DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STATE ENFORCEMENT & INVESTIGATION DIVISION
STUDENT HEARING OFFICE

CONFIDENTIAL

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HEARING OFFICER'S DETERMINATION

IN THE MATTER OF:	)	
a minor, by and	)	
through his parents	)	
	)	
DOB	)	DATE OF HEARING
	)	February 23 & 24, 2010
Petitioner,	)	
	)	DATE OF COMPLAINT
V.	)	November 24, 2009
	)	
The District of Columbia	)	ATTENDING SCHOOL:
Public Schools,	)	
Respondent	)	

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COUNSEL FOR PARENT/STUDENT: **Michael Eig**
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Chevy Chase, Maryland 20815

COUNSEL FOR DCPS: **Daniel McCall**
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HEARING OFFICER'S DECISION AND ORDER

I. INTRODUCTION

This is an year old child found eligible to receive special education and related services pursuant to the IDEA under the classification of Specific Learning Disability (SLD). During the 2007-2008 school year, the student attended During the summer of 2008, several IEP meetings were held in order to determine an IEP and placement for the 2008-2009 school year. The student's parents objected to the proposed IEP and placement at and unilaterally placed the student at the for the 2008-2009 school year. On October 31, 2008, the parents filed a due process complaint challenging as inappropriate the 2008-2009 IEP and placement and requesting reimbursement for the cost of the for the 2008-2009 school year. On March 6, 2009, an HOD was issued finding that the 2008-2009 IEP and placement were appropriate and that DCPS had not denied the student FAPE. The HOD did not contain any findings of fact. On April 9, 2009, the parents appealed the Hearing Officer's decision to the United States District Court for the District of Columbia, where it is currently pending.

In March 2009, the parents contacted DCPS requesting that the student be placed and funded at the for the 2009-2010 school year. On August 26, 2009, the parents attended an MDT meeting for the student at which they provided DCPS with current information concerning the student. On November 24, 2009, this due process complaint was filed because the student's IEP meeting had not been reconvened and DCPS had not made a decision concerning the student's 2009-2010 IEP or placement. Subsequent to the filing of the due process complaint, on January 8, 2010, an IEP meeting was held at which DCPS proposed a program and placement at Petitioner rejected both the number of hours of services and the placement at the meeting. On January 25, 2010, Petitioner filed an amended due process complaint to include a challenge to the proposed program and placement.

DCPS waived a resolution session in this matter on December 12, 2009.

A pre-hearing conference was held on December 22, 2009, and a pre-hearing order was issued on December 31, 2009.

A second pre-hearing conference was held on January 20, 2010, and a second pre-hearing order was issued on January 23, 2010.

On December 7, 2009, DCPS filed a Motion to Dismiss for Lack of Jurisdiction. Petitioner filed an Opposition on December 10, 2009, and an Order denying the Motion to Dismiss was issued on December 22, 2009. DCPS argued that the Hearing Officer lacked jurisdiction to hear this case and that the issues and claims in the case had been previously litigated as part of the hearing leading to the March 6, 2009, HOD. However, no issue or claim concerning the student's 2009-2010, IEP or placement was litigated in

the prior proceeding. The March 6, 2009, complaint, HOD, and appeal to the U.S. district Court all concern only the 2008-2009 school year. The events leading up to the present complaint had not even occurred as of the time of the issuance of the previous HOD.

On January 25, 2010, Petitioner filed an amended due process complaint in order to include the issues concerning DCPS' proposed program and placement which was first revealed to Petitioner at the January 8, 2010 IEP meeting. The parties agreed to allow the filing of an amended complaint during the January 20, 2010, pre-hearing conference. At that same pre-hearing conference, the hearing was continued to February 23 & 24, 2010. A pre-hearing order containing this agreement was issued on January 23, 2010. The order gave the parties three business days of receipt to object to anything contained in the order. No objections were received. On January 29, 2010, DCPS counsel sent an email indicating that, pursuant to 34 CFR § 300.508(d)(4), the time period for a resolution session and due process hearing begin again when an amended complaint is filed. By responsive e-mail, the Hearing Officer declined to reset the timeline for several reasons. First, DCPS had failed to timely raise the issue of the timeline and had, in fact, consented to both the amended complaint and the hearing dates during the January 20, 2010, pre-hearing conference. Second, the amended complaint did not raise new issues but rather was submitted to conform to the issues already being discussed between the parties from at least January 8, 2010. DCPS had ample time to try to resolve these issues prior to the hearing.

