

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 26, 2017, and September 27, 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 specific learning disability (“SLD”). Student attends a District of Columbia Public Schools (“DCPS”) high school (“School A”). DCPS is the student’s local educational agency (“LEA”).

Student’s mother (“Petitioner”) filed the current due process complaint on July 27, 2017, alleging DCPS denied the student a free appropriate public education (“FAPE”) by failing to, inter alia, propose an appropriate individualized educational program (“IEP”) for the student.

The parties participated in a resolution meeting, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing in this matter. The 45-day period began on August 27, 2017, and ends [and the Hearing Officer’s Determination (“HOD”) is due] on October 10, 2017.

The undersigned Impartial Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on the complaint on September 5, 2017, and issued a pre-hearing order (“PHO”) on September 8, 2017, outlining, inter alia, the issues to be adjudicated.

RELIEF SOUGHT:

Petitioner seeks as relief that the Hearing Officer order DCPS to place and provide transportation for the student to a therapeutic, full-time, non-public special education school (“School C”), and order DCPS to amend the student’s IEP with appropriate goals, related services, classroom aides, and specialized instruction. Petitioner requests that the Hearing Officer order an award of compensatory education.

LEA Response to the Complaint:

DCPS filed a timely response to the complaint on July 31, 2017. DCPS denies that there has been any failure to provide the student with a FAPE. DCPS asserts the IEPs created for the student were appropriate and developed in concert with the parent. DCPS contends that while

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

the student's academic performance needs improvement, it does not demonstrate a lack of appropriate progress. DCPS asserts that the independent evaluation provided by Petitioner needed to be reviewed prior to any programming and placement decision for the student.

ISSUES:³

The issues adjudicated are:

1. Whether the LEA denied the student a FAPE by failing to timely and fully evaluate and identify the student in all areas of disability since July 2015, specifically failing to evaluate the student for intellectual disability ("ID") and/or emotional disability ("ED") disability classification and failing to conduct an FBA.
2. Whether the LEA denied the student a FAPE by failing to develop an appropriate IEP since July 2015, specifically the IEPs dated February 2015, February 2016, and January 18, 2017, because the IEP(s) had: (a) insufficient hours of specialized instruction; (b) an LRE with insufficient hours of specialized instruction outside general education; (c) inappropriate academic goals; (d) an inappropriate transition plan; (e) inappropriate aids and services, and (f) no ESY services.
3. Whether the LEA denied the student a FAPE by failing to review and revise student's IEP(s), in light of the student's lack of academic progress.⁴
4. Whether the LEA denied the student a FAPE by failing to provide the student with an appropriate educational placement from January 2017 to present because student's education placement should have been, and was not, a therapeutic setting in a separate special education school.

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 41 and Respondent's Exhibits 1 through 10 and the Hearing Officer Exhibit 1) 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 Petitioner alleges the February 2015 IEP should have been reviewed and revised by October 2015, the February 2016 IEP reviewed and revised by the fall of 2016, and the January 2017 IEP reviewed and revised by June 2017 when the April 2017 psychological evaluation was provided to DCPS.

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

⁶ Petitioner presented four witnesses: Petitioner, Student, and educational consultant, an independent psychologist and representative of School B and an investigator with the agency that is representing Petitioner. Respondent

SUMMARY OF DECISION:

The Hearing Officer concluded that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issues #1 and #3. The Hearing Officer concluded that Respondent did not sustain the burden of persuasion by a preponderance of the evidence on issue #2 and that with regard to issue #4, Respondent sustained the burden of persuasion by a preponderance of the evidence that the student is not yet in need of placement totally removed from non-disabled peers. The Hearing Officer directs DCPS in the order below to complete evaluations to determine the student's appropriate disability classification, programming and placement, and pursuant to the parties' stipulation, that DCPS fund compensatory education for the student.

FINDINGS OF FACT:⁷

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 SLD. (Petitioner's Exhibit 14-1)
2. Student was first determined eligible for special education in elementary school, and was retained once during elementary school. (Petitioner's testimony, Petitioner's Exhibit 26-1).
3. In February 2013, DCPS conducted a triennial psychological evaluation. Student's cognitive functioning fell within the significantly below average range. The evaluator concluded that student's cognitive weaknesses, mainly verbal reasoning and slow processing speed, negatively impacted the student's school performance. The student's broad reading, broad math, and broad written expression scores were approximately two grade levels below Student's grade, at the time of the evaluation. The evaluator concluded the student's cognitive and academic weakness was consistent with SLD and the student met the criteria for continued eligibility. The evaluator recommended specialized instruction and strong academic interventions to build academic skills and behavioral support/counseling to assist the student with Student's low self-esteem. (Petitioner's Exhibit 24-1, 24-8, 24-14, 24-15)
4. The student attends School A, a DCPS high school, where Student began attending in January 2017, due to a DCPS involuntary transfer. (Petitioner's testimony, Petitioner's Exhibits 22, 31)

presented three witnesses: a DCPS special educator, a DCPS special education coordinator and DCPS social worker.

