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Office of the State Superintendent of Education
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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”) Respondent.</p> <p>Case # 2017-0163</p> <p>Date Issued: October 5, 2017</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: September 19, 2017 September 20, 2017</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ This “Corrected” HOD is issued to make typographical and/or grammatical changes only; no substantive changes have been made. The HOD issuance date, October 5, 2017, remains unchanged, as does the applicable appeal date. Personally identifiable information, including the name of Petitioner, 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 September 19, 2017, and September 20, 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 is age _____ and in grade _____.² The student resides with the student’s parent in the District of Columbia and is a 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”) middle school (“School A”). DCPS is the student’s local educational agency (“LEA”).

The student’s mother (“Petitioner”) filed the current due process complaint on June 19, 2017, alleging that DCPS denied the student a free appropriate public education (“FAPE”) by failing to propose an appropriate individualized educational program (“IEP”) and placement for school year (“SY”) 2015-2016 and for SY 2016-2017.

The parties participated in a resolution meeting on June 30, 2017, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on July 19, 2017, and ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on September 2, 2017. Petitioner filed an unopposed motion to continue and extend the HOD due date to allow for the requested hearing dates because of the unavailability of the parties for the original hearing date(s). The motion was granted and the HOD due date was extended by thirty-three (33) calendar days to October 5, 2017.

The undersigned Impartial Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on the complaint on July 28, 2017, and issued a pre-hearing order (“PHO”) on August 2, 2017, outlining, inter alia, the issues to be adjudicated.

RELIEF SOUGHT:

Petitioner seeks as relief that the Hearing Officer direct DCPS to place and fund the student at the non-public special education school where the student has been accepted (“School B”) and order DCPS to fund compensatory education.

DCPS Response:

DCPS filed a timely response to the complaint on July 27, 2017, in which it denies the

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

allegations that it failed to provide the student with a FAPE. DCPS asserts, inter alia, that the student has significant reported truancy that has resulted in the student's long-standing unavailability and underexposure to appropriate instruction. The IEPs at issue in the complaint were all developed without issue or concern raised by any participant, including Petitioner. The IEPs include an appropriate program and least restrictive environment ("LRE").

ISSUES:³

The issues adjudicated are:

1. Whether DCPS denied the student FAPE by failing to develop appropriate IEPs⁴ during SY 2015-2016 & SY 2016-2017 because the IEPs:

- a) Did not provide sufficient hours of specialized instruction, and/or
- b) Did not provide sufficient specialized instruction outside general education, and/or
- c) Failed to provide IEP goals for all academic areas, and/or
- d) Failed to provide behavioral support services and/or a behavior intervention plan, and/or
- e) Failed to provide instructional hours in a full-time outside general education program.

2. Whether DCPS denied the student FAPE by failing to provide the student an appropriate educational placement during SY 2015-2016 and SY 2016-2017 that was specifically designed for students with significant learning disabilities to address the student's average cognitive abilities and severe academic deficits.

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 40 and Respondent's Exhibits 1 through 36) that were admitted into the record and are listed in Appendix A.⁵ Witnesses' identifying information is listed in Appendix B.⁶

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.

⁴ The dates of the IEPs being challenged are dated: May 2015, March 2016, March 2017 and May 2017.

⁵ Any items disclosed and not admitted or admitted for limited purposes were noted on the record and summarized in Appendix A.

⁶ Petitioner presented four witnesses: Petitioner, an independent clinical psychologist, an educational consultant regarding compensatory education, and a representative from School B. Respondent presented two witnesses: a DCPS psychologist and a School A LEA representative.

SUMMARY OF DECISION:

The Hearing Officer concludes that Respondent did not sustain the burden of proof by a preponderance of the evidence on issues #1, and #2. As a result of the finding of denial of FAPE the Hearing Officer directs DCPS to convene an IEP meeting to review the student's recent evaluation and amend the student's IEP to prescribe specialized instruction in all academic core subjects and one hour of behavior support services per week outside the general education setting. The Hearing Officer also grants the student compensatory education in the amount of 150 hours of independent tutoring.

