District of Columbia

Office of the State Superintendent of Education

OSSE
Student Hearing Office
March 26, 2013

Office of Review and Compliance
Student Hearing Office
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Confidential

Parent on behalf of the Student[1], Petitioners, v. School A Public Charter School ("School A") Respondent. Case # 2012-0669	HEARING OFFICER'S DETERMINATION Hearing Dates: February 27, 2013 March 19, 2013 March 20, 2013 <u>Representatives:</u> Counsel for Petitioner: Roberta Gambale, Esq. James Brown & Associates 1220 L Street, N.W. Washington, D. C. 20001 Counsel for School A PCS: Mathew Bogin, Esq. 5454 Wisconsin Avenue #760. Bethesda, Maryland. 20815 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

[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 February 27, 2013, March 19, 2013, and concluded on March 20, 2013, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2009 on February 27, 2013, and Hearing Room 2006 on the final two days of hearing.

BACKGROUND AND PROCEDURAL HISTORY:

The student is [redacted] in seventh grade and was at the start of school year ("SY") 2012-2013 attending "School A" a District of Columbia public charter school that operates as its own local educational agency ("LEA"). The student began attending School A during SY 2011-2012. Prior to attending School A the student attended another pubic charter school, ("School B")

When the student enrolled at School A she had an individualized educational program ("IEP") that prescribed 20 hours per week of specialized instruction outside general education and the following related services: occupational therapy ("OT'), speech/language and behavioral support. On March 29, 2012, an IEP meeting was convened at School A at which the student's services were reduced to the following: 10 hours of specialized instruction per week inside general education, 5 hours per week outside general education.

The student's parent later objected to the reduction in the student's specialized instruction and addressed other concerns about the student's IEP and program at School A in correspondence sent to School A on the parent's behalf by an educational advocate the parent obtained.

In response to the correspondence School A convened an IEP meeting on September 11, 2012. The student's parent participated in the meeting along with her advocate. The parent requested that the student's specialized instruction be increased and requested other changes to the student's program. School A agreed to some changes but did not increase the student's hours of specialized instruction outside general education. School A agreed to conduct an evaluation of the student before making the other requested changes to the student's IEP and program.

On September 25, 2012, Petitioner filed a due process complaint alleging School A had denied the student a free and appropriate public education ("FAPE") by reducing the student's specialized instruction in the March 29, 2012, IEP and failing to appropriately revise the IEP and provide the student an appropriate placement at the September 11, 2012, IEP meeting.

A resolution meeting was held on October 17, 2012. The parties expressed the desire to proceed directly to hearing thus the 45 day period began October 18, 2012, and ended on December 1, 2012. School A filed a response to the complaint on October 19, 2012.

The Hearing Officer conducted a pre-hearing conference ("PHC") on October 31, 2012, reviewed the issues and set a hearing date of November 20, 2012. Following the PHC Petitioner's counsel alerted the Hearing Officer and Respondent's counsel that Petitioner would not be available on the agreed upon hearing date and indicated an intention to file for a continuance.

On November 15, 2012, Petitioner's counsel filed a motion for a thirty (30) day continuance and extension of the Hearing Officer's Determination ("HOD") due date. The parties agreed to new hearing dates of December 19, 2012, and December 20, 2012. On November 15, 2012, an interim order of continuance was issued extending the HOD due date and continuing the hearing 30 calendar days.

On October 31, 2012, School A conducted a psychological re-evaluation that indicated the student had regressed academically. An IEP team at School A reviewed the evaluation on December 5, 2012. At the December 5, 2012, IEP meeting the School A members of the team recommended a change in the student's IEP to increase specialized instruction to 15 hours per week outside general education and 5 hours per week inside general education. The parent disagreed and requested the student be provided even more specialized instruction to the level of 26.5 hours per week outside general education.

