

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

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Office of Dispute Resolution  
December 15, 2014

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STUDENT, <sup>1</sup>	)	
through the Parent,	)	
	)	Date Issued: December 13, 2014
Petitioner,	)	
	)	Hearing Officer: John Straus
v.	)	
	)	
District of Columbia Public Schools (“DCPS”)	)	
	)	
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

The Petitioner, who is the Student’s mother, filed a due process complaint notice on September 29, 2014, alleging that Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”).

The Petitioner alleged that the DCPS failed to review and revise the April 9, 2014 Individualized Education Program (“IEP”) by June 19, 2014 to determine whether annual goals were being achieved and when it failed to revise the IEP as appropriate to address any lack of expected progress toward the general education curriculum. The Petitioner also alleged that DCPS failed to develop an IEP and determine a placement that was reasonably calculated to enable the Student to make progress in the general education curriculum on April 9, 2014; specifically, the IEP fails to provide academic goals in Math and not enough specialized instruction outside the general education setting in light of the student’s lack of educational progress.

The Petitioner sought a meeting to review and revise the Student’s IEP to provide goals in Math and more specialized instruction outside the general education setting. The Petitioner also requested the Hearing Officer to award the student compensatory education in the form of services at tutoring service to redress the alleged lack of appropriate special education and related services since April 9, 2014.

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<sup>1</sup> Personal identification information is provided in Appendix A.

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DCPS asserts the April 9, 2014 IEP team reviewed the Student's progress and current program in special education and updated the present levels of performance and annual goals. As documented in his prior written notice, the team relied on IEP progress notes, demonstrated progress on his academic goals, and the 2013-2014 Paced Interim Assessment scores as a basis for the proposed action. The team also considered input from the student's teachers regarding participation in academic classes. DCPS stated the IEP was appropriate and was reasonably calculated to provide educational benefit at the time of its development.

### **Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R."); and 38 D.C. Code 2561.02.

### **Procedural History**

The due process complaint was filed on September 29, 2014. The hearing took place on November 12, 2014. The parties concluded their case in chief and the record was closed.

Neither Petitioner nor Respondent waived the resolution meeting. The resolution meeting took place on October 20, 2014. At the resolution meeting, parties agreed to keep the 30-day resolution period open. The 30-day resolution period ended on October 29, 2014, the 45-day timeline to issue a final decision began on October 30, 2014 and the final decision is due December 12, 2014.

The due process hearing was a closed hearing.

Neither party objected to the testimony of witnesses by telephone. The Petitioner participated in person.

The Petitioner presented four witnesses: the Petitioner, an Educational Advocate ("EA"), a School Psychologist ("SP") and a Special Education Teacher ("SET"). DCPS presented one witness: the Special Education Coordinator ("SEC").

The Petitioner's Disclosure Statement, filed and served on November 5, 2014, consisted of a witness list of five witnesses and documents P-01 through P-24. The Petitioner's documents were admitted without objection.

The Respondent's Disclosure Statement, filed and served on November 5, 2014, consisted of a witness list of four witnesses and documents R-1 through R-12. The Respondent's documents R-11 were admitted in to evidence over objection all other document were admitted in to evidence without objection.

The issues to be determined in this Hearing Officer Determination is as follows:

## Hearing Officer Determination

1. Whether the Respondent denied the Student a FAPE by failing to review and revise the April 9, 2014 Individualized Education Program (“IEP”) by June 19, 2014 to determine whether annual goals were being achieved and when it failed to revise the IEP as appropriate to address any lack of expected progress toward the general education curriculum.
2. Whether the Respondent denied the Student a FAPE by failing to develop an IEP and determine a placement that was reasonably calculated to enable the Student to make progress in the general education curriculum on April 9, 2014; specifically, the IEP fails to provide academic goals in Math and not enough specialized instruction outside the general education setting in light of the student’s lack of educational progress.

For relief, the Petitioner requested the Hearing Officer to order DCPS to convene a meeting to review and revise the Student’s IEP to provide goals in Math and more specialized instruction outside the general education setting and the Hearing Officer to order a compensatory education to redress the lack of special education services as a result of the inappropriate IEP from April 9, 2014 to the present.