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.

5. Prior to attending School A, Student attended another DCPS school (“School B”) where Student began attending during school year (“SY”) 2013-2014. (Petitioner’s Exhibit 9)
6. When the student arrived at School B, the student was skipped a grade, and attended School B for three school years prior to being retained and repeating a grade during school year (“SY”) 2016-2017. (Petitioner’s testimony, Petitioner’s Exhibit 26-1)
7. School B developed an IEP for the student on March 7, 2014, and the IEP was updated in an annual review on February 9, 2015. (Petitioner’s Exhibits, 9-1, 10-1)
8. The February 9, 2015, IEP prescribed the following services: 5 hours per week of specialized instruction outside the general education setting, 10 hours per week of specialized instruction inside the general education setting, 30 minutes per month of speech language pathology outside the general education setting and 120 minutes per month of behavioral support services outside the general education setting. The IEP included academic goals in math, reading, and written expression. The present levels of performance (“PLOP”) indicated the student could add, subtract, multiply, and divide single digit numbers, and was having trouble with pre-algebra. The IEP references grade level common core standards. The IEP did not require, or have a transition plan. The IEP did not provide for ESY services, and the classroom aides and services section stated the student should be allowed to test with a familiar adult. (Petitioner’s Exhibit 10-1, 10-3, 10-4, 10-5, 10-9, 10-12)
9. The February 9, 2015, IEP included one math goal for solving linear equations with 80% accuracy. The reading PLOP noted Student was reading on a first-grade level. The IEP had three reading goals: after reading a chunk of text of a novel written at grade level the student will complete a graphic organizer with 4 pieces of textual evidence, then describe 2 or more story elements using 4 pieces of textual evidence, one explicit, and one implicit, to support analysis for 4 out of 5 story chunks, and (2) given grade level texts the student will be able to make inferences while citing at least 2 pieces of textual evidence to support claims on teacher made assessments with 80% accuracy on 4 out 5 trials, and (3) given grade level texts, the student will be able to identify the main idea, while citing at least 2 pieces of textual evidence to support claim on teacher made assessments with 80% accuracy on 4 out 5 trials. The IEP had two written expression goals: (1) the student will be able to write a 5-sentence paragraph that includes a topic sentence, supporting details, and a concluding sentence, with no mistakes at 80% accuracy in 4 out 5 trials, using a graphic organizer, and (2) the student will be able to use a checklist to check for correct spelling, grammar, and punctuation, whenever the student writes a paragraph. (Petitioner’s Exhibit 10-3, 10-4, 10-5)
10. Student’s IEP progress reports for the second half SY 2014-2015 indicate Student was progressing on some of Student’s IEP academic goals; however, during some of the reporting periods, it was noted by the student’s teacher, that the student was not making progress and continued to need assistance with the goals and would benefit from a smaller class setting. (Petitioner's Exhibit 16)

