OSSE
Office of Dispute Resolution
September 19, 2016

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Confidential

Parent on Behalf of Student[1], Petitioner, v. District of Columbia Public Schools ("DCPS") [LEA} Respondent. Case # 2016-0164 Hearing Officer: Coles B. Ruff, Esq. Date Issued: September 19, 2016	HEARING OFFICER'S DETERMINATION Hearing Dates: August 29, 2016 September 1, 2016 Counsel for Each Party listed in Appendix A

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on August 29, 2016, and September 1, 2016, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____and in grade _____.[2] The student is a child with a disability pursuant to the IDEA with a disability classification of other health impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD"). During the second half of school year ("SY") 2015-2016 the student attended a school ("School A") within the District of Columbia Public Schools ("DCPS"). The student was enrolled in a public charter school in the District of Columbia that was its own location education agency ("LEA") during SY 2014-2015 and during the first semester of SY 2015-2016. The student is not enrolled in a DCPS school for SY 2016-2017.

On July 6, 2016, Petitioner filed this due process complaint alleging DCPS denied the student a free appropriate public education ("FAPE") by, inter alia, failing to implement the student's individualized educational program ("IEP") from January 2016 until the end of SY 2015-2016 by not providing her the instruction outside the general education and failing to provide an appropriate IEP from February 2016 that was reasonably calculated to meet the student's unique needs because it reduced the student's specialized instruction and eliminated extended school year ("ESY") services. Petitioner seeks as relief that the Hearing Officer find that DCPS denied the student a FAPE that the Hearing Officer order DCPS to provide the student compensatory education.

On July 14, 2016, the LEA filed a timely response to Petitioner's complaint in which it denies that it failed to provide the student with a FAPE. The LEA denies that DCPS has failed to materially implement the student's IEP between January 2016 and June 2016; School A was, and is, capable of providing the student instruction outside of the general education setting and the student received the services prescribed by her IEP. DCPS also asserts the student's February 24, 2016, IEP was reasonably calculated to provide the student with a FAPE and the student did not exhibit the significant regression and recoupment concerns necessary to qualify her for ESY. The LEA also contends that there are and no facts that demonstrate regression, academic harm, the need to revise the IEP or authorize independent compensatory education services.

The parties participated in a resolution meeting on July 19, 2016, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing in this matter. The

[2] The student's current age and grade are in indicated in Appendix B.

45-day period begins on August 6, 2016, and ends [and the Hearing Officer's Determination ("HOD") is due] on September 19, 2016.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on the complaint on August 3, 2016, and issued a pre-hearing order ("PHO") on August 8, 2016, outlining, inter alia, the issues to be adjudicated.

The issues adjudicated are:

1. Whether the LEA denied the student a FAPE by failing to implement the student's IEP from January 2016 through the end of SY 2015-2016 by not providing the student specialized instruction outside the general education setting that her IEP(s) required.

2. Whether the LEA denied the student a FAPE by failing to provide an appropriate IEP reasonably calculated to meet the student's unique needs from February 24, 2016, to the present, because the DCPS removed three hours of specialized instruction outside general education that was in the student's previous IEP and/or did not provide for ESY.

3. Whether the LEA denied the student a FAPE by failing to provide an appropriate placement from January 2016 to the present, because School A was incapable of implementing the specialized instruction outside general education that the student's IEP prescribes.

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 43 and Respondent's Exhibits 1 through 12) that were admitted into the record and are listed in Appendix A.[3] Witnesses are listed in Appendix B.[4]

SUMMARY OF DECISION:

Petitioner sustained the burden of proof by a preponderance of the evidence on whether the LEA denied the student a FAPE by failing to implement her IEPs from January 2016 through the end of SY 2015-2016 by not providing the student specialized instruction outside the general education setting that her IEP(s) required. Respondent had the burden of proof on the second two issues.[5] Respondent did not sustain the burden of proof on the second two issues and the

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

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

[5] The Hearing Officer concluded Respondent sustained the burden of proof on one part of this two-prong issue. The Hearing Officer concluded the student's February 24, 2016, IEP was inappropriate only because it did not provide for ESY, not because the student's specialized instruction had been reduced by three hours.

Hearing Officer determined that DCPS denied the student a FAPE by not providing the student specialized instruction outside the general education setting that her IEP(s) required, developed an inappropriate IEP on February 24, 2016, because the IEP did not prescribe ESY services, and because DCPS did not provide the student an appropriate placement that could implement the student's IEP.

As relief for the denials of FAPE determined, the Hearing Officer grants Petitioner compensatory education as relief with modification, but found that the proposal The Hearing Officer found that compensatory education proposal Petitioner presented did not meet the requirements pursuant to *Reid* and Hearing Officer granted Petitioner the number of hours of independent tutoring the Hearing Officer concluded was reasonable in light of the denials of FAPE that were determined. The Hearing Officer granted Petitioner, in the alternative an independent evaluation to determine the compensatory education the student is due.

