

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

Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

OSSE
STUDENT HEARING OFFICE

2012 DEC 11 AM 9:05

Student,¹

Date Issued: December 10, 2012

Petitioner,

IHO: Michael Lazan

v.

Hearing Dates: December 5, 2012

District of Columbia Public Schools,

Respondent.

Room: 2004

HEARING OFFICER DETERMINATION

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioner's Notice of Due Process Complaint ("Complaint") received by Respondent on September 26, 2012. This IHO was appointed to hear this matter shortly thereafter, on September 28, 2012. Respondent filed a Response to the Complaint on September 28, 2012, denying the allegations in the Complaint.

On Petitioner filed a Motion for Stay-Put with the Student Hearing Office on October 2, 2012. The motion sought to keep the Student at School A during the pendency of the litigation. This motion was granted by written order dated October 24, 2012.

On October 19, 2012, a resolution meeting was held. This resolution meeting was held outside the timelines as outlined in the regulations, which require resolution meetings to be conducted within 15 days. 34 C.F.R. Sect. 300.510(a). The parties did not resolve the matter

¹ Personal identification information is provided in Appendix A.

and did not agree to shorten the resolution period. The resolution period expired on October 26, 2012. The HOD was due on December 10, 2012.

A Prehearing Conference was held on November 2, 2012. A Prehearing Conference Summary and Order was issued on November 7, 2012.

A hearing date was set for December 5, 2012. This was a closed hearing. Petitioner was represented by Donovan Anderson, Esq. Respondent was represented by Lynette Collins, Esq. Petitioner entered into evidence exhibits 1-11; Respondent entered into evidence exhibits 1-6. Petitioner presented as witnesses: Petitioner, [REDACTED], Director of Community Relations for School A; [REDACTED] Coordinator for School A. Respondent presented as witnesses: [REDACTED] Admissions Director at School B; [REDACTED] Progress Monitor, DCPS. At the end of the hearing day on December 5, 2012, the parties presented oral closing arguments.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

BACKGROUND

The Student is male, [REDACTED] and eligible for services as a student with multiple disabilities. The Due Process Complaint contains one allegation: that DCPS denied the Student a FAPE by changing the Student's school placement from School A to School B. As relief, Petitioner seeks placement at School B for 2012-2013.

ISSUES

The issues to be determined are as follows:

Did DCPS offer a specific school placement (School B) for the 2012-2013 school year that would not have provided the Student with appropriate transition services, in particular vocational training and job placement services? If so, did DCPS deny the Student a FAPE for the 2012-2013 school year by failing to offer a specific school placement that would provide such appropriate transition services?

FINDINGS OF FACT

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 a [REDACTED] who attends School A. (Testimony of Student)
2. The Student is eligible for services as a Student with Multiple Disabilities. (P-1-1)
3. The Student's main educational goal is to get a diploma at school. The Student is also interested in obtaining employment after school. The Student enjoys work with his hands, such as work in drywall construction. (Testimony of Student)
4. The Student is able to add, subtract, multiply and divide whole and decimal numbers. (P-1-2)
5. The Student writes at about the fifth grade level. (P-1-3)
6. The Student's emotional and learning needs impact on his ability to stay on task and complete assignments. (P-1-2)
7. The Student is diagnosed with Mood, Conduct and Oppositional Defiant Disorders. (P-1-4)

8. The Student is motivated to attend his current school because of a stipend that he receives weekly. (Testimony of Student; Testimony of [REDACTED])

9. The Student has had difficulties with academics since at least 2007, when testing indicated that the Student's Full-Scale IQ was 66. In 2008, the Student had significantly lower verbal and non-verbal abilities and achievement than his peers. (P-2-9) (P-2-3)

10. The Student's disruptive behaviors were identified in 6th grade and have been linked to a car accident. (P-2-2-3)

11. The Student has had difficulty being able to understand other people's thoughts, becoming bored easily when there were no cognitive demands placed on him. (P-2-9-10)

