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**Confidential**

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| Parent on Behalf of Student <sup>1</sup> ,<br><br>Petitioner,<br><br>v.<br><br>District of Columbia Public Schools (“DCPS”)<br>[LEA}<br><br>Respondent.<br><br>Case # 2016-0172<br><br>Hearing Officer: Coles B. Ruff, Esq.<br><br>Date Issued: October 8, 2016 | HEARING OFFICER’S<br>DETERMINATION<br><br>Hearing Dates: September 21, 2016<br>September 23, 2016<br><br>Counsel for Each Party listed in<br>Appendix A |
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<sup>1</sup> Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

## **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 September 21, 2016, and September 23, 2016, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student is age \_\_\_\_\_ and in grade \_\_\_\_\_.<sup>2</sup> The student resides with his grandparent/guardian (“Petitioner”) in the District of Columbia. The student is child with a disability pursuant to IDEA with a disability classification of specific learning disability (“SLD”). The student attends a District of Columbia Public Schools (“DCPS”) [REDACTED] school (“School A”) and did so during school year (“SY”) 2014-2015 and SY 2015-2016. During SY 2014-2015 the student was in a self-contained classroom and performed well academically and behaviorally. Petitioner claims that in SY 2015-2016 the student was no longer in a self-contained classroom and he began manifesting school avoidance behaviors and skipping class and school. Petitioner also claims, inter alia, that DCPS failed to develop and/or update the student’s individualized educational program (“IEP”) to address his behaviors and the student missed two weeks of extended school year (“ESY”) services during summer 2016.

On July 25, 2016, Petitioner filed this due process complaint alleging DCPS, the local education agency (“LEA”), denied the student a free appropriate public education (“FAPE”). Petitioner seeks as relief that the Hearing Officer order DCPS to fund the student’s placement and transportation to a public or non-public school that can provide the student with educational benefit, designate a more inclusive disability classification, devise and implement a sufficiently restrictive IEP in terms of least restrictive environment (“LRE”), and devise and implement appropriate behavioral goals, supports and counseling services and update and/or modify the student’s functional behavior assessment (“FBA”) and behavior intervention plan (“BIP”).

On August 4, 2016, the LEA filed a timely response to Petitioner’s complaint in which it denies that it failed to provide the student with a FAPE. DCPS asserts it completed the FBA and developed the BIP on March 5, 2014, and that the student did not require an updated BIP and has demonstrated consistent progress in his social, emotional and behavioral goals. However, based upon the Petitioner’s July 7, 2016, request, DCPS agreed to perform a new FBA at the start of SY 2016-2017. The LEA asserts that the student’s October 30, 2015, IEP and classroom placement were reasonably calculated to provide educational benefit to the student in his LRE and were appropriate at the time the IEP was developed. The LEA asserts that the student’s disability classification was agreed upon by a team and does specifically dictate the education programming. The student was making progress during SY 2015-2016 and there was no trigger

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<sup>2</sup> The student’s current age and grade are in indicated in Appendix B.

that would require DCPS to reconvene regarding the student's IEP. However, the LEA contends that the student's attendance decreased toward the end of the school year, and DCPS complied with Petitioner's request for the meeting, that convened on July 7, 2016. The LEA asserts that during the July 7, 2016, meeting, the team discussed the student's attendance issues as well as the interventions being used to address attendance. The LEA contends the team agreed to amend the student's IEP to include ESY and the student experienced a two-day delay, which the LEA asserts is *de minimis*.

The parties participated in a resolution meeting on August 9, 2016, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing in this matter. The 45-day period begins on August 25, 2016, and ends [and the Hearing Officer's Determination ("HOD") is due] on October 8, 2016.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on the complaint on August 10, 2016, and issued a pre-hearing order ("PHO") on August 15, 2016, outlining, inter alia, the issues to be adjudicated.

