

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 August 31, 2017, and September 11, 2017, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2003 and Hearing Room 2006 respectively.

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 other health impairment (“OHI”) based on a diagnosis of Attention Deficit Hyperactivity Disorder (“ADHD”). The student attends a District of Columbia Public Schools (“DCPS”) 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 28, 2017, alleging that DCPS denied the student a free appropriate public education (“FAPE”) by failing to propose an appropriate individualized educational program (“IEP”) for the student in April 2016 and April 2017.

The parties participated in a resolution meeting on July 24, 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 28, 2017, and ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on September 11, 2017. Petitioner filed an unopposed motion to continue and extend the HOD due date to allow for the additional hearing date of September 11, 2017. The motion was granted and the HOD due date was extended by eleven (11) calendar days to September 22, 2017.

The undersigned Impartial Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on the complaint on August 14, 2017, and issued a pre-hearing order (“PHO”) on August 17, 2017, outlining, inter alia, the issues to be adjudicated.

RELIEF SOUGHT:

Petitioner seeks as relief that the Hearing Officer direct DCPS to revise the student’s IEP with updated present levels of performance and appropriate academic goals, amend the aids and services, and place the student in a self-contained program that can provide specialized instruction for all academic subjects.

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

LEA Response to the Complaint:

DCPS filed a timely response to the complaint on July 12, 2017. DCPS denies that it has failed to provide this student with a FAPE and asserts, inter alia, the student's excessive absences from school over several years resulted in missed instruction and continued to impact learning and access to specialized instruction. DCPS maintains that the student's initial IEP was appropriate at the time it was developed. DCPS also asserts the 2017 IEP is appropriate and Petitioner and her counsel were present when the IEP was developed, provided input regarding the service hours and agreed with the present levels and goals based on the data presented at that meeting.

ISSUES:³

The issues adjudicated are:

1. Whether the DCPS denied the student a FAPE by failing to propose an appropriate IEP in April 2016.⁴
2. Whether the DCPS denied the student a FAPE by failing to propose an appropriate IEP in April 2017.⁵

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 61 and Respondent's Exhibits 1 through 11) that were admitted into the record and are listed in Appendix A.⁶ Witnesses' identifying information is listed in Appendix B.⁷

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. At the outset of the hearing Petitioner counsel withdrew with prejudice all assertions in the complaint regarding behavioral support services, social/emotional goals in both the student's initial and current IEP.

⁴ Petitioner alleges the student's initial IEP was inappropriate because it did not prescribe sufficient hours of specialized instruction. Petitioner asserts the student's initial IEP should have prescribed specialized instruction outside general education. Petitioner also asserts the initial IEP did not include ESY, adaptive goals that could be implemented by the classroom teacher, e.g. maintaining attention, initiating and completing tasks, or transitioning between classes.

⁵ Petitioner asserts the student's current IEP is inappropriate because it does not prescribe sufficient hours of specialized instruction and the student's IEP and placement should be self-contained classroom with specialized instruction in all academic areas, i.e. 20 hours per week of specialized instruction outside general education. Petitioner also asserts the IEP lacks sufficient present levels of performance, adequate goals, and necessary aids and services.

⁶ Any items disclosed and not admitted or admitted for limited purposes were noted on the record and summarized in Appendix A.

⁷ Petitioner presented four witnesses: Petitioner, an independent educational consultant, an independent psychologist and an investigator with legal agency representing Petitioner. Respondent presented one witness: a DCPS special educator.

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 amend the student's IEP to prescribe 20 hours of specialized instruction outside general education and determine an appropriate educational placement and location of service for Petitioner for the remainder of SY 2017-2018. The Hearing Officer also grants the student compensatory education in the amount of 150 hours of independent tutoring.