11. The student's IEP progress report for the first half of SY 2015-2016 indicate the student made no progress on the math goals, due to excessive absences and missing class assignments. The student made no progress during the first reporting period on one reading goal, because of excessive absences. The student was provided additional opportunities to make up work due to absences but rarely if ever took advantage of the make-up sessions. The student progressed on the goals in the second reporting period and made progress on the remaining academic goals during the first and second reporting period. (Witness 5's testimony, Petitioner's Exhibit 17)
12. The student's academic goals referenced the common core standards and presenting the information on the student's instructional level. The goals were appropriate to allow Student to extend Student's learning. Student's special educator would break the skills down and provide step-by-step scaffolding. Other examples of scaffolding that were used for the student included graphic organizers, books on tapes, and videos. The objective is for the student to master a goal, and if mastery is not obtained, the goal may be carried over, or it can be changed. The student's attendance affected the student's progress on IEP goals. Because the student did not master the goal, does not mean that the goal was inappropriate. (Witness 6's testimony)
13. In January 2016, School B administered the Woodcock Johnson-IV ("WJ-IV). Student scored approximately four grade levels below Student's grade in writing skills, six grade levels below in reading, and approximately seven grade levels below Student's grade in math. (Petitioner's Exhibits 25)
14. In February 2016, DCPS completed an evaluation summary report in which the student's academic, speech and language and emotional, social and behavioral development progress was reviewed. DCPS determined at that time that no additional formal assessments were requested or warranted prior to reviewing the student's continued eligibility for special education services. (Petitioner's Exhibits 11)
15. The student's latest eligibility determination was made on February 1, 2016, at School B. School B developed an IEP for the student on February 1, 2016, that prescribed the following services: 5 hours per week of specialized instruction outside the general education setting, 10 hours per week of specialized instruction inside the general education setting, 30 minutes per month of speech language pathology outside the general education setting and 120 minutes per month of behavioral support services outside the general education setting. (Petitioner's Exhibit 11-1, 12-1, 12-13)
16. The student's special education teacher and case manager developed the student's academic IEP goals. The student's academic goals were grade level goals that were modified for the student for an intensive level of support with scaffold steps. In developing the student's academic goals, the special educator used an intensive level of support for the student because the student was operating more than two grades levels below the current grade at the time. The goals were created based on Student's baseline data and present levels of performance and were designed for Student to attain the goals over a period of one year. (Witness 6's testimony, Petitioner's Exhibit 12)

17. The February 1, 2016, IEP PLOP for math cited Student's WJ-IV scores and noted Student was often absent from classes, did not complete classwork or homework and rarely participated in class. The IEP included three math goals: By January 2017, when given 4-word problems using reference materials that list scaffold steps, the student will correctly create and solve one-variable equations and check the answer using a calculator for 3 out of 4 problems; (2) By January 2017 when given a verbal description of an algebraic expression involving one arithmetic operations that represents a real-world problem, the student will select the correct algebraic expression from four, fixed, answer choices for 4 out of 5 problems; (3) By January 2017, when given a real-life problem involving constraints and real world representations with assigned prices, the student will use the items to evaluate the cost of buying a specific number to find whether a given number would be less than equal to, or more than, and correctly identify the solution for 4 out of 5 problems. Each goal provided an example describing the goal. The goals were designed specifically for the student and too advanced for the student. The student could use a calculator to check answers. (Witness 6's testimony, Petitioner's Exhibit 12-3, 12-4, 12-5)
18. The PLOP for reading cited Student's WJ-IV scores and notes that the student's basic reading skills are limited compared to peers. The IEP included three reading goals: (1) By January 2017, after reading an informational text at instruction level, the student will correctly respond to 3 out of 4 multiple choice questions that require student to read an inferential statement about the text and select from three answer choices – the answer that references the excerpt from the text that most logically supports it for 3 out of 4 tests; (2) By January 2017, after given a paragraph of instruction level text written and read out loud with a specific word or phrase with an implied meaning underlined, the student will complete a sentence framed by circling the correct answer when provided 1 written prompt, above each space, in the sentence frame for 2 out of 2 words or phrases; (3) By January 2017, after reading an instructional level information text, the student will write and draw a picture to represent the correct topic of the text, use the picture to create a diagram, or write a list that includes descriptions of 5 references for the book directly related to the topic, and write two paragraphs in response to a question about the theme for 3 out of 4 texts. (Petitioner's Exhibit 12-6, 12-7, 12-8)
19. The PLOP for written expression noted that the student can produce short sentences independently, and short constructed responses with teacher prompts and assistance. The IEP included three written expression goals: (1) By January 2017 the student will demonstrate command of the conventions of English capitalization, punctuation, and spelling, when writing, (2) By January 2017, after reading an excerpt from an explanatory text with a partner and given a vocabulary preview of the target vocabulary words in the texts, the student will write a one paragraph summary explanation of the text using at least 5 domain-specific vocabulary words/phrases that appear in the explanatory text for 4 out of 5 summary writing opportunities; (3) By January 2017, when given a set of art pieces, the student will choose 1 art piece, imagine they are the curator in a museum, and describe the art to a visitor who is looking at the art, including who the artist is, what time

period they worked in, and at least 5 details about the art piece in 3 out 4 trials. (Petitioner's Exhibit 12-8, 12-9)

