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Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”) Respondent.</p> <p>Case # 2017-0167</p> <p>Date Issued: September 3, 2017</p>	<p style="text-align: center;">CORRECTED HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates: August 21, 2017 August 22, 2017</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information, including the name of the Respondent, is in Appendices A & B attached to this decision which must be removed prior to public distribution.

This “Corrected” HOD is issued to make typographical and/or grammatical changes only; no substantive changes have been made. The HOD issuance date, September 3, 2017, remains unchanged, as does the applicable appeal date.

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 21, 2017, and August 22, 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 The student resides in the District of Columbia and is a child with a disability pursuant to IDEA.

The student attended a District of Columbia Public Schools (“DCPS”) _____ school (“School A”) during school year (“SY”) 2016-2017 and DCPS was and remains the student’s local educational agency (“LEA”). The student began attending School A at the start of SY 2016-2017.

The student’s current individualized education program (“IEP”) was developed on February 13, 2017. The student’s parent (“Petitioner”) filed the current due process complaint on June 20, 2017, alleging, inter alia, that DCPS denied the student a free appropriate public education by failing to implement the student’s IEP.

The parties participated in a resolution meeting. The complaint was not resolved and the parties do not mutually agree to shorten the thirty (30) day resolution period. The 45-day period began on July 20, 2017, and ends [and the Hearing Officer’s Determination (“HOD”) is due] on September 3, 2017.³

The undersigned Impartial Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on the complaint on June 28, 2017, and issued a pre-hearing order (“PHO”) on July 3, 2017, outlining, inter alia, the issues to be adjudicated.

RELIEF SOUGHT:

Petitioner seeks as relief that the Hearing Officer find that DCPS as the LEA denied the student a free appropriate public education by failing to develop an appropriate IEP on February 13, 2017, and by failing to implement the February 13, 2017, IEP from the March 10, 2017 until the end of SY 2016-2017, and that the Hearing Officer order DCPS to fund the requested compensatory education.

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

³ The issues alleged in the complaint were bifurcated and a hearing was conducted on July 17, 2017, on one issue in the complaint that required an expedited hearing and decision. The HOD from that hearing was issued on August 17, 2017 (Case # 2017-0167-B).

LEA Response to the Complaint:

The LEA filed a timely response to the complaint on June 30, 2017. The LEA denies that there has been any failure to provide the student with a free appropriate public education. In its response, the LEA asserts, inter alia, that the student's specialized instruction hours were increased and the behavior support services hours were decreased by the team and the parent agreed. It was determined by the team that the student was not being successful managing the higher number of hours of behavioral support services and this change was appropriate to meet the student's educational needs. The student's IEP was consistently implemented and School A is an appropriate placement for the student.

ISSUES: ⁴

The issues adjudicated are:

1. Whether the DCPS denied the student a free appropriate public education ("FAPE") by failing to implement the student's IEP while the student was suspended from February 1, 2017, to February 3, 2017.
2. Whether DCPS denied the student a FAPE by failing to develop and appropriate IEP on February 13, 2017, because it reduced the student's hours of behavioral support services from 60 minutes per week to 120 minutes per month and did so without first conducting an evaluation of the student prior to the reduction in services.
3. Whether DCPS denied the student a FAPE by failing to fully implement the student's IEP from March 10, 2017, to March 27, 2017, by providing 10 hours of specialized instruction per week outside general education rather than 15 hours per week.⁵
4. Whether DCPS denied the student a FAPE by failing to implement the student's IEP from March 28, 2017, to April 4, 2017, because the student was denied entry to School A and had not yet begun attending School C.
5. Whether DCPS denied the student a FAPE by failing to implement the student's IEP from April 4, 2017, to May 2, 2017, while the student was attending School C.
6. Whether DCPS denied the student a FAPE by failing to fully implement the student's IEP from May 2, 2017, to June 14, 2017,⁶ by (a) providing 10 hours of specialized instruction

⁴ The Hearing Officer restated the issue at the outset of the hearing and the parties agreed that this was the issue to be adjudicated.

⁵ At hearing when the issues to be adjudicated were reviewed, the parties agreed and the Hearing Officer ruled that the allegations in the complaint, including claims regarding implementation of the student's IEP, were limited to the period after the filing date of the due process complaint that resulted in the April 10, 2017, HOD. Thus, the period that this failure to implement related to was from March 10, 2017, rather than February 13, 2017.

per week outside general education rather than 15 hours per week and (b) not providing 120 minutes per month of behavior support services.