FINDINGS OF FACT:⁸

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 OHI based on a diagnosis of ADHD. (Petitioner's Exhibit 6-1).
2. DCPS conducted a comprehensive psychological evaluation of the student in March 2016. The evaluation revealed the student had a full-scale IQ score of 73 and a processing speed index of 60. The student's academic achievement scores were in the extremely low range for reading and low average to low for math and written language. The evaluator recommended the student be considered for a disability of OHI. (Petitioner's Exhibit 20-1, 20-5, 20-9, 20-12)
3. The student's initial IEP was developed on April 20, 2016. Petitioner participated in the student's initial IEP meeting by telephone. The IEP meeting notes indicate that the window for extended school year ("ESY") services was open at the time of the meeting and Petitioner would give ESY services consideration. (Petitioner's Exhibits 3-1, 4-2)
4. The student's IEP included goals in math, reading and written expression and cited common core standards for the student's current grade level. The IEP prescribed that the student be provided 10 hours of specialized instruction per week inside general education. The IEP required the use of a graphic organizer in the classroom and the use of manipulatives to assist the student with math computation. The IEP did not prescribe ESY services. The IEP included classroom and assessment accommodations.⁹ (Petitioner's Exhibit 3-1, 3-2, 3-3, 3-4, 3-5 3-6, 3-7, 3-9)

⁸ 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.

⁹ The classroom and assessment accommodations included, but were not limited to, repetition of directions read aloud, calculating device, small group testing extended time, test administered over several days and frequent breaks.

5. The student's initial IEP noted the student's present levels of academic achievement and functional performance ("PLOP") for math, reading and written expression. The PLOP for math indicated the student's recent i-Ready math test showed the student was operating at kindergarten level for math, two grade levels below the student's then current grade. The PLOP indicated the student was able to add and subtract single digit numbers and recognize and write numbers 1 to 20. The student showed strengths in measurement and data and was able to compare lengths of two objects. The student struggled with math reasoning and word problems and was unable to determine which math operation to use for a word problem. The student was unable to add and subtract double-digit numbers accurately. (Petitioner's Exhibit 3-3)
6. The student's initial IEP had four math goals: (1) To tell time to the nearest half-hour and minute in 3 out of 4 trials with at least 75% accuracy. The baseline for the goal stated the student scored Level 1 on math measurement test. (2) To add and subtract double digit numbers with regrouping in 3 out of 5 trails with at least 75% accuracy. The baseline for the goal stated that the student scored on level K on the math I-Ready section for numbers and operations. (3) Identify and draw geometric shapes and explain their attributes in 3 out of 5 trials with at least 75% accuracy. The baseline for the goal stated that the student scored on level K on the geometry section of the I-Ready math test. (4) To measure using standard and metric units in 3 out 5 trials with 75% accuracy. The baseline for the goal stated the student tested on a level K on the I-Ready math test.
7. The student's initial IEP noted the student's PLOP for reading: The student's testing on the Dibels/TRC middle of year (MOY) reading test shows that the student is reading on a pre-K level. The student is able to identify some basic three letter words but struggles with decoding and blending new words; with assistance of a teacher can tell what the student just read, but struggles with reading independently on the student's instructional level and retelling what happens in a story. (Petitioner's Exhibit 3-3)
8. The student's initial IEP had four reading goals: (1) After reading a book on instructional level the student will be able to identify the characters from the story and give at least one detail in 3 out of [five] trials with at least 75% accuracy. The baseline for the goal stated the student is reading on a PC level on the Dibels/TRC reading test. (2) After reading a book on instructional level the student will be able to answer the "WH" questions in 3 out of 5 trails with at least 75% accuracy. The baseline for the goal stated the student was reading on a PC level on the Dibels/TRC reading test. (3) Know and apply grade-level phonics and word analysis skills in decoding words in 3 out 5 trails with at least 75% accuracy. The baseline for the goal stated that the student is able to say the sounds of most letters. (4) Decode regular spelled one-syllable words in 3 out of 5 trials with at least 75% accuracy. The baseline for the goal stated that the student is able to say the sounds of most letters. (Petitioner's Exhibit 3-5)
9. The student's initial IEP noted the student's PLOP for written expression: The student's classroom writing examples show the student is writing below level and unable to write a basic sentence without assistance. After a brief read on instructional level the student is

unable to write what happened in the story without assistance. The student is able to write basic words or phrases from the board. (Petitioner's Exhibit 3-5)