The parent also requested additional accommodations to include reading of test questions in all academic areas, not just math, and that the IEP include a communication log to the parent for noting the student's assignments. The parent also requested a dedicated aide and an increase in the student's behavioral support services and a behavior intervention plan ("BIP"). Petitioner alleged the team refused these requests. School A acknowledged at the meeting it could not implement the student's revised IEP and stated its intention to notify OSSE so that an appropriate placement for the student could be identified.

The parties appeared for hearing on December 19, 2012, and at the hearing after a discussion of the facts and issues Petitioner made a verbal request followed by a written motion on December 20, 2012, to amend the complaint to include issues that allegedly arouse from the December 5, 2012, IEP meeting. Respondent did not object. At the hearing School A represented that it had already contacted OSSE and had stated that the student was in need of a more restrictive placement than School A could provide.

On December 20, 2012, Petitioner filed a motion to amend the complaint. Respondent agreed to the amendment in writing.[2] Petitioner filed the amended complaint on December 20, 2012, to include the events and any issues that arose from the December 5, 2012, IEP meeting. The parties agreed to convene a resolution meeting on the amended complaint.

On December 31, 2012, the Hearing Officer issued an order granting Petitioner's motion to amend. Thus, the timeline for the amended complaint began again.

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[2] Respondent's counsel agreed to the amendment in writing by email to the Hearing Officer dated December 31, 2012.

As a result of School A referring the student's placement to OSSE, OSSE agreed to place and fund the student at a private full time special education school, ("School C").

Counsel for School A filed a response to the amended complaint on January 14, 2013.[3] Respondent denied any and all alleged denial(s) of a FAPE and specifically denied that the student's IEP(s) and placement while she attended School A were inappropriate and asserted that the requested modifications to the student's IEP were not warranted prior to the availability of the data provided by the October 2012 evaluation.

Respondent asserted that based upon that evaluation the December 5, 2012, IEP team changed the student's IEP to increase the special education services that the team believed was appropriate including changing the student's disability classification to intellectual disability. School A asserted that thereafter it made a request to OSSE for a placement where the student's revised IEP could be implemented.

The resolution meeting on the amended complaint was held January 25, 2013, and was unsuccessful in resolving the issues. The parties expressed no desire to proceed directly to hearing. Thus, the 45-day period on the amended complaint began on January 20, 2013, and ended (and the HOD was due) on March 5, 2013.

A pre-hearing conference ("PHC") on the amended complaint in this matter was held on February 8, 2013.[4] At the time of the pre-hearing conference the student had begun attending School C. Petitioner was satisfied with that placement. Thus, the student's prospective placement was no longer at issue. Petitioner sought as relief an order concluding School A had denied the student a FAPE and ordering School A to provide the student compensatory education.

On February 13, 2013, the Hearing Officer issued a second pre-hearing order stating the issues to be adjudicated and setting hearing dates of February 27, 2013, and February 28, 2013.

On February 27, 2013, the parties appeared for hearing. Petitioner presented her first witness but her second and final witness became ill and was unable to testify. Petitioner requested a continuance of the hearing and extension of the HOD due date for twenty (20) calendar days. Respondent did not oppose. The motion to continue was granted setting new hearing dates of March 19, 2013, and March 20, 2013. The new HOD due date became March 25, 2013.

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[3] This response was considered timely given that the parties agreed on December 19, 2012, that due to the winter break all action on the amended complaint would commence after school resumed on January 7, 2013.

[4] The pre-hearing conference was convened on the first date that both counsel were available following the resolution meeting.