FINDINGS OF FACT:⁷

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 Exhibit 1-1).
2. DCPS conducted an initial comprehensive psychological evaluation of the student in June 2014.⁸ According to the evaluation, the student's cognitive abilities were average with relative weakness in the student's composite memory index. The student had been retained once prior to the evaluation, and at the time of the evaluation, was operating two grade levels behind the student's then current grade and was below basic in all core subjects including reading writing and math. The evaluator noted the student's school attendance problems. The evaluator also noted that the student's behaviors were highly indicative of Attention Deficit Hyperactivity Disorder ("ADHD"). The evaluator concluded the student appeared to meet the criteria for SLD disability classification. (Petitioner's Exhibit 9-1, 9-7, 9-9, 9-10, 9-11, 9-16,
3. The student was determined eligible and the student's initial IEP was developed on June 20, 2014, and included goals in reading. The student's initial IEP prescribed one hour of specialized instruction in reading per day in the general education setting. (Petitioner's Exhibit 5)
4. The student's IEP was reviewed and updated on May 6, 2015. The present levels of performance ("PLOP") in reading indicated that the student was operating below basic levels in all core subjects including reading, writing and math during SY 2013-2014. The student's reading assessments indicated that the student was still reading at the same grade level as when the student was evaluated in June 2014. The student's IEP included

⁷ 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.

⁸ The student had been evaluated previously been evaluated by a public charter school the student attended during 2010 and was found ineligible for special education.

only goals in reading and prescribed one hour of specialized instruction in reading per day, again in the general education setting. (Petitioner's Exhibit 4-1, 4-4, 4-7)

5. The student's IEP progress reports during SY 2014-2015 indicate the student was making progress toward the student's IEP goals. (Petitioner's Exhibit 17, 18)
6. The student began attending School A during SY 2015-2016. On March 22, 2016, School A updated the student's IEP. The student's PLOP for reading indicated the student had regressed a grade level in the student's reading and noted that the student's absences from school had negatively impacted the student's academic growth. The student's specialized instruction increased to 5 hours per week inside general education and 5 hours per week outside general education. Again the IEP only included goals for reading. (Petitioner's Exhibit 3-1, 3-3, 3-4)
7. The student's IEP progress reports for SY 2015-2016 indicate the student made no progress on the student's IEP goals. (Petitioner's Exhibit 14, 15, 16)
8. The student's end of year report card for SY 2015-2016 indicated the student failed most of the student's classes and was absent a total of 64 days with 55 days being unexcused. The student was tardy 17 times. Nonetheless, the student was promoted to the next grade. (Petitioner's Exhibit 29)
9. On February 16, 2017, School A conducted the student's annual IEP review. The PLOP for reading stated that based on the data, the student was again reading on the second grade level and again noted that the student's absences impacted the student's academic growth. The IEP prescribed a total of 6 hours of specialized instruction per week outside the general education setting: 3 hours in reading and 3 hours in written expression. However, the IEP did not include any written expression goals. (Petitioner's Exhibit 2-1, 2-3, 2-4)
10. In May 2017, DCPS conducted a psychological triennial reevaluation of the student. The evaluator reviewed the student's prior evaluation, report cards, IEP and IEP progress reports, and interviewed the student, Petitioner and the student's teachers. The evaluator assessed the student's academic achievement. The evaluation did not include an updated cognitive assessment. The student's academic achievement scores were rated as low to very low. (Respondent's Exhibit 29)
11. On May 30, 2017, School A conducted an annual review of the student's IEP. Petitioner participated in the meeting with her counsel. The IEP included academic goals in the areas of math, reading, and emotional, social and behavior development, goals to address the student's off task and work avoidance behaviors and the student's absenteeism. The IEP prescribed 10 hours per week of specialized instruction outside the general education setting with 5 hours devoted each to math and reading and 30 minutes per month of consult behavior support services. (Petitioner's Exhibit 1)