12. In 10th grade, the Student was expelled from School C, where he had poor attendance. (P-2-8)

13. The Student subsequently attended School A. (Testimony of Student)

14. Prior to the 2011-2012 school year, School A had a full staff with well rounded academics. An important part of the school was work through modules. (Testimony of [REDACTED])

15. In or about June, 2011, there were staff changes at School A. The students in the school were upset about the change, and the Student was particularly concerned about it. The school lost most of its staff. (Testimony of [REDACTED])

16. For the 2011-2012 school year at School A, the Student received services in the form of small homeroom classes in which "modules" were completed on the computer. This instruction involves creating work samples. (Testimony of Student; Testimony of [REDACTED]; Testimony of [REDACTED])

17. For the 2011-2012 school year at School A, the Student also received a period of math once a day, with instruction in algebra, fractions. There were 9-10 students in the class.

(Testimony of Student)

18. For the 2011-2012 school year at School A, the Student also received science with Mr. Israel. (Testimony of Student)

19. For the 2011-2012 school year at School A, the Student also had an internship and did work in drywall construction for two whole days a week. (Testimony of Student)

20. For the 2011-2012 school year at School A, there were no employability classes in the school. The teachers did not help the Student with resumes. A [REDACTED] at the school tries to help students gain employment. (Testimony of Student)

21. During this year, the teachers would not use traditional teaching strategies, but would be in essence working on test prep for the CASAS test so that students could gain an external diploma after graduation through an external diploma program. An external diploma does not require an examination. (Testimony of [REDACTED]; Testimony of [REDACTED])

22. At the IEP meeting of May 17, 2012, the IEP team recommended 27 hours per week of specialized instruction outside general education, with the start date of May 17, 2012. The end date was May 16, 2013. (P-1-6)

23. At the IEP meeting of May 17, 2012, the IEP team recommended one hour per week of behavioral support services outside general education. (P-1-6)

24. The Student needed a structured therapeutic environment for the 2012-2013 school year. (P-1-7)

25. The Student needed repetition of directions, simplification of oral directions, a location with minimal distractions, individual testing for the 2012-2013 school year. (P-1-8)

26. Also during this year, the Student needed counseling services to help him prepare for independence and adulthood and manage his social and emotional issues. (P-1-4)

27. Also during this year, the Student needed services in reading so he could apply for a job. (P-1-2) The Student needs work on filling out application forms, on interpreting employment contracts, on identifying common occupations, on identifying procedures involved for interviewing for a job, on interpreting procedures for simple first aid. (P-1-2)

28. Also during this year, the Student needed services in being able to locate and use educational services in the community, in being able to read job descriptions, and in reading job related signs, charts, diagrams and forms. (P-1-2)

29. Also during this year, the Student needed services in writing on pre-writing strategies, consistent application of punctuation, consistent application of spelling rules. (P-1-3)

30. During this year, the Student's math goals related to communicating in written and oral form mathematical ideas and solving multi-step mathematical word problems. (P-1-2)

31. During this year, the Student's reading goals related to reading a short selection and identifying the main idea and critical details, developing methodologies for self-checking reading comprehension, and summarizing and drawing conclusions from implicit information. (P-1-3)

32. During this year, the Student's writing goals related to writing a complete sentence, writing a five paragraph essay, and editing his work. (P-1-3)

33. During this year, the Student's emotional goals related to taking personal responsibility for his academics, learning the importance of tone, remaining on task, learning positive behavioral techniques to improve his coping ability, and developing age-appropriate problem solving skills. (P-1-4)

34. The IEP's Coordinated Set of Activities for Post Secondary Education and Training contains goals relating to working with children and/or at a recreational center and/or bus driver and/or in retail. Short-term goals relate to identifying and researching academic, training or vocational programs in these fields, getting a commercial driver's license, articulating the nature of his disability, applying for jobs in retail. (P-1-11-12)

35. Transition Services in the IEP include assistance with researching post-school goals. The setting for this service is School A. (P-1-11)