FINDINGS OF FACT: [6]

1. The student is a child with a disability with classification of OHI due to ADHD. During the second half of SY 2015-2016 the student attended School A, a DCPS school. The student did not ESY during summer 2016.[7] The student is not enrolled in a DCPS school for SY 2016-2017. (Parent's testimony, Petitioner's Exhibit 21-1)

2. During SY 2014-2015 and during the first semester of SY 2015-2016 the student attended School B, a public charter school that is its own LEA for special education purposes. (Parent's testimony, Petitioner's Exhibit 15-1)

3. In May 2015 School B conducted a psycho-educational evaluation of the student. The evaluation confirmed that the student has borderline cognitive functioning that is the likely reason for her academic deficits and results in her learning at a slower pace than most students her age. (Petitioner's Exhibit 10-4)

4. On May 21, 2015, School B convened a meeting to review the student's evaluation. The team discussed striking the correct balance between her need for increased specialized instruction and her having access to non-disabled peers in her least restrictive environment ("LRE"). The team discussed and determined the student's LRE was not total removal from general education in all academic areas. The team settled on increasing the student's specialized instruction outside general education by adding three additional hours per week to replace her science class. School B completed an IEP amendment form to reflect these changes to the student's IEP. (Petitioner's Exhibits 11-4, 11-5, 12-1)

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

[7] The parties agreed that although the student was not prescribed and did not receive ESY services for 2016, DCPS' ESY services ended July 29, 2016.

5. In June 2015 School B conducted a functional behavioral assessment ("FBA"). The FBA focused on the student's defiance behaviors and the team determined the student's behavior did not warrant a behavior intervention plan ("BIP"). The BIP did not address the student's attention problems. (Petitioner's Exhibit 13-1, 13-2, 13-4)

6. The student attended ESY at School B in summer 2015. The student's ESY services were limited to instruction in math. (Parent's testimony, Petitioner's Exhibit 17)

7. In September 2015, while attending School B, the student's reading skills were measured to be at the beginning of 5th grade level for instructional purposes, [redacted] grade levels behind. (Petitioner's Exhibit 15-7)

8. On November 5, 2015, School B updated the student's IEP. The IEP prescribed specialized instruction and related services. The specialized instruction was as follows: 5 hours per week of specialized instruction in reading inside general education, 4 hours per week of specialized instruction in written expression in general education, 13.5 hours per week of specialized instruction outside general education with 7 of those hours dedicated to math, 2.5 hours dedicated to reading and 1 hour to written expression. The IEP included academic goals only in these three areas of concern. Three hours of specialized instruction per week were to be provided outside general education were not directed toward any particular area of concern. However, the IEP noted, with regard to these hours, that the student "required additional support outside the classroom in order to support her processing and memory needs in retaining academic content." (Petitioner's Exhibit 15-1, 15-3, 15-4, 15-5, 15-6, 15-7, 15-8, 15-9, 15-10, 15-15)

9. The student's November 5, 2016, IEP also prescribed the student be provided ESY services. School B determined on November 5, 2015, that the student's math skills were jeopardized by a break in services, as it took an unreasonable amount of time for her to recoup her math skills after a break in services. (Petitioner's Exhibits 15-18, 16-1)

10. The student's School B IEP and School A IEP indicated that with regard to her reading and written expression instruction, the student needs instruction outside the classroom to help her catch up to grade level. (Petitioner's Exhibits 15-16, 21-13)

11. The student's parent became dissatisfied with the instruction the student was receiving at School B, particularly with the instruction being provided in the resource special education classroom. The student found it difficult to focus while in the resource classroom because of the behavioral problems of other students. In addition, the special education teacher was disrespectful to the students. As a result, the parent withdrew her from School B and enrolled her in School A for second semester 2015-2016. (Parent's testimony)

12. In January 2016, the student's parent took copies of the student's report card and her IEP to School A. The School A special education coordinator looked at the student's IEP at the time of enrollment and simply said it was okay for the student to enroll. School A

notified the student's parent that it would conduct a thirty-day review of the student's IEP and performance. (Parent's testimony)

13. On February 24, 2016, School A convened a meeting to review the student's performance and her IEP. The student's parent participated in the meeting along with her educational advocate. The team noted the student was in a general education class of 27 students with two teachers. For English Language Arts ("ELA") the student was in a small group of about 8 students. (Petitioner's Exhibits 19)

