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Office of Review and Compliance  
Student Hearing Office  
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OSSE  
Student Hearing Office  
February 11, 2014

**Confidential**

<p>Parent on Behalf of Student<sup>1</sup>,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: January 29, 2014</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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<sup>1</sup> 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 January 29, 2014, 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 2006.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student is \_\_\_\_\_ attending a DCPS school (School A). He resides in the District of Columbia with his parents and is a child with a disability pursuant to IDEA with a classification of specific learning disability (“SLD”).

In April 2009 when the student was \_\_\_\_\_ still in kindergarten DCPS conducted evaluations that included the following: psychological, educational, speech and language. The student was assessed as having borderline cognitive scores, and academic scores at kindergarten level and below average receptive and expressive language functioning. Since the student has attended School A, his individual educational program (“IEP”) services have gradually increased. In March 2012 DCPS updated the student’s IEP. The services that were prescribed in that IEP were the following: 3 hours per day of specialized instruction – one hour each in math, written expression and reading and 2 hours per month of speech language pathology.

Although the student was due for triennial evaluations by 2012 DCPS did not conduct formal comprehensive evaluations. In May 2013 an independent neuropsychological evaluation was conducted of the student by Children’s National Medical Center (“CNMC”). That evaluation determined the student has average cognitive abilities, but is operating at kindergarten to first grade in reading and written language, and at second to third grade in math. Based upon this evaluation the student has made little progress academically since DCPS evaluated him in 2009.

An independent educational assessment and independent speech-language evaluation were conducted in June 2013 and August 2013 respectively. Petitioner provided DCPS the independent evaluations and DCPS conducted its review of the evaluations and of the student’s educational placement to determine if he was in need of a more restrictive setting.

DCPS convened IEP meetings on September 4, 2013, and October 1, 2013, and the student’s IEP was revised on October 13, 2013, to prescribe that all instruction be provided outside general education. The team determined the student was in need of a more restrictive setting and that he would be placed in a school other than School A. On November 2013 DCPS proposed that the student attend a newly created special education program (“School B”) located at another DCPS school.

On October 28, 2013, Petitioner filed the due process complaint asserting DCPS denied the student a free and appropriate public education (“FAPE”) by failing to: (1) reevaluate the student since 2009; (2) provide an appropriate IEP since March 2012 and (3) provide an appropriate placement at School A and now at School B.

Petitioner seeks as relief an order directing DCPS to immediately place, fund and provide transportation for the student to attend a private full-time out of general education school ("School B") where the student has been accepted and reimburse the cost of the independent evaluations.

DCPS filed a response to the complaint on November 25, 2013. DCPS denied any alleged denial of a FAPE and specifically denied that it failed to provide an appropriate IEP, current evaluations, and an appropriate location of services. DCPS asserted that on May 16, 2011, a data review for the student was completed that constituted his reevaluation. DCPS reviewed the independent evaluations and based on all the information available as of that date, increased the student's IEP to "full time." DCPS maintains that School B would be preferable for this student as his least restrictive environment ("LRE") and although DCPS did not provide ESY, DCPS did provide the Linda Mood Bell reading programming to student during Summer 2013 and the student benefitted from that program.

The student has remained at School A pending the outcome of this due process hearing.

A resolution meeting was held November 25, 2013. The case was not resolved and the parties did not mutually agree to proceed directly to hearing. The 45-day period began on December 14, 2013, ended (and the Hearing Officer's Determination ("HOD") was originally due) on January 29, 2014.

A pre-hearing conference was held on December 31, 2013, and a revised pre-hearing conference order was issued January 14, 2014, outlining, inter alia, the issues to be adjudicated and setting a hearing date of January 22, 2014.

Because of inclement weather and DCPS closing on day of the scheduled hearing DCPS counsel requested a continuance of the hearing and extension of the HOD due date for seven days to January 29, 2014, and February 5, 2014, respectively. The motion was unopposed and was granted.

## **ISSUES: <sup>2</sup>**

### **The issues adjudicated are:**

1. Whether DCPS denied the student a FAPE by failing to conduct triennial evaluations that were to be conducted in 2012.
2. Whether DCPS denied the student a FAPE by failing to provide an appropriate IEP since March 2012, because the IEPs (March 2012 and October 2013) did/does not include the

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<sup>2</sup> The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated, particularly as noted in the footnote for issue #2 regarding the appropriateness of the student's IEPs.

following: (1) sufficient hours of special education services and/or (2) ESY services for Summer 2013, and/or other recommendations made by independent evaluators.<sup>3</sup>

3. Whether DCPS denied the student a FAPE by failing to provide the student an appropriate educational placement/location of service since March 2012 at School A and at the DCPS proposed placement, School B.