**The issues adjudicated are:**

1. Whether the LEA denied the student a FAPE by failing to provide the student with an appropriate IEP and appropriate placement/setting/location of services during SY 2015-2016 because: (a) the student's IEP and placement are insufficiently therapeutic, structured and restrictive; (b) the student requires a more restrictive LRE; (c) the student requires more hours outside of general education, up to and including full-time, stand-alone special education day school; (d) the student requires more hours of behavioral supports, defined with greater specificity; (e) the student requires a current and modified FBA and BIP; (f) the student's disability classification is under-inclusive, and (g) the student requires sufficiently defined and appropriate present levels of performance, baselines and goals.
2. Whether the LEA denied the student a FAPE by failing to timely and appropriately update the student's IEP to address any lack of expected progress from November 2015 to the present.
3. Whether the LEA denied the student a FAPE by failing to provide timely and appropriate ESY services during the summer of 2016.
4. Whether the LEA denied the student a FAPE by failing to timely and appropriately address the student's declining attendance and/or assess/evaluate him in this area.

**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 75 and Respondent's Exhibits 1 through

24) that were admitted into the record and are listed in Appendix A.<sup>3</sup> Witnesses are listed in Appendix B.<sup>4</sup>

### **SUMMARY OF DECISION:**

Petitioner sustained the burden of proof by a preponderance of the evidence that the DCPS denied the student a FAPE by failing to provide timely and appropriate ESY services during the summer of 2016 and by failing to timely and appropriately address the student's declining attendance and/or assess/evaluate him in this area.

Respondent sustained the burden of proof by a preponderance of the evidence that the student's October 30, 2015, IEP was reasonably calculated to provide educational benefit at the time it was developed. Respondent also sustained the burden of proof by on issue #2 above as to whether the LEA denied the student a FAPE by failing to timely and appropriately update the student's IEP to address any lack of expected progress from November 2015 to the present.

As relief for the denials of FAPE determined, the Hearing Officer grants Petitioner an independent psychological evaluation to determine the student current academic functioning and to review the evaluation review the student's disability classification, update the student's IEP as appropriate and determine the student's placement and location of services for the remainder of SY 2016-2017.

The Hearing Officer found that compensatory education proposal Petitioner presented did not meet the requirements pursuant to *Reid* and Hearing Officer granted Petitioner the number of hours of independent tutoring the Hearing Officer concluded was reasonable in light of the denials of FAPE that were determined.

### **FINDINGS OF FACT:<sup>5</sup>**

1. The student resides with Petitioner in the District of Columbia and is a child with a disability pursuant to IDEA with a disability classification of SLD. (Petitioner's testimony, Petitioner's Exhibit 3-1)
2. The student attends School A, a DCPS [REDACTED] school, and did so during SY 2014-2015 and SY 2015-2016. (Petitioner's testimony)

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<sup>3</sup> Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

<sup>4</sup> Petitioner presented four witnesses: Petitioner, two educational advocates employed by Petitioner's law firm and a witness from Lindamood Bell testifying about its recommendation for services for the student. Respondent presented two witnesses: the student's School A special education teacher and her general education teacher.

<sup>5</sup> The evidence (documentary and/or testimony) that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

3. Prior to attending School A, in March 2013, an independent psychological evaluation was conducted of the student. The student's cognitive functioning was measured in the Very Low range with an IQ score of 68. The student's academic functioning was far below grade level and the evaluator concluded the student had a learning disability. The evaluator also diagnosed the student with Anxiety Disorder, and Attention Deficit Hyperactivity Disorder ("ADHD") and recommended, among other things, that the student be classified as having multiple disabilities to include SLD, emotional disturbance ("ED") and other health impairment ("OHI") due to ADHD. The evaluator also recommended the student be placed in a full time, small, therapeutic school. (Petitioner's Exhibit 11-16, 11-17, 11-19)
4. On December 4, 2014, DCPS convened a meeting at School A to review the independent evaluation. Petitioner participated in the meeting with her educational advocate. The team noted the student's ADHD but discussed and agreed that the student's disability classification was SLD because his learning disability was the main factor keeping him from accessing the general education curriculum. The team specifically ruled out the ED disability classification and agreed that the appropriate placement for the student was a full time classroom for learning disabled students. There was no disagreement by Petitioner or her advocate about the student's disability classification. (Petitioner's Exhibit 17-3)
5. On January 16, 2014, a team met to review the student's BIP and to discuss his LRE. The team discussed the student's tendency to be withdrawn in the classroom but to be more engaged during group counseling sessions rather than individual counseling. The team agreed to refer the student to the DCPS LRE team and the student was eventually placed in an out of general education program for students with learning disabilities during SY 2014-2015. (Petitioner's Exhibit 17-2)
6. In March 2014 School A developed a BIP for the student to improve his behavior in attending and remaining in class, completing class assignments and complying with classroom and school rules. (Respondent's Exhibit 3-1)
7. On November 14, 2014, School A updated the student's IEP. Petitioner attended the IEP meeting in person. The IEP prescribed that the student be provided 26.5 hours per week of specialized instruction outside general education and 240 minutes of behavioral support per month outside general education. This schedule allowed for the student to be with general education peers during lunch periods. (Respondent's Exhibit 5-9)
8. During SY 2014-2015 the student was in a self-contained SLD classroom at School A with approximately eight students. The student performed well academically and behaviorally during SY 2014-2015, made honor roll and was awarded as the most improved student. (Petitioner's Testimony, Petitioner's Exhibit 26)
9. On October 30, 2015, the student's IEP team met and updated the student's IEP. The student's teacher discussed his academic progress. The social worker was there and said