20. Student's IEP progress reports for the second half SY 2015-2016 indicate Student made progress on math goals in the third reporting period and the fourth reporting period, except for one math goal, where no progress was made in the fourth reporting period because of missed assignments. The student made progress in reading goals, and mastered one goal by the fourth reporting period, but made no progress on one reading goal during the fourth reporting period. Although capable of mastering the goal, Student showed low motivation to complete schoolwork. Student made progress on all the written expression goals. (Petitioner's Exhibit 18)
21. Student's DCPS transcript reflects that Student failed all classes at School B during SY 2015-2016, except ROTC in which Student earned a "B". (Petitioner's Exhibit 23)
22. Student's progress report for the first reporting period of SY 2016-2017 noted Student's math goals were not introduced because Student was scheduled to take Algebra during second advisory. Student made progress in the first reporting period on the remaining academic goals. (Petitioner's Exhibit 19)
23. School B conducted an annual review of the student's IEP on January 18, 2017, that prescribed the following services: 5 hours per week of specialized instruction outside the general education setting, 10 hours per week of specialized instruction inside the general education setting, 60 minutes per month of speech language pathology outside the general education setting and 120 minutes per month of behavioral support services outside the general education setting. (Petitioner's Exhibit 14-1, 14-12).
24. The January 18, 2017, IEP PLOP for math cited Student's 2016 WJ-IV scores and noted there was no updated math performance information, because the student did not pass Algebra, and did not attend summer school, or complete evening recovery for the Algebra course. The IEP included three math goals: (1) By 1/17/18 given 5 problems involving one variable, linear equations, and one variable inequalities using a problems solving checklist, the student will use inverse operations to isolate the variable correction for 4 out 5 problems; (2) By 1/17/18 when given a written description of an algebraic expression involving one arithmetic operations, that represent a real world problem, the student will select the correct algebraic expression from four, fixed answer choices for 4 out 5 problems; (3) By 1/17/18 when given a problem involving the angles formed by two parallel lines cut by a transversal, the student will correctly solve for an unknown angle in a figure by using facts about pairs of angles for 4 out 5 problems. (Petitioner's Exhibit 14-3, 14-4)
25. The PLOP for reading cited Student's WJ-IV scores and noted Student's struggles to focus, with Student remaining off task, resulting in minimum progress. The IEP included three reading goals: (1) By 1/17/18, after reading a preferred fictional story in class, the student will complete a paragraph template which recounts 2 to 3 details/events of the student 3 to 5 characters in the story, the main idea of the story, and the resolution of the

story for 2 out of 3 fictional stories; (2) By 1/27/18, after reading an informational text at instructional level/grade level, the student will correctly respond to 4 out of 5 multiple choice questions that require Student to read an inferential statement about the text and select from three answer choices, the answer that references the excerpt from the text that most logically supports it for 4 out of 4 texts, and (3) By 1/17/18, when given a dictionary/use of a computer, and a selection of grade level text containing a word or phrase with an implied meaning that is underlined, the student will use a sentence frame to write 2 to 3 sentences explaining both the literal and implied meaning of the word or phrase and 2 to 3 sentences explaining in which the meaning is used in the context of the text for 2 out of 3 words or phrases. The reading goals were appropriately tailored to the student's abilities and included scaffolding to enable the student to achieve the goals. (Witness 6's testimony, Petitioner's Exhibit 14-5, 14-6, 14-7)

26. The PLOP for written expression cites the student's WJ-IV scores from January 2016, and notes the student is able to write simple and compound sentences using the correct capitalization and punctuation. The student is also able to develop a paragraph with 5 to 8 sentences, when given a topic which is easier for Student, with personal information rather than responding in writing to a reading assignment. The IEP included three written expression goals: (1) By 1/17/18, after a vocabulary preview of transition words and phrases, the student will write the transitions for the paragraph using a word bank to make topics connect, and coherent based on the topics for 4 out 5 sets of paragraphs; (2) By 1/27/18, after reading an excerpt from and informational text, the student will write a 3 to 5 paragraph summary of the text using at least 5 to 10 domain-specific vocabulary words/phrases that appear in the informational text for 4 out of 5 summary writing opportunities, and (3) By 1/17/18, after reading a current event that discusses an issue with at least two opposing claims, and participating in a vocabulary preview for the words "claim" "counterclaim" and "evidence" the student will use a writing outline with the interview questions given of hypothetical interview with one person from each side of the issue, and the student will write answers to the outlined questions. The writing goals were appropriately tailored to the student's abilities at the time and included scaffolding to enable the student to achieve the goals. (Witness 6's testimony, Petitioner's Exhibit 14-7, 14-8, 14-9)
27. The student's IEP progress reports for the second reporting period of 2016-2017 indicate Student made progress on reading goals and made no progress in written expression because the student did not complete required writing assignments and one written expression goal was not introduced. (Petitioner's Exhibit 21)
28. During the first advisory of SY 2016-2017 the student failed six out of ten subjects except Health Education and ROTC, and obtained an incomplete in Accounting. During the second advisory, the student's grades increased in some subjects, but the student still failed five out of nine subjects. (Petitioner's Exhibit 20)
29. The student's progress report for the second reporting period of SY 2016-2017 noted the student's math goals were not introduced because the student was not taking math that

advisory. The student made progress in the first reporting period on the remaining academic goals. (Petitioner's Exhibit 19)