### **Findings of Fact**<sup>2</sup>

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer’s Findings of Fact are as follows:

1. The Student is \_\_\_\_\_ residing in the District of Columbia with the Petitioner who is the Student’s mother.
2. On May 20, 2009, the student received a psychological assessment. The assessment included a Wechsler Intelligence Scale for Children –Fourth Edition which yielded average to low average standard scores. The assessment also included a Beery-Buktenica Developmental Test of Visual Motor Integration which yielded a very low standard score of 59. The assessment included the Behavior Rating Inventory of Executive Functioning which yielded elevated scores indicating the Student has difficulty with some aspects of executive function such as the Student’s ability to inhibit impulsive responses, adjusting to changes in routine, modulate emotions, sustain working memory, plan and organize problems solving approaches organize environment and materials, and monitor his own behavior. The Connor’s Rating Scale indicated the Student has the most difficulties with Attention Deficit with Hyperactivity (“ADHD”) symptomology. This profile was reflected by the Clinical Assessment of Behavior and the Brown Attention-Deficit Disorder Scales for Children. The evaluator stated the student is a student with Other Health Impairment (“OHI”) under the IDEA based on the ADHD diagnosis.<sup>4</sup>

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<sup>2</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness’s testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer’s determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>3</sup> Petitioner

<sup>4</sup> P-12, SP

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3. On March 13, 2012, the Student received a Woodcock Johnson Normative Update Test of Achievement III (“WJ III”) which yielded average scores of academic achievement.<sup>5</sup>
4. On May 10, 2012, the IEP team convened. The team noted the Student has a Grade Point Average (“GPA”) of 1.35 and has been absent 19 days and tardy 78 days during the 2011-2012 school year. The team reviewed the March 13, 2012 WJ III and determined the Student’s disability impacts his education and the Student is a student with OHI under the IDEA. The team developed goals in reading and written expression and the team determined the student required four hours per week of specialized instruction to be provided in the general education setting.<sup>6</sup>
5. The student brought a knife to school and was expelled from Charter School on February 22, 2013. On February 28, 2013, the IEP team determined that the incident was not a manifestation of the Student’s disability.<sup>7</sup>
6. The Student enrolled in Middle School on March 25, 2013. On April 19, 2013, the Middle School IEP team convened. The team revised the Student’s goals and decreased the student’s hours of specialized instruction to 2.5 hours per week in the general education setting.<sup>8</sup>
7. On April 9, 2014, the IEP team reconvened. The Petitioner noted the Student is frustrated in his classes, failing math and lack of homework. She expressed concerns regarding the Student’s decreased progress in his classes and requested online access to the Student’s homework assignments. The team revised the Student’s goals and decreased the student’s hours of specialized instruction to 2 hours per week in the general education setting.<sup>9</sup>
8. The Student received an A in Elective MS and Art 8, a B in Music, a C in U.S. History and Geography and an F in English, Pre-Algebra and Science during the 2013-2014 school year.<sup>10</sup>
9. The Student received failing grades in all of his classes during the first advisory of the 2014-2015 school year except English and Science. The student received a D in English and a B in Science.<sup>11</sup>

### **Conclusions of Law**

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

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<sup>5</sup> P-13, SP

<sup>6</sup> P-6, P-7, EA

<sup>7</sup> P-8, EA, Petitioner

<sup>8</sup> P-9, EA

<sup>9</sup> P-10, P11, EA, Petitioner

<sup>10</sup> P-19, Petitioner

<sup>11</sup> P-16, Petitioner, EA

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“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005).

**DCPS did not deny the Student a FAPE by failing to review and revise the April 9, 2014 IEP by June 19, 2014 to determine whether annual goals were being achieved and when it failed to revise the IEP as appropriate to address any lack of expected progress toward the general education curriculum.**

FAPE means "special education and related services that are provided at public expense, under public supervision and direction, and without charge...and are provided in conformity with the" IEP. 34 C.F.R. § 300.17. 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 34 C.F.R. § 300.320. "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 issue of whether an IEP is appropriate is a question of fact for hearing. See, e.g., *S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003).<sup>12</sup>

Here, the Petitioner attended the April 9, 2014 IEP team meeting and expressed her concerns regarding the Student failing grade in Math. DCPS decreased the Student hours of service from 2.5 hours per week to 2 hours per week of specialized instruction. The Student then failed his Math class. The Petitioner is concerned about the Student's failing grades; especially in Math.