the student was courteous and respectful. At that time the student was doing well. The team agreed to continue the same level of services from the student's prior IEP: 26.5 hours per week of specialized instruction outside of general education and 240 minutes per month of behavioral support services per month outside of general education. Petitioner participated in the meeting along with the student and agreed with the IEP his level of services and his LRE. (Respondent's Exhibit 8, 9)

10. For SY 2015-2016 the student remained in full time special education program but began to travel in cohort with his special education class to different special education teachers for different subjects rather than remain the same classroom for most of the day as he did during SY 2014-2015. However, the all the student's classes were in the same general vicinity within School A. (Witness 5's testimony)
11. Petitioner ensured the student got on the school bus daily and he had only a few absences from school during SY 2015-2016. However, the student's report card for that school year reflects he missed 45 days of school. Petitioner was notified that the student was missing school and might be subject to truancy proceedings but nothing ever came of it. In actuality, the student's absences were far less but he did have significant number of missed classes during the last two advisories of the school year. (Petitioner's testimony, Petitioner's Exhibit 22-2)
12. During SY 2015-2016 the student attended classes regularly during the first two advisories. He missed more class during the third and fourth advisories and had six absences from his math class during the third advisory and 10 absences during the fourth advisory. The student had 9 absences from his ceramics class during his third advisory during the third advisory and 9 absences during the fourth advisory. The student had 4 absences from his English class during the third advisory and 5 absences during the fourth advisory. The student had 3 absences from his Reading Worship in third advisory and 3 absences in the fourth advisory. The student passed all his classes during SY 2015-2016 except his ceramics class. However, his grades were not good as they were the previous school year. (Petitioner's Exhibits 22-1, 22-3, 26)
13. As result of the student's noted absences the School A attendance counselor required the student to pick up daily attendance sheets for his teachers to sign. However, the student often did not pick up the attendance sheets. (Petitioner's testimony)
14. The student's special education math teacher participated in the October 30, 2015, meeting, and developed his IEP math goals. The student's October 30, 2016, IEP math goals indicates his present levels of performance as measured by the "IXL" math assessment. At the meeting no one expressed concern about the student's math goals. (Witness 5's testimony, Respondent's Exhibit 8-3, 8-4)
15. The student progressed in his math goals during SY 2015-2016. Before the summer 2016 the student was operating on 6th or 7th grade level in math. However, at the start of SY 2015-2016 he is operating at the 4<sup>th</sup> grade level. The decline is apparently due to the time

he was away from school during the summer months. (Witness 5's testimony, Respondent's Exhibits 8-3, 11-2)

