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 Office of the State Superintendent of Education
 Office of Review and Compliance
 Office of Dispute Resolution
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Confidential

<p>Parent on Behalf of Student,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”)</p> <p>Respondent.</p> <p>Case # 2017-0206</p> <p>Date Issued: November 15, 2017</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: October 17, 2017 October 16, 2017</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, November 15, 2017, 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 October 16, 2017, and October 17, 2017, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2003. The parties submitted written closing arguments on October 27, 2017.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is age _____ and in grade _____.² Student resides in the District of Columbia and is a child with a disability pursuant to IDEA with a disability classification of specific learning disability (“SLD”). Student attends a District of Columbia Public Schools (“DCPS”) high school (“School A”). DCPS is the student’s local educational agency (“LEA”).

Student’s father (“Petitioner”) filed the current due process complaint (“DPC”) on July 28, 2017. Respondent’s Response to the complaint was filed August 7, 2017. On September 1, 2017, Petitioner filed an amended DPC, which restarted the due process hearing timeline.

In the amended DPC Petitioner alleged DCPS denied the student a free appropriate public education (“FAPE”) by failing to, inter alia, propose an appropriate individualized educational program (“IEP”) for the student on March 17, 2017.

The parties participated in a resolution meeting, on October 6, 2017, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing in this matter. The 45-day period began on October 1, 2017, and ends [and the Hearing Officer’s Determination (“HOD”) is due] on November 15, 2017.

This matter was originally assigned to Independent Hearing Officer (“Hearing Officer”) NaKeisha Sylvester Blount, Esq., who on September 26, 2017, convened a pre-hearing conference (“PHC”) on the complaint and issued a pre-hearing order (“PHO”) on September 16, 2017, outlining, inter alia, the issues to be adjudicated.

On October 11, 2017, the OSSE Office of Dispute Resolution reassigned this case to the current Hearing Officer, Coles B. Ruff, Jr. Esq., to conduct the hearing and to adjudicate the due process complaint. During the hearing on October 16, 2017, and October 17, 2017, the parties agreed to a revision of the issues to be adjudicated that are outlined below.

² The student’s current age and grade are indicated in Appendix B.

Relief Sought:

Petitioner seeks as relief that the Hearing Officer find that Student has been denied a FAPE and order DCPS to convene an IEP meeting within 15 days of the decision to revise Student's IEP to include services reasonably calculated to meet Student's unique needs; an Order that DCPS locate a program that can implement Student's IEP within DCPS, or an Order that DCPS fund an alternative placement such as the proposed nonpublic school; an Order that DCPS fund an independent FBA and an independent comprehensive, psychological evaluation; an Order that DCPS fund reasonable compensatory education for the denials of FAPE.

LEA Response to the Complaint:

DCPS filed a timely response to the amended complaint on September 11, 2017. DCPS denies that there has been any failure to provide Student with a FAPE. DCPS asserts that on March 17, 2017, the IEP team concluded that there was no data to support Student's removal from general education for the foreign language course, as Student was capable of accessing the curriculum in Student's general education classroom. DCPS did not deny Student a FAPE through Student's March 17, 2017, IEP by not providing Student a full-time outside the general education setting. DCPS also asserts there are no denials of FAPE on any of the other violations alleged.

ISSUES:³

The issues adjudicated are:

1. Whether the LEA denied Student a FAPE by failing to provide Student with an appropriate IEP, on March 17, 2017, because the IEP (a) reduced Student's specialized instruction from 24 hours per week to 20 hours per week, (b) reduced Student's behavioral support services from 180 minutes per month to 90 minutes per month, (c) contained inappropriate academic goals, and (d) contained an inappropriate LRE, to wit: 20 hours per of specialized instruction outside the general education setting rather than 27.5 hours per week outside the general education setting.⁴
2. Whether the LEA denied Student a FAPE by failing to review the March 17, 2017 IEP prior to the end of the 2016-2017 school year to determine whether the annual goals were being achieved and to address any lack of expected progress.⁵

³ The Hearing Officer stated the issues at the outset of the hearing and the parties agreed that these were the issues to be adjudicated. The Hearing Officer later provided each counsel a written revised list of issues to be adjudicated and inadvertently omitted one issues that was to be adjudicated (issue 4(c) of the September 26, 2017, PHO). That issue is listed here. The September 26, 2017, PHO indicated that Respondent carried the burden of persuasion on that issue.

