

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
810 First Street, NE – Second Floor
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

OSSE
Student Hearing Office
October 15, 2013

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p>	<p>HEARING OFFICER’S DETERMINATION</p>
---	--

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 October 1, 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 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student resident with his parent in the District of Columbia and is a student with a disability under IDEA with a classification of multiple disabilities (“MD”) including intellectual disability. The student currently attends a DCPS high school “School A.” The student began attending School A in ninth grade at the start of school year (“SY”) 2013-2014. During the previous school year the student attended a DCPS middle school (“School B”) where his individualized educational program (“IEP”) was amended in December 2011 to prescribe monthly related services of 240 minutes of occupational therapy (“OT”) and 120 minutes of speech language pathology (“S/L”).

Petitioner filed the current complaint asserting DCPS failed to comply with the parent’s request at the student’s December 2011 IEP and November 2012 IEP meetings, that the student be provided counseling services as recommended in the student’s 2010 psychological evaluation. Petitioner alleged the student had been the victim of bullying and consequently needed counseling to help his self-esteem and developing coping skills to address bullying by his school peers. In addition, Petitioner asserted DCPS did not provide the student all related services in his IEP during part of SY 2011-2012 and all of SY 2012-2013, did not provide extended school year (“ESY”) services and asserted the student’s IEP is inappropriate because inter alia, it lacks counseling services.

Petitioner seeks an order directing DCPS to revise the student’s IEP to include

counseling, conduct updated evaluations needed to supplement baseline and present level of performance (“PLOP”) information and immediately provide all related services in the student’s IEP and fund compensatory education.

DCPS filed a timely response to the complaint denial of a free and appropriate public education (“FAPE”) and specifically asserted that the student’s IEP is reasonably calculated to provide educational benefit, the baseline data and present level of performance (“PLOP”) are accurate. DCPS asserted that if any services were missed they were either made up or the missed services were de minimis; there is no indication the student was in need of ESY or any of the other related services and because this was not in the IEP it was the IEP team’s determination the student was not in need of these services. In addition DCPS asserted that a previous HOD determined the student was not in need of counseling services. DCPS committed to conducting evaluations (SL, OT and functional behavior assessment (“FBA”) to which the parent granted consent. The evaluations will be

completed at School A soon after the start of SY 2013-2014. DCPS maintains that if the IEP team determines that a psychological evaluation is necessary when it reviews the pending evaluations DCPS will conduct that evaluation as well.

A resolution meeting was held _____ and all matters were not resolved. The parties expressed no desire to proceed directly to hearing; instead they expressed a desire to allow the full 30-day resolution period to expire before the 45-day timeline begins. The 45-day period begins on August 30, 2013, and ends (and the Hearing Officer's Determination ("HOD") is due) on October 13, 2013.

The Hearing Officer conducted a pre-hearing conference ("PHC") in this matter on August 28, 2013, by telephone with both counsel participating and issued a pre-hearing conference order on September 12, 2013, stating, inter alia, the issues to be adjudicated at hearing.

THE ISSUES ADJUDICATED:

1. Whether DCPS denied the student a FAPE by failing to provide the student S/L and OT services between January 2012 and the end of SY 2012-2013.
2. Whether DCPS denied the student a FAPE by developing an inappropriate IEP on November 29, 2012, by a) failing to include counseling, b) failing to include a behavior intervention plan ("BIP"), c) failing to provide appropriate PLOP and baseline data in the areas of math reading, and written expression.²
3. Whether DCPS denied the student a FAPE by failing to determine whether the student was due ESY services for Summer 2013.

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 21 and Respondent's Exhibits 1 through 7) that were admitted into the record and are listed in Appendix A.

² Following the PHC Petitioner counsel sent an email stating the following to the questions posed by the Hearing Officer during the PHC as to the alleged inadequacies of the IEP: The PLOP / baseline data was addressed in paragraph 5 of the DPC. The PLOP information & baseline data provided in reading, math, and writing is extremely vague. Information about what tests were administered, what areas were tested, when it was administered and specific information regarding his grade level functioning in core areas is missing.