12. On May 4, 2017, School A conducted a functional behavior assessment (“FBA”) and on May 30, 2017, School A developed a behavior intervention plan (“BIP”) to address the student’s attendance issues and off task behaviors. (Petitioner’s Exhibits 10, 11)
13. The student’s IEP progress reports for SY 2016-2017 indicate the student made no progress on the student’s IEP goals. (Petitioner’s Exhibit 12, 13)
14. The student’s end of year report card for SY 2016-2017 indicates the student failed most of the student’s classes and was absent a total of 66 days, with 61 days being unexcused. The student was tardy 14 times. The student was, nonetheless, promoted to the next grade. (Petitioner’s Exhibit 25)
15. The student’s end of year report card for SY 2016-2017 indicates the student failed most of the student’s classes and was absent a total of 66 days, with 61 days being unexcused. The student was tardy 14 times. The student was, nonetheless, promoted to the next grade. (Petitioner’s Exhibit 25)
16. Due to the student’s truancy and court involvement, on August 10, 2017, the Child Guidance Clinic of the Superior Court of the District of Columbia conducted a psycho-education evaluation of the student. The student’s cognitive scores were in the Very Low range, lower than when the student was initially evaluated by DCPS in 2014. An adaptive assessment was conducted that ruled out a diagnosis of intellectual disability. The student’s academic achievement scores were at the second to third grade level. The evaluator noted the student was at risk of growing indifference to school, increased truancy, and additional juvenile misconduct. A DCPS IEP team has not yet reviewed the psycho-educational evaluation. (Petitioner’s Exhibit 7)
17. The School A psychologist who conducted the May 2017 evaluation of the student believes that the student’s recent cognitive scores are probably an underestimation of the student’s abilities, and the student’s academic deficits are directly related to the student’s chronic truancy over the last two school years. The student had significant tardiness and often skipped class when the student was in the school building. Whenever the student was found in the hallway at School A the student was brought back to the student’s classroom. (Witness 4’s testimony)
18. The student’s attendance at School A for SY 2017-2018 has continued to be problematic. The student’s mother has expressed that the student may not be attending because the student has an expectation of attending a different school other than School A. (Witness 5’s testimony)
19. The student’s parent has observed that the student is self-conscious about the student’s reading abilities and does not like to read aloud. When the student’s parent tries to help with reading and homework, the student is easily frustrated and jumps up and leaves. (Petitioner’s testimony)

20. The student's IEPs at while at School A have not programmed for the student's ADHD and until recently have not addressed the resulting behaviors of impulsivity of leaving class, and not completing classwork. The IEPs initially did not prescribe goals in the areas of math and writing despite the student's deficits in these areas and did not include goals or the related service of behavioral support until recently. The student's absences and work avoidance are related to the student's academic deficits and the resulting embarrassment the student feels because of the academic deficits. (Witness 1's testimony)
21. The student's recent evaluations indicate that the since DCPS evaluated the student in 2014 the student's academic achievement has been stagnant. Because of the student's academic deficits, Petitioner's expert witness recommended that the student's IEP prescribe specialized instruction in all academic areas due to the severity of the deficits in reading, math and writing and behavioral support 1 hour per week. The expert witness recommended that the student's educational placement should be an out of general education setting with small group instruction and one-on-one with a special education teacher in a school that offers supports and therapeutic modalities. The expert recommends the student's placement in classes with other students with SLD and ADHD in a public school setting if such a placement is available. Otherwise, she recommends that the student be placed in a non-public school that offers the recommended services and supports. (Witness 1's testimony)
22. The student has interviewed at and been accepted to a non-public special education school ("School B"). School B has an adult to student ratio of 3 to 1 and classrooms generally with 6 students and one lead certified special education teacher, a co-teacher, and a behavior counselor. School B has an OSSE certificate of approval ("C of A"). The cost is \$63,000.00 annually, and related services and transportation is billed separately. School B serves students with various disability classifications including LSD and other health impairment ("OHI") for ADHD. School B offers a reading intervention program and has a reading specialist on staff. School B has a truancy team to address any student with truancy problems and can provide private transportation and linked home intervention for a student who has been identified as truant. At School B the student would not have contact with non-disabled peers. (Witness 2's testimony, Petitioner's Exhibit 40)
23. Petitioner engaged an educational consultant to provide a recommendation regarding compensatory education. The consultant recommended 275 hours of independent tutoring and 75 hours of mentoring or counseling to compensate the student for the alleged harm from a lack of sufficient specialized instruction and behavior support. The student could make as much as 2 to 3 grade levels of progress if the student receives and participates in the recommended compensatory services.⁹ (Witness 3's testimony, Petitioner's Exhibit 37)

CONCLUSIONS OF LAW:

⁹ This consultant never met the student, the parent nor talked with any of the student's teachers in reaching a conclusion about the appropriate amount of services to compensate the student.