II. JURISDICTION

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶ 1400 *et seq.*, 34 CFR Part 300 *et seq.*, and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

III. ISSUES

Has DCPS denied the student FAPE by

1. Failing to timely hold an IEP meeting to develop an IEP for the 2009-2010 school year?

2. Failing to propose an IEP or placement by the start of the 2009-2010 school year?

3. Predetermining the 2009-2010 program and placement for the student, thereby denying the parents' meaningful participation in the IEP process?

4. Failing to provide an appropriate program and placement for the 2009-2010 school year?

5. If DCPS has failed to provide an appropriate placement, is the
a proper placement for the student?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated January 5, 2010, containing a list of witnesses with attachments P 1-40. A supplemental disclosure was submitted on January 11, 2010, containing exhibits P 41-45, and a second supplemental disclosure was submitted on February 13, 2010, containing exhibits P 46-57.The disclosures were admitted in their entirety. Petitioner called as witnesses both of the student's parents, an educational advocate, a speech and language (s/l) therapist from the and the Academic Director at the

DCPS submitted a five day disclosure letter dated February 16, 2010, containing a list of witnesses with attachments DCPS 1-4 and 6-10. No DCPS 5 was provided. The disclosure was admitted in its entirety. DCPS called as witnesses a DCPS Program Manager in the non-public unit, the SAM Coach at a special education teacher at Dr. Wayne Sailor, a professor in the School of Education, University of Kansas, a social worker at the SEC at and a DCPS compliance case manager.

V. FINDINGS OF FACT

1. This is a year old child found eligible to receive special education and related services pursuant to the IDEA under the classification of Specific Learning Disability (SLD). (DCPS 7)

2. During the 2007-2008 school year, the student attended (ES). During the summer of 2008, several IEP meetings were held in order to determine an IEP and placement for the 2008-2009 school year. The student's parents objected to the proposed IEP and placement at and unilaterally placed the student at the for the 2008-2009 school year. On October 31, 2008, the parents filed a due process complaint challenging as inappropriate the 2008-2009 IEP and placement and requesting reimbursement for the cost of the for the 2008-2009 school year. On March 6, 2009, an HOD was issued finding that the 2008-2009 IEP and placement were appropriate and that DCPS had not denied the student FAPE. (Testimony of mother, P 35, 36, DCPS 2)

3. On March 11, 2009, Petitioner's attorney sent a letter to DCPS' attorney advising that the parents were requesting that DCPS consider placing and funding the student at the for the 2009-2010 school year. The letter also informed DCPS that the would be holding an annual review for the student in the next month or so. (P 41)

4. In May 2009, the held an IEP meeting for the student. Angel Hunter, the program manager for the non-public unit at DCPS received an invitation to attend the meeting. It is not clear if the or Petitioner's counsel contacted Ms. Hunter. Ms. Hunter had intended to attend the meeting but at the last minute could not do so. She called into the meeting instead and expressed her concern that she could not be there in

person. Ms. Hunter was told that was o.k. and that she did not need to participate for the meeting to go forward. Ms. Hunter ended the call and did not participate in the meeting.