14. At the February 24, 2016, meeting, the team revised the student's IEP. The IEP prescribed specialized instruction and related services. The team removed the 3 hours per week of specialized instruction outside general education that was not dedicated to any particular area of concern in the student's School B IEP. The student's new IEP prescribed the following weekly specialized instruction: 5 hours per week of specialized instruction in reading in general education, 4 hours per week of specialized instruction in written expression in general education and 10.5 hours per week of specialized instruction outside general education with 7 of those hours dedicated to math, 2.5 hours dedicated to reading and 1 hour to written expression. The IEP indicated the ESY services were not required for the provision of FAPE to the student. (Petitioner's Exhibits 15-15, 21-1, 21-23, Respondents Exhibit 4-24)

15. During the February 24, 2016, meeting, the parent's advocate pulled the parent aside and asked if she agreed with the reduction of three hours of specialized instruction outside general education. The advocate then expressed to the team that the parent disagreed with the reduction in hours of instruction. The School A team members stated that because the hours were not designated for any particular area of concern they believed these hours were unnecessary. (Parent's testimony)

16. The School A team members maintained the reduction in hours in the student's IEP and stated that the student's need for the additional hours of specialized instruction would be reconsidered at a subsequent IEP meeting with a review of the student's performance. ESY was not discussed during the February 2016 meeting and the parent's advocate did not bring it up. (Parent's testimony)

17. On April 6, 2016, School A convened an IEP meeting to review the student's progress since the February 24, 2016, meeting. The student's parent attended without her advocate. ESY was not addressed, and the student's parent did not remember to bring up the additional three hours of specialized instruction that had been removed from the IEP at the February 24, 2016, meeting. The student's teacher reported that the student had made progress in math and reading. There were no changes to the IEP after the April 2016 meeting. (Parent's testimony, Petitioner's Exhibit 23-1)

18. School A assessed the student's math and reading skills using the i-Ready assessment. The student's i-Ready math score was below grade level. However, she made progress of 23 points from January 2016 to June 2016. The target score for her grade level at the time was a score of 550. On January 28, 2016, the student scored 440; on March 11,

2016, the student scored 447 and on April 14, 2016, her score dropped to 435 and on May 20, 2016, she scored 463. The targeted growth for a student using this i-Ready program is 13 to 23 point increase in one school year. The student achieved a 23-point increase from January 2016 to June 2016. Thus, the student made a year's progress in math in half a school year while she was attending School A. (Respondent's Exhibit 8-1, 9-3, 9-4)

19. By the end of the year the student's overall math performance was at level 4 or fourth grade. Her number and operations was at level 6 or 6th grade and her Algebra and Algebraic thinking was at level 4 or 4th grade. In geometry she was at level 4 or fourth grade. (Petitioner's Exhibit 26-2)

20. The student took the scholastic reading inventory ("SRI") in February 2016 and scored 657, "below basic," placing her around a third grade reading level. In June 2016 the student's score was 777. She progressed to 4th grade reading level from the 12th percentile for her grade to the 24th percentile. Thus, the student's showed a year's academic growth in this assessment in the time she attended School A.[8] (Respondent's Exhibits 4-8, 10-1)

21. At School A, the student had two special education teachers, one for ELA and reading instruction, and another special education teacher for math. The student's ELA/reading special education teacher co-taught with a general education teacher in the ELA class. This special education teacher was the student's sole teacher in the student's Read-180 class. (Witness 4's testimony, Witness 5's testimony)

22. In the student's School A ELA classroom there were 27 students. The general education teacher and the special education teacher used a parallel teaching model. The special education teacher was in the back of the room where there was another writing board and table where she instructed a small group of 5 to 8 students. Every day the student was assigned to the small group usually to focus on writing skills and sometimes reading skills. The class period was 70 minutes, 5 days per week. The student was in the small group for the entire class period. Sometimes the special education teacher would pull in another 3 to 4 students into the small group based on their education needs. The group was limited to a maximum of nine students and was a mix of special education students and English language learners ("ELL"). The majority of the students had IEPs. (Witness 4's testimony. Petitioner's Exhibits 15-15, 15-16, 19, 21)

23. The student's Read-180 class was one hour per day, 5 days per week. Students were in groups of no more than 7 students and rotated through three different stations within the classroom, spending 20 minutes at each station. Students were on computer on software at their individual reading level for twenty minutes, were in small group instruction for 20 minutes, and spent 20 minutes in independent reading. There were 21 students in the class. Generally, the same students rotated together. The majority of the children in the

[8] The Hearing Officer notes, however, using a different assessment at School B the student's reading level was measured at the beginning of 5th grade level at the start of SY 2015-2016 for instructional pursposes rather than independent reading.

student's group had IEPs, and the reading level of all the students in her group was comparable. (Witness 4's testimony)

