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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>&</p> <p>School A, Public Charter School, LEA</p> <p>Respondents.</p> <p>Case # 2017-0235</p> <p>Date Issued: November 13, 2017</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: November 7, 2017 November 8, 2017 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 13, 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 November 7, 2017, and November 8, 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 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is age _____ and in grade _____.² Student resides with Student’s parent in the District of Columbia and is a child with a disability pursuant to IDEA with a disability classification of multiple disabilities (“MD”) including specific learning disability (“SLD”) and other health impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”).

Student attends a public charter school (“School A”) located in the District of Columbia that is its own local educational agency (“LEA”) where Student began attending at the start of school year (“SY”) 2016-2017. Prior to attending School A, the student attended a District of Columbia Public Schools (“DCPS”) [REDACTED] school (“School B”) for two school years: SY 2014-2015 and SY 2015-2016.

Student’s mother (“Petitioner”) filed the current due process complaint on August 30, 2017, alleging both DCPS and the School A denied the student a free appropriate public education (“FAPE”) by failing to, inter alia, propose an appropriate individualized educational program (“IEP”) for the student.

Relief Sought:

Petitioner seeks as relief that the Hearing Officer find that both DCPS and School A denied the student a FAPE and order School A to develop an IEP that prescribes all services outside the general education setting, or at least 20 hours of specialized instruction per week outside the general education setting. Petitioner requests that School A convene a meeting to find an appropriate placement, if the student’s revised IEP cannot be implemented at School A. Petitioner requests that DCPS and School A fund reasonable compensatory education.

Response to the Complaint:

DCPS filed a timely response to the complaint on September 11, 2017. DCPS denies that there has been any failure to provide the student with a FAPE and asserts that the student’s IEP and placement while at School B were appropriate. School A filed a timely response to the complaint on September 11, 2017. School A denies that there has been any failure to provide the

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

student with a FAPE and asserts the student's IEP and placement at School A was and is appropriate and the student's least restrictive environment ("LRE") does not require all services be provided outside the general education setting.

Resolution Meeting and Pre-Hearing Conference

Petitioner and Respondent School A participated in a resolution meeting on September 13, 2017, and did not resolve the complaint. They did not mutually agree to proceed directly to hearing in this matter. Petitioner and DCPS participated in a resolution meeting on October 2, 2017, and did not resolve the complaint. The 45-day period began on September 30, 2017, and ends [and the Hearing Officer's Determination ("HOD") is due] on November 13, 2017.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on the complaint on September 22, 2017, and issued a pre-hearing order ("PHO") on September 28, 2017, outlining, inter alia, the issues to be adjudicated.

ISSUES:³

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to make extended school year ("ESY") services available to the student during the summer of SY 2015-2016 by omitting ESY as a related service on Student's IEP.
2. Whether DCPS denied the student a FAPE by failing to develop a December 2, 2015, IEP that was reasonably calculated to enable the student to make progress in general education because the IEP did not provide: (a) an appropriate disability classification such as emotional disability ("ED") or SLD; (b) behavior support service to address severe disruptive and avoidance behaviors in the classroom, and/or (c) full-time or close to full-time specialized instruction outside of the general education setting.
3. Whether DCPS denied the student a FAPE by failing to review and revise the IEP developed on or about December 2, 2015, by the end of SY 2015-2016, to address lack of progress toward annual goals and in the general curriculum, by providing: (a) specialized instruction in full-time or close to full-time outside of general education setting; (b) ESY services; (c) an appropriate disability classification, and (d) behavior support services.
4. Whether School A denied the student a FAPE by failing to develop a December 1, 2016, IEP that was reasonably calculated to enable the student to make progress in general education, because the IEP did not provide (a) specialized instruction in full-time or close to full-time outside of general education setting; (b) ESY services; (c) an appropriate disability classification, and (d) behavior support services.

³ The Hearing Officer restated the issues at the outset of the hearing and the parties agreed that these were the issues to be adjudicated.

5. Whether School A denied the student a FAPE by failing to review and revise the IEP developed on or about December 1, 2016, before the end of SY 2015-2016, to address lack of progress toward annual goals and in the general curriculum, by providing: (a) specialized instruction in full-time or close to full-time outside of general education setting; (b) ESY services; (c) appropriate disability classification, and (d) behavior support services.
6. Whether School A denied the student a FAPE by failing to provide ESY services to the student during the summer of SY 2016-2017, by omitting ESY as a related service on Student's IEP.