30. The student's end of year report card from School A, for SY 2016-2017 reflect that the student passed all classes except one: Environmental Science. (Petitioner's Exhibit 22)
31. Credit recovery was available to the student to make up any classes the student did not pass, and the student did not attend credit recovery during summer. (Witness 5's testimony)
32. In April 2017, at Petitioner's request, an independent psycho-educational evaluation was conducted. The student's cognitive functioning was at the deficient level, with a Full-Scale IQ of 61. The evaluator diagnosed the student with a mild intellectual disability. The student's academic achievement scores were approximately second to third grade level in reading and math, and a bit higher in written language. The evaluator also diagnosed the student with SLD with impairments in math, Attention Deficit Hyperactivity Disorder ("ADHD"), and generalized anxiety disorder. The evaluator recommended the student be placed in a self-contained education placement with no interaction with non-disabled peers. (Petitioner' Exhibit 26-1, 26-5, 26-12, 26-14, 26-17, 26-18)
33. The evaluator conducted an adaptive assessment of the student and concluded the student's adaptive skills were consistent with the diagnosis of mild intellectual disability. (Petitioner's Exhibit 27)
34. Student's overall psychological profile demonstrates intellectual limitations that affect Student's ability to learn, reason, problem-solve, and apply skills Student has learned. Student's adaptive functioning, as assessed by the independent evaluator, is consistent with those cognitive limitations. Student showed no appreciable academic progress when comparing achievement testing from 2013 and 2017. The student should have been expected to achieve slow but steady progress with appropriate instruction. The evaluator opined that the student is in need of unique instruction for students with intellectual disability to make the greatest progress possible with small group and multi sensory approach in a therapeutic school with highly coordinated services. The evaluator opined that the student did not need interaction with non-disabled peers because of fighting and reactive aggression in the past. (Witness 2's testimony)
35. Petitioner's counsel provided DCPS with a copy of the independent evaluation ("IEE") on June 5, 2017. (Petitioner' Exhibit 5)
36. On September 18, 2017, School A convened an IEP meeting at which the IEE was reviewed. Based upon the IEE, the DCPS psychologist was unable to confirm that the student, in fact, qualified for the ID disability classification. It was premature to make a decision on the student's disability classification. The DCPS psychologist requested to conduct additional assessments of the student to fully determine whether the student should be classified with the ID disability. A FBA and BIP were discussed, and the

School A social worker is currently working to complete the FBA. Petitioner consented to the additional evaluations. (Witness 5's testimony, Respondent's Exhibit 10)

37. Petitioner engaged the services of an educational consultant who observed the student at School B and participated in the September 13, 2017, IEP meeting. The consultant concluded the student is able to make progress but requires a tremendous amount of assistance from teachers to make progress. The student shows resistance to instruction, puts Student's head down in class, and is reluctant to ask questions because other students might make fun of Student. Petitioner's consultant agreed that the determination of the student's disability classification will significantly impact the student's special education programming and whether Student will be on diploma or certificate track. The team did not want to revise the student's IEP. Increase of the student's special education hours and goals was delayed until that determination was made. Nonetheless, the consultant opined that the student needs a full time therapeutic setting, small group instruction, behavior supports with no interaction with general education peers because the student does not want to be embarrassed because of academic deficits. (Witness 1's testimony)
38. The student did not feel safe at School B and Student would routinely skip classes. The student got into trouble for not going to class, being in the hallways, and was suspended for fighting. At School B, the student's classes sometimes had 22 students. At School A, Student's classes generally have 6 students in a classroom. Student gets along with Student's classmates, but does not want to continue to attend School A, because Student does not think it is the right school. The classes are difficult and Student does not believe Student gets sufficient help when requested. (Student's testimony)
39. Student is more verbal and making more friends this current school year at School A. Student is better able to self-advocate, is demonstrating more maturity, and is socially engaged with Student's non-disabled peers. (Witness 7's testimony)
40. The student has been accepted to School C, a non-public special education school based on School C's review of Student's psychological evaluation and education records and an interview with Petitioner. At School C the student would be in the career and independent living program with a target of employment after high school. The program would work on the student's social skills and improving job readiness. The student would remain in a self-contained class. School C has special education teachers and a dedicated aides familiar with students with ID classification. School C also has a behavior program with behavior specialists. All related services are provided on campus including speech language therapy. School C would conduct a 30-day review to adjust the student's programming needs as appropriate. School C is equipped to address the student's needs and to make sure the student gets credits, if the student is on a diploma track. School C has approximately 200 students with various disability classifications from kindergarten to 12th grade. The cost of the program is unclear, but School C has an OSSE certificate of approval ("C of A"). (Witness 3's testimony, Hearing Officer's Exhibit)