7. Whether DCPS denied the student a FAPE by failing to provide the student an appropriate placement at School A from March 10, 2017, to June 14, 2017.

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 24 and Respondent's Exhibits 1 through 17) that were admitted into the record and are listed in Appendix A.⁷ Witnesses' identifying information is listed in Appendix B.⁸

SUMMARY OF DECISION:

The Hearing Officer concludes the Petitioner sustained the burden of proof by the preponderance of the evidence on issues #3, #4 and #6. Petitioner sufficiently demonstrated that DCPS failed to implement the student's IEP from March 10, 2017, to March 27, 2017. Petitioner also sufficiently demonstrated that DCPS failed to implement the student's IEP and from March 28, 2017, to April 3, 2017, for total of five school days, and that DCPS failed to implement the student's IEP for a from May 2, 2017, to June 14, 2017, by failing to provide the student 1.7 hours of the specialized instruction per week the student's IEP prescribes.

Respondent sustained the burden of proof by a preponderance of the evidence on issues #2 and #7. Petitioner held the burden of proof on issues # 1 and # 5 and did not sustain the burden of proof by a preponderance of evidence on those issues.

The Hearing Officer grants Petitioner an independent educational evaluation for the purpose of determining appropriate compensatory education for denials of FAPE determined in this HOD.

⁶ The Hearing Officer took administrative notice of the DCPS school calendar that reflects that June 14, 2017, is the end of SY 2016-2017.

⁷ Any items disclosed and not admitted or admitted for limited purposes were noted on the record and summarized in Appendix A.

⁸ Petitioner presented four witnesses: Petitioner (the student's father), the student's mother, Petitioner's former attorney and an educational consultant regarding compensatory education. Respondent presented two witnesses: A DCPS school psychologist and the School C principal.

FINDINGS OF FACT:⁹

At the August 21, 2017, and August 22, 2017, hearing the parties requested the Hearing Officer adopt and incorporate the findings of fact from the April 10, 2017, HOD as well as the August 17, 2017, HOD regarding this student (Case # 2017-0071 and Case # 2017-0167-B). I complied with the parties' request. However, only the Findings of Fact from those HODs that I found relevant to the remaining issues to be adjudicated and that were not redundant are enumerated below. Those Findings of Fact are listed below with reference the corresponding HOD with modification only to references to the school(s) to assist in the logic and readability of this HOD. Additional findings of fact are derived from the evidence presented during the August 21, 2017, and August 22, 2017, hearing. The Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia, where resides with Mother. Student is currently enrolled in School A. Student is eligible for special education and related services under the IDEA disability classification Emotional Disturbance (ED). (April 10, 2017, HOD: Petitioner's Exhibit 4-4)
2. For the 2013-2014 and 2014-2015 school years, Student attended School B Public Charter School. Mother saw a change in Student's behaviors, including difficulties with peers, agitation, and depression. Mother requested in spring 2016 that Student be evaluated for special education eligibility. (April 10, 2017, HOD: Petitioner's Exhibit 4-4)
3. On March 30, 2016, INDEPENDENT PSYCHOLOGIST conducted a comprehensive psychological evaluation of Student. In her April 28, 2016 report, Independent Psychologist reported that for intellectual functioning, Student's scores were Low Average to Average, except for a Very Low score for working memory. Student's achievement scores on the Woodcock Johnson Fourth Edition Tests of Achievement (WJ-IV) were Low in Broad Math, Low Average in Broad Reading, Math Calculation Skills, Academic Skills and Academic Fluency and Average in Broad Written Language. Behaviorally, Student, Mother and a teacher reported several Clinically Significant or At-Risk behavioral areas of concern on the Behavior Assessment Scales for Children (BASC-3) rating scales, including Hyperactivity, Aggression, Conduct Problems, Attention Problems, Withdrawal, Negative Emotionality, Attitude to Teachers, Locus of Control, Social Stress, Anxiety, Depression, Sense of Inadequacy, Somatization, Relations with Parents, Interpersonal Relations, Anger Control, Resiliency, Adaptability, Social Skills, Leadership, Study Skills and Functional Communication. Independent Psychologist opined that Student met diagnostic criteria for Major Depressive Disorder and recommended that Student appeared to meet eligibility criteria as a student who