⁴ This issue replaced and combined issue 4(a) and 4(b) in the September 26, 2017, PHO.

⁵ This issue replaced the issue 4(c) in the September 26, 2017, PHO.

3. Whether the LEA denied Student a FAPE by failing to conduct triennial reevaluations by August 15, 2017, because a comprehensive psychological evaluation and/or FBA were not conducted.⁶
4. Whether the LEA denied Student a FAPE by failing to convene a meeting to review triennial reevaluations, to the extent it they may have been conducted.⁷
5. Whether the LEA denied Student a FAPE by failing to conduct a comprehensive psychological evaluation and/or functional behavior assessment (“FBA”) and develop a behavior intervention plan (“BIP”) by the end of SY 2016-2017 to address Student’s attendance issues that began to manifest in January 2017.⁸

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 46 and Respondent’s Exhibits 1 through 29) that were admitted into the record and are listed in Appendix A.⁹ Witnesses’ identifying information is listed in Appendix B.¹⁰

SUMMARY OF DECISION:

Petitioner held the burden of persuasion on issues: #3, #4, and # 5. DCPS held the burden of persuasion on issues #1 and #2. The Hearing Officer concluded that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence of issues #3, #4, and #5. DCPS sustained the burden of persuasion on issues #1 and #2 by a preponderance of the evidence. The Hearing Officer dismissed the complaint with prejudice and denied Petitioner’s requested relief.

⁶ This issue replaced the issue 4(f) in the September 26, 2017, PHO.

⁷ This issue replaced the issue 4(e) in the September 26, 2017, PHO.

⁸ This issue replaced the issue 4(d) in the September 26, 2017, PHO.

⁹ Any items disclosed and not admitted or admitted for limited purposes were noted on the record and summarized in Appendix A.

¹⁰ Petitioner presented five witnesses: Petitioner, and the following witnesses who were designated as expert witnesses: an educational advocate employed by the law firm representing Petitioner, a clinical psychologist who evaluated Student, the admission director of School B, the non-public school where Petitioner is seeking Student be placed, and Student’s tutor from School B. Respondent presented two witnesses: a DCPS LEA representative from School A and a DCPS social worker, who were both designated as expert witnesses.

FINDINGS OF FACT:¹¹

1. Student resides in the District of Columbia and is a child with a disability pursuant to IDEA with a disability classification of SLD. (Petitioner's Exhibit 11-1)
2. In August 2014, an independent psychological evaluation was conducted of Student, and the report is dated August 19, 2014. At the time Student was repeating a grade. The psychologist assessed Student's cognitive functioning, academic achievement, and social emotional and behavioral functioning. Student's cognitive functioning was Low Average with a Full-Scale IQ scored of 85. Student's academic achievement was considered within the Low range for broad math and the Very Low range in broad reading, broad written language and written expression. Generally, Student's academic achievement scores were four to five years below, when measured in grade equivalency, and approximately 5 years below, when measured in age equivalency. The psychologist diagnosed Student with a specific learning disorder in reading, math and written expression as well as Attention Deficit Hyperactivity Disorder ("ADHD") (Petitioner's Exhibit 17-1, 17-4, 17-11, 17-12, 17-16)
3. On November 24, 2015, DCPS obtained consent from Student's parent to conduct a functional behavior assessment ("FBA") and a Woodcock Johnson IV ("WJ-IV"). DCPS conducted the FBA and the WJ-IV and reviewed the evaluations on February 16, 2016, and developed a behavior intervention plan to address Student's behaviors of using profanity and initiating conflicts with peers during English class. (Petitioner's Exhibit 11-1, Respondent's Exhibits 1-1, 2, 3, 4, Petitioner's Exhibit 18)
4. Student's WJ-IV academic achievement scores from February 2016 improved slightly compared to when Student was evaluated in August 2014. However, Student remained significantly below level in all measured academic areas. (Petitioner's exhibit 19-1)
5. On February 22, 2016, DCPS completed an evaluation summary report that summarized the data from the FBA and WJ-IV and information provided by Student's teachers and case manager. (Respondent's Exhibit 5)
6. On February 22, 2016, DCPS completed a disability worksheet and determined, based on WJ-IV and Scholastic Reading Inventory scores, Student continued to meet the SLD disability classification and remained eligible for special education services. (Respondent's Exhibits 6, 7)
7. During school year 2015-2016, Student attended another DCPS school ("School A"). On February 5, 2016, Petitioner filed a DPC alleging, inter alia, School B was not