10. The student's initial IEP had three written expression goals: (1) The student will be able to write a sentence from a written prompt on the board in 3 out of 5 trials with at least 75% accuracy. The baseline for the goal stated the student is able to write a question from a board. (2) Student will be able to write a complete sentence with the proper spelling and capitalization in 3 out of 5 trails with at least 75% accuracy. The baseline for the goal stated the student is able to write sentences from a book with the appropriate guidance. (3) After listening to/reading a story on instructional level the student will write two details from the story in 3 out of 5 trails with at least 75% accuracy. The baseline for the goal states that with assistance with spelling the student is able to write a sentence for a detail from a story. (Petitioner's Exhibit 3-5, 3-6)
11. The student's report card that was issued for the third advisory, soon after the student's initial IEP was developed, indicated the student was operating significantly below grade level in all subjects except music, art and physical education. In these subjects the student was either approaching expectations or proficient. The student's work habits and personal and social skills ratings, that included skills such as following directions and completing classwork on time, indicated that the student rarely met expectations in any of the areas measured. (Petitioner's Exhibit 9)
12. The student was promoted to the next grade at the end of SY 2015-2016 and returned to School A for SY 2016-2017. On October 14, 2017, the student's teacher prepared a written summary of the student's academic performance and indicated the student was operating below basic in academic areas but was excelling in work habits and behavior. The teacher noted that although the student was performing below grade level, the student was a hard worker and showed determination. (Petitioner's Exhibit 10)
13. The student's IEP progress report for the first advisory of SY 2016-2017 indicated that the student was progressing on some of the student's IEP goals and some had not been yet introduced. For the second and third advisories the progress reports noted student was not making progress relative to the student's goals because of the student's frequent absences from school. From the beginning of SY 2016-2017 through March 22, 2017, the student had a total of 35 absences from school 21 of which were excused and 14 of which were unexcused. (Petitioner's Exhibits 12, 13, 14)
14. On March 21, 2017, DCPS conducted a classroom observation while the student was in general education reading instruction. The observation notes that the student's reading and writing skills were significantly below grade level and the student needed significant teacher support to complete the reading and writing activities. The student's teacher commented that the student had made no progress toward academic goals and frequent absences contributed to the lack of progress. (Petitioner's Exhibit 22)
15. The student is able to work well with the student's School A general education and special education teachers and gets along with peers. The student's poor school

attendance has contributed to the student's lack of academic progress. The student's IEP goals reference the common core standards and were designed to expose the student to grade level material while focusing on remediating the student's particular academic deficits. The student is able to follow along in small group and work one to one and has accommodations in the student's IEP to help move the student forward academically. The student has mastered some basic skills based on one on one instruction and repetition. (Witness 4's testimony)

16. School A provided the student literacy instruction in addition to the services the student was provided pursuant to the student's IEP. The student does not qualify for adaptive or daily life skill goals and only requires academic supports. School A offered to provide the student behavioral support services but Petitioner declined those services. Based on the student's absences School A initiated truancy proceedings and Petitioner was reported to Child and Family Services. (Witness 4's testimony)
17. On April 13, 2017, School A convened the student's annual IEP review meeting. Petitioner participated in the meeting along with her attorney. At that meeting School A noted that the student was receiving 20 minutes per day of reading intervention in addition to the services in the IEP during which the student worked on phonics, sound awareness and basic reading. The student's teachers indicated the student was not making much progress. The student's general education English teacher indicated that she worked with the student in small group instruction and one on one instruction at times. She indicated the student had made little progress and could not generate a sentence without assistance. The student's math teacher also noted the student was working at kindergarten level and had not mastered basic addition and subtraction and the student did better working one on one. (Witness 2's testimony, Petitioner's Exhibits 6, 7)
18. During the April 13, 2017, meeting the team discussed the student's absences and reported the student had 40 absences. Petitioner believed that number was overstated. The team discussed the student's IEP goals and there were changes made to the goals based upon requests made by Petitioner's attorney. The team, including Petitioner and her attorney agreed on the IEP goals, baselines and accommodations. DCPS proposed an increase in the student's level of specialized instruction to 12 hours per week with 5 of the hours for reading outside general education. The other 7 hours were in general education. Petitioner requested increased specialized instruction and placement in a self-contained DCPS classroom. However, Petitioner did not request a specific number of hours of specialized instruction. The School A team members stated that the student's lack of academic progress was attributable to absences during SY 2016-2017 and School A did not have a self-contained classroom. (Petitioner's testimony, Witness 2's testimony, Petitioner's Exhibits 6, 7)
19. The student's May 2017 i-Ready testing indicated the student was operating on kindergarten level, more than two grade levels behind, in math. During SY 2016-2017 the student made incremental progress in math, increasing the student's i-Ready score from 314 to 371, but remained on the kindergarten level. (Petitioner's Exhibit 23)