36. Other services in connection to transition include an employability class, mock job interview, a career lecture series, job opening awareness services, and job placement services. The setting for all these services is School A. (P-1-12)

37. The IEP also recommends transition services in terms of job fair attendance, job shadowing. The setting for these services is "community." (P-1-12)

38. The setting at School A has been reasonably successful in terms of emotional, social and behavioral development. The Student presents as studious and inquisitive, "almost thirsty to learn." He is socially appropriate with his peers, respectful of staff and complies with school rules. (P-1-4)

39. For 2012-2013, the placement at School A is "totally different" than it had been. The entire setting has two teachers. The Student does not receive any math at the setting. The Student receives only one class at the setting, a group reading class with [REDACTED] (the former Science teacher). [REDACTED] is not certified to teach special education in the District of Columbia. (Testimony of Student; Testimony of [REDACTED])

40. In the afternoons on Monday and Wednesday, the Student builds with [REDACTED]. On Tuesday and Thursday, the Student has a janitorial internship with the Salvation Army. On Friday, there are no classes in the afternoon. (Testimony of Student)

41. During the internship, School A staff will call the job site to determine what the Student is doing. (Testimony of Student)

42. The Student receives behavioral support from [REDACTED]. (Testimony of [REDACTED])

43. There is a career lecture series at the school, a job board, a job coach goes to the job sites. There are no employability classes in the school. The teachers did not help the Student with resumes. A [REDACTED] at the school tries to help students gain employment. (Testimony of Student; Testimony of [REDACTED])

44. During the 2012-2013 school year, the school staff are gearing the Students to get a higher score on the CASAS reading exam so the Student can get an external diploma through an external diploma program. The Student already has a high enough CASAS score on math. (Testimony of [REDACTED])

45. During the 2012-2013 school year, School A gives the Student weekly stipend of \$100. If the Student does not participate the school, he does not get "paid." The school contends that this is a token economy system. (Testimony of Student; Testimony of [REDACTED])

46. School A is provisionally certified by OSSE. (R-4-1) Conditions have been set for the school to receive full approval status. These conditions include conformity with the District of Columbia Standards of Learning. The conditions include submitting a statement which identifies all circumstances under which a student might receive monetary incentives or

rewards from the Empowering Center program, which is a program that is intertwined with School A program. (R-5-2)

47. A Prior Written Notice dated August 1, 2012 changed the location of services to School B. The notice indicates that School A does not have its certificate of occupancy from OSSE. (P-5-1)

48. School B has 46 students. There are alternative school days, an "A" day and a "B" day, during which students have different schedules. The school includes certified teachers, has 10 students maximum in the classes, has social workers, speech and language pathologists. There are small class sizes and instruction by certified special education teachers. (Testimony of [REDACTED])

49. The school includes a vocational component. There are carpentry classes, computer graphic web design classes, a computer networking classroom, cosmetology classes, a culinary arts class, offers college readiness instruction, job placement instruction, job shadowing, mock job interviews. Students are sent to job fairs. Guest speakers will come to the school. Students are sent to internships at job sites. (Testimony of [REDACTED])

50. The carpentry classes involve such work as drywall, fixing holes, installing a sink. (Testimony of [REDACTED])

51. School B has developed relationships with private businesses who have employed School B students after their graduation. (Testimony of [REDACTED])

52. At the school, students work on independent living skills. (Testimony of [REDACTED])

53. At the school, a behavior modification program is provided to students that allows students to buy items at a school store. (Testimony of [REDACTED])

54. At the school, a social worker is assigned to the students, and group and individual sessions are provided for behavioral issues. (Testimony of [REDACTED])

55. Students at the school are ages 14-21. (Testimony of [REDACTED])

56. A number of Students were to be transferred to School B from School A by DCPS. All the students from School A were to be placed in a "pre-G.E.D. program" at School B. The school was selected for these students by DCPS because it has a significant vocational component. (Testimony of [REDACTED]; Testimony of [REDACTED])