⁹ In addition to the Findings of Fact from the prior HODs, the other Findings of Fact in this HOD are based on the documents and testimony from the hearing conducted on August 21, 2017, and August 22, 2017. 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.

should begin to receive special education services under the ED primary disability category. (April 10, 2017, HOD: Petitioner's Exhibit 4-5)

4. At an initial eligibility meeting on May 23, 2016, School B MDT team reviewed Independent Psychologist's comprehensive psychological report and determined that Student met IDEA eligibility criteria for the ED disability. (April 10, 2017, HOD: Petitioner's Exhibit 4-5)
5. On June 14, 2016, School B IEP team developed an initial IEP for Student. The June 14, 2016, IEP identified Mathematics, Reading and Emotional, Social and Behavioral Development as areas of concern. In a description of how Student's disability affects progress in general education, the IEP team reported that Student's diagnosis of Major Depressive Disorder results in engaging in behaviors that impede ability to make progress in the general education curriculum and that these behaviors manifest themselves through anger, irritability and aggression, but are rooted in feelings of insecurity and inadequacy. This initial IEP provided that Student would receive 6 hours per week of Specialized Instruction in the general education setting and 1 hour per week of Behavioral Support Services outside general education. Due to the end of the school year, this IEP was not implemented at School B. (April 10, 2017, HOD: Petitioner's Exhibit 4-6)
6. For the 2016-2017 school year, the parents enrolled Student in School A. On or about August 22, 2016, Father went to School A and provided Student's School B IEP to school staff. On that visit, he was unable to meet with Special Education Coordinator. (April 10, 2017, HOD: Petitioner's Exhibit 4-6)
7. Mother requested a 30-day review meeting to review Student's IEP at School A. A meeting was scheduled for November 2016, but it was cancelled because School B had not "released" Student from its special education student database, which resulted in SEC's not being able to access Student's special education records on the DCPS Special Education Database System (SEDS). School A did not hold an IEP meeting for Student until February 2017. (April 10, 2017, HOD: Petitioner's Exhibit 4-6)
8. Student's grades for the second quarter at School A were D's and F's. In the first two terms, had 42 class absences. On December 17, 2016, Mother requested in an email to Student's case manager at School A that Student be removed from School A's Engineering Academy. Mother's reason was that the program was too much of a challenge for Student "due to the circumstances of IEP." (April 10, 2017, HOD: Petitioner's Exhibit 4-6)
9. On January 23, 2017, Mother completed an application for Student to participate in School A's voluntary Twilight Program. The Twilight Program is an alternative learning program in the early evening which allows a student to earn a full year's course credit in 9 weeks. Student was put in the Twilight Program because created problems in the regular day school. (April 10, 2017, HOD: Petitioner's Exhibit 4-7)

10. Mother testified that Student's June 14, 2016, IEP has not been implemented at School A. SEC testified, to the contrary, that the IEP was implemented and that, from the start of the school year, there had been no services which the school failed to provide. Mother acknowledged in her testimony that Student had a counselor at School A, whom she thought was a psychologist, and that she did not know what specialized instruction services had been provided to Student. I found SEC's testimony on the implementation of the June 14, 2016, IEP to be more credible than that of Mother, and I find, from the preponderance of the evidence, that Student's IEP services were implemented at School A. (April 10, 2017, HOD: Petitioner's Exhibit 4-7)
11. On February 1, 2017, in the Twilight Program space on the 4th Floor of School A, the code of conduct violation of concern in this proceeding occurred. That afternoon, Student allegedly let a group of non-Twilight Program students onto the 4th Floor, via an unused stairway, to attack another student, "Student B," with whom Student had an ongoing dispute. Student and Student B had at least two other fights in the past. Twilight Teacher noticed that Student and Student B were face to face yelling at each other. Twilight Teacher intervened and got between the two students. Student B spit at Student. Student became hysterical and swung at Student B, unintentionally hitting Twilight Teacher in the mouth. The teacher suffered a "busted" lip. (April 10, 2017, HOD: Petitioner's Exhibit 4-8)
12. After the incident, Principal determined that Student should be suspended out of school. On February 6, 2017, Principal provided a written notice to Mother that he had met with Student to discuss the February 1, 2017 incident "involving Fighting which creates substantial risk or results in minor injury." Principal stated in the notice that he had determined that Student was responsible for the conduct and that he was proposing an Off-site Long Term Suspension for 25 days. Student was instructed to continue to attend school until the DCPS Instructional Superintendent authorized or modified the proposed disciplinary action. (April 10, 2017, HOD: Petitioner's Exhibit 4-8)
13. An IEP meeting for Student had already been scheduled for February 13, 2017. SEC decided to proceed with the IEP meeting and then hold an MDR meeting for Student. The meeting convened at School A on February 13, 2017. Mother and Father attended. School A gave no prior written notice to the parents that this was to also be an MDR meeting. (April 10, 2017, HOD: Petitioner's Exhibit 4-8)
14. At the IEP review part of the meeting, the IEP team updated Student's initial IEP from School B, increasing Specialized Instruction Services to 15 hours per week, all outside the general education setting. The IEP team reduced Student's Behavioral Support Services to 120 minutes per month. (April 10, 2017, HOD: Petitioner's Exhibit 4-8)
15. The IEP team proceeded next to review the February 1, 2017 code of conduct violation incident. School Psychologist reviewed the April 28, 2016 comprehensive psychological evaluation report by Independent Psychologist. School Psychologist stated to the team that Student was not in an emotional state when the incident occurred, that the incident