¹¹ 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 (or the page number of the entire disclosure document) 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.

implementing student's individualized education program ("IEP"). On April 30, 2016, an HOD issued on the DPC concluded DCPS had denied Student a FAPE. The HOD also concluded that Student is able make adequate progress in a general education school with sufficient services, including sufficient amounts of instruction outside general education. The hearing officer also concluded that a non-public special education school was not Student's least restrictive environment ("LRE"). Nonetheless, the HOD ordered, as compensatory education, that DCPS fund Student at a non-public school for the remainder of SY 2015-2016, and fund up to 300 hours of Student's participation in an intensive reading program during summer of 2016. The HOD also ordered DCPS to convene an multidisciplinary team ("MDT") meeting to revise Student's IEP and develop a plan for transitioning Student into an appropriate location of services for SY 2016-2017. (Respondent's Exhibit 8-13)

8. On July 19, 2016, DCPS convened an IEP meeting and reviewed and revised Student's IEP. On July 19, 2016, DCPS revised Student's IEP to prescribe 24 hours per week of specialized instruction and 180 minutes per month of behavioral support services both outside the general education setting. On August 18, 2016, DCPS sent Petitioner a letter providing notice that Student would be placed at another DCPS school ("School A") for SY 2016-2017. (Respondent's Exhibits 10, 11, 18, Petitioner's Exhibit 8-13)
9. Student began attending School A at the start of SY 2016-2017. (Respondent's Exhibit 18-17, 18-21)
10. On December 22, 2016, Petitioner filed another DPC alleging DCPS failed to offer Student an appropriate IEP beginning July 2016 and failed to fully implement Student's IEP in SY 2016-2017. The HOD issued March 11, 2017, concluded the IEP DCPS developed on July 19, 2017, was reasonably calculated to provide Student educational benefit and Student did not require a more restrictive placement than the 24 hours of specialized instruction outside the general education setting that the IEP prescribed. (Respondent's Exhibit 18)
11. However, the March 11, 2017, HOD concluded, DCPS had failed to fully implement Student's IEP. The HOD awarded Petitioner compensatory education in the amount of 100 hours of independent tutoring for the denial of FAPE. The HOD also directed that DCPS begin to fully implement Student's IEP. (Respondent's Exhibit 18, Petitioner's Exhibit 18)
12. The March 11, 2017, HOD also directed DCPS to ensure the Student's IEP team promptly completed its review of Student's IEP in light of the November 2016 Lindamood-Bell testing data. The HOD noted that if Petitioner refused to participate in an IEP review meeting, DCPS may proceed without Petitioner as provided in 34 C.F.R. 300.322(d). (Respondent's Exhibit 18)
13. The March 11, 2017, DCPS HOD directed DCPS to ensure that the hours of specialized instruction in Student's July 19, 2016, IEP be provided in full to Student at School A in

the setting established by the IEP and to ensure that Student received specialized instruction in reading, writing, social studies, science and foreign language outside the general education classroom. (Respondent's Exhibit 18-20)