FINDINGS OF FACT:³

1. The student resident with his parent in the District of Columbia and is a student with a disability under IDEA with a classification of MD. (Petitioner's Exhibit 2-1)
2. The student currently attends School A where he began attending ninth grade at the start of SY 2013-2014. During SY 2011-2012 the student attended School B where his IEP was amended in December 2011 to prescribe related services of 240 minutes of OT and 120 minutes of SL both per month. (Petitioner's Exhibits 2-1, 1-5)
3. The student's handwriting is poor - he does not space letter properly and it is difficult to read. It is difficult to understand the student when he speaks because of his speech and language deficits. (Parent's testimony)
4. The student attended School B from grade 6 through 8. While the student was attending School B his parent telephoned his teacher and talked with her at least once every two weeks about the student's progress and she and talked with the student every day about what occurred at school. The student's parent was concerned that the student was being picked on at school by other students and that he would be become angry and retaliate. The school bus attended told the parent that she should address the bullying on the school bus with the principal and she did. (Parent's testimony)
5. At the student's December 2011 IEP and November 2012 IEP meetings the student's parent requested that counseling services be added to the student's IEP as recommended in the student's 2010 psychological evaluation. The parent asserted the student had been the victim of bullying and consequently needed counseling to help his self-esteem and developing coping skills to address bullying by school peers. The IEP team did not agree to provide those services. There was no mention of ESY at the meeting and there was no meeting before the end of SY 2012-2013 to determine if the student would benefit from ESY services. (Parent's testimony, Petitioner's Exhibits 1, 12-15)
6. The student has never had ESY services on his IEP. (Petitioner's Exhibits 1-8, 2-10)
7. The student's IEP does not prescribe counseling services. (Parent's testimony, Petitioner's Exhibits 1, 2, 12-15)
8. On November 29, 2011, a HOD was issued on a previous due process complaint file September 16, 2011. In the HOD the Hearing Officer determined the student was not in need of counseling services. (Petitioner's Exhibit 3-11)

³ 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.

9. The student was in a special education self contained class at School B for all three years he was there. There were 8 to 10 students in the classroom and the student remained in that class except for attending in non-core special subjects. In class the student was talkative and helpful. The student was well mannered, pleasant and helpful and was industrious and had a good work ethic. The student's academic progress has been slow but steady and some his IEP goals have been carried over from year to year. There was one student that the student had occasional run-in with but there was no indication that at school the student was being bullied or that anything was going on with that one student beyond what might be considered typically adolescent behaviors. The student's IEP team at the November 29, 2012, meeting did not believe counseling or ESY services were necessary for the student. (Witness 4's testimony, Petitioner's Exhibit 2)
10. During SY 2012-2013 the student made some progress on his IEP academic goals. (Witness 4's testimony, LEA Exhibit 5)
11. Petitioner engaged the services of an education advocate who reviewed the student's IEPs, evaluations, educational records and observed the student in the classroom at School B. The advocate observed the student for more than two hours at School B. During the observation the student struggled reading aloud and the teacher said he had trouble staying on task. He was quiet and needed prompting from the teacher to respond to questions. (Witness 1's testimony)
12. The advocate offered her opinion of the PLOPs and baselines for the academic goals in the student's current IEP. She opined that at least one of the student's current reading goals requires a much higher level skill than the student's current academic functioning and the baseline data does not indicate how the student is currently functioning relative to the goals and the goal is "probably inappropriate." Baseline data is important because the student's teacher at School A needs to know the student's current functioning relative to his goals and is unlikely to discern this from the IEP necessitating assessment(s) to obtain baseline data. Many of the student's academic goals were repeated from his previous IEP which tends to indicate the student made little progress. (Witness 1's testimony)
13. The student's 2011, IEP in the area of math the student's present level of performance ("PLOP") states: the student is able to identify number to 500. The student is able to write ordinal numbers of 1 to 10 and is capable of memorizing his multiplication facts of 1 -3. He is becoming more proficient with counting money, telling time and becoming more familiar with simple fractions and when they are needed or daily life. (LEA Exhibit 1-2)
14. The student's 2011, IEP in the area of reading the student's PLOP states: [the student] can identify Dolch sight words from 1-3 grade list. [The student] works very consistently and diligently to complete all task put before him. [The student] is reading on a third grade level as indication on the Slossan oral Reading Test. [The student] (LEA Exhibit 1-3)