happened with Student's foresight and that Student was aware of the consequences of fighting at school. (April 10, 2017, HOD: Petitioner's Exhibit 4-8)

16. The MDR team determined that Student's prior IEP and placement were appropriate and that Student's special education services, supplementary aids and services and behavior intervention strategies had been provided consistent with IEP and placement, that Student's disability did not impair ability to control behavior and, specifically, that the behavior exhibited was more likely the result of an intentional plan by Student and peer group. The parent provided no information at the MDR meeting, except Mother indicated that Student's conduct was a result of a bad choice by Student. The IEP team determined that Student's February 1, 2017 code of conduct violation was not a manifestation of her IDEA disability. (April 10, 2017, HOD: Petitioner's Exhibit 4-9)
17. The parents appealed School A's February 6, 2017, Notice of Proposed Disciplinary Action to the D.C. Office of Administrative Appeals. Following a hearing on March 24, 2017, an administrative law judge issued a decision on March 27, 2017, finding that the proposed 25-day disciplinary action was appropriate. (April 10, 2017, HOD: Petitioner's Exhibit 4-9)
18. When School A convened the student's IEP meeting on February 13, 2017, the team determined that the student's hours of specialized instruction would be increased and the hours of behavioral support services were reduced from 240 minutes per month to 120 minutes per month because the student did not seem to be benefitting from and utilizing the amount of services that were on the IEP. The School A team believed it was not productive for the student to be forced to engage in services that were not benefitting the student. (Witness 4's testimony, Respondent's Exhibit 11-1, 11-9)
19. For the February 1, 2017, code of conduct violation incident, the student did not attend school for three school days, from February 1, 2017, to February 3, 2017. The student had not yet met the ten-day suspension threshold when Student was suspended from February 1, 2017, through February 3, 2017, therefore, School A was not required to provide the student any special education services during those days. (Witness 4's testimony)
20. The student had four classes where specialized instruction was provided along with other students with disabilities. The four classes in which the student was provided specialized instruction outside general education totaled 13.3 hours of specialized instruction per week. This resulted in the student not receiving 1.7 hours of specialized instruction per week that Student was due to receive. There were twelve school days during the period from March 10, 2017, to March 27, 2017, or roughly 2.5 weeks of school that the student was not provided specialized instruction fully in accordance with IEP. Thus, the student missed approximately 4 hours of specialized instruction that the student was due to receive during that period. (Witness 4's testimony)
21. On April 10, 2017, a HOD was issued on Petitioner's due process complaint setting aside the suspension for the February 1, 2017, conduct incident and setting aside the decision of the February 13, 2017, MDR team regarding that incident. (August 17, 2017, HOD)