24. School A provided the student math instruction through a special education teacher in her math class for 1 hour per day. During the class the special education teacher pulled the student out for instruction in a small group in a space within the same classroom. The special education teacher also taught the student in her science class where she was also pulled out by the special education teacher for small group instruction in the same classroom. Each of the student's classrooms was co-taught by a special education and general education teacher. Each special education teacher had a space in the classroom with a separate table and board at which they conduct small group instruction separate, and apart, from the general class. (Witness 5's testimony)

25. The student's IEP required that the student be provided 19.5 hours per week of specialized instruction. She was with the ELA special education teacher 350 minutes per week or 5 hours 50 minutes. The student was in the Reading-180 for 5 hours per week. The student was also provided specialized instruction in math for 5 hours per week of nearly 16 hours per week of instruction from a special education teacher. In addition, the student received specialized instruction in her science class, but it is unclear how many hours per week of additional specialized instruction she was provided beyond her ELA, Read-180 class and math class. (Witness 4's testimony, Witness 5's testimony)

26. From the time the student was enrolled in January 2016 School A until the February 24, 2016 meeting, School A implemented the student's School B IEP in a similar manner as it did after the February 24, 2016, meeting. (Witness 4's testimony, Witness 5's testimony)

27. The student was focused and working hard within a couple of weeks of arriving at School A. Although she was significantly below grade level, she student made huge gains in both her reading and writing during the time she attended School A. The student benefited from being with general education students and frequently she did not want to leave the room for related services. In the Read 180 class the student was consistently on task and willing to work. The student reads independently at fourth grade level; however, her School A special education teacher believes she can be instructed at middle school level. (Witness 4's testimony, Respondent's Exhibits 10-1, 11-9, 11-10, 12)

28. The student's May 11, 2016, IEP progress report reflects that the student was making progress on all her IEP goals. (Petitioner's Exhibit 24)

29. The student's June 17, 2016 report card reflects she had passing grades in all subjects including her science class. (Respondent's Exhibit 7)

30. Two educational advocates testified on behalf of Petitioner as expert witnesses and offered opinions about the student's level of instruction need. They both testified that the student needs as much small group instruction as possible because she gets distracted easily. However, the witnesses had never observed the student and are not familiar with

the physical environment or instruction provided at School A. (Witness 1's testimony, Witness 3's testimony)

31. The advocate who testified as an expert witness gave her opinion that implementation of the IEP in small groups within the general education classroom would not qualify as implementation of the student's specialized instruction outside general education. However, the witness acknowledged that a school could provide special education in a ways other than a separate classroom. (Petitioner's Exhibit 32-1)

32. "Outside general education" and "inside general education," including the terms "push-in" and "pullout", describe methods in which special education is provided to students by either the teacher pushing into the general education classroom or the teacher pulling the student out of the general education classroom to a separate room, usually called a resource room. In a resource room the special education teacher teaches special education students a modified version of what the general education teacher is teaching and/or addresses a student's IEP goals. (Witness 1's testimony)

33. However, according to the student's School A special education teacher, outside general education means outside the classroom in a small group setting taught by a special education teacher. The education can be delivered in the same classroom but in a different space in the room and students are receiving instruction based on their individual needs. (Witness 4's testimony)

34. DCPS, on it's website, describes outside general education as follows: "outside of general education" refers to all specialized instruction and services that are provided to a class or grouping *made up entirely of students with disabilities (emphasis added)* students with less than 20 hours of specialized instruction outside of general education in their IEPS generally receive services in a Learning Lab, also referred to as a resource room or pull-out services. A Learning Lab is a classroom that is separate from the general education classroom where students with disabilities are given direct, specialized instruction and academic assistance. Student in this setting spend part of their time in the Learning Lab and part of their time in the general education setting with modifications and and/or accommodations." (Petitioner's Exhibit 32)

35. DCPS, on it's website, describes inside general education as follows: "inside of general education" means that the specialized instruction and related services for students with disabilities will served while they are with their peers without disabilities in the general classroom. DCPS believes that all students will benefit from including students with disabilities in a general education setting to the greatest extend possible." (Petitioner's Exhibit 32)

36. ESY is usually provided to a student if the student needs additional school days in order for FAPE to be provided and/or when a prolonged absence would negatively impact the student. A team would consider regression, recoupment and rate the student is progressing or an emerging skills situation. (Witness 1's testimony)

37. Petitioner had the student's learning ability assessed through the use of Lindamood-Bell ("LMB") on August 8, 2016. The student's reading fluency was assessed as being approximately 4th grade level. As a result LMB recommended the student take its "Seeing Stars" program to develop her cognitive ability for reading. LMB also recommended that the student would benefit from developing her language processing skills through its "Visualizing and Verbalizing" program that would provide assistance in the area of reading comprehension. (Witness 2's testimony, Petitioner's Exhibit 30)