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 45 and Respondent DCPS's Exhibits 1 through 3 and Respondent School A's Exhibit 1-22) that were admitted into the record and are listed in Appendix A.⁴ Witnesses' identifying information is listed in Appendix B.⁵

SUMMARY OF DECISION:

Petitioner held the burden of persuasion on issues: #1, #3, # 5, and # 6. Respondent DCPS held the burden of persuasion on issue #2. Respondent School A held the burden of persuasion on issue #4. The Hearing Officer concluded that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence of issues, #1, #3, #5, and #6. Respondent DCPS sustained the burden of persuasion on issue #2 by a preponderance of the evidence and Respondent School A sustained the burden of persuasion on issue #4 by a preponderance of the evidence. The Hearing Officer dismissed the complaint with prejudice as to both Respondents and denied Petitioner's requested relief.

⁴ Any items disclosed and not admitted or admitted for limited purposes were noted on the record and summarized in Appendix A.

⁵ Petitioner presented three witnesses: Petitioner, an educational advocate employed by the law firm representing Petitioner who testified as an expert witness, and an independent school psychologist who testified as an expert witness. DCPS presented two witnesses: the special education coordinator of School B, and a DCPS school psychologist. Respondent School A presented three witnesses: an independent psychologist who testified as an expert witness, the School A LEA representative, who testified as an expert witness, and the School A special education coordinator.

FINDINGS OF FACT:⁶

1. Student resides with Petitioner in the District of Columbia and is a child with a disability pursuant to IDEA with a disability classification of MD, which includes SLD and OHI due to ADHD. (PCS Exhibit 12-1)
2. DCPS conducted an initial psychological evaluation of Student in April 2011, while the student was attending a DCPS school. Student's cognitive functioning was in the Low Average to Average range. The assessments conducted suggested Student exhibited behaviors associated with ADHD. Student's academic achievement scores in reading were Far Below Proficient Level. Student's overall academic achievement scores were in the Average to Low Average ranges. The psychologist concluded Student's inattentive behaviors had an adverse impact on Student's educational performance and Student appeared to be eligible for special education under the criteria for OHI due to ADHD. Student was found eligible and was provided an initial IEP. (Petitioner's Exhibit 17-1, 17-9, 17-11, 17-13, 17-14)
3. During school year SY 2013-2014, Student was attending a public charter school for which DCPS was the LEA. An analysis of existing data ("AED") was prepared in March 2014 that noted student was operating far below grade level in math, reading and written expression, but was making progress on IEP goals that were two grade levels below Student's grade at the time. The AED noted that Student was pleasant, friendly, cooperative, extroverted, understood social cues and interacted with peers without difficulty. (Petitioner's Exhibit 18)
4. DCPS conducted a psychological triennial reevaluation of Student in March 2014. The evaluation noted that Student had been retained the prior school year and was repeating the grade during SY 2013-2014. The evaluator reviewed Student's 2011 evaluation, noted the cognitive assessment from that evaluation, reviewed the recent Woodcock-Johnson III (WJ-III) assessment, and conducted a classroom observation and teacher interview. (Respondent's Exhibit 3-1, 3-2)
5. Student's academic achievement in Broad Reading, and Broad Written Language were nearly 4 years behind as a measure of age equivalency. Student's Broad Math achievement was just over 2 years behind. The DCPS psychologist noted that based on a teacher interview, Student was provided small group instruction and was making slow, but steady, academic progress. However, Student often refused to complete homework but was able to complete classwork when there was 1:1 proximity control, or a reward system in place. The psychologist concluded Student continued to meet the eligibility criteria under OHI. (Respondent's Exhibit 3-3, 3-7)

⁶ 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.