15. The student's 2011, IEP in the area of written expression the student's PLOP states: [The student] can write letters, words and copy material from the board or text. [The student] seems to enjoy writing original sentences using newly introduced vocabulary words. The sentence structure is admirable and they usually possess some depth. With additional guided practices, he should improve. When given a spelling test (Morrison-McCall0 [the student] scored a 2.5 G.E. [the student can and has read words that are much higher in difficulty. I also stress and have hem use these words in speaking and writing to make them a part of their reading and speaking repertoire. (LEA Exhibit 1-3)
16. In the 2012 IEP the PLOP in math stated: "[the student] is hard worker. His effort is commendable in class, he works to completion usually." [The student] when tested obtained a score of third grade equivalency. [The student] has not seemed to make much improvement in the area since last year but he has not regressed. [The student] seems to enjoy reading more. (LEA Exhibit 2-2)
17. The 2012 IEP has three goals in the area of math: (1) [The student will master the multiplication facts from 1 to 10 to memory. [The student] will be able to apply the multiplication concepts and how they can be used in everyday life circumstances - Baseline: [the student] has not all but he continues to make progress he does not consistently practice at home and he should and the student time in the class is not long enough; (2)[the student] will learn of simple fractions and how they correspond to everyday life. Baseline: He is beginning to understand the concern and its applications, (3) [the student] will gain greater knowledge of time (management) use of the calendar, money and spending to help with transition of daily life, independent adulthood. Baseline: [the student] is still growing in these areas of expertise, He will broaden his present knowledge and learn hot to usefully facilitate this information.⁴ (LEA Exhibit 2-2)
18. The student's 2012, IEP in the area of reading the student's PLOP states: [the student] can identify most of the six hundred most common words used in Reading. This has been a challenge for him but he has made some strides with peer support from his sister as well0. He seems to retain vocabulary knowledge of words introduced to him. [The student] also enjoys writing original sentences, even when not asked. He will take the initiative to write independently. (LEA Exhibit 2-3)
19. The 2012 IEP has two goals in the area of reading: (1) [The student] will learn how characters in written text as well as in other media manifest internal and external conflicts. He will learn the elements of plat, tone, settings, how to define the protagonist and antagonist. He will learn and explain the relation of cause and effect and the consequences they can cause. [The student] will be introduced to more literature in written and verbal texts - Baseline: [the student] is a struggling reader. We are currently working on some of these skills presently. He is becoming familiar with the new literature and the language; (2) Determine the meaning of unfamiliar words using knowledge of English language structure, (suffixes, prefixes, etc.) [The student] will be

⁴ The student's 2011 IEP had four goals – the three goals in the 2011 IEP were carried over verbatim from the previous IEP. The one goal that was dropped was a generic improvement goal.

continuing in the broadening of his present vocabulary with words from written text in literature and phonetically introduced vocabulary. Baseline: [the student] is reading on a third grade level. He needs consistent practices and drills in order to retain information. [the student] enjoys books and he has not visited the public library as often as he should. I have seen him bring in written materials that are obviously too difficult for him to master. (LEA Exhibit 2-3)

20. The student's 2012, IEP in the area of written expression the student's PLOP is the same as in the 2011 IEP. It states: [The student] can write letters, words and copy material from the board or text. [The student] seems to enjoy writing original sentences using newly introduced vocabulary words. The sentence structure is admirable and they usually possess some depth. With additional guided practices, he should improve. When given a spelling test (Morrison-McCall) [the student] scored a 2.5 G.E. [the student can and has read words that are much higher in difficulty. I also stress and have hem use these words in speaking and writing to make them a part of their reading and speaking repertoire. (LEA Exhibits 1-3, 2-4)
21. The 2012 IEP has three goals in the area of written expression: (1) Write original stories that demonstrate careful placement of descriptive details about setting, characters, and events. Baseline: [the student] struggles with writing but he tries very hard to accomplish assigned tasks. [the student is still functioning below his peers. (2) [The student] will continue to work on mastering correct spelling and grammatically correct verb tense in formulating original sentences. He will also improve on self-correcting when proofreading his work without constant assisting. Baseline: [the student] is still struggle with proofreading. He stil seems to require constant monitoring. (3) [The student] will continue increasing his sight word vocabulary and work attach skills. Also [the student] will participate in weekly spelling activities. Baseline: His spelling skills are almost third grade level. [The student] is continuing to show improvement in class and does well on the spelling tests.⁵ (LEA Exhibit 2-5)
22. DCPS did not provide the student all related services in his IEP during SY 2012-2013, did not provide him ESY services. (Parent's testimony, Petitioner's Exhibits 1, 2, 12-15)
23. The student missed approximately 7 hours (420 minutes) of OT services during SY 2012-2013. (LEA Exhibits 2-7, 4)

Month:	Services due:	Services received:
January	240	0
February	240	0
March	240	120
April	240	180

⁵ Two of the student's three goals in this area are the same as the previous IEP. The one goal that was dropped required the student to group ideas and place then in logical order of events.