38. LMB recommends the student take its first program for 4 hours per day for 5 days per week for 8 to 10 weeks or 160 hours or 200 hours at $122 per hour. In the alternative, LMB would administer 120 hours in "Seeing Stars" and the remaining 40 to 80 hours in the "Visualizing and Verbalizing" and then reassess the student and make further recommendations on any additional services. LBM estimates that with these services the student should be able to increase her reading from 4th to 8th grade reading material, although her reading speed or may not increase at that rate. The cost of the total recommended program ranges from a total of $19,520 to $24,400. (Witness 2's testimony, Petitioner's Exhibit 30)

39. Petitioner's advocate developed a compensatory education plan and proposed the amount of services LBM recommended. In developing the plan she assumed that all the violations alleged in the complaint occurred and the student missed 411 hours of services including specialized instruction and ESY. The compensatory education plan did not credit School A for any instruction outside general education. In developing the plan the advocate considered the student was due compensatory education because she is below grade and the LMB program would be a start toward the student getting to grade level. The advocate did not attend the student's IEP meeting(s), never talked to student or any of the teachers, never spoke to parent prior to the hearing and did not consider the student's grade and IEP progress reports in her development of the plan. (Witness 1's testimony, Petitioner's Exhibit 28)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

Generally, pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

However, pursuant to D.C. ACT 20-486, enacted November 20, 2014, which provides in pertinent part: "In special education due process hearings occurring pursuant to IDEA (20 U.S.C. §1415(f) and 20 U.S.C. § 1439(a)(l), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that: (i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence. ...This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016."

As stated in the pre-hearing order, Petitioner has both the burden of production and persuasion as to the first issue adjudicated. Respondent has the burden of persuasion with respect to the second and third issues adjudicated after Petitioner establishes a prima facie case on these two issues. The burden of persuasion is to be met by a preponderance of the evidence.

ISSUE 1: Whether the LEA denied the student a FAPE by failing to implement the student's IEP from January 2016 through the end of SY 2015-2016 by not providing the student specialized instruction outside the general education setting that her IEP(s) required.

Conclusion: Petitioner sustained the burden of proof that DCPS failed to implement the student's IEP by failing to provide the student specialized instruction outside general education.

Petitioner asserts that Respondent provided no specialized instruction outside general education that was required both in the student's November 5, 2015, IEP and her February 24, 2016, IEP, and was not provided ESY services through July 29, 2016.

Pursuant to 34 C.F.R 300.323 (e) School A was required to must provide the student services comparable to those described in her School B IEP, until School A either adopted the School B IEP, or developed and implemented a new IEP.[9]

[9] If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new

Once a student's IEP is developed, the school district "must ensure that ... special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(c)(2). Since a "de minimis failure to implement all elements of [an] IEP" does not violate the IDEA, the plaintiff must "demonstrate that the [school district] failed to implement substantial or significant provisions of the IEP." *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 274 (D.D.C. 2011). In other words, the school district must have committed "[material] deviations from the IEP's stated requirements" for the plaintiff to recover under the IDEA. *See Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007).

"While this Circuit requires the plaintiff to demonstrate more than a mere difference between the hours of service provided by the school district and the hours prescribed in the student's IEP," see *Savoy v. Dist. of Columbia*, 844 F. Supp. 2d 23, 34 (D.D.C. 2012), "it does not require proof that the student suffered "demonstrable educational harm" for the plaintiff to prevail", see *Wilson*, 770 F. Supp. 2d at 275.

5E DCMR 3002.3 provides that:
(c) The LEA shall ensure that an IEP is developed and implemented for each eligible with a disability served by the LEA.
(d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP…
(f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

Petitioner asserts that none of the instruction the student was provided at School A was provided outside general education and that School A only provided the student specialized instruction inside general education.

The facts of this case demonstrate that when the student began attending School A in January 2016, she had an IEP from School B that prescribed that the student be provided specialized instruction both inside and outside special education. School A developed its own IEP for the student on February 24, 2016, that also prescribed specialized instruction both inside and outside general education. The student's IEPs clearly separate and distinguish the services to be provided inside and outside general education.

From the time the student began attending School A, her specialized instruction in reading, written expression and in math was provided in a classroom that was co-taught by a general education and a special education teacher. The student was, however, pulled into small group instruction inside that same classroom where she was provided instruction from a special

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public agency either was required to IEPs for children who transfer public agencies in the same State. If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either— (1) Adopts the child's IEP from the previous public agency; or (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§ 300.320 through 300.324.

education teacher. In the student's ELA class, the student was mostly with other students who had IEPs. However, the student's School A special education teacher testified that within the small group there were some students who did not have IEP.