THE ISSUES ADJUDICATED:

A. Whether School A violated 34 C.F.R. § 300.320 and/or § 300.324 and/or § 300.116, and thus denied the student a FAPE by developing an inappropriate IEP and/or placement for the student on March 29, 2012, and September 11, 2012, in that the IEP(s) lacked the following:

1. Sufficient hours of specialized instruction (20 hours or more outside general education) based upon the number of hours in the student's previous IEP she brought with her to School A and/or
2. An appropriate disability classification that included SLD and speech language impairment and/or OHI for ADHD, and/or
3. A Dedicated Aide to assist with attention and social interactions, and/or
4. Appropriate math baselines and goals for geometry - measures and estimation and order of operation, and/or
5. Social emotional goals including parent consultation regarding the student's behavior, and/or
6. Accommodations including preferential classroom seating and weekly progress report(s).

B. Whether School A PCS violated 34 C.F.R. § 300.320 and/or § 300.324 and/or § 300.116, and thus denied the student a FAPE by developing an inappropriate IEP and/or placement for the student on December 5, 2012, in that the IEP lacked the following:

1. Reading of test questions in all academic areas, and/or
2. A behavior intervention plan.[5]

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-45 and Respondent's Exhibit 1-8) that were admitted into the record and are listed in Appendix A. The witnesses are listed in Appendix B.

FINDINGS OF FACT: [6]

1. The student is [redacted] in the seventh grade and at the start of SY 2012-2013 was attending School A, a District of Columbia public charter school that operates as its own LEA. The student began attending School A during SY 2011-2012 in sixth grade. Prior

[5] At the outset of the hearing Petitioner's counsel withdrew the remaining items under this issue that had been listed in the PHO.

[6] The evidence that is the source of the Finding of Fact is noted within a parenthesis following the finding. 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.

to attending School A the student attended School B, another pubic charter school where she attended from pre-kindergarten until fifth grade. (Parent's testimony, Petitioner's Exhibits 2, 5, 6)

2. The student had the following evaluations conducted prior to enrolling at School A: In June 2010 an occupational therapy ("OT") evaluation was conducted that recommended the student receive OT services of 30 minutes per week. A June 2011 speech and language evaluation diagnosed the student with severe communications deficits and recommended direct speech/language services of 1 hour per week. A July 2010 evaluation diagnosed the student with Attention Deficit Hyperactivity Disorder ("ADHD"). An August 2011 psycho-educational evaluation assessed the student's cognitive abilities at the extremely low range with a full-scale IQ score of 56. The student was operating at low elementary level academically but because of her Vineland scores she was determined to be a student with a specific learning disability ("SLD"). An IEP team at School B reviewed these evaluations while the student was attending School B. ([redacted] Petitioner's Exhibits 10, 11, 12, 13)

3. While at School B in fifth grade the student received 15 hours of specialized instruction per week outside general education. The student also had discipline problems while attending School B. At the end of her fifth grade year, in anticipation of the student changing schools the student's special education teacher convened an IEP meeting in August 2011 to amend the student's IEP to increase the level of specialized instruction form 15 hours per week to 20 hours per week. However, this amended IEP was never implemented at School B. ([redacted] testimony)

4. When the student enrolled at School A she had an IEP she brought from School B that prescribed 20 hours per week of specialized instruction outside general education and the following related services: OT and behavioral support. (Parent's testimony, Petitioner's Exhibit 6-9)

5. School A conducted a progress meeting for the student thirty-days after she began attending School A. The student seemed to be progressing well. The parent observed the student in her math and science classes when she first arrived at School A. However, as the student began to have some behavioral and attention difficulties the parent kept in weekly contact with the student's teachers and related service providers in order to keep abreast of the student's progress. (Parent's testimony)

6. Overtime it became apparent to the student's parent that the student was having what seemed to the parent to be weekly behavioral difficulties, including arguing with teachers and other students, being out of her seat and having difficulty focusing in class. (Parent's testimony)

7. The student would on occasion become verbally combative with teachers and peers. During her counseling sessions the School A therapist worked with the student on self-esteem, controlling her emotions and on social skills development to interact in age appropriate ways. The student's counseling services while she attended School A were

primarily delivered in group sessions so as to assist the student in navigating her peer relationships and to develop socially acceptable responses. The student made significant progress in developing respectful interactions with staff and peers. She benefitted significantly from the counseling services and the therapist conferred regularly with the student's teachers. ([redacted] testimony)[7]