22. However, before the HOD was issued the student began attending School C on April 4, 2017, for the long-term suspension. Despite the HOD that set aside both the suspension and the decision of the MDR team, the student remained at School C from April 4, 2017, to May 2, 2017. (Mother's testimony)
23. The student's mother took the student to School C on March 27, 2017, after being notified by School A that the student was to report to School C during the long-term suspension. When the student's mother arrived, School C was not aware that the student was supposed to begin attending School C. As a result, the student was out school for five school days prior to School C being informed by School A that the student was to attend School C. School C later telephoned the student's mother and told her the student could attend. (Mother's testimony)
24. Although School C had no information about the student when the mother first visited School C, she completed the School C application, provided School C with a copy of the student's IEP and met with the School C special education teacher. (Mother's testimony)
25. School C is an alternative school setting where DCPS students are placed when on long-term suspensions of ten or more days. School C has four special education teachers and provides small group instruction. During the period the student attended, School C provided the student instruction in English, Math and Science by a special education teacher in a small group setting of approximately six students. Not all students in the small groups necessarily had IEPs, as students are transient and come and only stay during the period of their suspension. While the student attended School C, the student was provided specialized instruction and behavior support services in accordance with IEP.¹⁰ (Witness 3's testimony)
26. The student returned to School A on May 2, 2017. From May 2, 2017, until the end of SY 2016-2017, the student was provided the behavior support services the student's IEP prescribed. Also during this period, the student had four classes where specialized instruction was provided along with other students with disabilities: English, Math, Social Studies and African American Literature. The four classes in which the student was provided specialized instruction outside general education totaled 13.3 hours of specialized instruction per week. This resulted in the student not receiving 1.7 hours of specialized instruction per week that she was due to receive. There were 28 school days during the period from May 2, 2017, to June 14, 2017, or roughly 4 weeks of school, thus the student was not provided approximately 7 hours of specialized instruction that the student was due to receive during that period. (Witness 4's testimony, Petitioner's Exhibit 20-2)

¹⁰Although the parent testified that that the student told the parent that the student was in regular education classes while at School C, the Hearing Officer concluded that Witness 3's testimony was more credible. As principal of School C, he had first hand knowledge of the services that are provided to students at School C, and the Hearing Officer concluded that description of the services constituted specialized instruction.

27. On May 2, 2017, School A convened a meeting that the student parent's attorney attended. During the meeting the School A staff shared that because the student was failing Math was likely to fail the grade. School A provided the student's schedule. The parent's attorney asked the School A principal to add one more class outside general education, but the principal suggested instead that the student's IEP be amended to reduce the hours of specialized instruction. (Witness 1's testimony)
28. Petitioner presented a compensatory education plan that sought to compensate the student for DCPS allegedly denying the student a FAPE due to an inappropriate IEP and as a result of not implementing the student's IEP from March 10, 2017, through June 14, 2017. Petitioner asserted that as a result, the student lost one full year and earned no credits during SY 2016-2017 and did not advance to the next grade. Petitioner requested that DCPS be ordered to fund a credit recovery program and independent tutoring to support the credit recovery. A person who had previously provided the student tutoring services while the student was attending School B testified about the proposed compensatory education plan. The recommended credit recovery would be provided at a cost of \$395 per half-unit program. It is a requirement to have a learning coach to assist the student with the course with 50 to 75 hours of independent tutoring for each half-unit course. (Witness 1's testimony, Petitioner's Exhibit 19)

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.

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 issues #2 and #7. Petitioner has the burden of persuasion on the remaining issues. 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 implement the student’s IEP while the student was suspended from February 1, 2017, to February 3, 2017.

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

34 C.F.R. § 300.323(c)(2) requires that, as soon as possible following the development of an IEP, special education and related services are made available to the child in accordance with the child’s IEP.

“To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and, instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the IEP “*Savoy v. District of Columbia* (DC Dist. Court) 844 F. Supp. 2d 23, February 2012 adopted *Houston Indep. School District v. Bobby R.* 200 F3d 341 (5th Circ. 2000)

The IDEA provides protections to a student with a disability from removal from school for a code conduct violation when the student has been removed from school for more than ten school days in a single school year. Otherwise, a school may discipline the student as it would any other nondisabled student.¹¹

¹¹ 34 C.F.R. § 300.530 provides in pertinent part:

(b) (2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

(d) Services. (1) A child with a disability who is removed from the child’s current placement pursuant to paragraphs (c), or (g) of this section must— (i) Continue to receive educational services, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP; and (ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. (2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting. (3) A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

The evidence demonstrates that student was suspended from February 1, 2017, to February 3, 2017. With these three days of suspension the student had not yet reached the threshold of ten-days of suspension that requires that the student be provided special education services during the period of removal. Witness 4 credibly testified that the student had not yet met the ten-day suspension threshold and there was no testimony or documentary evidence presented that refuted this witness' testimony. Consequently, the Hearing Officer concluded that Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to develop and appropriate IEP on February 13, 2017, because it reduced the student's hours of behavioral support services from 60 minutes per week to 120 minutes per month and did so without first conducting an evaluation of the student prior to the reduction in services.