At the time of the meeting, Ms. Hunter was confused as to why she had been contacted since the student was not a DCPS non-public student, that is, a student funded by DCPS at a non-public school. (Testimony of Ms. Hunter)

5. On June 3, 2009, the parents wrote to Ms. Hunter and included a copy of the student's IEP. The parents requested that DCPS consider the information and let them know the school system's placement decision for the 2009-2010 school year as soon as possible. (P 15, 16)

6. The student's DCPS IEP expired on June 12, 2009. (DCPS 1)

6. On July 16, 2009, Ms. Hunter sent the parents a Letter of Invitation (LOI) proposing dates on July 27, 28, and 29 on which to hold an MDT meeting to discuss placement. (P 17)

7. On July 23, 2009, Petitioner's counsel faxed and e-mailed a letter to Ms. Hunter indicating that the parents would be on vacation during that time period and suggesting the dates of August 19, 20, and 21 for the meeting. Ms. Hunter responded asking if the meeting could be convened on August 6 or 11. (P 18, 19)

8. The MDT meeting was held on August 26, 2009. Present were the student's father, counsel for Petitioner, counsel for DCPS, and Ms. Hunter. At the meeting, the parents provided DCPS with some current information concerning the student. The MDT developed a Student Evaluation Plan (SEP), and determined it would review and gather all recent evaluations and the student's present levels of performance from the The parent signed consent for DCPS to contact the to retrieve all evaluations and educational information. The team determined that the meeting would be rescheduled to review all new information and agreed on tentative dates of September 22 or 23, pending availability. (P 23, 24)

9. On September 3, 2009, the parents forwarded additional reports from the for DCPS review. On September 8, 2009, the parents emailed Ms. Hunter and notified her that the was unavailable on the previously discussed dates, and asked that she get in touch with them to discuss new dates. (P 25, 26).

10. On September 9, 2009, Ms. Hunter emailed the parents informing them that she had forwarded the student's information and the August 26, 2009, meeting notes to Gayle Hall, who would be taking over scheduling of the IEP meeting for DCPS. (P 26)

11. The parents did not hear anything from Ms. Hall. On September 15, 2009, and again on October 5, 2009, the parents wrote to Ms. Hall inquiring about the status of the IEP meeting. In addition, the parents left phone messages with Ms. Hall. She did not respond to the letters or messages. (P 27, 28)

12. On November 24, 2009, the parents filed the present due process complaint. Shortly thereafter, DCPS appointed a compliance officer, James Coleman, to review the case. He sent an LOI to the parents on December 3, 2009, proposing to convene an IEP meeting on January 7 or 14, 2010. (P 32, Testimony of Mr. Coleman)

12. The IEP meeting was held on January 8, 2010. A draft IEP and proposed program and placement were presented by DCPS at the meeting. On February 11, 2010, DCPS sent the parents an LOI for an additional IEP meeting suggesting the dates of February 18 or 23. Petitioner's counsel was not available on those dates and suggested March 2, 2010, to reconvene. An LOI for March 2, 2010 was sent to the parents on February 16, 2010. (P 57, DCPS 10, Testimony of parents, Mr. Coleman)

13. The student had no IEP from DCPS from June 12, 2009 to at least January 8, 2010. DCPS did not issue a Prior Notice of Placement (PNOP) until February 16, 2010. (DCPS 9)

14. The record contains many evaluations and reports detailing the student's education related problems dating from December 2006 to May 2009. (P 2-15) DCPS has not contested the nature or scope of the student's educational problems. In fact, it has presented no evidence concerning the student's educational deficits. Likewise, the March 6, 2009, HOD made no findings of fact concerning the student's educational deficits, nor did it in any way contest Petitioner's evidence concerning the nature and scope of the student's problems. The HOD focused solely and briefly on the issue of whether could meet the student's needs as presented. Therefore, exhibits P 2-15 are taken as true so far as they describe the nature and extent of the student's educational problems.

15. The student is bright but his academic progress lags far behind his abilities. The student is inattentive and compulsive and requires a lot of redirection to stay on task and maintain his effort. He has an immature neuromotor and regulatory attention system. The student has been diagnosed with ADHD. (P 6)

16. The student has weak executive functioning causing difficulties for the student with deliberate learning. He has difficulty with rote learning and automatization and slow processing speed. The student has difficulty with all academic areas as evidenced in his test scores in reading, writing, and math. He has weak phonological awareness and weak graphomotor control and planning skills. The student has a learning disability in reading, writing and math. He fits the classic definition of dyslexia or a learning disability in reading as well as dysgraphia or a learning disability in writing. As of January 2008, the student did not easily segment words, combine sounds, or match beginning and ending sounds. He could not consistently recite the alphabet, identify all of his letters, or count to 20. (P 6)