6. There was no concern raised by any of the student's IEP team members that student be considered for a SLD or ED disability classification in addition to OHI. Because Student's academic deficits were being addressed with specialized instruction pursuant to an IEP, the psychologist did not consider, or find it necessary to consider, whether Student might meet the criteria for SLD disability classification in addition to OHI. There were no behavioral concerns, other than inattention, that were observed or raised that warranted a recommendation by the psychologist that Student be provided behavioral support services. (Witness 7's testimony, Respondents Exhibit 3-3, 3-7)
7. Student's IEP was updated at an annual review on March 26, 2014. The IEP included academic goals in the areas of math, reading and written expression. The IEP prescribed Student receive 12 hours per week of specialized instruction: 5 hours per week of inside the general education setting, and 7 hours per week outside the general education setting. The IEP also prescribed 2 hours per month of speech language pathology, and classroom and testing accommodations to address Student's reading and attention deficits. The IEP did not prescribe behavioral support services or ESY services. In reading, the IEP noted that Student's below level decoding and word recognition skills negatively impacted Student's ability to read and comprehend grade level material independently. The IEP noted that in math, Student needed support in adding 2-digit numbers with regrouping, subtracting 2-digit number with grouping, struggled with understanding what operation to perform when solving a word problem, telling time to the quarter hour, counting money, and using fractions. Student scored almost 2 years behind peers. In written expression, the IEP noted Student was able to orally formulate simple and complex sentences, but struggled recording thoughts in writing and demonstrated below level spelling skills. (Petitioner's Exhibit 8-1, 8-3, 8-4, 8-6, 8-9, 8-11, 8-12)
8. Student began attending School B for SY 2014-2015. In the first and second grading periods of SY 2014-2015, Student's report card reflected that Student was performing significantly below grade level in reading, writing and language, and math. Student was approaching grade level expectations in speaking and listening, and operating on grade level in social studies, science, music art and physical education. (Petitioner's Exhibit 28-1)
9. On December 8, 2014, School B convened an annual IEP review meeting. Petitioner's parent participated in the meeting and the team updated Student's IEP. The IEP included an update of present levels of performance ("PLOP") in math, reading and written expression, and revision of the goals.⁷ The IEP prescribed 10 hours per week of specialized instruction outside the general education setting and 120 minutes per month of speech-language pathology. The IEP did not prescribe behavior support services. It prescribed ESY services and ESY goals for math, reading and written expression. Student attended ESY during the summer of 2015 and made progress on Student's ESY goals. (Petitioner's testimony, Petitioner's Exhibits 9-1, 9-14, 9-17, 24)

⁷ The Hearing Officer notes that the IEP goals were updated to address and build more fundamental skills, particularly in reading with one goal addressing decoding skills. (Petitioner's Exhibit 9-6)

10. Student's report card for the third grading period of SY 2014-2015 reflected that Student was performing significantly below grade level in reading, writing and language, and math. Student was approaching grade level expectations in speaking and listening. Student's IEP progress report for the third reporting period of SY 2014-2015 reflected Student was made no progress on two of four math goals, but made progress on all other IEP goals. (Petitioner's Exhibits 23, 28-1, 28-2)
11. Student attended ESY during the summer of 2015 and made progress on Student's ESY goals. Student was more excited about attending school during ESY and there were far fewer students in Student's classroom than during the regular school year. (Petitioner's testimony, Petitioner's Exhibits 24)
12. Student returned to School B for SY 2015-2016. In the first and second grading periods of SY 2015-2016, Student's report card reflected that Student was performing significantly below grade level in reading, writing and language, and math. Student was approaching grade level expectations in speaking and listening. Student was developing, but not yet secure in the reading, writing and math skills. (Petitioner's Exhibit 29-1, 29-2)
13. School B convened an annual review of Student's IEP on December 2, 2015. Petitioner participated in the meeting. The PLOP for math was updated and noted the student had made significant improvement in overall math skills and was able to perform relatively well in math when compared to classmates. The PLOP for reading was updated slightly by noting slight progress in Student's Dibels TRC reading level. The PLOP for written expression stayed the same. The IEP noted student had "shown very minimal progress and is 2 to 3 grade levels behind in performance compared to [] peers." The IEP included 4 math goals, 2 reading goals, 1 written expression goal, and 2 speech and language goals. The math goals were similar to the previous goals but more challenging, and the reading goals were reduced from four to two goals that focused on increasing Student's TRC reading score and reading comprehension, while fading teacher prompting and support. The previous IEP had three written expression goals that were reduced to 1 goal that focused on fading teacher support to write short stories and summaries of text. (Petitioner's Exhibit 10-1, 10-3, 10-11, 10-14)
14. At School B, Student did not present with any behavioral concerns other than inattention. Because Student's ADHD was the primary concern, the team only considered the OHI disability classification. Student was making progress on IEP goals, and there were no signs of regression. The IEP team that met on December 2, 2015, determined Student was not in need of ESY services. Petitioner did not raise any issues about ESY. The team agreed that the level of services in the IEP was appropriate to address Student's needs and there was no request for additional services. (Witness 1's testimony, Respondent's Exhibit 2-1, 2-11)
15. On December 2, 2015, the IEP team increased Student's specialized instruction to 12 hours per week outside the general education setting and prescribed 120 minutes per month of speech-language pathology outside the general education setting. The IEP did

not prescribe behavior support services and did not prescribe ESY services. (Petitioner's Exhibit 10-11, 10-14)