14. Prior to the March 11, 2017, HOD being issued, student was in a foreign language class in general education. Despite the directive in the HOD that School A ensure student received specialized instruction in foreign language outside the general education, Student continued to receive the foreign language class in general education through the remainder of the SY 2016-2017. At the meeting on March 17, 2017, School A reduced Student's behavioral support services and reduced the hours of specialized instruction to account for Student continuing the foreign language course in the general education classroom. At the time of the meeting Student was performing well in the foreign language class and had earned a grade of "A" in the first and second grading periods. Student ultimately passed the class and earned a grade of "B+" at the end of SY 2016-2017. (Witness 5's testimony Respondent's Exhibit 26-2)
15. On March 28, 2017, DCPS convened an IEP meeting with Petitioner, and Student's attorney and educational advocate were present. Petitioner disagreed with DCPS reducing Student's hours of specialized instruction outside the general education setting and the reduction in behavioral support services. There was some discussion about the reading intervention program that Student was being provided at School A. The meeting ended with School A and Petitioner in disagreement about the amount of specialized instruction and behavioral support services Student would be provided in the IEP. (Respondent's Exhibit 24)
16. Student's IEP dated March 17, 2017, updated the present levels of performance ("PLOP") for math and updated the math goals from Student's previous IEP. The PLOP from reading was updated with the data from the Lindamood-Bell assessment, and indicated student had received a Scholastic Reading Inventory Score in January 2017 that placed student at 5th grade reading level. The four reading goals were carried over from the previous IEP. The PLOP for written expression was updated. The two written expression goals were carried over from the previous IEP. (Petitioner's Exhibits 8, 11)
17. During the third and fourth reporting period of SY 2016-2017, Student made progress on all IEP goals except one reading goal and one transition goal. (Respondent's Exhibit 25)
18. Student's year-end report card for SY 2016-2017 reflects that Student passed all courses attempted. Student's year-end grade point average ("GPA") was 2.82 and cumulative GPA was 2.70. Student had 33 days absent with 23 of those days unexcused. Student was tardy to school 39 times. Although Student's school attendance for SY 2016-2017 reflects that student had 23 days of unexcused absences, and 39 days tardy, the absences from Student's actual classes were far fewer. Despite the absences Student was able to pass all classes at the end of SY 2016-2017 and carried above average grades in almost all classes in each grading period during the school year. (Respondent's Exhibit 26-2)

19. Student is enrolled in a diploma track program at School A and near completion of the requirements for a high school diploma. Student needs approximately 5.5 credits and 49 hours of community services hours to complete the DCPS high school graduation requirements. (Respondent's Exhibit 27)
20. Student is popular with other students at School A and is very involved in the school and ran for student government. Student benefits from being around non-disabled peers and Student's teachers have reported that Student performs well academically despite academic deficits and is able to assess the general education curriculum with the supports provided through Student's IEP. (Witness 5's testimony)
21. At the start of SY 2016-2017 Student requested of the School A social worker that the number of hours of behavior support services be reduced. The social worker informed Student that depending on progress in their sessions together she might consider a reduction later in the school year. Student has willingly engaged in and benefitted of the behavioral support services that have been provided and made progress on the social emotional and behavioral goals in Student's IEP. Student engages well with peers and School A staff. (Witness 6's testimony)
22. Although Student had some behavioral incidents at the start of the second semester of SY 2016-2017 and had a short term out of school suspension, the School A social worker still concluded at the March 17, 2017, and March 28, 2017, IEP meetings that it was appropriate to reduce Student's behavior support services based on the progress Student had made relative to IEP goals. (Witness 6's testimony, Petitioner's Exhibit 30)
23. Student is not currently in a reading intervention program at School A because Petitioner does not want Student to use the reading intervention program School A uses. School A has not been able to formally assess Student's reading or math level with any standardized assessments since January 2017 because Petitioner has instructed Student not to take any assessments unless and until Petitioner has granted consent. Petitioner has not granted consent for School A to assess Student. (Petitioner's testimony, Witness 5's testimony)
24. Petitioner is not satisfied with Student remaining in a DCPS school, because he does not believe DCPS can effectively address Student's needs, and prepare Student to attend college given Student's severe academic deficits. Consequently, Petitioner believes student is in need of a full-time, out of general education placement at a non-public special education school. (Petitioner's testimony, Petitioner's Exhibits 32, 33)
25. Student has been interviewed by, and accepted at, School C, a non-public special education separate school. School C's education program is designed for supporting students who learn differently and have ADHD. School C holds an OSSE certificate of approval ("C of A") and is authorized to serve student with SLD classification along with a number of other disability classifications. The related service providers go into the classrooms to support students in addition to providing pullout services. Student has received tutoring services at School C in the past and is currently receiving tutoring at