41. The parties stipulated as to compensatory education for the student if the Hearing Officer determines that there is a denial of FAPE. The parties agreed to compensatory education in the amount of 80 hours of independent academic tutoring and 60 hours of independent counseling at the OSSE designated rates. (Stipulation)

CONCLUSIONS OF LAW:

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

34 C.F.R. § 300.17 provides:

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

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

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO and at the hearing, Petitioner held the burden of persuasion on issue #1 and # 3. Petitioner established a prima facie case on issue #2, and issue #4 and the burden of persuasion fell to Respondent on those issues. 8 The normal standard is preponderance of the evidence. See, e.g.

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

N.G. v. District of Columbia 556 F. Supp. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether the LEA denied the student a FAPE by failing to timely and fully evaluate and identify the student in all areas of disability since July 2015, specifically failing to evaluate the student for ID and/or ED disability classification and failing to conduct an FBA.

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

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

34 C.F.R. §300.304 provides evaluation procedures that require that the agency use a variety of assessment tools, and it specifically states that the agency must not use any single measure or assessment as the sole criterion for determining if the child is a child with a disability and determining an appropriate program.⁹

Petitioner asserts that DCPS failed to diagnose the student with ID or ED and did not provide the student an FBA.

placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

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

The evidence demonstrates that when the student's last comprehensive evaluation occurred in February 2013, the student's cognitive functioning was within the significantly below average range. At the time of the evaluation, the evaluator concluded the student continued to meet the eligibility criteria for SLD. The evaluator did not suggest that the student's cognitive functioning was indicative of an intellectual disability. At the time of the evaluation, the student was operating academically two grade levels below the student's then current grade.

When the student's triennial evaluation was conducted in 2016 DCPS reviewed the student's academic progress and conducted and WJ-IV. The student's academic functioning had fallen even further behind the student's grade level. The student scored approximately four grade levels below the student's grade in writing skills, six grade levels below in reading, and approximately seven grade levels below the student's grade in math. At the time of the evaluation, there was no request made for additional assessments and DCPS did not indicate that any additional assessments were necessary to determine the student's continued eligibility for special education services. There is no specific requirement pursuant to the IDEA or the DCMR¹⁰ that a student's cognitive and social emotional functioning be assessed during reevaluation.

Although Petitioner asserts that DCPS should have conducted adaptive assessments to determine if the student had an ID classification, there is no indication from the evidence that Petitioner or anyone from the student's IEP team ever considered, prior to the recent independent evaluation being conducted, that the student should be evaluated to determine if the student was eligible as an ID student or ED student.

Although DCPS is required to evaluate a student in all areas of suspected disability, there was no clear indication prior to this recent independent evaluation that the student was perhaps ID or ED. Even though the independent evaluator who conducted the recent evaluation and subsequently administered adaptive assessments, when that evaluation was reviewed by an IEP team, including a DCPS psychologist, there was doubt remaining as to whether the student truly met the ID and/or ED criteria and the team asked for, and Petitioner consented to, additional evaluations. Even one of Petitioner's expert witnesses testified that it is currently unclear whether the student meets the ID classification and what the appropriate programming should be for the student unless and until that final determination is made.

Likewise, although there is indication that the student engaged in fighting at School B that resulted in the student being involuntarily transferred to School A, the student's behaviors at School A, even by the student's own acknowledgement, have improved. Again, prior to the

¹⁰ DCMR 5E § 3005 As part of an initial evaluation (if appropriate) and as part of any reevaluation, the IEP team, including other qualified professionals, as appropriate, shall: (a) review existing evaluation data on the child, including: (1) evaluations and information provided by the parents of the child; (2) current classroom-based assessments and observations; and (3) observations by teachers and related service providers; and (b) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine: (1) whether the child has a particular category of disability under this chapter or, in the case of a reevaluation of a child, whether the child continues to have such a disability; (2) the present levels of performance and educational needs of the child; (3) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and (4) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum.

recent independent evaluation, there has been no request for, and no significant indication that, the student be evaluated for ED classification or that a FBA should be conducted.