16. Student's report card for the third grading periods of SY 2015-2016 reflected that Student was still performing significantly below grade level in reading, writing and language, and math. There were several areas in the report card that reflected no grade was given. Student's IEP progress reports third and fourth reporting period of SY 2015-2016 revealed that Student' made good progress on IEP academic goals and mastered one math goal. The IEP progress report stated Student made slow, but steady, progress on meeting the speech/communication goals, and noted that no regression had been shown. (Petitioner's Exhibit 29-1, 29-2, Respondent's Exhibit 1)
17. In the general education classroom other students often teased Student about being in special education, and a result, Student did not like being pulled out the general education classroom. However, when Student received pull out special education services Student felt supported and protected in the special education classroom and wanted more time and attention from the special education teacher. (Petitioner's testimony)
18. Student began attending School A at the start of SY 2016-2017. School A adopted and began implementing Student's IEP developed at School B. During the first grading period of SY 2016-2017, Student earned passing grades in all subjects, except in math, where Student earned an "F". However, during the second grading period, Student earned an "F" in reading and writing, and increased the grade in math to a "C". During the first and second reporting periods, Student made progress on some IEP goals and made no progress on others. Student's teacher noted Student's reading difficulties and that Student needed frequent and constant guidance and prompting, and at times one-to-one support to complete assignments. Student was often late to school in the mornings and often missed the reading intervention class, which limited Student's growth in reading. (Witness 5's testimony, Petitioner's Exhibits 32-2, 33-1, PCS Exhibit 16-1 through 16-12)
19. School A noticed that Student's listening comprehension was strong and Student could respond to grade level text if the text was read to Student. School A used classroom data from teacher observations, weekly quizzes, assessment data and IEP progress reports and made a determination and Student could utilize more support in the classroom. (Witness 5's testimony)
20. On December 1, 2016, School A conducted an annual review of Student's IEP. Petitioner participated in the meeting. The PLOP for math cited recent assessments School A conducted that placed Student at the beginning of first grade level in math. The PLOP for reading remained the same as Student's previous IEP. The written expression PLOP noted Student struggled with formulating words and attempting any written assignments beyond writing Student's name, but showed adequate comprehension and ability to completed assignments if given orally. School A kept one of Student's reading goals the same as the previous IEP and changed the second goal to address decoding. The written expression goal was changed from writing short stories and summaries to

writing simple sentences using capitalization and ending punctuation. School A increased the overall specialized instruction from 12 hours per week to 15 hours per week, with 5 hours per week each in reading and math outside the general education setting, and 5 hours per week inside the general education setting. The IEP team did not find that the student required behavior support services. The team also did not believe that the student demonstrated any signs of regression or loss of skills during school breaks that would warrant ESY services. The team determined that it would proceed with evaluating Student. (Witness 5's Testimony, Petitioner's Exhibit 11-1, 11- 4, 11-6, 11-7, 11-10, 11-13)

21. School A IEP team members determined that the IEP goals in the December 1, 2016, IEP were appropriately ambitious and believed the hours of specialized instruction prescribed were appropriate given that Student could access the curriculum from the general education classroom when provided supports such as reading to Student. School A concluded Student did receive benefit from being with non-disabled peers. Although Student displayed work avoidance behaviors, the behaviors were not disruptive. Student's teacher(s) addressed Student's inattention and work avoidance with redirection and Student responded to the redirection. (Witness 5's testimony)
22. School A conducted a speech-language evaluation of Student in December 2016, and the evaluation report was completed on January 6, 2017. Student presented with a mild receptive language deficit and a moderate expressive language deficit. (PCS Exhibits 5, 10-2)
23. During the third grading period of SY 2016-2017, Student raised the grade in reading and writing from "F" to "C" and "B" respectively. However, Student's math grade fell from "C" to "F". Student earned passing grades in all other subjects that grading period. (Petitioner's Exhibits 32-2, 33-1)
24. In February 2017, School A conducted a triennial psycho-educational evaluation of Student, with the evaluation report completed on March 2, 2017. The psychologist assessed Student's cognitive, social-emotional, and behavioral functioning as well as academic achievement. The psychologist interviewed Student, Petitioner, and Student's teacher. Student's cognitive functioning was Low Average with a Full Scale IQ of 79. However, Student's verbal comprehension scores were average. Academically, Student showed deficits in math, reading and writing. Student's strongest performance was the ability to listen to passages and answer correctly, which resulted in a listening comprehension score at grade level. However, Student's decoding and word reading scores were more than five grade levels below Student's current grade. Student's writing abilities were also approximately five grade levels behind. In math, Student was operating approximately three grade levels below current grade. The student's social, emotional, and behavioral functioning demonstrated Student's inattention, hyperactivity/impulsivity, difficulties in executive functioning, defiance/aggression, and learning problems. The psychologist concluded Student continued to meet the criteria for eligibility under the OHI classification due to ADHD. (Petitioner's Exhibit 20-1, 20-4, 20-5, 20-7, 20-8, 20-9, 20-13, 20-14, 20-15)