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

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

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

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

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

The evidence demonstrates that when the student's IEP team met on February 13, 2017, to update the student's IEP the team increased the student's specialized instruction and decreased the student's behavioral support services from 240 minutes per month to 120 minutes per month. Respondent's expert witness credibly testified that the reason for the reduction was that the

student was not benefiting at School A from the amount of behavioral support services that had originally been prescribed while the student was attending School B.

There was no testimony or documentary evidence that refuted this credible testimony that the team determined the reduction in services would benefit the student and the student was actually refusing the additional services. There is no requirement under IDEA that an evaluation occurs prior to a team determining that a student's related services should be reduced. Given that the team increased the student's specialized instruction at the February 13, 2017, meeting and given the credible testimony of Respondent's expert witness as to why the behavioral support services were reduced, the Hearing Officer concludes that Respondent sustained the burden of proof on this issue by a preponderance of the evidence.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to fully implement the student's IEP from March 10, 2017, to March 27, 2017, by providing 10 hours of specialized instruction per week outside general education rather than 15 hours per week.

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

“To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and, instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the IEP “*Savoy v. District of Columbia* (DC Dist. Court) 844 F. Supp. 2d 23, February 2012 adopted *Houston Indep. School District v. Bobby R.* 200 F3d 341 (5th Circ. 2000)

The Findings of Fact that were adopted and incorporated into this HOD from the April 10, 2017, HOD reflect that the student's IEP services were implemented at School A. The claims regarding implementation in the present case relate to the student's February 13, 2017, IEP and are asserted for the period after the prior due process complaint was filed, from March 10, 2017, until March 27, 2017, when School A instructed the student to attend School C because of a suspension.

The evidence demonstrates that the student's IEP required that the student be provided 15 hours per week of specialized instruction per week and based upon the Respondent's expert witness' testimony, the student in fact was receiving 13.3 hours per week of specialized instruction outside general education. This resulted in the student not receiving 1.7 hours of specialized instruction per week that was due to receive.

There were twelve school days during the period from March 10, 2017, to March 27, 2017, or roughly 2.5 weeks of school, thus the student was not provided approximately 4 hours of specialized instruction that was due to receive. Although Respondent's expert witness asserted that the difference in hours in specialized instruction per week was of no moment, the Hearing Officer did not agree. The Hearing Officer concludes that 4 hours of missed specialized instruction during this period was not de minimus, but significant. Thus, the student was denied a FAPE as result of not being provided the full measure of prescribed specialized instruction during this period.

ISSUE 4: Whether DCPS denied the student a FAPE by failing to implement the student’s IEP from March 28, 2017, to April 4, 2017, because the student was denied entry to School A and had not yet begun attending School C.

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

As previously cited: “To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and, instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the IEP “*Savoy v. District of Columbia* (DC Dist. Court) 844 F. Supp. 2d 23, February 2012 adopted *Houston Indep. School District v. Bobby R.* 200 F3d 341 (5th Circ. 2000)

The evidence demonstrates that the student was instructed by School A to attend School C during a period of suspension and based upon the parent’s unrefuted testimony when she took the student to School C, School C had no information that the student was to attend. Thus, the student missed five days of school before the parent received a telephone call from School C and the student then began attending School C. The Hearing Officer concludes that five days of missed school is significant and that a substantial portion of the student’s IEP was not implemented as a result. Thus, the student was denied a FAPE.

ISSUE 5: Whether DCPS denied the student a FAPE by failing to implement the student’s IEP from April 4, 2017, to May 2, 2017, while was attending School C.

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

The student’s mother testified that when she first went to School C to enroll the student she had a conversation with the special education teacher and provided School C with a copy of the student’s IEP. The evidence demonstrates that while at School C the student was in a low student to teacher ratio classroom of no more than six students and that a special education teacher provided the student specialized instruction. The evidence demonstrates through the credible testimony of Witness 3, the principal at School C, that while the student was attending School C IEP was implemented. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

ISSUE 6: Whether DCPS denied the student a FAPE by failing to fully implement the student’s IEP from May 2, 2017, to June 14, 2017, by (a) providing 10 hours of specialized instruction per week outside general education rather than 15 hours per week and (b) not providing 120 minutes per month of behavior support services.

