhibit 13-1, 13-2, 13-3)
8. On November 20, 2012, DCPS conducted an educational assessment of the student. The November 20, 2012, Woodcock Johnson (“WJ-III”) was administered when the student was age nine, 0 months (7-9) and in second grade (2.3). Generally, the student was operating at or near second grade level in the areas measured. The student had the following scores:

Cluster/Test	Standard Score	Grade Level	Age Eq.
Brief Achievement	89	1.8	7-2
Broad Reading	85	1.7	7-0
Broad Math	106	2.7	8-0
Broad Witten Language	88	1.8	7-2
Written Expression	95	2.1	7-5
Letter -Word Identification	87	1.6	6-11
Reading Fluency	93	2.0	7-3
Passage Comprehension	89	1.7	7-0
Brief Math	106	2.7	8-0
Calculation Skills	104	2.6	7-11
Math Fluency	102	2.6	7-11
Calculation	104	2.6	7-11
Applied Problems	106	2.8	8-1
Broad Written Language	88	1.8	7-2
Written Expression	95	2.1	7-5
Writing Fluency	88	1.8	7-1
Spelling	85	1.5	6-10
Writing Samples	99	2.3	7-7

(Respondent’s Exhibit 10)

9. On November 28, 2012, DCPS conducted a speech language reevaluation. The evaluator reviewed the student’s prior records but apparently knew about, but did not have a copy of, the March 2012 speech/language evaluation report. The reevaluation noted the student had previously been identified as having academic concerns in the area of reading. The evaluator conducted assessments of the student including the CELF-4 which was an assessment conducted in the March 2012 evaluation. Based

upon the assessments and information provided by the student's teacher regarding the student language abilities the evaluator concluded the student was no longer in need of speech language intervention. (Respondent's Exhibit 6-1, 6-4, Petitioner's Exhibit 8-2)

10. An IEP team met on December 12, 2012, at School A to determine the student's continued eligibility for special education and related services. Based on the student's recent academic assessments and teacher progress reports and feedback the DCPS members of the team determined the student no longer qualified for services as a student with a disability. The DCPS members of the team concluded that student could access the general education curriculum and that student had mastered the math goals in his IEP. The student's special education teacher during SY 2012-2013 was of the opinion that the student got distracted easily but was able to get back on task thus his behaviors were not impacting him in the classroom as much as in the past. Although there was some indication the student was behind grade level in his reading skills the team did not believe his deficits in reading were significant enough to warrant special education. Following the December 12, 2012, meeting the student no longer received special education services. (Witness 3's testimony)
11. The team notes in the summary report from the December 12, 2012, meeting state the that the student was "showing strong success in the acemic area of mathematics. He is able to access the general education curriculum easily and is able to engage in grade level content." However, the eligibility determination report also noted that with regard to the student's communication/speech and language goals the student had demonstrated minimal progress due to his unwilling [ness] to fully cooperate or come to speech therapy. The notes also indicated the student had shown regression in his ability to attend and had regressed in the area of emotional, social and behavioral development in his general education classroom. DCPS issued a prior written notice stating the student was no longer eligible for special education services. (Respondent's Exhibits 7, 8-4, 8-5, 9)
12. The student's parent participated in the December 12, 2012, meeting by telephone and thought the meeting was convened simply to address the student's transportation services. She had no idea before hand that the meeting was being held to determine if the student would continue in special education. The parent disagreed with the decision to exit the student from special education and belived he still needed special education services and was still having behavioral and academic concerns. (Parent's testimony)
13. From January to March 2013 the student was eager to learn and cooperative in his general education classroom. He did not appear to have any problems accessing the curriculum and when he did not understand something he had no problem raising his hand and asking for assistance. The student had a strong suit for math but did not demonstrate any significant deficit in reading. His behavior was not alarming and he spoke up for himself and took responsibility for his actions. There was no need for the classroom teacher to reach out for help regarding the student's behavior and the

student had no suspensions. There was a behavior system in place for the class and the student complied with the system. (Witness 5's testimony)