Likewise, in the student's Read 180 class, the student was in a small group mostly with students who had IEPs. Petitioner asserts that only 20 minutes of this period should be counted as instruction because the teacher only engaged in direct instruction for twenty minutes and the other times the student was working on the computer on reading independently. The Hearing Officer is not convinced by this argument. The special education teacher supervised the student in each of the station rotations and thus the evidence demonstrates the student was receiving instruction from the teacher the entire class period of 1 hour per day for five days per week. The Hearing Officer concludes that the student was being provided specialized instruction from a special education teacher during this period for 1 hour per day, despite the fact that there were general education students in the room who were rotating through other stations during the class period.

Although the student's parent testified that the student told her that she was distracted in the small groups while in the same classroom as the rest of the students, the student's special education teacher testified that she saw not distractions or off task behaviors from the student. The Hearing Officer finds the teacher's testimony more credible in this regard. The parent did not visit the classroom or even confer with the student's teachers regarding the student's progress. Nonetheless, Petitioner still asserts that this instruction should not be counted as instruction outside general education. Respondent, on the other hand, asserts that that outside general education does not require that the student be in a separate room.

It is conceivable that the student being pulled for small group instruction would not necessarily require a separate room as long as the instruction was truly separated and free of distractions for the student's in the small group. Thus, the Hearing Officer concludes that the small group instruction in a separate space within the same classroom was not a fatal flaw to the outside general education delivery.

However, the special education teacher testified that within the small group, the student was in both the ELA and Read-180 classroom. The group of children the student was with was not exclusively special education students. Although the evidence indicates that students in the group were operating at or near the same academic level, all the students in the group did not have IEPs.

The student's specialized instruction was provided inside of a general education classroom where the special education teacher had a designated area in which to provide IEP instruction. While in this area, the teacher had a separate board and table for students. The creation of a designated area for the provision of special education services operated like a room-within-a-room.

The DCPS website designates "outside of general education" as all specialized instruction and services that are provided to a class or grouping *made up entirely of students with disabilities (emphasis added)* students with less than 20 hours of specialized instruction outside of general education in their IEPS generally receive services in a Learning Lab, also referred to as a

resource room or pull-out services. A Learning Lab is a classroom that is separate from the general education classroom where students with disabilities are given direct, specialized instruction and academic assistance. Students in this setting spend part of their time in the Learning Lab and part of their time in the general education setting with modifications and and/or accommodations."

Although the issue of whether the LEA can satisfy the requirement of "outside of general education" through the implementation of a designated area within the general education classroom, presents a novel question for this Hearing Officer, the Hearing Officer need go no further than the content of the DCPS website on the criteria of "outside of general education". According to DCPS specialized instruction and services must be provided to a class or grouping *made up entirely of students with disabilities (emphasis added).* [10]

DCPS breached its requirement that the grouping be made up entirely of special education students by bringing children into the student's group who did not have IEP's and were not special education students. Although DCPS raised the fact that the children in the student's group were all performing at about the same level, this does nothing to repair the breach caused by general education student's participating in the student's specialized instructional time. In making this conclusion, the Hearing Officer is not saying that the student did not derive benefit from her education, no matter how flawed in its grouping composition. However, it is important to recognize that services are provided "outside of general education" for a reason, and the reason is usually that the student requires the attention of the teacher and the exclusion of general education students.

There was no persuasive authority presented that suggests that in order for a student to receive specialized instruction outside of the general education setting, the student must physically be taken to another classroom. The fact that there was a separate learning space where the student could receive specialized instruction away from the general education students appears to satisfy the "outside of general education" requirement. Despite this observation, DCPS appears to have compromised the provision of specialized instruction outside of general education by allowing children who were not special education students to partake of the instruction provided to the student. The Hearing Officer finds that this act breaks the protocol for outside special education instruction and renders the instruction that the special education teacher provided to be specialized instruction inside general education rather than outside general education. The student's math instruction was also delivered in similar manner, inside general education.

In the case of a failure to implement and IEP there is no requirement that Petitioner demonstrate harm. The evidence demonstrates the student made significant progress both in reading, and math during her time at School A and this factor is taken into account in terms of remedy but not in terms of determining whether there was a denial of a FAPE.

Of the 19.5 hours of specialized instruction the student was to be provided each week, the majority (10.5) of these hours were to be provided outside general education. Thus, the Hearing

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[10] Although there was testimony offered by both parties' witness about the definition of the term "outside general education" the Hearing Officer found the DCPS website definition the most persuasive as it clearly documented the term.

Officer concludes Petitioner sustained the burden of proof by a preponderance of the evidence that School did not fully implement the student's IEP and that the services the student was not provided was substantial.