57. The students from the School A program visited the school and indicated to [REDACTED] that they would not go to the school unless they were paid. The Student himself did not like School B because it has an undesirable location, and because he does not want to start all over again with his education. (Testimony of Student; Testimony of [REDACTED])

58. If the Student attended the school, he would have attended with the other School A students. Since the other School A students did not ultimately attend, the Student would have been placed in classes with non-diploma bound students aged 19-21. (Testimony of [REDACTED])

59. The non-diploma bound students are on a lower academic level than the student. The instruction would have to be differentiated if the student were placed with the students in these classes. (Testimony of [REDACTED])

60. On the "A" days at School B, the students received 80 minutes of reading, with 4 students in the class; a math class; a writing class; a science class. On the "B" days at School B, the Students receive a history class, a reading class, and two 80 minute vocational classes. (Testimony of [REDACTED])

61. There is no employability class at the school, but these skills would be worked on in reading where the students work on resume writing, reading job requirements. (Testimony of [REDACTED])

62. School B has a reading specialist who works with students whose scores are significantly below level with methodologies such as Orton-Gillingham, Lindamood Bell. The Student would have been eligible for such services. (Testimony of [REDACTED])

63. Testing by [REDACTED] on August 31, 2012 on the Woodcock-Johnson III Normative Update Tests of Achievement indicated that the Student scored a 4.0 grade equivalent in broad writing, 7.1 grade equivalent in reading fluency, 2.3 grade equivalent in passage comprehension. (P-3-1)

64. By letter dated October 26, 2012, School B was placed on probation by OSSE in regard to its certificate of approval. The school's application for certification was incomplete. While the certificate of approval is on probationary status, the school may not enroll any additional students from the District of Columbia. (P-9-1-2)

65. I found all the witnesses credible except [REDACTED] who I found partly credible. During testimony, [REDACTED] indicated that the Student was being considered to be a hired as a personal trainer by the gym that he works at in his School A internship. The Student's testimony makes clear that such internship is janitorial in nature, something [REDACTED] did not explain clearly. Additionally, the Student did not mention anything about being considered for hire by such gym in his candid testimony.

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:

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conforming with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D); 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Schaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005). The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Rowley, 458 U.S. at 201. The IDEA, according to Rowley, imposes "no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." Id. at 198; A.I. ex rel. Iapalucci v. Dist. of Columbia, 402 F. Supp. 2d 152, 167 (D.D.C. 2005)

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

1. Failure to Implement.

A District has discretion to change the school setting during the time span of an IEP, but only if the new setting provides the Student with a FAPE. A school district may be found to have denied a Student a FAPE if it is shown that the District cannot materially implement the IEP in the new setting. Savoy v. District of Columbia, 844 F.Supp.2d 23 (D.D.C. 2012). To prevail on a "failure to implement" claim, Petitioners challenging the implementation of the IEP must show more than a de minimis failure to implement all elements of the IEP. Instead, Petitioners must show that "substantial or significant" portions of the IEP could not be implemented. Savoy, 844 F.Supp.2d at 30 (citing Houston Ind. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir 2000); Van Duyn v. Baker Sch. Dist. 5J, 502 F.2d 811, 822 (9th Cir. 2007)).

Petitioner suggests alleges that there is a failure to implement here, and has pointed to language in the IEP indicating specifically that certain services relating to transition are to be performed at School A. Petitioner also contends that School B could not implement the vocational portions of the IEP.

This IHO agrees with Petitioner's contention that the IEP was written to be implemented at School A. The IEP includes references to School A in the transition services section of the IEP, including with respect to researching post-school goals, an employability class, "mock job interview," a career lecture series, job opening awareness services, and job placement services.