There was insufficient evidence presented that any additional assessments were warranted at the time of the student triennial evaluation in 2016. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 2: Whether the LEA denied the student a FAPE by failing to develop an appropriate IEP since July 2015, specifically the IEPs dated February 2015, February 1, 2016, and January 18, 2017, because the IEP(s) had (a) insufficient hours of specialized instruction, (b) an LRE with insufficient hours of specialized instruction outside general education, (c) inappropriate academic goals, (d) an inappropriate transition plan, (e) inappropriate aids and services, and (f) no ESY services.

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, *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 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 claims the student's IEPs for the past two years were inappropriate. Petitioner asserts the IEPs had insufficient hours of specialized instruction, an LRE with insufficient hours of specialized instruction outside general education, inappropriate academic goals, an inappropriate transition plan, inappropriate aids and services, and no ESY services.

Petitioner's expert witness testified that the student's IEP goals and objectives were written above the student's ability and that the student was not provided with enough services in the IEPs. Although Petitioner's special education teacher testified emphatically that the student's IEP goals and the level of services that were prescribed in the IEP were tailored to the student's abilities, and that the student made progress relative to most of the goals, the evidence clearly demonstrates that student's academic progress over the years has been lacking.

With regard to the appropriateness of the student's IEP goals, the Hearing Officer found the student's special education teacher's testimony more credible. Her testimony was detailed as to how the IEP goals were tailored to match the student's abilities and included appropriate scaffolding for the student. Nonetheless, in some of the student's IEP progress reports, the student's special education teacher noted that the student did not make progress relative to the student's IEP goals because the student needed a smaller class setting. The evidence demonstrates that School B continued to prescribe the same level of specialized instruction for the student in the same setting in the IEPs for the past two school years. The evidence clearly demonstrates that this was inappropriate.

Consequently, the Hearing Officer concludes that the student's February 2016 and January 2017 IEPs contained insufficient hours of specialized instruction in an LRE with insufficient hours of specialized instruction outside the general education setting and were not reasonably calculated to provide educational benefit. The student's special education teacher clearly noted in the IEP progress reports the student's needed a smaller class setting. Consequently, with regard to these two components of issue #2, the Hearing Officer concludes Respondent did not sustain the burden of persuasion by a preponderance of the evidence. The Hearing Officer concludes that the student should have been in a self-contained special education program where the student would have been provided at least 20 hours of specialized instruction per week outside general education.

There was insufficient evidence presented that the student's IEP lacked an appropriate transition plan and lacked appropriate aids and services. Likewise, there was no specific evidence that the student should have been provided ESY services. Although there was indication the student could have and perhaps should have attended summer school for credit recovery for failed course(s), there was insufficient evidence that the student met the criteria for ESY services.

ISSUE 3: Whether the LEA denied the Student a FAPE by failing to review and revise the student's IEP(s) in light of the student's lack of academic progress.

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

34 C.F.R. §300.324(b)¹¹ requires that a student's IEP be updated at least annually.

Petitioner alleges the February 2015 IEP should have been reviewed and revised by October 2015, the February 2016 IEP reviewed and revised by the fall of 2016, and the January 2017 IEP reviewed and revised by June 2017 when the April 2017 psychological evaluation was provided to DCPS.

The evidence demonstrates that DCPS conducted timely annual reviews of the student's IEPs and made adjustments in the student's IEP goals. Although Petitioner alleges DCPS failed to review and revise the student's IEPs prior to the annual reviews, there was insufficient evidence presented to demonstrate that there was any request from Petitioner, or any of the student's teachers that the student's IEP be reviewed in between the annual review dates.

Although the evidence demonstrates that based upon the student's recent WJ-IV scores the student's academic performance has fallen more significantly behind over time, the evidence demonstrates that the student was making progress in most of the student's IEP goals, except on the occasions when the student's school attendance interfered. There was insufficient evidence that DCPS should have reviewed and updated the student's IEP at times other than the annual review dates. Although Petitioner asserted that the recent IEE should have triggered a review of the student's IEP, that evaluation was provided to DCPS near the end of the school year and the current due process complaint was filed not long thereafter. DCPS convened a meeting to review the evaluation shortly after the start of the current school year and has initiated additional evaluations to assist in reviewing and revising the student's IEP. 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 the LEA denied the student a FAPE by failing to provide the student with an appropriate educational placement from January 2017 to present because the student's education placement should have been, and was not, a therapeutic setting in a separate special education school.