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.

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO and at the hearing, Respondent holds the burden of persuasion on issues # 1 and #2. 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 FAPE by failing to develop appropriate IEPs¹⁰ during SY 2015-2016 & SY 2016-2017 because the IEPs:

- a) Did not provide sufficient hours of specialized instruction, and/or
- b) Did not provide sufficient specialized instruction outside general education, and/or
- c) Failed to provide IEP goals for all academic areas, and/or
- d) Failed to provide behavioral support services and/or a behavior intervention plan, and/or
- e) Failed to provide instructional hours in a full-time outside general education program.

¹⁰ The dates of the IEPs being challenged are dated: May 2015, March 2016, March 2017 and May 2017.

Conclusion: Respondent did not sustain the burden of proof 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, *Andrew F. v. Douglas County School District Re-1*, a district must provide "an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. 988, 999 (2017).

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

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits." *Schaefer v. Weast*, 554 F.3d 47. The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials, informed by their own expertise and the views of a child's parents or guardians; any re-view of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

Petitioner alleges the student's IEPs since May 6, 2015, that have been implemented while the student has been attending School A have been inappropriate for various and alternative reasons. The evidence demonstrates that when the student was first determined eligible in 2014 the student was reading on second grade level and that student was operating below basic in all core subjects including reading, writing and math. Despite the significant deficits, the May 6, 2015, IEP only provided goals in reading and only provided five hours of specialized instruction inside the general education setting.

This is the IEP that the student brought to School A and that was implemented at School A until it was updated on March 22, 2016. On March 22, 2016, School A increased the student's specialized instruction from 5 hours per week to 10 hours per week with 5 of those hours outside the general education setting. However, the IEP again only prescribed goals in reading despite the student's additional deficits in writing and math. Although the student has had a history of attendance problems that have undoubtedly contributed to the student's continuing academic deficits, the IEP did not address the student's apparent behavioral concern of poor school attendance.

School A again updated the student's IEP on February 16, 2017, and kept the same level of specialized instruction but specified that 3 of the 6 hours of specialized instruction would address written expression, yet the IEP did not include goals for written expression. Finally, on May 30, 2017, after School A had conducted an updated evaluation of the student, the student's specialized instruction was increased to 10 hours per week outside the general education setting to address reading and math. But again, there were no goals for written expression despite the fact that the student's previous IEP had prescribed instruction in written expression and there was no indication the student had made any progress in written expression. This IEP did include goals in the area of emotional, social and behavioral development to address the student's attendance, but the behavioral support services were not direct services, only consult services.

Petitioner's expert witness credibly testified that the student's academic deficits as far back as the May 6, 2015, IEP warranted that the student be prescribed specialized instruction in reading, writing and math and that the student's academic deficits continued because of the lack of sufficient specialized instruction and contributed to the student's school avoidance and absenteeism. There was insufficient evidence presented by Respondent to counter this expert witnesses' testimony. The witnesses from School A attributed the student's lack of academic progress totally to the student's attendance problems. However, not until the student's May 30, 2017, IEP was the student's attendance ever addressed in the student's IEP and a FBA was not conducted and BIP was not put in place until May 2017.

Based upon the evidence adduced and the credible testimony of Petitioner's expert witness the Hearing Officer concludes that the IEP's that the student has had since the student began attending School A have been inappropriate and have not adequately addressed the student's needs. They have not prescribed sufficient hours of specialized instruction and goals in all areas of academic deficit and have not until recently addressed the student's attendance and behavioral concerns. As a result, the Hearing Officer concludes that the student's IEPs since the student has attended School A have been inappropriate and as of the March 22, 2016, IEP when the IEP was updated by an IEP team at School A, that IEP was not reasonably calculated to provide the student educational benefit. Consequently, the Hearing Officer concludes that Respondent did not sustain the burden of persuasion on this issue by a preponderance of the evidence and concludes that the student was denied a FAPE.