#### **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in Petitioner's disclosures (Exhibits 1 through 44) that were admitted into the record and are listed in Appendix A. DCPS disclosed no documents and relied on Petitioner's disclosures. Witnesses are listed in Appendix B.

#### **FINDINGS OF FACT:<sup>4</sup>**

1. The student is attending School A. He resides in the District of Columbia with his parents and is a child with a disability pursuant to IDEA with a classification of SLD. (Petitioner's Exhibit 13-1)
2. In April 2009 when the student was retained in kindergarten, DCPS conducted evaluations that included the following: psychological, educational, speech-language. The student was assessed as having borderline cognitive scores, academic scores at kindergarten level and below average receptive and expressive language functioning. (Parent's testimony, Petitioner's Exhibit 16-1, 16-9, 17-1, 17-4, 18-1, 18-6)
3. The student was thereafter found eligible and received speech language services and pull out specialized instruction pursuant to his IEP. He was provided ESY after first and second grade but did not have these services any year following. Initially the student no displayed no behavior difficulties but by third grade he began to display behavior problems. And now occasionally gets in trouble at school. He has begun to display problems with attention and task completion. (Parent's testimony)

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<sup>3</sup> Petitioner also asserted in the complaint that the IEP(s) were/are deficient because of they lack an appropriate teacher-to-student ratio lack specialized instruction tailored to meet the student's needs and/or lack specific research-based intervention services designed for students with his particular learning disabilities. As clarified at the outset of the hearing Petitioner also asserted the IEP goals remained the same and were not changed and with regard to the October 2013 IEP there were insufficient speech language services and the IEP team did not incorporate all the recommendations provided in the independent evaluations.

<sup>4</sup> The evidence that is the source of the Finding of Fact ("FOF") 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.

4. Since the student has attended School A, his IEP services have gradually increased. In March 2012 DCPS updated the IEP to prescribe the following: 3 hours per day of specialized instruction – one hour each in math, written expression and reading and 2 hours per month of speech-language pathology. (Petitioner's Exhibit 3-1, 3-9)
5. At the student's March 2012 IEP meeting no one raised the issue of reevaluating the student and the parent did not ask that the student be evaluated. (Parent's testimony)
6. Although the student was due for triennial evaluations by 2012, DCPS did not conduct formal reevaluates of the student during that year. (Parent's testimony)
7. At School A the student has had the same special education teacher for the past two years (SY 2012-2013 and SY 2013-2014) and she has been a member of his IEP team. This teacher prepared progress reports for the student that indicated that he was progressing albeit slowing toward his IEP goals. The student is resistant to reading and has anxiety when called upon to read. He is significantly behind but does make his best efforts. He is making progress based on the level of instruction that he has received. (Witness 5's testimony, Petitioner's Exhibits 6, 7)
8. At School A the student is in a general education classroom of 22 students. His special education teacher pulls him from that classroom and groups him with other special education students for three hours per day when he is in a group of no more than five students. He sometimes gets to coach the other students on patterns as he picks them up easily which gives him a sense of accomplishment in his interactions with students in the general education setting. (Witness 5's testimony)
9. In May 2013 an independent neuropsychological evaluation was conducted of the student by CNMC. That evaluation determined the student has average cognitive abilities, but is currently operating at kindergarten to first grade in reading and written language, and at second to third grade in math. He has made minimal progress with written language skills. He has significant impairment in auditory memory, his vocabulary is borderline and he shows signs of impulsivity, inattention and problems with executive functioning. (Witness 3's testimony, Petitioner's Exhibit 19-1, 19-6, 19-15)
10. The psychologist reviewed the student's previous evaluations and his March 2012 IEP and concluded the student has made no progress with his core reading skills over the past 2 to 3 years using grade level estimates from the previous evaluations. In math, however, the student has made some nice progress in calculations and fluency and word problems when he is given cues. As he progresses in school and as math becomes more language based he will probably have more problems with math. (Witness 3's testimony, Petitioner's Exhibit 19-4, 19-5)
11. The student's mother and two of his teachers prepared a behavior rating scale as a part of the student's psychological evaluation. These rating scales indicate that over the past two to three years the student has begun to display negative behaviors with increasing academic demands. Primarily the behavior problems occur when he is asked to do language-based tasks. (Witness 3's testimony)