The question is whether the change in school setting would have resulted in a "substantial" or "material" variation from the IEP. In fact, the record shows that the new school setting would have implemented most of the material programmatic elements involved in the transition services portion of the IEP. One hundred sixty minutes a week are devoted to vocational instruction at School B. As required in the IEP, the new school would provide

career-based lectures and job placement services. As per the IEP, there would be job fair attendance, job shadowing, mock job interviews at School B. Additionally, School B contains carpentry classes, which should be of particular interest to this Student who expresses an interest in working with his hands. The carpentry classes at the school involve such work as drywall, fixing holes, installing a sink, work that has been of interest to this Student.

The record also shows that School B is able to implement the IEP in terms of academics, and Petitioner does not contend otherwise. The IEP requires a full schedule of specialized instruction for the Student, with math, reading and writing goals, and behavioral support services. The record indicates that the school has a full complement of appropriately certified teachers and teaching assistant that, at the time of the Prior Written Notice, would have been able to provide such services to the Student. The Student would have received reading, writing, science, history in a small class setting. The Student would have been provided with a reading specialist who works with students who have reading difficulties. The Student would have been provided with behavioral support through a behavioral modification system and group and individual counseling. Overall, this IHO was impressed by the impression left by the school witness. On this record, this IHO finds that School B would have been to able to implement the May, 2012 IEP of the Student. Savoy, 844 F.3d at 33-35. Petitioner was not denied a FAPE by the Prior Written Notice dated August 1, 2012, which assigned the Student to School B.

2. Change of Placement.

An "educational placement" must be based on an IEP. 34 CFR Sect. 300.116(b)(2). In Letter to Fisher, the United States Department of Education Office of Special Education Programs (OSEP) called the issue of determining change of educational placement a "very fact-

specific inquiry." Letter to [REDACTED] 21 IDELR 992 (OSEP 1994). OSEP concluded that whether a change in educational placement has occurred turns on "whether the proposed change would substantially or materially alter the child's educational program" and set forth the following factors to be considered in determining whether a change in educational placement has occurred:

whether the educational program set out in the child's IEP has been revised;
whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements.

Letter to Fisher, 21 IDELR 992; see also Veazey v. Ascension Parish Sch. Board, 121 Fed. Appx. 552 (5th Cir. 2005). As stated by the D.C. Circuit in Lunceford v. District of Columbia, 745 F.2d 1577 (D.C. Cir. 1984): "there must be a fundamental change in, or elimination of, a basic element of the educational program in order to qualify as a change in educational placement." As explained in A.W. v. Fairfax County Sch. Bd., 372 F.3d 674, 680 (4th Cir. 2004), an appropriate inquiry is made into whether there has been a "diminution" of educational benefits.

The record here indicates that the Student's educational placement as of the time of the August 1, 2012 Prior Written Notice consisted of specialized instruction in small classes with work involving creating work samples with computer "modules," a period of math each day, a period of science each day, an internship, and work in drywall construction. There were also behavioral support services in this placement.

At School B, the Student's day would be substantially similar. No "basic elements" of the educational program have been eliminated. The Student would receive specialized

instruction in small classes. Classes would consist of reading, writing, math, science, with an internship and vocational instruction. Behavioral Support services would be provided, and a behavior modification program would be implemented.

Applying the Letter to [REDACTED] factors, Petitioner has not shown or alleged that the IEP has been revised. Petitioner has not shown or alleged that the Student will be educated nondisabled children to a greater extent. Petitioner has not also shown or alleges that there are any issues with the continuum of alternative placements here.

The issue here is whether the third factor in [REDACTED] applies, i.e., whether Petitioner will have the same opportunities to participate in nonacademic and extracurricular activities in the new setting or whether there has been a fundamental change to these activities. The record indicates that the Student would have the same kind of opportunities in nonacademic and extracurricular activities at School B as he had at School A. Like in School A, there is instruction where students work with tools. Like in School A, there is job placement instruction. Like in School A, the school has developed relationships with businesses that employ their students after graduation. Like in School A, School B will have speakers talk to the students. Like in School A, students are sent to internships at job sites. Like in School A, a substantial part of the school day is devoted to vocational instruction.