8. The student was provided speech/language services at School A that were integrated with the student's core curriculum and in coordination with her special education and general education classroom teachers. The student was provided a graphic organizer to assist her in her writing exercises. The student made significant progress in her speech-language goals and was able to master some of the goals when compared with her prior speech-language evaluation. The student was also able to make progress in following multi-step directions and developed and used strategies to effectively follow two and three step directions. ([redacted])[8]

9. On March 29, 2012, School A convened an IEP meeting for the student. The student's teachers at the meeting expressed that the student was progressing well. The parent had no complaints but when asked by the principal if there were any particular areas that should be addressed the parent expressed that she still had concerns about the student's focus and organizational skills for which she stated the student needed support. The School A members agreed to reduce the student's specialized instruction to 10 hours per week inside general education and provide 5 hours outside general education in content areas particularly in math. The student's related services were maintained and included speech and language therapy. The IEP included accommodations of preferential seating and breaks. (Petitioner's Exhibits 4-1, 4-2, 4-3, 4-4, 5-11, 5-12)

10. At first the parent did not have a problem with the reduction in the student's specialized instruction but became concerned when she received a progress report indicating the student was failing math and a notice from School A two weeks after the March 29, 2012, IEP meeting that the student would be retained in sixth grade. The parent immediately called the School A principal about the letter and the parent was later told by the principal that the student would not be retained. However, as a result of the letter the parent enlisted the assistance of an educational advocate, [redacted] who was the student's special education teacher at School B for third, fourth and fifth grades. (Parent's testimony)

11. The student was not retained in sixth grade but promoted to seventh grade. However, the parent did not receive the student's final SY 2011-2012 report card until after the start of SY 2012-2013 due to the parent moving to another residence. Prior to the start of SY 2012-2013 the parent through [redacted] requested a meeting with School A to address her concerns about the student's performance and her program at School A. (Parent's testimony)

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[7] This witness was qualified as an expert in clinical psychology.

[8] The witness was designated as a expert in speech-language pathology.

12. Once the parent received the report card at the beginning of SY 2012-2013, she saw that the student had in fact failed math. The student earned the following final grades in the following subjects in SY 2011-2012: (Petitioner's Exhibit 15-4)

Subject	**Grade**
Music 6	B-
Math 6	F
Reading & Language Arts	C
Science 6	C-
Social Studies	B-

13. On August 31, 2012, [redacted] sent a correspondence to School A raising her concerns about the student's reduction in specialized instruction hours and other specific concerns with the student's educational program at School A. She first raised concern about the accuracy of the student's disability classification, objected to the math goals in the IEP as lacking baselines and not addressing specific math operations. She requested that the IEP be amended to include social/emotional goals and parent consultation regarding the student's behaviors. She also requested that the student's hours of specialized instruction be increased and that the student be provided a dedicated aide. ([redacted] testimony, Petitioner's Exhibits 28)

14. On September 11, 2012, the parent participated in an IEP meeting for the student at School A. [redacted] accompanied the parent to the meeting. The concerns raised in Ms. Long's correspondence were addressed and as a result some requests for changes to the IEP were made and some were not. Accommodations were made and goals were added. However, the requested change in the student's hours of specialized instruction was not made but the School A staff stated they wanted to do assessment prior to changing the hours. (Parent's testimony [redacted] testimony, Petitioner's Exhibit 2, 3, 28)

15. In response to [redacted] request about the student's disability classification, because that could not be done without a psychologist, School A requested the student be re-evaluated and the parent consented. The IEP baselines in math were changed and there were discussions about the student's social emotional goals. The School A staff believed that most of the accommodations that the parent and [redacted] requested were made. The team deferred on the request for an increase in specialized instruction until the evaluation was conducted and deferred on the request for the dedicated aide until other interventions were instituted. School A agreed to begin the process of developing a behavior intervention plan ("BIP") for the student by conducting a functional behavioral assessment ("FBA"). ([redacted] testimony)