25. The psychologist who conducted the March 2017 evaluation saw nothing in the evaluation data that was indicative of an ED disability classification. Although there was data in the evaluation that indicated Student might also be considered for a SLD classification, the psychologist noted the OHI classification and suggested the IEP team should consider all relevant disability classifications and determine if another classification better accounted for Student's presentation. (Witness 4's testimony, Petitioner's Exhibit 20-1, 20-15)
26. During the third and fourth reporting period, Student made progress on one of three math goals, and made progress on the goals for reading, written expression and speech-language. (PCS Exhibit 16-20 through, 16-24)
27. In the last grading period for SY 2016-2017, Student earned passing grades in all courses. However, Student's year-end grade in reading and math was "F". The report card teacher comments for the fourth grading period indicated Student was not completing homework in a number of courses. (Petitioner's Exhibits 31, 32-3, 33-1)
28. On a couple of occasions after the evaluation was completed, School A requested that Petitioner participate in a meeting to review the evaluation and update Student's IEP prior to the end of SY 2016-2017. School A was not able to convene the meeting with Petitioner until July 12, 2017. (Witness 6's testimony, Petitioner's Exhibit 12)
29. When the meeting convened on July 12, 2017, Petitioner was present and represented by an attorney, who participated in the meeting by telephone. Petitioner participated in person. The team reviewed the psycho-educational evaluation along with a speech-language evaluation that School A conducted. (Petitioner's Exhibit 12, PCS Exhibit 10)
30. During the meeting held on July 12, 2017, a psychologist explained that Student has been relying on Student's strengths in oral comprehension to the detriment of other skills, and it is now necessary to assist Student in processing visual information and integrating visual information with oral comprehension skills. The team reviewed the disability worksheets and agreed to the MD classification due to OHI for ADHD and SLD. The School A team members proposed an increase in specialized instruction with additional reading interventions and assistive technology to help decode text. Petitioner's attorney requested Student be placed in "full-time" outside general education classroom. The School A team members expressed that because Student was making social strides, Student should not be totally removed from non-disabled peers. The team recommended that the proposed increase in services be attempted and then Student's progress could be measured every quarter. The team agreed to increase Student's speech-language services to 240 minutes per month, but did not comply with Petitioner's attorney's request that the student be placed in a "full-time" out of general education classroom. (PCS Exhibit 10-3, 10-4, 10-5)
31. As a result of the meeting convened July 12, 2017, School A amended Student's IEP to change the disability classification from OHI to MD including OHI and SLD. The

amendment also increased Student's specialized instruction to 20 hours per week, with 10 hours inside the general education setting, and 5 hours each per week in reading and math outside the general education setting. Student's speech-language services were increased to 240 minutes per month. The IEP did not include ESY services or behavioral support services. (Petitioner's Exhibits 13-1, 13-12, 13-15, 37)

32. Petitioner's educational advocate requested 310 hours of compensatory education from DCPS and 265 from School A. The educational advocate administered a WJ-IV assessment to Student on October 28, 2017, to assist in determining compensatory education. The scores indicated that Student's grade equivalency was fourth grade in math calculations skills and second grade in academic skills. Student's writing samples were measured as slightly above Student's current grade level. (Witness 2's testimony, Petitioner's Exhibits 21, 43)

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).

Petitioner held the burden of persuasion on issue #1, #3, # 5, # 6. Respondent DCPS held the burden of persuasion on issue #2 after Petitioner established a prima facie case on that issue. Respondent School A held the burden of persuasion on issue #4 after Petitioner established a prima facie case on that issue.⁸ 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 DCPS denied the student a FAPE by failing to make ESY services available to the student during the summer of SY 2015-2016 by omitting ESY as a related service on Student's IEP.