School C based upon compensatory education that was granted by previous HODs. School C has reading and math intervention programs. Student would be provided the courses needed to graduate at the end of SY 2017-2018 as well as math and reading intervention. Teachers are certified in special education and are content certified. The cost of the program is \$45,000.00 annually for the 10-month program. Related services and extended school year are billed separately. (Witness 2's testimony)

26. Student has received tutoring as compensatory education from prior HODs. The tutor first worked with Student in 2015, and then 2016 to improve Student's writing and reading skills. As a result, student was able to improve reading abilities from approximately second grade level to fifth grade level. Student can read up to 6th grade passage comprehension level with material Student finds interesting. Most recently, the tutor has worked with Student on Scholastic Aptitude Test ("SAT") preparation. Student was able to take the SAT on October 11, 2017. The tutor will soon resume tutoring with the student working on decoding and reading comprehension. Student has approximately 75 hours of tutoring remaining, and the tutor believes student could perhaps make a year and half to two years growth in reading skills with the remaining tutoring hours. Student is eager to learn, and wants to improve reading skills and attend college after completing high school. (Witness 4's testimony)

27. Petitioner's educational advocate requested 100 hours of specialized tutoring, 36 hours of counseling, and 40 hours of mentoring as compensatory education based on the assertion that Student should have been provided 27.5 hours per week of specialized instruction rather than 20 hours per week, should have been provided 180 minutes per month of behavioral support services rather than 90 minutes, and because DCPS allegedly failed to provide an appropriate IEP, a triennial comprehensive psychological evaluation, a FBA, and failed to develop a BIP. (Witness 2's testimony, Petitioner's Exhibit 46)

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").

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

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.

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)

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO and at the hearing, Respondent held the burden of persuasion on issue #1. Petitioner held the burden of persuasion on issue #2, and issue #3. ¹² The normal standard is preponderance of the evidence. See, e.g. *N.G. v. District of Columbia* 556 F. Supp. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether the LEA denied Student a FAPE by failing to provide Student with an appropriate IEP, on March 17, 2017, because the IEP (a) reduced Student's specialized instruction from 24 hours per week to 20 hours per week, (b) reduced Student's behavioral support services from 180 minutes per month to 90 minutes per month, (c) contained inappropriate academic goals, and (d) contained an inappropriate LRE, to wit: 20 hours per of specialized instruction outside the general education setting rather than 27.5 hours per week outside the general education setting.

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

¹² 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.

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.

Under the recent Supreme Court decision, *Andrew F. v. Douglas County School District Re-1*, a district must provide "an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. 988, 999 (2017).

"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 47. The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials, informed by their own expertise and the views of a child's parents or guardians; any re-view of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

Petitioner alleges the student's March 17, 2017, IEP is inappropriate because the IEP (a) reduced Student's specialized instruction from 24 hours per week to 20 hours per week, (b) reduced Student's behavioral support services from 180 minutes per month to 90 minutes per month, (c) contained inappropriate academic goals, and (d) contained an inappropriate LRE, to wit: 20 hours per of specialized instruction outside the general education setting rather than 27.5 hours per week outside the general education setting.

The evidence demonstrates that on March 17, 2017, School A convened an IEP meeting without the Petitioner or his counsel present in order to comply with the directives from the March 11, 2017, HOD. At that meeting School A reduced Student's behavioral support services in half and reduced specialized instruction by 4 hours per week to account for student being in a foreign language class in general education. This was a class Student had been in since the start

of SY 2016-2017 and which was part of the basis for the Hearing Officer in the March 11, 2017, HOD concluding Student had been denied a FAPE. Nonetheless, rather than begin to implement Student's IEP, School A took action that directly countered the findings and conclusions of the March 11, 2017, HOD about student being provided specialized in foreign language class in general education, presumably so that the failure to implement Student's IEP that had been determined, would cease to be a violation.