12. The psychologist diagnosed the student with a specific learning disability reading, written language and math (despite his progress in this area). She deferred the diagnosis of Attention Deficit Hyperactivity Disorder (“ADHD”). Because the student’s inattention seemed to be linked to language demands. Consequently, the psychologist deferred the diagnosis until the student’s learning concerns are addressed with additional special education services. (Witness 3’s testimony, Petitioner’s Exhibit 19-6, 19-7)
13. The psychologist recommended in her report that the student be in a classroom devoted to language-based disabilities with a low teacher/student ratio. The services provided the student need to be more intense now than would have been necessary in earlier years. He needs remediation and significant accommodations to learn and demonstrate what he knows and he will need significant supports in core and non-core subjects to access the curriculum. However, the student does not need to be segregated from non-disabled peers because of his behavior. (Witness 3’s testimony)
14. An independent speech language evaluation was conducted of the student August 12, 2013. The evaluation indicated the student had deficits in auditory processing which causes a distortion in his listening. As a result he has to put extra effort to understand what is presented to him in class. However, he was able to use cues and context and inferential reasoning and compensatory behaviors to address his deficits. (Witness 1’s testimony, Petitioner’s Exhibit 24)
15. The student had scattered scores in language assessments. He was average in sentence formulation; however, his spontaneous speaking was more problematic. He has a language-based learning disability. He has perceptual confusions that impact him in all areas of learning. (Witness 1’s testimony, Petitioner’s Exhibit 24-4, 24-8)
16. The speech-language evaluator recommended behavior modifications for the student to limit his frustrations and suggested goals and exercises to improve his memory. When compared with the student’s 2009 speech language evaluation the student’s expressive language abilities have regressed. She recommended the student be provided individual speech and language services at least twice per week and perhaps daily to be coordinated with the student’s classroom teacher and other service providers. (Witness 1’s testimony, Petitioner’s Exhibit 18)
17. In June 2013 an independent educational consultant for the student’s parent assessed the student and prepared a written report. Petitioner provided DCPS all the independent evaluation reports and DCPS conducted its own review of evaluations and a review of the student’s educational placement to determine if he was in need of a more restrictive setting than School A. (Petitioner’s Exhibits 19, 22, 23, 25, 26, 27, 28, 29)
18. The parent’s educational consultant also reviewed the student’s IEPs and concluded that not everything that should have been targeted in the IEPs was targeted either through goals or accommodations. In his prior IEP the student’s phonemic awareness and decoding was not targeted. Over the years while attending School A the student has never mastered any of his goals and made minimal progress and the student’s speech and language goals remained the same. (Witness 2’s testimony, Petitioner’s Exhibit 22-2)

19. During Summer 2013 the student participated in the Linda-Mood Bell reading program. (Petitioner's Exhibits 31, 32)
20. DCPS convened IEP meetings on September 4, 2013, and October 1, 2013. At the September 4, 2013, meeting the team reviewed the independent evaluations. The student's IEP was revised on October 13, 2013, to prescribe that all instruction be provided outside general education. The team determined the student was in need of a more restrictive setting and that he would be placed a school other than School A. At that time School B had not been identified as the school the student would attend. The team also developed a BIP for the student to address his anxiety and frustration in the educational setting. (Parent's testimony, Witness 5's testimony, Petitioner's Exhibits 11, 12, 13, 14)
21. The parent's educational consultant participated in the September 4, 2013, and October 1, 2013, IEP meetings. The consultant provided written recommendations for inclusion in the student's IEP. The parent's educational consultant took what was already in the IEP and revised to better target the student's needs. She is of the opinion the IEP is still lacking in addressing the student's global needs and no targeting of executive functioning. (Witness 2's testimony, Petitioner's Exhibit 44)
22. The student's IEP now prescribes five hours (per day) of special education outside general education, two hours per month of speech and language therapy, two hours per month of behavioral therapy and three hours per month of occupational therapy. There are also 2 hours of consultative speech language services per month and 1 hour of consultative occupational therapy per month. (Petitioner's Exhibit 13-20)
23. The DCPS team did not make all the recommended changes in the IEP and said when he arrived at his new school they could evaluate him and modify the IEP appropriately but that School A could not provide the level of services he needed. (Parent's testimony)
24. On November 13, 2013, DCPS proposed that the student be placed at School B. DCPS selected School B based on the student's needs. It can provide the intensity services in the student's new IEP and it has smaller teacher to student ratio than School A. School B will be using special education program in reading and computer based learning. A teacher has been hired for this class but it is unclear whether there are other students yet enrolled in the program. There will be a 30-day review if the student attends School B to assess his progress and the appropriateness of program and location. (Witness 5's testimony)
25. On January 10, 2013, the student's parent and her educational consultant visited School B and spoke with a staff member of the school who informed them that School B has 310 students from head-start to eighth grade. They were informed that the program identified for the student was new and there no students with full-time out of general education IEPs attending. The student would be the only one served at that level. The student's assigned teacher was not available on the day of their visit. They could not see the classroom and the staff member they spoke with did not have a copy of the student's IEP and asked the parent for it. (Parent's testimony, Witness 2's testimony)