16. On October 31, 2012, School A conducted a psychological re-evaluation. An IEP team at School A reviewed the evaluation on December 5, 2012. As a result of the evaluation the team agreed to change the student's disability classification to mild intellectual disability ("ID") ([redacted] testimony, Respondent's Exhibit 5)

17. The October 2012 evaluation results were consistent with the student's prior psychological evaluation conducted while she attended School B. The evaluation indicated that the student would be better served in a special education setting rather than a general education setting. The October 2012 evaluation demonstrated that although the student was assessed as having extremely low cognitive abilities, she had maintained her level of academic achievement based on her previous psychological assessments in August 2011. This indicated that student has made some educational progress since attending School A. ([redacted] testimony)[9]

18. At the December 5, 2012, IEP meeting the School A members of the team recommended a change in the student's IEP to increase specialized instruction to 15 hours per week outside general education and 5 hours per week inside general education. The parent disagreed and requested the student be provided even more specialized instruction to the level of 26.5 hours per week outside general education. (Respondent's Exhibit 1)

19. School A acknowledged at the December 5, 2012, meeting that it could not implement the student's revised IEP and stated its intention to notify OSSE so that an appropriate placement for the student could be identified. OSSE eventually concluded the student's placement would be changed to a full-time special education placement and as of February 4, 2013, the student began attending School C, a private full time special education school, with OSSE funding. ([redacted] testimony)

20. From December 5, 2012, following the meeting until the student began attending School C, she was in a full time special education classroom all day at School A. There were no behavior problems for the student and no complaints about the student from teachers or peers after the December 5, 2012, meeting. The student was doing well but she didn't like being out of the general education classroom and away from her friends. (Parent's testimony)

21. [redacted] expressed an opinion as the student's former special education teacher that with the appropriate supports the student can make a lot of progress. [redacted] pointed out that at School B the student went from a non-reader when [redacted] began working with her to reading at a second grade level before leaving School B. Based upon her experience in working with the student over the years at School B she recommended the that the student could handle two hours of tutoring twice per week to assist her in remediating any deficits she has acquired since attending School A. In developing a proposed compensatory education plan [redacted] presumed the student should have been provided at least 20 hours of specialized instruction outside general education as her previous IEP prescribed from the time the IEP was changed in March 2012 until the IEP meeting on December 5, 2012. ([redacted] testimony)

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[9] This witness was qualified as an expert in clinical psychology.

22. [redacted] reviewed the student's records and spoke with the student and the parent in developing a proposed compensatory education plan to compensate the student for what [redacted] believed to be School A's failure to provide the student at FAPE. The proposed plan recommended the following services:

> " 124 hours of individual tutoring to be provided at 2 hours a week twice a week. The tutor should specifically work with the student on reading comprehension, committing basic math skills to memory, and writing logical sentences and paragraphs in response to questions requiring demonstration of understanding. These services should occur after school. The student needs constant support and repetition of instruction as she forgets information learned one day on the next day. The student also needs to establish a rapport with her tutor."
>
> "The student should have had 15 hours more of pullout services than she received. The student's services were cut to fit the needs of the school not the student's needs. The student had not mastered many of her math, writing, and reading goals before her goals were cut in March 2012. The goals were changed and hours reduced despite the student's lack of mastery and despite the fact that a new IEP was not warranted until August of 2012. The student was also not getting all of her special education services prior to the March 2012 IEP meeting."
>
> "24 hours of counseling services to assist the student in obtaining better organization and social skills. These services should be provided at the student's school. Counseling should also focus on the student's difficulty with accepting help from others. This is a new issue created out of the fact that the student has been placed in the general education setting and is embarrassed by having someone assisting her in the general education setting. While the student is a very friendly individual with a sunny disposition, she has been known to defy authority, get into social situations that she does not know how to navigate out of, and be a fairly unorganized person."
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> "Petitioner engaged the services of an educational consultant to develop a compensatory education plan. The consultant reviewed the student's academic records and evaluations, spoke with the student and his parent, and proposed a plan designed to compensate the student for Respondent's failure to conduct the student's triennial psychological evaluation and failure to conduct the requested vocational assessment. In addition, the consultant proposed services that were allegedly designed to compensate the student for Respondent's prescribed appropriate transition plans and/or goals based on age appropriate assessments and failure to provide the student the full level of services prescribed by his IEP. However, the consultant erroneously concluded the student had missed services thus the recommendation for tutoring services were erroneously based on the student having missed services which was not a claim raised in the complaint or proved during the hearing. The student expressed to this consultant that he is motivated and willing to participate in any program that will assist him academically."