17. The student's most recent comprehensive speech and language assessment, conducted in April 2008, diagnosed the student with Developmental Articulation Disorder, Mixed Receptive-Expressive Language Disorder, and Reading Disorder due to deficits in

phonological awareness skills as applied to reading and spelling. The student's greatest weaknesses were in the areas of sound blending, sound segmentation, isolation of medial and final sounds, and sound-symbol correspondence knowledge. The student had difficulty matching appropriate letters to sounds when spelling and sounds to letters when reading and accurately sequencing sounds/letters. The student also had difficulties applying strategies or skills to attack unfamiliar words, resulting in frequent phonologically-based errors. These deficits impacted the student's reading comprehension and language skills. (P 7)

A March 2009, Annual Speech and Language Report from the indicated that the student was making slow progress but that the April 2008 report still reflected the student's problems and appropriate diagnoses. In addition, this report recommended adding a diagnosis of Disorder of Written Language due to the student's difficulties in language organization, encoding, and writing mechanics. The report recommended that the student continue to receive S/L therapy at the frequency of two individual and one group session per week as well as integrated services provided in the classroom. (P 14)

18. a S/L pathologist at the testified for Petitioner. supervises the schools S/L programs, as well as their clinical fellows and graduate students. She has been a S/L pathologist for over 25 years, and has worked at the for 10 years. worked with the student during the summer 2008, when the student was enrolled in an intensive S/L summer program. She supervises the S/L pathologist who presently works with the student and sometimes provides direct services to the student. She conducts on-going discussions with the student's teachers and his S/L therapist, has observed the student and has delivered therapy to him as recently as the day before this hearing began. was a credible witness with substantial knowledge in the area of S/L therapy and an intimate knowledge of the student's problems.

confirmed that the student has multiple S/L issues, including articulation, oral motor, work retrieval, organization, and phonological awareness. She noted that the student has a fragile linguistic self esteem and reverts to baby talk when he feels challenged in reading and writing. After one and one-half years of intensive work the student is finally at the stage where he can read very simple books and is willing to read in front of others. The fact that this is as far as the student has gotten at his age and with the amount of time spent working with him indicates that the student is severely impaired. noted that the student's writing and spelling are equally impaired. (Testimony of

19. A July 2008, Occupational Therapy (OT) evaluation determined that the student had deficits in sensory motor processing and required OT services to address his deficient fine motor skills. A January 2009 OT Progress Report from the reported that the student has difficulty with visual spatial awareness, which impact the developments of reading and handwriting. The student has difficulty identifying reversals of letters and numbers and makes a number of reversals when writing. The student's hand strength is significantly below average, impacting his ability to write. The progress report

recommended increasing the student's OT services from one to two sessions per week during the 2009-2010 school year. (12, 13)

20. The student's most recent IEP, developed on May 21, 2008, includes a long list of needs for this student in perceptual reasoning, oral language, written language, reading, math, S/L, and OT. The student's current level of functioning in perceptual reasoning is at the 1.0 grade level, in written language at the 1.0 grade level, in reading at the 1.5 grade level, and in math at the 2.0 grade level. (P 15)

21. DCPS convened an IEP meeting for the student at the on January 8, 2010. Present at the meeting were both parents, counsel for Petitioner, the Director of OT, the of the lower school, the Academic Director, the student's teacher at the the social worker, a special education teacher, the DCPS Compliance Manager, and by phone, DCPS counsel. Near the end of the meeting Dr. Angela Stephens was contacted by phone. (Testimony of mother, Mr. Coleman)

22. At the meeting, DCPS presented the parents with a draft IEP. The student's goals and objectives were discussed. DCPS agreed to add a number of objectives at the parents' request. Almost all of the goals and objectives are taken from the May 21, 2008, IEP. The draft IEP included goals and objectives in the areas of S/L and OT, needs that were not in DCPS' 2008-2009 IEP. Some time after the IEP meeting a second draft of the IEP was provided to the parents incorporating the agreed upon new objectives. The parents agree with the goals and objectives in this IEP. participants in the meeting also agreed with the goals and objectives. (DCPS 6, 7, Testimony of mother and father, Mr. Coleman,