May	240	240	
June	120 ⁶	120	
September	240	0	
October	240	0	
November	240	120	
December	240	300	
January	240	300	
February	240	315	
March	240	195	
April	240	240	
May	240	300	
June	120	60	
Total:	<u>3600</u>	<u>3180</u>	(420) minutes missed

24. The student missed approximately 2.5 hours (155 minutes) of S/L services during SY 2012-2013. (LEA Exhibits 2-7, 3)

Month:	Services due:	Services received:
January	60* ⁷	90
February	90*	60
March	120	90
April	120	60
May	120	135
June	60 ⁸	30
September	120	60
October	120	30
November	120	0
December	120	0
January	120	235
February	120	255
March	120	210
April	90*	60
May	90*	180

⁶ The Hearing Officer reduced June services for both years to 120 based on the school year ending after two weeks and did not include any services in the calculation for August as there was only one week of school during that week.

⁷ * The student was absent on days he was due to receive services and services were attempted; therefore those hours of service are not included in the amount due the student for the months noted with asterisks.

⁸ The Hearing Officer reduced June services for both years to 120 based on the school year ending after two weeks and did not include any services in the calculation for August as there was only one week of school during that week.

June	60	0	
Total:	<u>1650</u>	<u>1495</u>	(155) minutes missed

25. The parent’s educational consultant proposed a compensatory education program to compensate the student for the alleged denials of FAPE that allegedly included the student not receiving related services prescribed by his IEP.⁹ The consultant did not speak with the student’s teacher or related services providers. (Witness’ 1’s testimony, Petitioner’s Exhibit 18)

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

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

⁹ The proposed plan sought to compensate the student for missed IEP related services: SY 2012-2013, no counseling and no ESY services. The plan proposed that the student be provided 2 hours per week of instruction/tutoring services for a total of 40 hours and 40 hours of counseling behavior support services, 27 hours of OT services and 40 hours of mentoring.

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.

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 1: Whether DCPS denied the student a FAPE by failing to provide the student S/L and OT services between January 2012 and the end of SY 2012-2013.

Conclusion: Petitioner presented sufficient evidence to sustain the burden of proof that DCPS did not provide the student all related services that his IEP prescribed and that the student was consequently harmed.

34 C.F.R. §300.323(c) provides: Each public agency must ensure that--

- (1) A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and
- (2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

A party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. Thus, a court reviewing failure-to-implement claims under IDEA must ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material." *Catalan et al., v. District of Columbia*, 478 F Supp 2^d 73 (2007), 47 IDELR 223.

The evidence¹¹ in this case demonstrates that DCPS failed to provide the student 7 hours of OT services and 2.5 hours of S/L services from January 2012 to the end of SY 2012-2013. The parent testified that the student continues to have speech and handwriting difficulties that these services are designed to address. Absent any testimony to the contrary the Hearing Officer concludes that despite relative low number of total hours missed of these related services the student was harmed by not being provided the services and will thus order DCPS to provide the services.

ISSUE 2: Whether DCPS denied the student a FAPE by developing an inappropriate IEP on November 29, 2012, by a) failing to include counseling, b) failing to include a behavior

¹¹ Finding of Fact ("FOF") #s 3, 23, 24

intervention plan (“BIP”), c) failing to provide appropriate PLOP and baseline data in the areas of math, reading, math and written expression.

Conclusion: Petitioner presented sufficient evidence to sustain the burden of proof that the student’s IEP contains inappropriate PLOP and baseline data in the area of math, reading, and written expression. However, Petitioner failed to present sufficient proof that the student’s IEP is inappropriate because it does not provide for counseling services or a BIP.

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.

To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

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

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.” *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009).

Requirements of the IDEA are satisfied when a school district provides individualized education and services sufficient to provide disabled children with some educational benefit. *Blackmon v Springfield R-XII Sch. Dist.* 198 F.3d 648, at 653 (8th Cir. 1999)

The evidence¹² demonstrates in this case that the student PLOP and baseline data does not adequately relate to the student’s IEP academic goals and that most of the PLOP baselines and goals have been carried over from one IEP to the next which indicates that student’s progress relative to his goals may be difficult for current teacher to assess. Petitioner presented expert testimony on this issue that was not adequately countered by the DCPS witness.