ISSUE 2: Whether DCPS denied the student FAPE by failing to provide the student an appropriate educational placement during SY 2015-2016 and SY 2016-2017 that was specifically designed for students with significant learning disabilities to address the student's average cognitive abilities and severe academic deficits.

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

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is determined at least annually and is based on the child's IEP. 34 CFR § 300.116(b) (1) (2). *At the beginning of each school year*, each public agency must

have *in effect*, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320. 34 C.F.R. § 300.323(a) (emphasis added).

A student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP. *See Roark v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006); *Spielberg v. Henrico Cty. Public Sch.*, 853 F.2d 256, 258 (4th Cir. 1988) ("Educational placement is based on the IEP, which is revised annually."); 34 C.F.R. § 300.116(b)(2).

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.")

The evidence demonstrates that the IEPs that the student was provided while the student was attending School A during SY 2015-2016 and SY 2016-2017 were inappropriate. Petitioner's expert witness credibly testified that the student should have been provided specialized instruction in all core academic subjects given the student's academic deficits and that the specialized instruction should have been provided outside the general education setting. The expert witness also credibly testified that the student should be provided at least one hour of behavioral support services per week. This credible testimony was not sufficiently refuted by the DCPS' witnesses. Because the student's IEPs while the student has attended School A have been inappropriate, the student's resulting educational placement at School A has been inappropriate. The Hearing Officer concludes that Respondent did not sustain the burden of persuasion by a preponderance of the evidence on this issue and that the student was denied a FAPE in this regard.

Because the student's IEPs while the student attended School A, including the student's most recent IEP developed on May 30, 2017, did not prescribe sufficient specialized instruction in all core academic subjects outside the general education setting and did not prescribe sufficient behavior support services, the Hearing Officer in the order below directs that DCPS review the student's most recent evaluation and update the student's IEP consistent with the findings of this HOD.

Remedy:

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

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate

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

The Hearing Officer concluded based on the evidence that while the student has attended School A the student has been without appropriate IEPs and an appropriate placement. Petitioner has requested that the student be placed at School B. Petitioner's expert witness testified that the student should be prescribed specialized instruction in core academic subjects outside the general education setting and that the student should have a placement with therapeutic modalities available. The expert witness acknowledged that such a setting may be available at a public school. Because it is not clear to the Hearing Officer from the evidence adduced that the student requires total removal from the student's non-disabled peers as the student would experience if the student attended School B, the Hearing Officer directs in the order below that DCPS determine an appropriate location of services for the student for the remainder of SY 2017-2018.

Petitioner requested that the student be provided compensatory education in the amount recommended by Petitioner's consultant. However, the consultant made his recommendation without having met the student, or talking with the student's parent or the student's teachers. In addition, the student clearly had attendance issues that contributed to the lack of academic progress. The Hearing Officer concludes that the student's attendance problems resulted in the student missing significant instruction that may have resulted in the student making more progress than the student did. As a result, the Hearing Officer considers it appropriate to provide the student an amount less than requested and concludes that 150 hours of independent tutoring would significantly address the student's academic deficits that resulted from the lack of appropriate IEPs and placement during SY 2015-2016 and SY 2016-2017. ¹¹

ORDER: ¹²

1. DCPS shall, within ten (10) school days of the issuance of this order, convene an IEP meeting and review the student's August 10, 2017, psycho-educational evaluation, and amend the student's IEP to prescribe specialized instruction in all academic core subjects outside the general education setting (at least 20 hours of specialized instruction per week) and prescribe 1 hour of behavior support services per week outside the general

¹¹ Once a plaintiff "has established that she is entitled to [a compensatory education] award, simply refusing to grant one clashes with *Reid*, which sought to eliminate 'cookie-cutter' awards in favor of a 'qualitative focus on individual needs' of disabled students." *Stanton ex rel. K.T. v. District of Columbia*, 680 F. Supp. 2d 201, 207 (D.D.C. 2010) (quoting *Reid*, 401 F.3d at 524, 527).

¹² Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

education setting, and DCPS shall determine an appropriate location of services to implement the student's IEP for the remainder of SY 2017-2018.

2. Within ten (10) school days of the issuance of this order DCPS shall provide Petitioner funding for 150 hours of independent tutoring at the OSSE prescribed rate.
3. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: October 5, 2017

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