([redacted] testimony, Petitioner's Exhibits 35)

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 [RESPONDENT'S'] 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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [10] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. 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).

ISSUE A: Whether School A violated 34 C.F.R. § 300.320 and/or § 300.324 and/or § 300.116, and thus denied the student a FAPE by developing an inappropriate IEP and/or placement for the student on March 29, 2012, and September 11, 2012, in that the IEP(s) lacked the following:

1. Sufficient hours of specialized instruction (20 hours or more outside general education) based upon the number of hours in the student's previous IEP she brought with her to School A and/or

[10] The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the 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.

2. An appropriate disability classification that included SLD and speech language impairment and/or OHI for ADHD, and/or
3. A Dedicated Aide to assist with attention and social interactions, and/or
4. Appropriate math baselines and goals for geometry - measures and estimation and order of operation, and/or
5. Social emotional goals including parent consultation regarding the student's behavior, and/or
6. Accommodations including preferential classroom seating and weekly progress report(s).

Conclusion: Petitioner sustained the burden proof by a preponderance of the evidence that the student's hours of specialized instruction outside general education should have been increased as of the September 11, 2012, meeting and that as a result the student was denied a FAPE from September 11, 2012, to December 5, 2013, when the student's IEP was amended to increase the level of specialized instruction and the student began to be provided all services outside general education.

34 C.F.R. § 300.320 (b) provides:

> Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include--
> (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
> (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

34 C.F.R. §300.324(b) provides:

> (b) Review and revision of IEPs.
> (1) General. Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team--
> (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and
> (ii) Revises the IEP, as appropriate, to address--
> (A) Any lack of expected progress toward the annual goals described in Sec. 300.320(a)(2), and in the general education curriculum, if appropriate;

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.

Although Petitioner has asserted six categories above in which Petitioner sought to prove that the student was denied a FAPE there was insufficient evidence presented as to any of these categories except as to the specialized instruction and only from the period School A was put on notice at the September 11, 2013, meeting by the parent and her advocate that the student's specialized instruction should be increased.

Petitioner presented insufficient proof that there was a basis for a change in the student's disability classification prior to the October 2012 evaluation being conducted and the December 5, 2012, meeting being held.

There was also insufficient evidence presented that the student needed a dedicated aide. When [redacted] and the parent requested the change in math baselines or math goals in the IEP those changes were made, but [redacted] testimony was insufficient to demonstrate that prior to that meeting there was a request or a legitimate basis for this change.

The evidence indicates that the parent was in regular touch with the School A staff including the related services providers about the student's social emotional goals and there was evidence that the student IEP had preferential seating and that the parent was receiving regular progress reports for the student.