16. At the October 30, 2015, IEP meeting the student's other special education teacher noted the student's present levels for reading and written expression in his IEP. The student scored 175 in the scholastic reading inventory (SRI) at the start of SY 2015-2016. The student has made significant progress in his reading abilities between the start of SY 2015-2016 the start of SY 2016-2017. His score increased to 418 in September 2016, which is equivalent to a one grade level increase. (Witness 6's testimony, Respondent's Exhibit 8-4, 8-5, 8-6)
17. The student began to have attendance issues in his reading and English classes near the end of the SY 2015-2016. The student's English teacher attributed to the student concern about his grandmother's illness. He would miss classes but be at school. His progress report notes in April 2016 indicated he was demonstrating very little progress toward his reading and writing goals that marking period and his need to pay attention and focus more in class. However, the student is back on point this current school year attending class regularly. (Witness 6's testimony)
18. Before October 30, 2015, the student demonstrated success with 240 minutes per month of behavioral support services, so it was reasonable to continue with this level of support as of the date that the IEP was developed. The student's attendance was not a problem as of the October 2015 meeting. The student's behavior support goals are designed to assist him to be on task and to be less influenced by peer behaviors and make better judgments. The DCPS social worker developed a BIP for the student in November 2015. In the spring 2016 the student's attendance began to be affected by concerns outside of school related to concerns about his grandmother's health. (Witness 7's testimony, Respondent's Exhibits 6-2 7-4, 7-5, 10)
19. During the second and third advisories the student was missing classes and he had a BIP that stated that the teacher and staff were to ensure that the student was closely monitored during less structured setting. There was to be a daily assessment of student progress through behavioral charting and observations. There was some degree of follow up between the student's teachers and the student's social worker but that communication and collaboration did not happen with all the students teachers. The student was having some concerns at home that affected his class attendance and he was getting involved with older students. However, the School A social worker attempted to address with the student the concerns he had outside of school. (Witness 7's testimony, Respondent's Exhibit 10)
20. The student does need a more restrictive environment than in his current placement. The student does not display emotional and behavioral issues. He is friendly and helpful but is sometimes is a follower of older students. He has begun to attend class more regularly in the current school year and has the potential to gradually transition to general education. (Witness 6's testimony, Witness 7's testimony)

21. On July 7, 2016, DCPS convened a MDT meeting at which the team determined the student required ESY services. However, the student did not start ESY timely in summer 2016 because DCPS delayed in identifying the ESY placement for the student and he had no bus transportation. Petitioner provided him transportation to and from ESY. Petitioner has not received any progress reports from the student's ESY program. (Petitioner's testimony, Petitioners' Exhibit 14)
22. The student has a caseworker from First Home Care who visits him once per week at School A. He also sees psychiatrist and takes medication for his ADHD. The student's parent believes his recently displaying more impulsive behavior, anger and not taking care of his hygiene. (Petitioner's testimony)
23. Petitioner's engaged an independent school psychologist to prepared and propose a compensatory education plan. The psychologist surmised that the students had difficulty during SY 2015-2016 and opined that no appropriate interventions were put in place and a soon as his attendance problems developed. As a result of the harm the consultant recommended 240 hours (1 hour per week for each school weeks of the school year) of the direct instruction/tutoring and 50 hours of mentoring/counseling (Witness 3's testimony, Petitioner's Exhibits 11-17, 42-5)
24. The student has visited, been interviewed and accepted by a private special education school ("School B"). School B has a therapeutic day program with a total of 91 students and 56 students in its [REDACTED] program. The student would be in a special education classroom with five other students a special education teacher and paraprofessional. School B can implement his IEP and support his academic deficits and vocational certification program. School B services student's with a full range of disability classifications. School B has OSSE certificate of approval and has and annual costs of \$61,800. Students are escorted wherever they go in the school and doors are manned by staff to prevent student's from leaving class and/or the school. School B can provide the student a DCPS diploma and has related services and mental health professionals and crisis intervention available to address students' behaviors. There are students with significant behavior problems. The [REDACTED] student transition between classes and between floors for classes. (Witness 2's testimony, Petitioner's Exhibit 51)

#### **CONCLUSIONS OF LAW:**

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--  
(a) Are provided at public expense, under public supervision and direction, and without charge;  
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Generally, 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). The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii). However, as noted in the pre-hearing order Respondent had the burden or persuasion on the first two issues adjudicated. Petitioner had the burden or persuasion on the remainder of the issues. <sup>6</sup>

**ISSUE 1:** Whether the LEA denied the student a FAPE by failing to provide the student with an appropriate IEP and appropriate placement/setting/location of services during SY 2015-2016.

**Conclusion:** Respondent sustained the burden of proof 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.

"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).

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<sup>6</sup> Pursuant to D.C. ACT 20-486, enacted November 20, 2014, which provides in pertinent part: "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. ...This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016."