14. The student's report card for second grade for the last two advisories indicated the student was meeting the standards in English Arts. His skill levels were rated as "secure" in five of the fourteen areas measured and rated as "developing" in all others. In math his skill levels was rated as "secure" in six of the ten areas measured and rated as "developing" in all others. (Petitioner's Exhibit 13-1, 13-2, 13-3)
15. School A convened another eligibility meeting on June 11, 2013, with the parent present as a result of the parent's disagreement with the student being exited from special education in December 2012. The parent was informed about and actually urged that the June 2013 meeting occur. The DCPS team again determined the student was ineligible for special education and related services based on the student's academic performance as measured by his November 2012 assessment and data provided by his teachers⁵ despite any continued attention and focus issues. The team agreed that the student qualified under Section 504 of the ADA due to his ADHD and developed a 504 plan for the student. The student's behavior intervention plan ("BIP") was updated at the meeting. DCPS conducted a review of the student's March 2012 speech language evaluation. DCPS thereafter completed a form indicating the student had completed speech language services and that the services were being discontinued. The parent did not agree with the DCPS determinations made at that meeting. (Respondent's Exhibits 2, 3, 4, 5, Petitioner's Exhibit 2, Witness 4's testimony, Parent's testimony)
16. The student began third grade at School A at the start of SY 2013-2014. The student's report card for the first advisory of third grade indicate he was below basic in reading, written language, speaking and listening, math, and social studies. The student's report card for the second advisory of third grade indicate he remained below basic in reading, written language and math and improved to basic level in speaking and listening, science and social studies. The report card also noted the student work habits and personal and social skills were in need of improvement. (Petitioner's Exhibit 15-1)
17. During SY 2013-2014 the student has had frequent behavioral concerns. (Parent's testimony, Petitioner's Exhibit 11)
18. DCPS conducted a comprehensive psychological evaluation and a speech language evaluation of the student in March 2014. The psychological evaluation included assessments of the student's academic functioning. In April 2014 DCPS found the student eligible for special education services and developed an IEP. (Petitioner's Exhibits 22, 23, 24)

⁵ Witness 4 testified that DCPS has a policy that if student does not have academic deficit of at least two grade level the student will not be found eligible for special education. However, there was no written authority provided to substantiate this policy.

19. Comparing the student's scores between the student's academic achievement in November 2012 and the most recent assessment in March 2014 the student has made some progress in all areas but the student's present levels of achievement compared to his age and his grade have declined. In November 2012 the student was 9 months deficit compared to his age in broad reading and was above his age in broad math. However, by March 2014 the student's broad reading age deficit had grown from 9 months to 1 year - 5 months; his math achievement had gone from being above age to a deficit of 1 year. The student had the following scores in those assessments:

Age: 7-9 Grade: 2.3 November 2012				Age: 9-1 Grade: 3.7 March 2014		
				(+1.4 grade/yrs.)		
Cluster/Test	S/Score	GL	Age Eq.	S/Score	GL	Age Eq.
Brief Achievement	89	1.8	7-2	88	2.7	8-1
Broad Reading	85	1.7	7-0	82	2.4	7-8
Broad Math	106	2.7	8-0	86	2.8	8-1
Broad Witten Language	88	1.8	7-2	84	2.4	7-9
Written Expression	95	2.1	7-5	85	2.3	7-8
Letter -Word Identification	87	1.6	6-11	86	2.6	7-10
Reading Fluency	93	2.0	7-3	85	2.3	7-7
Passage Comprehension	89	1.7	7-0	85	2.1	7-5
Brief Math	106	2.7	8-0	88	2.8	8-2
Calculation Skills	104	2.6	7-11	88	2.8	8-2
Math Fluency	102	2.6	7-11	81	2.3	7-7
Calculation	104	2.6	7-11	79	2.3	7-7
Applied Problems	106	2.8	8-1	95	3.3	8-7
Broad Written Language	88	1.8	7-2	84	2.4	7-9
Written Expression	95	2.1	7-5	85	2.3	7-8
Writing Fluency	88	1.8	7-1	71	1.6	6-11
Spelling	85	1.5	6-10	89	2.5	7-10
Writing Samples	99	2.3	7-7	99	3.4	8-9