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

34 C.F.R. 300.106 (a) provides: (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section. (2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with Sec. Sec. 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.⁹

The Fourth Circuit has articulated the standard of "necessary" for extended school year services in the context of a free and appropriate public education. "[Extended school year] services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." *MM v. School District of Greenville County*, 303 F.3d 523, 537-38 (4th Cir. 2002); see also *Johnson v. District of Columbia* 112 LRP 36774 (February 15, 2012)

Petitioner asserts that DCPS denied the student a FAPE by not providing ESY services during the summer of 2016. The evidence demonstrates that Student's IEP, developed in December 2014, prescribed ESY services. Student was provided ESY services during the summer of 2015.

⁸ 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.

⁹ DCMR Title 5E30 § 3017 provides:

3017.1: The LEA shall ensure that extended school year services are available as necessary to provide FAPE to a child with a disability.

3017.2 Extended school year services must be provided only if a child's IEP team determines, on an individual basis (in accordance with § 3007, Individualized Education Program (IEP) Development), that the child needs those services in order to receive FAPE.

3017.3 In implementing the requirements of this section, the LEA shall not: (a) Limit extended school year services to particular categories of disability; or (b) Unilaterally limit the type, amount or duration of these services.

Petitioner testified that during the summer of 2015 Student did well and benefitted from ESY, particularly being in the classroom with fewer students. However, when Student's IEP was updated in December 2015, the IEP team did not include ESY services in Student's IEP. Petitioner asserts that Student's IEP PLOPs and goals indicate the student was not making progress and this is indicative of regression and the need for ESY services. During the December 2015 IEP meeting, Petitioner did not request that ESY be continued in the Student's IEP.

On the other hand, the DCPS witness who participated in the IEP meeting, credibly testified that Student demonstrated no signs of regression and the IEP team concluded that the student was not in need of ESY services.¹⁰ Student's IEP PLOPs and goals demonstrated Student was making some progress and did not indicate regression. The Hearing Officer finds based upon the evidence that the IEP team appropriately determined the student was not in need of ESY services. Petitioner did not demonstrate that Student showed any signs of regression, or indications that any gains during a regular school year would be significantly jeopardized, such that ESY services were warranted during the summer of 2016. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of proof on this issue.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to develop a December 2, 2015, IEP that was reasonably calculated to enable the student to make progress in general education because the IEP did not provide: (a) an appropriate disability classification such as ED or SLD; (b) behavior support service to address severe disruptive and avoidance behaviors in the classroom, and/or (c) full-time or close to full-time specialized instruction outside of the general education setting.

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

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

Under the recent Supreme Court decision, *Endrew 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

¹⁰ FOF # 14

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 asserts that the December 2, 2015, IEP was inappropriate because it did not contain an appropriate disability classification such as ED or SLD, behavior support service, and/or full-time or close to full-time specialized instruction outside of the general education setting.

The evidence demonstrates that DCPS conducted and psychological evaluation of Student in 2014 which confirmed Student's OHI disability classification. At the time of the evaluation, there was no concern raised by any of the student's IEP team members that student be considered for a SLD or ED disability classification in addition to OHI. Because Student's academic deficits were being addressed with specialized instruction pursuant to an IEP, the psychologist did not consider, or find it necessary to consider, whether Student might meet the criteria for SLD disability classification in addition to OHI. In addition, at the time of the evaluation, there were no behavioral concerns, other than inattention, that were observed or raised that warranted a recommendation by the psychologist that Student be provided behavioral support services.¹¹

Likewise, at the time Student's December 2, 2015, IEP was being developed, there was no concern raised by any member of Student's IEP team, including Petitioner, that Student be considered for any other disability classification. As was noted and testified to by the evaluator who conducted the 2014 evaluation, Student's academic deficits were being addressed by specialized instruction. There is no indication that had Student been considered for, or identified within another disability classification, that Student's educational programming would have changed. Although an IEP team has now determined, based on a more recent evaluation, that Student warrants a different disability classification, there was no basis for such a determination at the time the December 2, 2015, IEP was developed. At the time of the December 2, 2015, IEP meeting there was also no indication that Student was displaying any behavior difficulties that would have warranted the team adding behavioral support services to Student's IEP.