¹¹ 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.

Conclusion: Respondent sustained 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 (1) is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; (2) is made in conformity with the Least Restrictive Environment (“LRE”) provisions of the IDEA that mandate that to the maximum extent possible, disabled children are to be educated with their nondisabled peers and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; (3) is determined annually; (4) is based on the child’s IEP; and (5) is as close as possible to the child’s home. 34 C.F.R. 300.114, 34 C.F.R. 300.116.

The “educational placement” consists of: (1) the education program set out in the student’s IEP, (2) the option on the continuum in which the student’s IEP is to be implemented, and (3) the school or facility selected to implement the student’s IEP. *Letter to Fisher*, 21 IDELR 992 (1994).

In this jurisdiction, the educational placement is based upon the child’s IEP, and the school designated by the public agency to implement the child’s IEP is the location of services. *Johnson v. District of Columbia*, 2012 L 883125 (D.C.C., March 16, 2012). The school district is not required to maximize or provide the best program; rather, it need only be an education that is specifically designed to meet the child’s unique needs, supported by services that will permit the child to benefit from the instruction. *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982). As stated previously, 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).

Petitioner asserts DCPS has failed to provide the student with an appropriate placement, because the student is receiving specialized instruction among the student’s general education peers and requires a full-time therapeutic placement with highly coordinated services. Petitioner alleges the student requires a smaller setting and should not be in a general education setting.

The evidence clearly demonstrates that the student has not demonstrated any significant academic progress over the past few years and that the student’s academic deficits relative to the student’s same grade peers have increased overtime based upon the student’s recent IEE. Petitioner asserts and presented two expert witnesses to attest to the fact that the student should be in a placement where the student is totally removed from the student’s non-disabled peers. The basis for that recommendation is student did not need interaction with non-disabled peers because of fighting and reactive aggression in the past and because the student does not want to be embarrassed because of the student’s academic deficits. The student testified the student does not want to continue to attend School A, but acknowledged getting along better with peers at School A. And there was evidence the student is better able to self-

advocate, is demonstrating more maturity, and is socially engaged with the student's non-disabled peers.

Although it is clear from the student's significant academic deficits as noted by the student's recent IEE that the student is clearly in need of more intense specialized instruction, as noted above, there are outstanding evaluations that should ultimately determine the most appropriate program and placement for the student. Based upon the fact that the student's disability classification remains uncertain and it is unclear whether the student's educational programming should remain on the high school diploma track or shift to the certificate track, the Hearing Officer cannot conclude, simply based on the testimony of Petitioner's expert witnesses, at least at this juncture, that the student should have been in an educational placement totally removed from non-disabled peers as of the development of the student's most recent IEP in January 2017, or that it would be the most appropriate placement for the student yet. Consequently, the Hearing Officer concludes that Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

Petitioner has requested that the Hearing Officer direct that DCPS place and fund the student at School C. However, based upon the reasoning above, the Hearing Officer concludes that although evidence demonstrates that the student might benefit from placement at School C, and School C has a C of A, such a placement prior to a review of the pending evaluations and a review by a team of the student's appropriate disability classification and programming, the student's placement at School C is premature.

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 for the past two school years the student has been without appropriate IEPs due to insufficient specialized instruction and an LRE with insufficient hours of specialized instruction outside general education and the student should have been provided at least 20 hours of specialized instruction per week outside general education. Based on the evidence presented, the Hearing Officer concludes that the student

would benefit from independent tutoring and counseling and grants the amount of compensatory education that the parties stipulated.

ORDER: ¹²

1. As a result of the finding of denials of FAPE, the Hearing Officer directs DCPS to complete the pending evaluations that the September 18, 2017, IEP team concluded would be conducted, and within fifteen (15) school days of the issuance of this order: (a) convene an IEP meeting to review those evaluations, (b) review and determine the student's appropriate disability classification and appropriate programming and (c) revise the student's IEP to prescribe at least 20 hours of specialized instruction per week outside general education, and to include updated present levels of performance and appropriate academic goals, (d) that the team determine an appropriate educational placement for the student in a program to address the student's academic deficits and social emotional and behavioral development, and (e) that DCPS determine a location of services for the student for the remainder of SY 2017-2018.
2. DCPS shall also provide Petitioner, within ten (10) school days of the issuance of this order, authorization for 80 hours of independent academic tutoring and 60 hours of independent counseling at the OSSE designated rates.
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 10, 2017

Copies to: Counsel for Petitioner
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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.