20. The student's cognitive abilities are at the top of the low average range, which indicates the student has the potential to improve in academic skills as measured against the academic achievement skills in the initial psychological evaluation. Given the student's current limits in reading and math, processing speed and working memory, the student needs specific accommodations such as preferential seating and more individualized instruction in reading, math and writing. The student has the potential to make significant progress in a short time if the student is in a classroom with a low student to teacher ratio and where the student has more attention and less distraction. The student would need this type of setting for a couple of years at the most, then the level of instruction could be scaled back to eventually have the student return to general education. (Witness 3's testimony)

21. Petitioner's educational consultant conducted an observation of the student at School A and developed a report of recommendations for changes in the student's IEP. However, the consultant's report was not provided to School A. Petitioner's consultant opined that the student's initial IEP was not appropriate and should have contained at least 15 hours per week of specialized instruction with 10 hours inside general education and 5 outside general education in reading. The consultant also opined that the student should have qualified for ESY services. Because the student's academic skills are so low and the student is not making progress the student needs all instruction outside general education. The consultant recommended the student be in a self-contained classroom for students with learning disabilities. (Witness 1's testimony)

22. Petitioner's consultant also proposed a compensatory education plan for the student that proposed that the student receive 240 hours of reading tutoring to allow the student to complete a research based reading program. The consultant also recommended the student be provided 110 hours each in math and written expression based on the services the consultant estimated the student missed by not having appropriate IEPs. The consultant used an arbitrary calculation that reduced the estimate of hours of instruction missed by half. (Witness 1's testimony, Petitioner's Exhibit 39)

CONCLUSIONS OF LAW:

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

34 C.F.R. § 300.17 provides:

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

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must

have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO and at the hearing, Respondent shall hold the burden of persuasion on issue #1 and #2. Petitioner shall establish a prima facie case on issue #1, and issue #2 before the burden of persuasion falls to Respondent. 10 The normal standard is preponderance of the evidence. See, e.g. *N.G. v. District of Columbia* 556 F. Supp. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether the DCPS denied the student a FAPE by failing to propose an appropriate IEP in April 2016.

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

¹⁰ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

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

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

have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

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

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

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

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

Petitioner alleges the student's initial IEP was inappropriate because it did not prescribe sufficient hours of specialized instruction. Petitioner asserts the student's initial IEP should have prescribed specialized instruction outside general education. Petitioner also asserts the initial IEP did not include adaptive goals that could be implemented by the classroom teacher, e.g. maintaining attention, initiating and completing tasks, or transitioning between classes.

The evidence demonstrates that when the student was first found eligible the student was operating significantly below grade level. The Hearing Officer credited Petitioner's expert witness' testimony that the student's IEP should have included specialized instruction outside general education given the student's significant academic deficits. Although there was evidence that the student's attendance had an impact on the student's lack of academic progress, at the time the student was first found eligible, the evidence of the student's severe academic deficits support a conclusion that the student should have been provided significant specialized instruction outside general education particularly with regard to the student's reading, math and

written instruction. Although the DCPS expert witness testified that the student's IEPs were appropriate, the Hearing Officer found Petitioner's expert witness' testimony, coupled with the student's academic data demonstrating severe academic deficits, sufficient to conclude the student's initial IEP was inappropriate and not reasonably calculated to provide the student educational benefit when it was developed.

Petitioner's expert witness testified that the student's initial IEP should have prescribed at least 15 hours of specialized instruction with some hours outside general education for reading. The Hearing Officer found this portion of this witnesses testimony convincing given the student's severe academic deficits as noted in the initial evaluation and the academic difficulties the student was displaying in the classroom. Although there was testimony that the student's academic goals, baselines and accommodations were also inappropriate, the Hearing Officer concludes, based upon my own review of the goals, that the goals seemed commensurate with the student' level of functioning. Although the IEP referenced grade level core competencies, the goals, however, appeared to be commensurate with the student achievement levels as noted in the student's initial evaluation. Although Petitioner asserted the student should have been provided ESY services, the Hearing Officer did not conclude based on the evidence presented that the student met criteria for ESY services. Petitioner consultant's testimony alone on this issue was insufficient to conclude the student qualified for ESY services.