26. The student has been accepted to School C. It is ten-month program with five weeks of ESY to remediate students in reading, writing and math. The student fits the criteria of the children at School C with language-based disabilities. School C has 62 students 14 of who are funded by the District of Columbia. School C has a strong reading program along with reading tutorials. The reading program has three levels: Level 1 addresses difficulties encoding and decoding, Level 2 addresses reading fluency, and Level 3 addresses reading comprehension. There are no more than eight students with one teacher in each class. And in the Level 1 reading group to which the student will be assigned there are no more than 3 students and 1 teacher. The school provides related services. There are 2 full time licensed speech therapists on staff, a part-time licensed occupational therapist and a counselor. (Witness 4's testimony, Petitioner's Exhibit 40)
27. School A's tuition is \$36,900 annually and related services are billed separately as follows: \$111.00 per hour for speech-language pathology, \$114.00 per hour for occupational therapy and \$121.00 per hour for counseling. The school has a certification from OSSE. (Witness 4's testimony)
28. The parent's educational consultant expressed an opinion that School C is appropriate because among other things it has phonemic awareness program and the staff is open to amending the student's IEP appropriately. (Witness 2's testimony)
29. The student current special education teacher at School A expressed her opinion as a member of the student's IEP team that School C is not the LRE for the student because at School C the student would not have the opportunity for interaction with non-disabled peers. (Witness 5's testimony)

#### **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.<sup>5</sup> *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 1:** Whether DCPS denied the student a FAPE by failing to conduct triennial evaluations that were to be conducted in 2012.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS failed to conduct the student's triennial evaluations that were to be completed in 2012.

34 C.F.R. § 300.303(a) makes clear that, "A local education agency ("LEA") shall ensure that a re-evaluation of each child with a disability is conducted...if the child's parents or teacher requests a re-evaluation." and that the reevaluation must be conducted at least once every three years.

In *Herbin v. Dist. of Columbia*,<sup>2</sup> the court held that requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp 2d. 254 , 259, 261 (D.C.C. 2005).

Although DCPS asserted in its response that it had conducted a record review in 2011 there was no evidence of that review. On the other hand, Petitioner presented evidence of the independent evaluations that were conducted in 2013 and that revealed the student's substantial delays and lack of significant academic progress.<sup>6</sup> As a result of these evaluations and recommendations of the evaluators the student's programming and services have been dramatically changed.<sup>7</sup> This is evidence sufficient to demonstrate that the student was harmed by not having these reevaluations conducted and reviewed by a team in a timely manner and he was thus denied a FAPE.

Accordingly, the Hearing Officer in the order below grants Petitioner's request for reimbursement of the cost of two independent evaluations at the price represented by the Petitioner as their cost.

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<sup>5</sup> 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.

<sup>6</sup> FOF #s 6, 9, 10, 16, 18

<sup>7</sup> FOF #s 13, 22

**ISSUE 2:** Whether DCPS denied the student a FAPE by failing to provide an appropriate IEP since March 2012, because the IEPs (March 2012 and October 2013) did/does not include the following: (1) sufficient hours of special education services and/or (2) ESY services for Summer 2013, and/or other recommendations made by independent evaluators.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that the student's March 2012 IEP was inappropriate because it lacked sufficient hours of specialized instruction. As to the most recent IEP there was sufficient evidence that the current IEP lacks sufficient speech-language services, however, there was insufficient evidence that it and lacks sufficient specialized instruction and/or goals.

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 "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia*, 561 F.Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). See 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. "The IEP 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).

34 C.F.R. § 300.324(a) provides that In developing each child's IEP, the IEP team must consider— (i) the strengths of the child; (ii) the concerns of the parents for enhancing the education of their child; (iii) the results of the initial or most recent evaluation of the child; and (iv) The academic, developmental, and functional needs of the child.

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 (8<sup>th</sup> Cir. 1999)

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).