Petitioner has not asserted, nor does the Hearing Officer consider, the claim asserted herein to be an alleged failure to comply with the March 11, 2017, HOD. Rather, Petitioner has asserted that the IEP School A developed on March 11, 2017, is inappropriate because it prescribes too few hours of specialized instruction outside general outside general education. Based upon the findings and conclusions in the March 11, 2017, HOD, Petitioner met a prima facie case that the student's March 17, 2017, IEP was inappropriate because of the reduction in specialized instruction from 24 hours per week outside the general education setting to 20 hours per week.

It was up to DCPS to demonstrate by a preponderance of the evidence that Student was not in need of the 24 hours specialized instruction Student's previous IEP prescribed. DCPS presented both documentary and testimonial evidence that student, despite academic deficits, was as of March 17, 2017, passing the foreign language class with grade "A" in both the first and second advisories of SY 2016-2017.

DCPS also presented credible testimony from the School A LEA representative who is an instructional coach and talked regularly with Student's teachers last school year, observed Student in class and around School A, that Student performed well in the foreign language class as well the other courses in which Student was enrolled. This evidence was convincing that student was, as of March 17, 2017, no longer in need of specialized instruction in the foreign language class. The Hearing Officer concludes that DCPS sustained the burden of persuasion by a preponderance of the evidence that the reduction in the specialized instruction from 24 hours per week to 20 hours per week was reasonably calculated to provide Student educational benefit.

Petitioner also asserted that the March 17, 2017, IEP was inappropriate because it reduced Student's hours of behavior support services. DCPS presented credible testimony from the School A social worker who provides Student behavior support services that Student had made sufficient progress on social emotional/behavioral support IEP goals that a reduction of services was appropriate. Although there was evidence that student had some behavioral incidents and received one out of school suspension, these incidents did not appear to be significant or indicative of a pattern of behavior that contradicted the testimony of the School A social worker. Consequently, the Hearing Officer concludes that DCPS sustained the burden of persuasion by a preponderance of the evidence that reducing Student's behavior support services from 180 minutes per month to 90 minutes per month was reasonably calculated to provide Student educational benefit.

Petitioner also asserted that the IEP developed on March 17, 2017, was inappropriate because it included inappropriate goals. The evidence demonstrates that the March 17, 2017, IEP adjusted the PLOPs in the IEP and updated the math goals. The reading and written expression goals were carried over from Student's July 2016 IEP. Although Petitioner presented a witness who

testified about the goals being carried over, that witness could merely speculate as to a reason the goals were carried over.

The evidence demonstrates that based on Student's scores on academic assessments Student has made slow progress, particularly in reading. The evidence indicates that Student was making progress on, but had not yet mastered, the academic goals in the IEP. That was a plausible reason for the IEP goals to have been repeated. The evidence demonstrates that School A has not been allowed by Petitioner to assess the student to accurately determine how much progress relative to prior scores Student has made. Nonetheless, the student has clearly demonstrated by class performance reflected in grades, that Student is making progress.

Based upon all these factors, the Hearing Officer concludes that it was reasonable for School A to continue Student's academic goals in the March 17, 2017, IEP. There was insufficient evidence presented that Student's IEP goals were inappropriate. Consequently, the Hearing Officer concludes that DCPS sustained the burden of persuasion by a preponderance of the evidence that the IEP goals in the March 17, 2017, IEP were reasonably calculated to provide Student educational benefit.

Although Petitioner has asserted that Student is in need of a IEP with 27.5 hours per week of services outside general education, in a placement that is totally removed from general education peers, there have been two consecutive HODs that have concluded that such a placement is not Student's LRE. Although Petitioner expressed concern that Student is still far below grade level and not prepared to attend college once Student's completes high school, the student is, nonetheless, making academic progress, passing courses and proceeding to meet the requirements for a high school diploma.