¹¹ FOF #6

Lastly, Petitioner asserts the December 3, 2015, IEP is inappropriate because it did not prescribe full-time, or close to full-time specialized instruction outside the general education setting. The evidence demonstrates that although Student's academic progress in reading and written expression has been extremely slow, Student made more progress in math, made progress on IEP goals, and has been able to make passing grades in other areas of the general education curriculum.¹² During the December 2, 2015, IEP meeting the team increased the student's hours of specialized instruction outside of the general education setting in response to the Student's slow academic progress. Although Petitioner asserts the team should have given Student all instruction outside general education, the team agreed to increase Student's services.

Petitioner presented two witnesses who testified as expert witnesses and asserted Student should have qualified for all instruction outside the general education setting and should have had other services Petitioner asserts were missing in Student's IEP. However, neither of the witnesses were present at the time of December 2, 2015, meeting nor did either have any independent knowledge about the services, classrooms, or teaching methods, that were utilized and/or considered, or which were provided to Student at School B. One of the two witnesses had never met Student or Petitioner. The Hearing Officer did not find either of the witnesses' testimony convincing.

Consequently, based on the evidence presented, the Hearing Officer concludes that the IEP DCPS developed for Student on December 2, 2015, was reasonably calculated to provide Student educational benefit based on the information available to the team at the time, and Respondent DCPS sustained the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to review and revise the IEP developed on or about December 2, 2015, by the end of SY 2015-2016, to address lack of progress toward annual goals and in the general curriculum, by providing: (a) specialized instruction in full-time or close to full-time outside of general education setting; (b) ESY services; (c) an appropriate disability classification, and (d) behavior support services.

Conclusion: Petitioner did not sustain the burden of persuasion 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

¹² FOF #s 13, 16

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.

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 2015-2016 because of a lack of progress, and should have revised Student's IEP to include specialized instruction in full-time or close to full-time outside of general education setting, ESY services, a different disability classification, and behavior support services.

However, the evidence reveals Student was making progress on IEP goals.¹⁴ There was insufficient evidence presented to refute the documentary evidence in the IEP progress reports that Student was making progress. Albeit the progress was not what Petitioner may have wanted, there is no indication that Petitioner requested that a meeting be convened prior to the annual IEP review meeting and no indication that the data, or any other concern warranted a review of Student's IEP prior to the annual IEP review meeting. The evidence proves DCPS conducted a timely annual review of the student's IEPs and made necessary adjustments to the student's IEP goals.

The evidence demonstrates that the student was making progress with the level of services that was being provided and there was insufficient evidence the student warranted a change to a full time special education program. There was no indication that Student warranted ESY services or behavior support services. There was insufficient evidence to support a conclusion that DCPS should have reviewed and updated the student's IEP prior to the next annual review date. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 4: Whether School A denied the student a FAPE by failing to develop a December 1, 2016, IEP that was reasonably calculated to enable the student to make progress in general education, because the IEP did not provide (a) specialized instruction in full-time or close to full-time outside of general education setting; (b) ESY services; (c) an appropriate disability classification, and (d) behavior support services.

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

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

Under the recent Supreme Court decision, *Endrew 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).

¹⁴ FOF # 16

“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." 34 C.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 asserts that the December 1, 2016, IEP was inappropriate because it did not contain an appropriate disability classification such as ED or SLD, behavior support service and/or full-time or close to full-time specialized instruction outside of the general education setting.

The evidence demonstrates that School A adopted and implemented the IEP Student brought from School B. During the first few months of SY 2016-2017, School A was able to assess Student’s skills through the use of teacher observations, progress reports, and assessments. Although Student’s academic skills were low, Student was missing reading instruction due to tardiness that may have also hindered Student’s skill development.

At the December 1, 2016, meeting the team determined that it would modify the IEP goals and increase Student’s level of specialized instruction. At the time of the meeting, there was no indication that Student was displaying any behavior difficulties that would have warranted behavior support services. Likewise, at the time of the meeting there was no indication that Student showed any signs of regression such that ESY services would have been warranted. There were no concerns raised by any of the student’s IEP team members that student be considered for a SLD or ED disability classification in addition to OHI. However, School A did determine that it would conduct evaluations of Student, which were completed by March 2017. Although an IEP team has now determined based on a more recent evaluation that Student warrants a different disability classification, there was no basis at the time the December 1, 2016, IEP was developed that warranted Student being considered for any disability classification beyond OHI for ADHD.