(Petitioner's Exhibit 22-10, Respondent's Exhibit 10-1)

20. DCPS offered the student compensatory education at the June 2013 meeting due to the student being exited from special education in December 2012 until June 2013 when an IEP team met and reconsidered the student's eligibility. However, the student has not actually been provided the tutoring services that were offered at the June 2013 meeting. (Witness 3's testimony, Parent's testimony)

21. The parent's educational advocate proposed a compensatory education program to compensate the student for being exited from special education and not being provided the level of services Petitioner asserted he should have been provided. The student's educational advocate opined that the student could be expected to make 1.5 years progress in reading and 1 year growth in math if he is provided 90 hours of academic tutoring. In addition, the advocate opined that the student would need 22.5

hours of independent counseling to appropriately compensate him for the missed behavior support services he was not provided during the time he was inappropriately exited from special education. (Witness 1's testimony, Petitioner's Exhibit 17)

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.⁶ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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

ISSUE 1: Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP on May 29, 2012, because (1) it did not prescribe sufficient specialized instruction both inside and outside general education of 10 hours per week each, (2) failed to prescribe at least 60

⁶ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

minutes per week of behavior support and (3) failed to include 30 minutes of group counseling per week as recommended by the student's March 2012 psychological evaluation.

Conclusion: There was insufficient evidence that the student should have been provided the level of services Petitioner claims (10 hours inside and 10 hours outside general education) or additional behavioral supports and counseling that were recommended in the student independent independent psychological evaluation.

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

To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

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

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

The evidence demonstrates the student's IEP when he attended School A during SY 2010-2011 prior to his departure to the public charter school only prescribed specialized instruction in math. The student's IEP was not implemented while he attended the public charter school. Upon the student's return to School A in March 2012 his IEP had not yet been updated. When School A updated the IEP in May 2012 the student's independent evaluation that was reviewed indicated the student has average cognitive abilities. The student behavioral functioning was also assessed in the March 2012 independent psychological evaluation but not his academic functioning. Based upon the student's history of having only been prescribed specialized instruction in math it was reasonable that the student's IEP developed in May 2012 only prescribed specialized instruction in math.

Petitioner presented its expert witness who conducted the independent evaluation and she testified that she based her recommendation for the student receiving specialized instruction in core academic areas beyond math on feedback from the student's teacher(s) regarding the student's attention issues in school but not any particular academic data that demonstrated the student had academic deficits that needed to be addressed through specialized instruction.

Consequently, despite the recommendation in the evaluation and the testimony that the student required specialized instruction in all core subjects the Hearing Officer concludes that the documentary evidence does not support that contention.⁷ Although there was a recommendation also in the evaluation that student needed more counseling services than the IEP prescribed and recommended group counseling, the Hearing Officer was not convinced by Petitioner's expert witnesses' testimony and the evidence of the student's functioning during second grade that the student was in need of more behavioral support services that the IEP prescribed. Both the student's special education teacher and his general education teacher testified credibly that the student's behavioral issues in the classroom were not problematic that school year and did not prevent him from assessing the curriculum.⁸ Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of proof that the student's May 29, 2012, IEP was inappropriate. At the time the student's IEP was developed it was reasonably calculated to provide the student educational benefit based on the data available to the IEP team.

ISSUE 2: Whether DCPS denied the student a FAPE by inappropriately exiting the student from special education on December 12, 2012, by (1) failing to comprehensively evaluate the student prior to the exit, (2) failing to consider existing evaluative data prior the exit, and (3) failing to include the parent in the team's decision to exit the student.

Conclusion: The evidence does demonstrate that DCPS conducted an evaluation and considered existing data when it exited the student from special education. However, Petitioner sustained the burden of proof that the student was inappropriately exited from special education services in December 2012 and the student was harmed thereby and denied a FAPE because it did not appropriately include the parent in the decision making process to exit the student on December 12, 2012.⁹

34 C.F.R § 300.305 requires

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must--

- (1) Review existing evaluation data on the child, including-
 - (i) Evaluations and information provided by the parents of the child;
 - (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
 - (iii) Observations by teachers and related services providers; and
- (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine--(i)(A) Whether the child is a child with a disability, as defined in

⁷ FOF #s 7, 8

⁸ FOF #s 10, 13, 14

⁹ However, the evidence demonstrates the parent was appropriately informed and involved in the June 2013 meeting where the student's eligibility was revisited.