However, failing grades do not always mean a student is denied a FAPE. The amount of appropriate regular education progress, in terms of passing grades and grade-to-grade advancement, necessarily depends upon the abilities of each individual student with a disability. *Carter v. Florence County Sch. Dist. Four*, 18 IDELR 350 (4th Cir. 1991), aff'd, 20 IDELR 532 (U.S. 1993). See *Conklin v. Anne Arundel County Bd. of Educ.*, 18 IDELR 197 (4th Cir. 1991) (recognizing that some children, due to the extent of their disabilities, will never be able to

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<sup>12</sup> Judicial and hearing officer review of IEPs is "meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was 'reasonably calculated to enable the child to receive educational benefits.'" *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207); see also *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008) (IEP viewed "as a snapshot, not a retrospective"). However, an LEA also must periodically update and revise an IEP "in response to new information regarding the child's performance, behavior, and disabilities." *Maynard v. District of Columbia*, 54 IDELR 158 (D.D.C. 2010), slip op. at p. 6; see 34 C.F.R. § 300.324.

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perform at grade level and will require several years to achieve what would be to a nondisabled child a year's worth of progress); and *L.F. v. Houston Indep. Sch. Dist.*, 58 IDELR 63 (5th Cir. 2012, unpublished), cert. denied, 112 LRP 4838, 133 S. Ct. 248 (2012) ("although [the student] consistently performed at least one grade level below her peers, the IEP listed goals, specific objectives, and evaluation methods required [for her] to improve"). The Petitioner asserts that the Student failing grades indicates that the Student was denied a FAPE. However, the IEP team looked at other indicators such as IEP progress reports, informal assessment scores and teacher reports. Therefore, the Hearing Officer finds that the Petitioner did not meet her burden of proof on this issue.

### **DCPS did not deny the Student a FAPE by failing to develop an IEP and determine a placement that was reasonably calculated to enable the Student to make progress in the general education curriculum on April 9, 2014.**

The purpose of the IDEA is to provide a "cooperative process" between parents and schools, and a central component of this collaboration is the IEP process. *Schaffer v. Weast*, 546 U.S. 49 (U.S. 2005). The IEP is the cornerstone of the IDEA that sets forth the FAPE that is offered to a child with a disability eligible to receive special education and related services under the IDEA. 34 C.F.R. § 300.17.

The standard for determining if a student has received FAPE is whether the IEP was reasonably calculated to provide educational benefit to the student. A district's obligation to provide FAPE to a student with a disability is satisfied when the district provides the student with the personalized educational program necessary to allow the child to derive an educational benefit from that instruction. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982).

The IEP does not operate as a contract offering guarantees that a student will achieve a certain amount of academic proficiency. *Coale v. State Dep't of Educ.*, 35 IDELR 149 (D. Del. 2001). See *Schaffer v. Weast*, 51 IDELR 177 (4th Cir. 2009) (holding that the parents could not use the student's 10th-grade IEP to show that his eighth-grade IEP was inappropriate, as the eighth-grade IEP was reasonably calculated to provide FAPE at the time it was developed).

In this case, DCPS did revise the Student's goals in its annual review of the Student's IEP. It is not clear why the team reduced the Student's hours of services; however, the Petitioner did not object to the reduction of services at the time. The Hearing Officer finds that the IEP was reasonably calculated at the time to provide the Student a FAPE based on the information available to the IEP team. Therefore, the Petitioner did not prevail on this issue.

### **Compensatory Education**

The Petitioner must show a denial of FAPE to be entitled to compensatory education. See *Phillips v. District of Columbia*, 60 IDELR 277 (D.D.C. 2013).<sup>13</sup> The Hearing Officer finds the Student was not denied a FAPE; therefore, compensatory services are not warranted.

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<sup>13</sup> In *Phillips*, determining that the parent failed to link the student's current deficits with the district's denial of FAPE, the court denied her request for relief.

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**ORDER**

No relief is granted.

**IT IS SO ORDERED.**

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

Date: December 13, 2014

*/s/ John Straus*  
Hearing Officer