DCPS has not yet presented the parents with a final IEP. Another meeting to discuss the IEP is scheduled for March 2, 2010. (P 57, Testimony of Mr. Coleman)

23. Toward the end of the January 8th IEP meeting, DCPS presented the amount of special education services it was proposing and the location of these services. At this point, the only DCPS representatives at the meeting were Mr. Coleman and the social worker. DCPS proposed to provide the student per week with 12.5 hours of specialized instruction, 30 minutes of behavioral support services, 40 minutes of occupational therapy, and 90 minutes of S/L therapy, all to be provided in a general education setting. (DCPS 7, Testimony of mother, father, Mr. Coleman).

24. The amount of services and the location for the services were determined by the was not at the IEP meeting. Mr. Coleman presented the number of hours of services and the location of services at the meeting. The parents and all participants in the meeting disagreed with both the number of hours and the location of services, believing that the student required a full-time placement. The parents and Petitioner's counsel repeatedly asked how 12.5 hours had been arrived at and how the student's needs could be met at that level of services.

was not there to explain the decision and neither Mr. Coleman nor could explain why the number was appropriate. DCPS refused to discuss any changes in the number of hours of services or the placement. (Testimony of Mr. Coleman, mother, father,

A PNOP was not issued until February 11, 2010, placing the student at The PNOP did not contain a description and explanation of agency action or a description of other options considered. (DCPS 9)

25. is in its second year of implementing the SAM model of service delivery. SAM stands for Schoolwide Application Model.[2] The delivery of services to the student would be within the SAM model. At the January 8th IEP meeting, DCPS called Dr. Angela Stephens to have her explain SAM to the parents. (Testimony of Ms. Stephens)

26. Dr. Wayne Sailor testified about the SAM model. He was qualified as an expert in special education programming and placement. Dr. Sailor is a Professor of Education at the School of Education at the University of Kansas. His credentials are impressive. Dr. Sailor holds a PhD in psychology from the University of Kansas obtained in 1969. He is the Associate Director of the Beach Center on Disabilities at the university. His CV is 39 pages long and includes pages of consultantships, grant awards, board and committee service, published articles, books and book chapters, and presented papers. Dr. Sailor's research and writing has focused on the delivery of special education services in an inclusion setting. Dr. Sailor developed the SAM model of special education delivery. He is the senior partner of two of a for profit corporation, SAM Schools LLC, that contracts with school systems for the provision of SAM services. Dr. Sailor was a credible witness and there is no doubt he believes the SAM model to be better than a self-contained model for all special education students.

The primary theoretical basis of the SAM model is that all students can be educated within and will benefit from a general education setting and all children should receive the services they need to succeed in school whether or not they are found eligible for special education. The SAM model was first used in several schools in Kansas City. It was successful in raising the performance level of those schools in which it was implemented. The SAM model was adopted by the New Orleans school system after hurricane Katrina and is used in all schools in Palo Alto, California. Starting with the 2008-2009 school year, DCPS signed a contract with SAM Schools LLC to bring the SAM model to a group of DCPS schools, including Eight DCPS schools began using the model during the 2008-2009 school year,.and 8 more schools were added during the 2009-2010 school year.

The SAM model is a type of response to intervention (RTI) model. The model uses three tiers. Tier one represents a level of services to be provided to all students. Tier 2 is for

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[2] Because has implemented an entirely new school model for the delivery of educational services to students, the March 9, 2009 HOD's findings concerning the ability of to provide FAPE to the student are of little relevance. The March HOD was based on ability to provide the student FAPE under an entirely different educational model.

those students who need more intensive instruction and tier 3 is for those students who need the most intensive interventions. Tier three may include individual support. The model allows for some instruction to take place in a small group or 1:1, but most instruction occurs in the general education classroom. The level of services is determined through a system of response to intervention. If a student is having problems a meeting is held and an intervention is put in place. Data is collected and if the intervention does not work, a more intensive intervention is tried.