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.” *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009). Requirements of the IDEA are satisfied when a school district provides individualized education and services sufficient to provide disabled children with some educational benefit. *Blackmon v. Springfield R-XII Sch. Dist.* 198 F.3d 648, at 653 (8th Cir. 1999)

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.")

The evidence in the case demonstrates that during SY 2014-2015 the student performed well academically and behaviorally and made significant progress. When the student's October 30, 2015, IEP was developed the student had just had successful academic year with the same level of services and LRE that had been in his previous IEP. From the vantage point of the team at the time this IEP was developed, the evidence demonstrates that the student's IEP was reasonably calculated to provide him educational benefit.

During SY 2015-2016 the student remained in a full time special education program and was provided the same level of services. However, the student was during this school year in a cohort of special education students who traveled together along with one or two staff members to different teachers and classes that were located in the same general vicinity within School A.

Although Petitioner asserted and had witnesses who testified that the student's IEP was inappropriate because it lacked a litany of elements, the Hearing Officer was unconvinced by this testimony. None of Petitioner's witnesses who provided testimony had ever observed the student in school, talked with teachers, assessed and one of the witnesses had never met the student. Although these witnesses were designated as expert witnesses their testimony was less credible than that of the DCPS witnesses who had actually work with the student.

The Hearing Officer was not convinced that that the student's disability classification was inappropriate as the student's 2013 psychological evaluation that recommended an expanded disability classification beyond SLD had been reviewed by a team that Petitioner and her advocate had long since attended and raised no issue about the disability classification. The student's LRE during SY 2014-2015 was clearly appropriate at the time the October 30, 2015, IEP was developed as the student had a highly successful year with the very same LRE and level of special education and related services.

Respondent presented sufficient evidence to demonstrate through the credible testimony of the student's special education teachers and social worker that the student's IEP present levels of

performance, baselines and goals and level of behavioral support services were also reasonable at the time the IEP was developed. Consequently, the Hearing Officer concludes Respondent sustained the burden of proof by a preponderance of the evidence on this issue.

**ISSUE 2.** Whether the LEA denied the student a FAPE by failing to timely and appropriately update the student's IEP to address any lack of expected progress from November 2015 to the present.

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

An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. See *Shaw v. Dist. of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002). While parents may desire "more services and more individualized attention," when the IEP meets the requirements discussed above, such additions are not required. See, e.g., *Aaron P. v. Dep't of Educ., Hawaii*, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011) (while "sympathetic" to parents' frustration that child had not progressed in public school "as much as they wanted her to," court noted that "the role of the district court in IDEA appeals is not to determine whether an educational agency offered the best services available"). Ultimately, a school district provides a FAPE so long as a child receives some educational benefit. *O.S. by Michael S. and Amy S. v. Fairfax County Sch. Bd.*, 115 LRP 50343 (4th Cir. October 19, 2015).

The evidence demonstrates that during SY 2014-2015 the student made academic progress and had good grades on his report card. However, in the first two advisories of SY 2015-2016 the student's grades were average, mostly "Cs". These grades were not as good as the student grades the previous school year. Although Petitioner sought to demonstrate that the student's academic performance was dramatically less than the previous school year, the Hearing Officer was not convinced by Petitioner's case in this regard. Respondent presented sufficient evidence from the student's report card and testimony from his special education teachers that the student made academic progress during SY 2015-2016. And it is clear from the evidence that at least in the first semester of SY 2015-2016 the student's academic performance was average and his class and school attendance was fine. Although Petitioner may have desired that the student have performed as well as he did the prior school year, the evidence does not support a finding that the student's academic performance slipped significantly enough to warrant DCPS amending the student's IEP in November 2015 or all during the SY 2015-2016. The evidence demonstrates that during the last two advisories of SY 2015-2016 the student's class attendance began to fall off. However, the evidence demonstrates that the student was still able to end the SY 2015-2016 school year with passing grades except for single class in the fourth advisory.

Consequently, based on the evidence 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 the student a FAPE by failing to provide timely and appropriate ESY services during the summer of 2016.

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

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 evidence demonstrates that DCPS determined on July 7, 2016, that the student was in need of ESY services and that the student missed two weeks of these services. As ESY is of such a short duration, the Hearing Officer concludes that two weeks of missed services is significant and denied the student a FAPE. In addition, there was evidence that the student significantly regressed in math skills during the summer 2016 as testified to by the DCPS witness. Consequently, the Hearing Officer concludes Petitioner sustained the burden of proof on this issue.