ISSUE 2. Whether the LEA denied the student a FAPE by failing to provide an appropriate IEP reasonably calculated to meet the student's unique needs from February 24, 2016, to the present, because the DCPS removed three hours of specialized instruction outside general education that was in the student's previous IEP and/or did not provide for ESY.

Conclusion: Respondent did not sustain the burden of proof on the appropriateness of the student's February 24, 2016, IEP.

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). See 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. "The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction:" *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005), quoting *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009) ("IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.").

"the Hearing Officer must first look to whether the State complied with the procedures set forth in the IDEA, and second, whether an individualized educational program developed through the IDEA's procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. Id. at 206-07 *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200 (1982),

The court judges the IEP prospectively and looks to the IEP's goals and methodology at the time of its implementation. *Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008); *District of Columbia v. Walker*, 2015 WL 3646779, *6 (D.D.C. Jun. 12, 2015) (the "adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.").

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

child receives some educational benefit. *O.S. by Michael S. and Amy S. v. Fairfax County Sch. Bd.*, 115 LRP 50343 (4th Cir. October 19, 2015).

34 C.F.R. 300.106 (a) provides:
(1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.
(2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with Sec. Sec. 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.

Petitioner alleges that the student's IEP was inappropriate because it reduced the student's hours of specialized instruction outside general education by three hours per week from the IEP the student brought to School A from School B in January 2016. Petitioner also alleges the February 24, 2016, IEP was inappropriate because it did not prescribe ESY services.

The evidence demonstrates that the student's School B IEP was amended in May 2015 to add three hours of specialized instruction outside of general education to take the place of the student's science class at School B. The additional hours of specialized instruction were not earmarked for any specific area of concern.

The School A team at the February 24, 2016, meeting inquired as to what the additional three hours were to address and there was no indication except Petitioner's advocate asserting the hours were for reading and math. However, there was no evidence that this was in fact the case. The evidence demonstrates that the student did not have science class at School B and instead was provided three additional hours of specialized instruction. The evidence demonstrates that at School A the student had a science class and was provided specialized instruction in that class. Although the School A team did not reduce the student's hours specifically because of the student's science class, in the absence of any specific area in which the instruction should be provided, School A's actions in removing the hours was reasonable.

Although Petitioner's expert witness testified that a reduction in specialized instruction would be supported only by a sustained improvement of the student's performance over time, the Hearing Officer did not find this testimony convincing. This witness also assumed the three hours were to be provided in reading and math and the witness had had never observed the student and are not familiar with the instruction provided at School A beyond her review documents. The evidence demonstrates that there was a specific reason for the additional 3 hours School B added to the student's IEP, and that reason was no valid at School A. The student was being provided a science class with the support of special education teacher and in fact passed her science class at School A. Consequently, the Hearing Officer concludes that Respondent sustained the burden of proof that the student's IEP was appropriate with regard to the reduction in specialized instruction outside general education by 3 hours.

However, there was insufficient evidence presented to sustain the burden of proof that the student's IEP was appropriate with regard to ESY. The evidence demonstrates the student attended ESY in summer 2015 at School B and the ESY was to address her math skills only.

Although the student made significant progress at School A in math and reading as measured by the assessments, the evidence demonstrates that in those measures at least as it pertains to math the student's scores dipped when she returned to school from spring break. Although she was apparently able to recoup the skills by the end of year assessments and she demonstrated a full year's growth in math, the student's scores after spring break is some evidence of regression. There was no evidence presented by Respondent with regard to ESY. Respondent simply argued that with the student's progress she would not regress over the summer and that she did not require ESY services to retain the gains she made in math.

The evidence demonstrates that ESY was not discussed at the February 24, 2016, meeting, nor was it discussed at the April 2016 meeting. The IEP was apparently simply changed to reflect that the student did not need ESY services without a discussion by the team as to why the service was being removed, unlike the removal of the three hours of specialized instruction where there was some discussion. None of Respondent's witnesses specifically addressed this ESY issue to give a reasonable explanation as to why the service was removed from the student's IEP. Consequently, the Hearing concludes that Respondent did not sustain the burden of proof on this issue and the student was denied a FAPE because she was not provided ESY services during the summer of 2016.

ISSUE 3. Whether the LEA denied the student a FAPE by failing to provide an appropriate placement from January 2016 to the present, because the current placement is incapable of implementing the specialized instruction outside general education that the student's IEP prescribes.

Conclusion: Respondent did not sustain the burden of proof that School A was an appropriate placement for the student that could implement her IEP.

"Educational placement" means educational program, not the particular institution where that program is implemented." *White v. Ascension Parish School Board,* 343 F.3d 373 (5th Cir. 2003), 39 IDELR 182. A placement is not a physical location, but a program of educational services offered to the student. *Sherri A.D. v. Kirby*, 19 IDELR 339 (5th Cir. 1992).