However, although the parent testified that she had concerns that the student was being bullied at School B and that she addressed this concern with the School B staff, there was no corroboration of this claim by the student’s teacher at School B. The teacher testified that there was one student that the student had an occasional run-in with but there was no indication that at school the student was being bullied or that anything was going on with that one student beyond what

¹² FOF # s 12, 13 through 21

might be considered typically adolescent behaviors. The student is now attending a different school and there is no evidence that in the student's current school there is any concern of this nature or that the student has behavioral or emotional difficulties that would warrant counseling as a related service or a BIP.¹³ However, because of the denial of FAPE the Hearing Officer has found herein as remedy the Hearing Officer directs DCPS in the Order below to conduct a comprehensive psychological evaluation and include (in addition to educational assessments to address the student's current levels of academic performance and IEP goals) that it include social/emotional assessments to determine whether the student would benefit from counseling services.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to determine whether the student was due ESY services for Summer 2013.

Conclusion:

Pursuant to 34 C.F.R. §Sec. 300.106

- (a) (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.
- (3) In implementing the requirements of this section, a public agency may not--
 - (i) Limit extended school year services to particular categories of disability; or
 - (ii) Unilaterally limit the type, amount, or duration of those services.
- (b) Definition. As used in this section, the term extended school year services means special education and related services that--
 - (1) Are provided to a child with a disability--
 - (i) Beyond the normal school year of the public agency;
 - (ii) In accordance with the child's IEP; and
 - (iii) At no cost to the parents of the child; and (2) Meet the standards of the SEA.3017

DCMR §5-E3017 provides:

3017.1 The LEA shall ensure that extended school year services are available as necessary to provide FAPE to a child with a disability.

3017.2 Extended school year services must be provided only if a child's IEP team determines, on an individual basis (in accordance with § 3007, Individualized Education Program (IEP) Development), that the child needs those services in order to receive FAPE.

¹³ FOF #7, 8, 9

The evidence¹⁴ demonstrates that the student's IEP while he attended School B during SY 2012-2013 did prescribe ESY services. Although the parent testified that there was no discussion of ESY services at the November 29, 2012, IEP meeting or subsequent thereto, there is no indication based on the student's prior IEP and the student's teachers' testimony that the student was in need of ESY services.¹⁵ A violation must negatively affect a student's substantive rights. See *Lesesne v. District of Columbia* 447 F. 3d 828 (D.C. Cir. 2006). Based on the factors discussed above, the Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student was denied a FAPE by DCPS for not making the ESY determination for SY 2012-2013.

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.

However, "*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.

Petitioner has requested compensatory education for the student allegedly not being provided counseling services, ESY and other alleged violations that were not proved and the proposed compensatory education plan significantly overstates the services the student actually missed. Nonetheless, the Hearing Officer concludes that the student has missed services and based on the evidence of the student's speech and language and occupational therapy deficits that the student should be provided some compensatory services. Even though the proposed plan has overestimated the actual missed services and proposed to remedy denials of FAPE not proved, to provide the student nothing would be inequitable. Therefore, the Hearing Officer will provide what he considers to be nominal compensatory services and directs DCPS to provide those related services in the order below.

¹⁴ FOF #s 6, 9

¹⁵ Extended school year services are only necessary to a FAPE when the benefits a disabled child gains during the regular school year will be significantly jeopardized if he/she is not provided with an educational program during the summer months. (See *M.M. School District of Greenville County* 37 IDELR 183 (United States Court of Appeals 4th Circuit (2002))

ORDER:¹⁶

1. DCPS shall within thirty (30) calendar days of the issuance of this Order, complete a comprehensive psychological evaluation (to include cognitive, academic and social/emotional components).
2. DCPS shall within fifty (15) calendar days of completion of the above evaluation convene a multi-disciplinary team (“MDT”) meeting to determine review the evaluation(s), to determine if the student is in need of counseling services, and review and revise the student’s IEP as appropriate including revision of the PLOP and baseline data.¹⁷
3. As compensatory education DCPS shall provide the student the following 7 hours of OT services and 2.5 hours of S/L services by January 31, 2014, in addition to the services that are currently being provided the student pursuant to his IEP.

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: October 13, 2013

¹⁶ Any delay in Respondent 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.

¹⁷ The parties by mutual assent may delay the MDT meeting until all evaluations including those DCPS had already agreed to conduct and/or fund.