**ISSUE 4:** Whether the LEA denied the student a FAPE by failing to timely and appropriately address the student's declining attendance and/or assess/evaluate him in this area.

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

The public agency has an "affirmative duty" to address a Student's truancy. *Springfield School Committee v. Doe*, 623 F.Supp.2d 150 (D. Mass 2009)("behavior management services" fall within the scope of IDEA); cf. *R.B. v. Mastery Charter School*, 762 F. Supp.2d 745 (E.D. Pa2010) (District had duty to respond to absences through educational intervention). Courts and administrative bodies have held that District should assess the reasons behind a student's truancy if the truancy can be linked to the disability. *Lexington County Sch. Dist. One v. Frazier*, 57 IDELR 190 (D. S.C. 2011)(SRO's ruling that District failed to assess Student's truancy issue upheld by District Court); *Independent Sch. Dist. No. 284, Wayzata Area Sch. v. A.C.*, 258 F.2d 769 (8th Cir. 2001)(neuropsychological assessment conducted of truant student; assessment was relied upon by the court to determine appropriate educational program for Student); see also *Urban Pathways Charter School*, 112 LRP 27526 (Pennsylvania, 2012)(District had duty to explore reasons behind absences); *Corpus Christi Ind. Sch. Dist.*, 57 IDELR 240 (Texas, 2011)(District denied FAPE when truancy was not properly assessed) . In the instant case, DCPS did not live up to its affirmative duty.

The evidence clearly demonstrates in this case that in the third and fourth advisories of SY 2015-2016 the student began to miss a significant number of classes and his grades his grades were affected by it. Petitioner credibly testified that the she ensured the student got on the school bus and attended school virtually every day during that school year, the student missed significant enough classes that his report card reflect that he had a total of 45 absences for the school year and DCPS actually initiated truancy proceeding, perhaps mistakenly, but nothing ever came of it. School A attempted to put an attendance plan in place for the student but the evidence

demonstrates there was little if any follow through by School A in ensuring the student complied with the attendance plan and there was insufficient communication between the School A social worker and all of the student's teacher to ensure that the behavior chartering and other documentation that was to occur to address the student's class attendance actually occurred. The evidence demonstrates that in the last two advisories of the school year, although the student passed his classes, his grade performance in those two advisories was significantly worse than his performance in the first two advisories of the school year. Based on this evidence the Hearing Officer concludes that School A did not follow through sufficiently with action to address the student's class attendance problems and as a result the student was denied a FAPE.

**Remedy:**

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded the student was denied a FAPE as result of missed ESY services and because DCPs failed to take sufficient action to address in class attendance.

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

The Hearing Officer found that compensatory education proposal Petitioner presented did not meet the requirements pursuant to *Reid* and Hearing Officer granted Petitioner a nominal number of hours of independent tutoring in light of the denials of FAPE that were determined, as to award no compensatory education at all would be inequitable.

As further relief for the denials of FAPE determined, the Hearing Officer also grants Petitioner an independent psychological evaluation to determine the student's current academic functioning and to review the evaluation review the student's disability classification, update the student's IEP as appropriate and determine the student's placement and location of services for the remainder of SY 2016-2017.

**ORDER:** <sup>7</sup>

1. Within ten (10) business days of the date of this order, DCPS shall provide Petitioner authorization for 25 hours of independent tutoring at the OSSE prescribed rate.
2. As relief for the denials of FAPE determined, the Hearing Officer grants Petitioner an independent psychological evaluation at the OSSE prescribed rate. DCPS shall grant Petitioner the evaluation authorization within ten (10) school days of this order.
3. DCPS shall convene a MDT meeting within fifteen (15) schools of its receipt of the independent evaluation from Petitioner to determine the student's current academic functioning, review the student's disability classification, update the student's IEP as appropriate and determine the student's placement and location of services for the remained of SY 2016-2017.
4. All other requested relief is denied.

**APPEAL PROCESS:**

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

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: October 8, 2016**

Copies to:     Counsel for Petitioner  
                  Counsel for DCPS  
                  ODR, OSSE & CHO

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<sup>7</sup> Any delay in Respondent DCPS in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.