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).

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.")

In determining the educational placement of a child with a disability, each public agency must

ensure that the placement decision 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; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

The evidence demonstrates that the student was provided specialized instruction in a general education classroom and even though she was provided small group instruction from a special education teacher in a separate area away from the majority of the general education class, she received instruction even in those small groups with general education students. The Hearing Officer has concluded that this was a failure to implement the student IEP and that the failure to implement was substantial. The evidence demonstrated that School A only provided specialized instruction in the format that the student was provided her specialized instruction and did not provide the instruction in any other way. Although School A might have been able to implement the student's IEP with fidelity with instruction outside general education, there was no evidence presented by Respondent that School A could or would do so for the student. Absent any evidence in this regard the Hearing Officer concludes that Respondent did not sustain the burden of proof on this issue and the student was denied a FAPE as a result.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that the student was not provided all the specialized instruction outside general education she was to provided and was not provided an appropriate IEP because her February 24, 2016, IEP did not prescribe ESY services and because DCPS provided the student an inappropriate placement at School A.

Compensatory Education

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 requests as compensatory education that the student be provided the services recommended by LMB. However, the compensatory education proposed and requested was far beyond what is reasonable to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.

The evidence demonstrates the student made significant progress both in reading, and math during her time at School A and this factor should be taken into account in terms of remedy. The advocate in her compensatory education proposal simply recommended the proposal that had been provided to Petitioner from LMB. The advocate did not attend the student's IEP meeting(s) and never talked to student or any of the teachers, never spoke to parent prior to the hearing and did not consider the student's grades and IEP progress reports in her development of the plan.

There was no other testimony other than that of advocate and the LBM representative that was presented with regard to compensatory education from which the Hearing Officer could fashion an appropriate remedy. The Hearing Officer concludes that the amount of services that were requested far exceeded the actual harm to the student, but instead was designed to get the student to grade level rather than remediate the actual harm to the student. Their testimony did demonstrate, however, the student would benefit from some reading remediation.

The Hearing Officer notes the difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position. The Hearing Officer believes an alternative approach in awarding compensatory education is for there to be a specific evaluation to look at where the student was operating when the denial of FAPE occurred and what she could have reasonably been expected to achieve academically from January 2016 to the end of SY 2015-2016, including the services she should have been provided in ESY had the student's February 24, 2016, IEP included the similar services in math she was provided for ESY 2015. A Court and a Hearing Officer may order assessments to assist in determining compensatory education. Id. at 526. *Davis v. District of Columbia*, 817 F.3d 792 [11]

Consequently, the Hearing Officer has fashioned alternative remedies from which Petitioner may choose: either 100 hours of independent tutoring at the OSSE/DCPS prescribed rate that can be used by Petitioner at a provider of her choice or Petitioner may elect to obtain and independent evaluation and have that evaluation reviewed by the parties to determine an appropriate amount of compensatory education. If the parties cannot reach an agreement on compensatory education Petitioner may file a separate due process complaint to seek compensatory education for the denials of FAPE determined in this HOD.

ORDER: [12]

1. Within ten (10) business days of the date of this order, DCPS shall provide Petitioner authorization for 100 hours of independent tutoring at the DCPS/OSSE prescribed rate. DCPS shall not be required to fund this award of 100 tutoring hours if Petitioner choses option #2 below in this order.

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[11] Davis v. District of Columbia, 817 F.3d 792 "In carrying out the complicated work of fashioning such a remedy, the district court or Hearing Officer should pay close attention to the question of assessment. Assessments sufficient to discern … needs and fashion an appropriate compensatory education program may now exist. But it may also well be that further assessments are needed. If so, the district court or Hearing Officer should not hesitate to order them…"

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

2. In the alternative to the independent tutoring awarded above, Petitioner, at her sole discretion, may opt for DCPS to fund an independent evaluation that assesses the student's academic needs for the purposes of determining appropriate compensatory education for the denials of FAPE determined herein and if the parties are unable to reach an agreement on compensatory services after a review of that evaluation then Petitioner may pursue that claim in a separate due process complaint. Petitioner shall notify Respondent of which of the two options she has chosen within five (5) business days of the issuance of this order.

3. If Petitioner choses option two above, DCPS shall, within ten (10) business days of the issuance of this order, issue Petitioner authorization for an independent educational evaluation at the OSSE prescribed rate that assesses the student's academic needs for the purposes of determining appropriate compensatory education for the denials of FAPE determined by this HOD and if the parties are unable to reach an agreement on compensatory services after a review of that evaluation then Petitioner may pursue that claim for compensatory education in a separate due process complaint.

4. All other requested relief is denied.

APPEAL PROCESS:

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

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.
Hearing Officer
Date: September 19, 2016

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