As to the insufficiency of services in the 2012 IEP the evidence demonstrates that the student should have been provided more intense services up to and including all instruction and services

being provided outside general education as his current IEP prescribes. Petitioner presented evidence of the independent evaluations that were conducted in 2013 that revealed the student's substantial delays and lack of significant academic progress. The student's lack significant progress was clearly apparent even without reevaluations being conducted.<sup>8</sup> Although DCPS increased the services to the student over time the level of services were clearly insufficient. This is evidence sufficient to demonstrate that the student was harmed by not having intensified special education services in a full time out of general education setting during his previous IEP period and he was thus denied a FAPE.

There was no specific evidence regarding ESY other than the parent stating that student had been provided ESY in the first two years he had an IEP. There was no evidence that the student needed the services during the summer to avoid regression. The student attended a reading summer program during Summer 2013 and was presumably engaged in instruction during that time.<sup>9</sup> Absent any specific evidence that the student was harmed by the lack of ESY services, their absence from the IEP does not render the 21012 IEP in inappropriate. Consequently, the Hearing Officer does not conclude that the student was harmed because the IEP did include ESY services that would have been provided during Summer 2013.

The evidence demonstrates that the student's IEP developed on October 16, 2013, incorporated significant changes to the student's IEP goals. There was substantial evidence of the student's severe language based deficits that require significantly more individual speech language services than the student is currently provided.<sup>10</sup> There was no contrary evidence presented by Respondent on the student need to lack thereof for these additional services. The Hearing Officer thus concludes that the lack of these additional services results in the IEP being inappropriate. As a result, the Hearing Officer directs in the Order below that the student be provided additional hours per week of speech-language services.

Although there was testimony offered that the IEP could include additional goals to target the student's global deficits, there was insufficient proof that the lack of the additional goals renders the remainder of the IEP inappropriate particularly in light of the student being now placed in a full time out of general education setting. Although the student's current IEP may not yet reach perfection, other than changes in the level of speech-language services, it is reasonably calculated to provide the student educational benefit. The Hearing Officer does, however, in the Order below direct that the student's IEP be reviewed within 30 days of his arrival at his new school location to allow the new IEP team at that school to review the IEP based upon the student's response and progress in the new setting.

**ISSUE 3:** Whether DCPS denied the student a FAPE by failing to provide the student an appropriate educational placement/location of service since March 2012 at School A and at the DCPS proposed placement, School B.

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<sup>8</sup> FOF #s 3, 4, 7, 11

<sup>9</sup> FOF # 19

<sup>10</sup> FOF # 14, 15, 16

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that both School A and School B are inappropriate programs for the student and he should be placed at School C.

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.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

The evidence demonstrates that during SY 2012-2013 the student had an inappropriate IEP because it did not provide the student full time out of general education services. Thus, the student's placement School A was inappropriate. DCPS has now proposed to place the student at School B. However, there was insufficient evidence that School B is a viable program that can implement the student's current IEP and provide him the services he needs. The one DCPS witness that provided any information about the program did not have direct knowledge of the program and could not say there are any other students in it.

On the other Petitioner and the educational consultant testified that when they visited the program there were no students in it and the teacher, although hired to teach, was not available.<sup>11</sup> Absent sufficient evidence that School B is appropriate and given the student's significant deficits and the fact that he has had an inappropriate IEP and been in an inappropriate placement since March 2012 and suffered harm as a result the Hearing Officer concludes the student was denied a FAPE and shall be placed at the school Petitioner has requested.

The evidence demonstrates that School C can provide the student with educational benefit and meets the requirements that the Hearing Officer must weigh in considering an educational placement proposed a parent.<sup>12</sup> *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005)

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<sup>11</sup> FOF # 25

<sup>12</sup> FOF #s 26, 27

**ORDER:<sup>13</sup>**

1. DCPS shall within five (5) school days of the issuance of this Order place and fund the student's attendance at the Chelsea School of Hyattsville, Maryland and provide him transportation services.
2. The student's IEP is hereby amended to prescribe two hours of speech and language services per week.
3. DCPS shall reimburse Petitioner the cost of the independent evaluations that were conducted by Dr. Sanz and Dr. Kamara at a cost of \$3,060.00 and \$2,265.00, respectively, within 60 calendar days of DCPS being provided an invoice and/or receipt of payment for the evaluations.
4. DCPS shall within 30 calendar days after the student has begun attending the Chelsea School review of the student's progress at the Chelsea School and update the student's IEP as the team deems appropriate based upon the recommendations made in the independent evaluations and input of the student's new team members who instruct and provide him services at the Chelsea School.<sup>14</sup>
5. All other requested relief is denied.

**APPEAL PROCESS:**

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

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: February 5, 2014**

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<sup>13</sup> 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.

<sup>14</sup> The parties may mutually agree to delay this meeting beyond the time prescribed by this order.