Consequently, the Hearing Officer concludes the student's initial IEP was inappropriate because it did not prescribe specialized instruction outside general education and the student was thus denied a FAPE.

ISSUE 2: Whether the DCPS denied the student a FAPE by failing to propose an appropriate IEP in April 2017.

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

As already stated, 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).

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

(D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

Petitioner asserts the student's current IEP is inappropriate because it does not prescribe sufficient hours of specialized instruction and the student's IEP and placement should be self-contained classroom with specialized instruction in all academic areas, i.e. 20 hours per week of specialized instruction outside general education. Petitioner also asserts the IEP lacks sufficient present levels of performance, adequate goals, and necessary aids and services.

The evidence demonstrates that during SY 2016-2017 the student made little if any progress in the student's IEP goals and the student's academic achievement. Although the evidence demonstrates that School A increased the level of student's specialized instruction in the April 2017 IEP, the IEP only increased the student's specialized instruction by 2 hours per week and only prescribed that the student be provided 5 hours per week of those instructional hours outside general education. The evidence demonstrates that the student's academic deficits were severe and that the student was still operating at kindergarten level although the student had been promoted to the next grade. The student's initial IEP was not reasonably calculated to provide the student educational benefit and neither was the IEP that was developed in April 2017.

The Hearing Officer credits Petitioner's expert witness's testimony that given the student's severe academic deficits and the insufficient services the student was provided with the student's initial IEP, the student should have, by April 2017, had an IEP with at least 20 hours of specialized instruction per week outside general education. Although DCPS' expert witness testified that the student's current IEP was appropriate, the evidence of the student's lack of progress belies that testimony. The student's absences more than likely contributed to the student's lack of academic progress, however, the evidence demonstrates that the student was so significantly behind academically when the student was first found eligible that the student's academic deficits only became more significant as the student progressed in grade while maintaining kindergarten level academic skills. As a result, the Hearing Officer concludes that the student's April 2017 IEP was inappropriate because it lacked sufficient hours of specialized instruction in the appropriate educational setting outside general education.

Although Petitioner also asserted that there was other aspects of the IEP that were inappropriate, the Hearing Officer did not conclude based on the evidence that the other areas of the student's IEP were lacking. DCPS sufficiently demonstrated that other than the level of services proposed and the setting in which the services were provided, the IEP was otherwise sufficient.

The Hearing Officer concludes that Respondent did not sustain the burden of proof by a preponderance of the evidence that the student's April 2017 IEP was reasonably calculated to provide the student educational benefit.

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 in April 2017 the student should have been provided at least 20 hours of specialized instruction per week outside general education. The Hearing Officer concludes the student is entitled to compensatory education for having not had an appropriate IEP and placement from April 2016 to present. Based on the evidence presented, the Hearing Officer concludes that the student would benefit from independent tutoring.

Petitioner requested that the student be provided compensatory education in the amount recommended by Petitioner's consultant. However, the consultant appeared to use an arbitrary calculation in arriving at the proposed number of tutoring hours. In addition, the student clearly had attendance issues that contributed to the lack of academic progress. Despite the fact that Petitioner's expert witness stated that the student's absences were taken into account in her recommendation for compensatory education, the Hearing Officer did not find that assertion credible. 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 in April 2016 and April 2017.

ORDER: ¹¹

1. As a result of the finding of denials of FAPE, the Hearing Officer directs DCPS to convene an IEP meeting, within fifteen (15) school days of the issuance of this order, to review and revise the student's IEP with updated present levels of performance and appropriate academic goals, and prescribe 20 hours of specialized instruction outside general education, that the team determine an appropriate educational placement for the student in a program to address the student's academic deficits, and that DCPS determine a location of services for the student for remainder of SY 2017-2018.

¹¹ 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.

2. The Hearing Officer also grants the student compensatory education in the amount of 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: September 22, 2017

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