- Sec. 300.8, and the educational needs of the child; or
- (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;
- (ii) The present levels of academic achievement and related developmental needs of the child;(iii)(A) Whether the child needs special education and related services; or
- (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services;

DCPS conducted evaluations and a reviewed data and input from his teachers in December 2012 and again at the June 2013 meeting and considered the student's deficits in reading to not be significant enough to warrant special education services.¹⁰ The Hearing Officer concludes that in December 2012 and June 2013 the student's exit from special education was based evaluation(s) and data as IDEA requires.

34 C.F.R § 300.322 requires

- (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.
- (b) Information provided to parents.
 - (1) The notice required under paragraph (a)(1) of this section must--
 - (i) Indicate the purpose, time, and location of the meeting and who will be in attendance;

The evidence demonstrates that the parent participated in December 2012 meeting by telephone and was not informed prior to the meeting that the student's eligibility would be reconsidered and she objected to the student being exited from special education. The student stopped being provided services at this point. DCPS conducted another meeting with the parent present in June 2013 and reconfirmed the student's ineligibility for services and then issued a prior written notice. Given that the parent was not informed of the purpose of the meeting before hand that the student's eligibility would be reconsidered, that she was given an opportunity to be physically present at the meeting and then there is no evidence she was issued a prior notice of that the student would be exited from special education until the meeting in June 2013 the Hearing Officer concludes that DCPS inappropriately discontinued the student's special education services in December 2012 significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE and caused the child a deprivation of educational benefits.

Although the student's May 29, 2012, IEP was appropriate when it was developed, when DCPS conducted its educational assessment in November 2012 that the student's academic functioning was clearly apparent. That assessment indicated the student was functioning on grade level in math but actually had deficits in other areas including reading and written expression. DCPS did not consider the student's reading deficits to be significant. Based upon this data DCPS concluded in December 2012 that the student was no longer eligible for special education and his

¹⁰ FOF #s 10, 15

services were discontinued. The evidence demonstrates, however, the student should have been provided at least some specialized instruction in reading as of December 2013 in addition to the specialized instruction in the area of math.¹¹ The student has now been recently reassessed with a comprehensive psychological evaluation that indicates he has made some academic progress since he was previously assessed in November 2012. However, the level of progress has significantly slowed to the point that student is now below grade level rather than on grade in math and even more below grade level in reading than he was in November 2013.¹² Although his academic performance does not technically indicate regression it does indicate harm based upon the student being inappropriately exited from special education in December 2012.

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.

Evidence demonstrates that the student's deficits in reading increased and he is now demonstrating deficits in math as well. There is evidence that the amount of tutoring requested by Petitioner would serve to place the student in the stead he would have been had he not been inappropriately exited from special education in December 2012 and to make up for the academic deficits he now has. Although may have previously offered compensation for missed services the evidence demonstrates that he student never received the services that were offered.¹³ In addition, the student was without behavioral support services during this time and is entitled to compensation for those missed services as well to address any social emotional issues that stem from his increased academic deficits. Consequently, the Hearing Officer directs in the Order below that the student be provided academic tutoring and counseling services requested as compensatory education and concludes those services are appropriate.

ORDER:¹⁴

1. As compensatory education for the student being inappropriately exited from special education services DCPS shall within 30 calendar days of the issuance of this Order provide the student 90 hours of independent tutoring and 22.5 hours of independent

¹¹ FOF #s 7, 8, 9

¹² FOF # 19

¹³ FOF # 20

¹⁴ 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.

counseling at the prescribed OSSE/DCPS rates. Petitioner shall use and complete this award by December 31, 2014.

2. All other requested relief 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 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: May 8, 2014