Petitioner witnesses who testified as expert witnesses asserted Student should have qualified for all instruction and services outside the general education setting. The Hearing Officer did not find Petitioner's witnesses' testimony convincing. Their testimony, including that of a psychologist who evaluated Student three years ago, was far outweighed by the documentary evidence of Student's progress on IEP goals and grades, coupled with the testimony of the School A personnel who had current and day to day contact with Student and testified about the Student's academic performance at School A.

The evidence demonstrates that Student passed all courses at the end of SY 2016-2017 and most with above average grades. The evidence demonstrates Student is popular at School A, interacts with peers and staff and is fully engaged with non-disabled peers. At School A, Student was in and remains in a self-contained special education program for the vast majority of the school day. Student is on diploma track and is a hand full of credits away from completing the requirements for high school graduation. Based upon the evidence presented in the current case, the Hearing Officer concludes that student is not need of an IEP and placement that is totally removed from non-disabled peers and DCPS has demonstrated by a preponderance of the evidence that the level and setting of specialized instruction and related services prescribed by Student's March 17, 2017, was reasonably calculated to provide Student educational benefit. Consequently, the Hearing Officer concludes that DCPS sustained the burden of persuasion of a preponderance of the evidence on this issue.

ISSUE 2: Whether the LEA denied Student a FAPE by failing to review the March 17, 2017 IEP prior to the end of the 2016-2017 school year to determine whether the annual goals were being achieved and to address any lack of expected progress.

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

34 C.F.R. §300.324(b)¹³ requires that a student’s IEP be updated at least annually to determine whether the annual goals for the child are being achieved and revise the IEP to address any lack of expected progress toward the annual goals and in the general education curriculum.

Petitioner asserts that School B should have reviewed and revised Student’s IEP prior to the end of SY 2016-2017 because of a lack of progress. However, the evidence reveals that Student was making progress on IEP goals and that Student was passing all courses. There was insufficient evidence presented to refute the documentary evidence in the IEP progress reports that Student was making progress. There is no indication that Petitioner requested that a meeting be convened prior to the end of SY 2016-2017 and no indication that the data, or any other concern, warranted a review of Student’s IEP prior to Student’s next annual IEP review meeting. There was insufficient evidence to support a conclusion that DCPS should have reviewed and updated the student’s IEP prior to the end of SY 2016-2017. Consequently, the Hearing Officer concludes Respondent sustained the burden of proof by a preponderance of the evidence on this issue.

ISSUE 3: Whether the LEA denied Student a FAPE by failing to a conduct triennial reevaluation by August 15, 2017, because a comprehensive psychological evaluation and/or FBA were not conducted.

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

34 C.F.R. § 300.303(a) makes clear that, “A local education agency (“LEA”) shall ensure that a re-evaluation of each child with a disability is conducted...if the child’s parents or teacher requests a re-evaluation.” and that the reevaluation must be conducted at least once every three years. Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp. 2d. 254, 259, 261 (D.C.C. 2005).

Petitioner asserts that when DCPS conducted Student’s triennial reevaluation in 2016 that DCPS should have, but did not, conduct cognitive and social, emotional and behavioral assessments.

¹³ 34 C.F.R. §300.324(b): Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team-- (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address-- (A) Any lack of expected progress toward the annual goals described in Sec. 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under Sec. 300.303; (C) Information about the child provided to, or by, the parents, as described under Sec. 300.305(a)(2); (D) The child's anticipated needs; or (E) Other matters.

However, 34 C.F.R. §300.304 provides evaluation procedures that require that the agency use a variety of assessment tools, and it specifically states that the agency must not use any single measure or assessment as the sole criterion for determining if the child is a child with a disability and determining an appropriate program.¹⁴

The evidence demonstrates that DCPS conducted a reevaluation that included a review of existing data on the student and included an academic achievement assessment. Although Petitioner asserts that Student's triennial reevaluation should have included cognitive and social, emotional and behavioral assessments, there is no specific requirement pursuant to the IDEA or the DCMR¹⁵ that a student's cognitive and social emotional functioning be assessed during reevaluation.