In his closing argument, Petitioner argues that School A is fundamentally different from School B because School A is oriented toward a different post-school outcome than School B. In particular, Petitioner argues that School A provided services to allow the Student to get into an external diploma program after leaving school. Petitioner argues that School B would have provided the Student with a G.E.D. program, which is materially different than the external diploma program.

While this IHO agrees that an external diploma program is different than a G.E.D. program, the record does not support the notion that this difference would be a fundamental change for the Student. There is nothing in the record to suggest that the Student could not obtain a G.E.D. or would not value a G.E.D. as much as an external diploma. The record indicates that the diploma is the Student's main educational goal, and that the Student could work toward a diploma through either approach.

Parenthetically, the Student testified that the instruction at School A is "totally different" for this year. Unlike in the Student's instruction at School A in 2011-2012 where there were multiple classes including in math and science, there is only one academic class for the Student for the current school year. This class is characterized as a group reading. There are no math classes for the Student even though there are math goals on the Student's IEP. There is no science class. In contrast, instruction at School B includes a variety of academic classes, much as School A used to provide. School B provides math, whereas School A does not. School B provides science, whereas School A does not. The academic services at School B are actually more similar to the 2011-2012 instruction at School A than the current instruction at School A itself.

On this record, the change from School A to School B through the Prior Written Notice dated August 1, 2012 should be not be characterized as a change in placement. DCPS did not deny the Student a FAPE through its Prior Written Notice dated August 1, 2012.

3. Other Arguments.

In his closing argument, Petitioner references a federal court case that warns against transferring students between schools in the middle of the school year. In Block v. District of Columbia, 748 F Supp. 891 (D.D.C. 1990) the Court acknowledged that while a public school

might be appropriate for a learning disabled student, there was substantial evidence to support a finding that a "mid-year change of placement" would pose a serious educational risk to the student.

However, in Block, the DCPS proposed change of school setting occurred in the middle of the student's school year. Here, the DCPS proposed change of placement occurred during the summer of 2012. A ruling against the student here would result mid-year school transfer only because of the stay-put relief ordered by this IHO. The District's actions -- here, the Prior Written Notice dated August 1, 2012 -- should be judged on their appropriateness at the time the actions were undertaken. S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp.2d 56, 66-67 (D.D.C. 2008)(the measure and adequacy of an IEP must be determined as of the time it was offered to the student); R.E. v. New York City Dep't of Educ., 694 F.3d 167, 185-186 (2d Cir. 2012)(same); Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999)(same); Carlisle Area Sch. V. Scott P., 62 F.3d 520, 530 (3d Cir. 1995)(same); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990)(same). Since the District proposed School B during the summer of 2012 and not during the middle of the 2012-2013 school year, the rationale in Block should be deemed inapplicable to these facts.

Petitioner also argues that School B can no longer provide educational services to the Student since School B is under probation by OSSE and can no longer accept new students from DCPS. Petitioner is correct, but DCPS should not be liable for FAPE denial in this connection. Again, DCPS should be judged by its actions at the time they were undertaken. At the time that the Prior Written Notice was issued in August, 2012, there is no dispute that School B was able to accept new students. S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp.2d 56, 66-67 (D.D.C. 2008)

In sum, Petitioner has not met his burden of showing that the Prior Written Notice dated August 1, 2012 violated the Student's right to FAPE through either a "failure to implement" theory or a "change of placement" theory. DCPS accordingly did not deny the Student a FAPE through its August 1, 2012 Prior Written Notice. Still, DCPS cannot implement the August 1, 2012 Prior Written Notice at this time given School B's current probationary status. Accordingly, the parties are urged to work together to find a school setting that can implement the IEP immediately after the issuance of this decision and the expiration of the Student's stay-put rights.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, Petitioner's claim is hereby dismissed with prejudice.

Dated: December 10, 2012

Michael Lazan
Impartial Hearing Officer

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 USC §1415(i).

Date: December 10, 2012

Michael Lazan
Impartial Hearing Officer