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

The student's IEP required that the student be provided 15 hours per week of specialized instruction per week and 120 minutes per month of behavioral support services. The evidence demonstrates that from May 2, 2017, when the student returned to School A, until the end of SY 2016-2017, based on the Respondent's expert witness' credible testimony, the student was provided the behavior support services IEP prescribed. However, the student received 13.3 hours per week of specialized instruction outside general education of the 15 hours per week was due to receive pursuant the February 13, 2017, IEP. This resulted in the student not receiving 1.7 hours of specialized instruction per week that was due to receive. There were 28 school days during the period from May 2, 2017, to June 14, 2017, or roughly 4 weeks of school. Thus, the student was not provided approximately 7 hours of specialized instruction that was due. The Hearing Officer concludes that 7 hours of missed specialized instruction during this period was not de minus, but significant. Thus, the student was denied a FAPE as result of not being provided the full measure of prescribed specialized instruction during this period.

ISSUE 7: Whether DCPS denied the student a FAPE by failing to provide the student an appropriate placement at School A from March 10, 2017, to June 14, 2017.

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 is determined at least annually and is based on the child's IEP. 34 CFR § 300.116(b) (1) (2). *At the beginning of each school year*, each public agency must have *in effect*, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320. 34 C.F.R. § 300.323(a) (emphasis added).

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

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

The evidence demonstrates that student began attending School A at the start of SY 2016-2017 and that prior to attending School A, had not been provided special education services, although had an IEP when arrived at School A. The evidence demonstrates that at School A, the student was provided services pursuant to the School B IEP until February 13, 2017, when School A updated the student's IEP and increased specialized instruction from 6 hours per week in the general education setting to 15 hours per week outside the general

education setting to better address the student's needs. Although the student was provided a total of 11 hours less specialized instruction at School A for the remainder of SY 2016-2017 than this new IEP prescribed, there was insufficient evidence that these missed services resulted in School A being an inappropriate placement for the student.

Although the evidence demonstrates that the student had behavior difficulties that resulted in being suspended, there was insufficient evidence from which to conclude that the student's behavior difficulties were the result of a lack of appropriate services or because the student's IEP could not be implemented at School A, or that School A was in any way otherwise an inappropriate placement for the student. Consequently, the Hearing Officer concludes that Respondent sustained the burden of proof on this issue.

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.

Petitioner in the proposed compensatory education plan asserted that the denials of FAPE that were alleged in the complaint resulted in the student failing and not being promoted. Petitioner, therefore, requested that as compensatory education that DCPS be ordered to provide the student credit recovery and independent tutoring to assist in completing credit recovery. However, there was insufficient evidence presented that the student not receiving approximately 11 hours of specialized instruction at School A, and missing five school days of school while not yet attending School C caused the student to fail the year and not be promoted to the next grade. Thus, the Hearing Officer did not conclude that student was due the credit recovery that was requested as compensatory education. There was sufficient evidence that the student had benefitted from tutoring services in the past and because the student is due compensatory education for the denials of FAPE, tutoring services would be an appropriate remedy.

However, there was insufficient evidence presented from which to determine an appropriate amount of independent tutoring that that would compensate the student for the missed services that have been determined by the Hearing Officer in this HOD. Thus, the Hearing Officer grants Petitioner in the order below an independent education evaluation that can be used to assist in

determining the appropriate compensatory education services the student is due, given that to award no compensatory education would be inequitable.¹²

ORDER:¹³

1. DCPS shall, within fifteen (15) school days of the issuance of this Order, authorize and fund an independent educational evaluation at the OSSE prescribed rate for the purpose of determining appropriate compensatory education for the student's missed services determined in the HOD, to wit: five missed school days from School C and 11 hours of specialized instruction at School A.
2. Within ten (10) business days of Petitioner presenting DCPS with the results of the evaluation granted above, DCPS shall convene a MDT meeting to review the evaluation and determine appropriate compensatory education services. If the parties do not reach an agreement on the level of compensatory services, Petitioner may pursue the claim for compensatory education for five missed school days from School C and 11 hours of specialized instruction at School A in a subsequent due process hearing.
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 3, 2017

¹² Once a plaintiff "has established that she is entitled to [a compensatory education] award, simply refusing to grant one clashes with Reid, which sought to eliminate 'cookie-cutter' awards in favor of a 'qualitative focus on individual needs' of disabled students." *Stanton ex rel. K.T. v. District of Columbia*, 680 F. Supp. 2d 201, 207 (D.D.C. 2010) (quoting Reid, 401 F.3d at 524, 527).

¹³ 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.

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