DCPS reevaluated Student with an educational assessment and functional behavioral assessment and prepared an AED. There was no request or requirement that DCPS conduct a psychological evaluation at the time of student's triennial evaluation. There was insufficient evidence presented that any additional assessments were warranted at the time of Student's triennial evaluation in 2016. DCPS also determined that Student continued to be eligible as a student with the SLD disability classification. Although DCPS did not conduct a psychological evaluation, it nonetheless reevaluated the student pursuant to the triennial evaluation requirements of IDEA. Consequently, the Hearing Officer determines that Petitioner did not sustain the burden of persuasion on this issue.

ISSUE 4: Whether the LEA denied Student a FAPE by failing to convene a meeting to review the triennial reevaluation, to the extent that it may have been conducted.

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

¹⁴ 34 C.F.R. § 300.304 Evaluation procedures. (a) Notice. The public agency must provide notice to the parents of a child with a disability, in accordance with § 300.503, that describes any evaluation procedures the agency proposes to conduct. (b) Conduct of evaluation. In conducting the evaluation, the public agency must— (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining— (i) Whether the child is a child with a disability under § 300.8; and (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities); (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. (c) Other evaluation procedures. Each public agency must ensure that— (4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

¹⁵ DCMR 5E § 3005 As part of an initial evaluation (if appropriate) and as part of any reevaluation, the IEP team, including other qualified professionals, as appropriate, shall: (a) review existing evaluation data on the child, including: (1) evaluations and information provided by the parents of the child; (2) current classroom-based assessments and observations; and (3) observations by teachers and related service providers; and (b) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine: (1) whether the child has a particular category of disability under this chapter or, in the case of a reevaluation of a child, whether the child continues to have such a disability; (2) the present levels of performance and educational needs of the child; (3) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and (4) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum.

As stated above, 34 C.F.R. § 300.303(a) makes clear that, “A local education agency (“LEA”) shall ensure that a re-evaluation of each child with a disability is conducted...if the child’s parents or teacher requests a re-evaluation” and that the reevaluation must be conducted at least once every three years.

The evidence demonstrates through the documentary evidence that DCPS completed triennial evaluations and completed a disability worksheet that determined Student remained eligible for special education with the SLD disability classification. There was insufficient evidence presented that DCPS did not conduct a meeting to review the triennial evaluations. Based upon the documentary evidence the Hearing Officer concludes that an eligibility meeting was convened in 2016 at which the student’s triennial evaluations were reviewed. Consequently, the Hearing Officer determines that Petitioner did not sustain the burden of persuasion on this issue.

ISSUE 5: Whether the LEA denied Student a FAPE by failing to conduct a comprehensive psychological evaluation and/or FBA and develop a BIP by the end of SY 2016-2017 to address Student’s attendance issues that began to manifest in January 2017.

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

As stated above, 34 C.F.R. § 300.303(a) makes clear that, “A local education agency (“LEA”) shall ensure that a re-evaluation of each child with a disability is conducted...if the child’s parents or teacher requests a re-evaluation” and that the reevaluation must be conducted at least once every three years.

The evidence demonstrates that Student’s school attendance for SY 2016-2017 reflects that student had 23 days of unexcused absences, and 39 days tardy. However, the absences from Student’s actual classes were far fewer. Although Petitioner testified that Student’s previous attendance problems were better addressed at one of Student’s previous schools, there was insufficient evidence that any one, including Petitioner, requested that Student be evaluated to address Student attendance issues.

Despite the absences, Student was able to pass all classes at the end of SY 2016-2017 and carried above average grades in almost all classes in each grading period during the school year. There is no indication that Student’s absences rose to the level of concern that would have warranted an updated FBA or BIP. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ORDER: ¹⁶

1. The due process complaint is hereby dismissed with prejudice.
2. All 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: November 15, 2017

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

¹⁶ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.