Save the evidence that School A refused to alter the student's hours of specialized instruction in the face of the clear evidence that the student had failed at least once course in 6th grade and the parent's direct request for the increase in hours, coupled with the increase that was eventually made in hours on December 5, 2012, there was insufficient evidence otherwise that School A in the areas raised in the complaint denied the student a FAPE. However, as to the failure to increase the student's hours of specialized instruction outside general education following the September 11, 2012, meeting the Hearing Officer does conclude the student was harmed and that she was denied a FAPE.

ISSUE B: Whether School A PCS violated 34 C.F.R. § 300.320 and/or § 300.324 and/or § 300.116, and thus denied the student a FAPE by developing an inappropriate IEP and/or placement for the student on December 5, 2012, in that the IEP lacked the following:

1. Reading of test questions in all academic areas, and/or
2. A behavior intervention plan.

Conclusion: Petitioner failed to present sufficient evidence to sustain the burden of proof that the student was denied a FAPE by School A's failure to prescribe reading of test questions and to develop a BIP for the student.

Petitioner presented no evidence as to the test questions. As to the BIP, [redacted] credibly testified[11] that School A initiated the FBA in order to develop a BIP. After the December 5, 2012, meeting and the changes made to the student's IEP and changes to the setting where the student was receiving instruction there were no more behavioral difficulties for the student as was testified to by the parent. Consequently, the Hearing Officer concludes that Petitioner failed to present sufficient evidence that there was any harm to the student in the BIP not being ultimately developed prior to the student leaving School A. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

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.

Furthermore, the Court must be wary of "mechanical" calculations because a "reasonable calculation" of a compensatory award "must be qualitative, fact-intensive, and above all tailored to the unique needs of the disabled student." Branham, 427 F.3d at 9 (citing Reid, 401 F.3d. at 524) (internal quotation marks omitted); but see *Stanton ex rel. K.T. v. Dist. of Columbia*, 680 F. Supp. 2d 201, 206-207 (D.D.C. 2010) (Huvelle, J.) (holding that formulaic calculations are not per se invalid, so long as the evidence provides a sufficient basis for an "individually-tailored assessment") (citing *Brown ex rel. E.M. v. Dist. of Columbia*, <568 F. Supp. 2d 44 >, 53-54 (D.D.C. 2008) (Bates, J.) (internal quotation marks omitted)).

As to compensatory education, Petitioner set forth a specific request for compensatory services. However, the Hearing Officer concludes that the tutoring and other services requested were not sufficiently linked through the evidence presented to the harm the student suffered from her not being provided sufficient specialized instruction outside general education from September 11, 2012, to December 5, 2012. [redacted] presumed the denial of FAPE was for a much longer period that the Hearing Officer concluded the student was deprived of services.

Petitioner requested 124 hours of independent tutoring; however, the Hearing Officer did not find a factual basis for that number of hours but found based on [redacted] testimony that tutoring would assist the student to make accelerated progress and the student could tolerate as much as four hours of tutoring per week. Absent specific testimony as to the total number of hours of tutoring the Hearing Officer concluded and a nominal number of hours was warranted and determined that nominal number was 4 hours per week for 8 weeks and to grant the student

[11] The witness was direct and forthright in her testimony.

no tutoring hours would be inequitable.

"Reid certainly does not require [a] plaintiff to have a perfect case to be entitled to a compensatory education award"; on the contrary, "[o]nce a plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with *Reid."Stanton*, 680 F. Supp. 2d at 207. The Hearing Officer concludes compensatory education is warranted and the type and form delineated below are based upon the facts of this case and are the form and type that are equitable to attempt to put the student in the place she would have been had Respondent fulfilled its obligations to the student and provided her a FAPE.

ORDER:

1. Respondent shall, within thirty (30) calendar days of the issuance of this Order, provide the student thirty-two (32) hours of independent tutoring (two hours twice per week for eight weeks) at the OSSE approved rate.

2. The above award of services to be provided to the student must be used by the student by the June 30, 2014, and will no longer be available to her after that date.

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*

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Coles B. Ruff, Esq.
Hearing Officer
Date: March 25, 2013