Lastly, Petitioner asserts the December 1, 2016, IEP is inappropriate because it did not prescribe full-time, or close to full-time specialized instruction outside the general education setting. The evidence demonstrates that although Student's academic skill levels in math, reading and written expression were extremely low, Student was making some progress and was able to achieve passing grades in most classes during the first semester of SY 2016-2017.¹⁵ The evidence demonstrates that at the December 1, 2016, IEP meeting, the team appropriately responded to Student's deficits by increasing the student's hours of specialized instruction. A member of that IEP team credibly testified that the team agreed to the level of services provided and determined that based on Student's demonstrated ability to access the general education curriculum it was appropriate for Student to remain with general education peers.¹⁶

Petitioner presented two witnesses who testified as expert witnesses and asserted Student should have qualified for all instruction outside the general education setting, and should have had the other services in the IEP Petitioner asserts were missing. However, neither of the witnesses were present at the December 1, 2016, meeting. One of the two witnesses had never met the student or Petitioner. The Hearing Officer did not find either of the witnesses' testimony convincing as to the appropriateness of the IEP that was developed on December 1, 2016.

Consequently, based on the evidence presented, the Hearing Officer concludes that the IEP School A developed on December 1, 2016, was reasonably calculated to provide Student educational benefit based upon the information available to the team at the time, and Respondent DCPS sustained the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 5: Whether School A denied the student a FAPE by failing to review and revise the IEP developed on or about December 1, 2016, before the end of SY 2015-2016, to address lack of progress toward annual goals and in the general curriculum, by providing: (a) specialized instruction in full-time or close to full-time outside of general education setting; (b) ESY services; (c) appropriate disability classification, and (d) behavior support services.

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

34 C.F.R. §300.324(b) 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 A should have reviewed and revised Student's IEP prior to the end of SY 2015-2016 because of a lack of progress. However, the evidence demonstrates that at the December 1, 2016, IEP meeting School A determined that evaluations should be conducted. School A proceeded with a speech-language evaluation and a psychological evaluation that were both completed by March 2017. School A reached out to Petitioner and attempted to convene an IEP meeting prior to the end of SY 2016-2017. Although the meeting was not held prior to

¹⁵ FOF # 18

¹⁶ FOF # 21

the end of SY 2016-2017, the meeting was held shortly thereafter and the evaluations were reviewed by an IEP team and Student's IEP was updated as a result.

The evidence reveals that during the third and fourth grading and reporting periods of SY 2016-2017, Student was making progress on IEP goals and achieving passing grades, with the exception of one course.¹⁷ There was insufficient evidence presented to refute the documentary evidence in the IEP progress reports and report cards that Student was making progress. -The progress may not meet Petitioner's expectations, but it is still progress. -There is also no proof that Petitioner made a request to convene Student's meeting before the end of SY 2016-2017.

Based upon the evidence that School A took action to evaluate Student and then initiated a meeting with Petitioner after the evaluations were completed, the Hearing Officer concludes there is no basis to conclude that School A should have convened a meeting prior to the end of SY 2016-2017 to amend Student's IEP as Petitioner contends. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 6: Whether School A denied the student a FAPE by failing to provide ESY services to the student during the summer of SY 2016-2017, by omitting ESY as a related service on Student's IEP.

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

34 C.F.R. 300.106 (a) provides: (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.

(2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with Sec. Sec. 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.

The Fourth Circuit has articulated the standard of "necessary" for extended school year services in the context of a free and appropriate public education. "[Extended school year] services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." *MM v. School District of Greenville County*, 303 F.3d 523, 537-38 (4th Cir. 2002); see also *Johnson v. District of Columbia* 112 LRP 36774 (February 15, 2012)

Petitioner asserts that School A denied the student a FAPE by not providing ESY services during the summer of 2017. Petitioner asserts that the student was not making progress and was in need of ESY services.

The IEP developed for Student in December 2015 did not prescribe ESY services, and was adopted and implemented by School A. School A convened an annual IEP review meeting on

¹⁷ FOF #s 26, 27

December 1, 2016. There is no evidence that Student was losing skills over any breaks from school and no team members raised any concern about regression, including Petitioner.¹⁸ The Hearing Officer finds the School A witness credible, in this regard. In addition, the evidence demonstrates Student was progressing on IEP goals as discussed in the IEP progress reports during the second half of SY 2016-2017. The Hearing Officer concludes based on the evidence, and as the IEP team determined, Student did not show signs of regression, or any indication that gains made during the regular school year would be significantly jeopardized, such that ESY services were warranted for summer 2017. Consequently, the Hearing Office concludes Petitioner did not sustain the burden of proof on this issue.

ORDER:

1. The due process complaint as to both Respondents, DCPS and School A [REDACTED] 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 13, 2017

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¹⁸ FOF # 19