Dr. Sailor was of the opinion that SAM can work for all children no matter what their disability and needs. In the case of the student, Dr. Sailor had reviewed the IEP and was of the opinion that his IEP could be implemented at Murch through general education with special education supports. The school would collect data and ask how the student was doing based on the data. If things were going badly in terms of grade level assessments the number of hours of intervention might increase. Dr. Sailor admitted that trying to convert an IEP to the SAM model was not a good fit. Dr. Sailor had no specific knowledge about the student except what was in his IEP. He did not know if the student could write his last name.

Dr. Sailor stressed the importance of data collection within the SAM model. The data is collected through the SAM analysis system (SAMAN) which collects data on the performance of students within the SAM program. Schools are graded and a grade of 2.5 means the school has completed implementation of the SAM model. It takes three years to put the program fully in place up to the level of enculturation. is considered the top SAM school in DCPS. At present it is at a 1.5 level on SAMAN.

(DCPS 6, Testimony of Dr. Sailor)

27. The goal of SAM is to move all students and all resources into an integrated setting and eliminate self-contained classrooms. (Testimony of Dr. Sailor)

28. Dr. Sailor stressed the importance of data collection. However, he provided no data to show how well was doing under SAM. He also provided no data to support his opinions as to the effectiveness of SAM nationwide or to support his opinion that self contained special education was no better and generally less good than inclusion education under a RTI model.

29. All DCPS witnesses testified that can implement the student's IEP. None of the witnesses explained how the student's IEP would be implemented.

30. All witnesses and Petitioner's educational advocate testified that the student's IEP could not be implemented at the service level proposed by DCPS and that the IEP required a full time self contained classroom for implementation. The student's daily program of special education and related services at the was described in detail. (Testimony of the parents)

31. is the student's educational advocate. She has an M.A. in special education and was a special education teacher in Montgomery County for 10 years. She has been an educational advocate for 12 years. Her company provides advice on the entire special education process and includes a full evaluation service. wrote a special needs advocacy book, had a radio show on special education, and has conducted training in a number of states. has worked with the student for over two years. She has reviewed his records, participated in meetings, observed him in the classroom, and spoken with his teachers. was a credible witness.

has reviewed the student's draft DCPS IEP. She does not believe the IEP is appropriate. has also visited the proposed placement at and does not think it is an appropriate placement. testified that the student needs an intensive amount of special education services and a special setting for the delivery of these services. The student has needs in every educational and emotional area. Supplemental modifications in a general education setting have not and would not be effective for this student.

is of the opinion that the student is doing well at the and developing emerging skills in reading, writing and spelling, as well as self-confidence.

is familiar with the SAM model and does not believe it is appropriate for all students because it does not include a full continuum of services since it does not allow for self contained classrooms or full time programs. (P 39, Testimony of

32. Academic Director, also testified that the DCPS IEP and placement are inappropriate for the student. holds an M.A. in education, is certified in DC as a special education teacher in K-12 and has been the Academic Director at for 33 years. She has taught classes at George Washington University in learning disabilities and has taught at American University for the past 30 years, predominantly in the development of IEPs. was certified as an expert in special education with an emphasis on the education of LD students. was knowledgeable about the student's special education needs and was a credible witness.

knows the student through his admission, monitoring of his IEP, reports, observations, and discussions with his teachers. The student is one of the neediest students at the He needs a highly structured full-time program in order to learn. The student is very vulnerable and has difficulty with social/behavioral issues, attention, taking risks, and self-esteem. He requires a high level of monitoring. He is doing well at

reviewed the DCPS proposed IEP and is of the opinion it can only be implemented in a full time program with small classes. does not believe the student can learn in a class of 25 students. The student's disabilities impact his functioning in all areas of his educational program and he requires special education even for his art and music classes. He could eat lunch with non-disabled peers but this is not important compared with his learning problems.

(P 40, Testimony of

33. From the time the parents contacted DCPS in March 2009, the student's parents wanted DCPS to fund the student at the and did not believe DCPS had an appropriate placement for their son. (Testimony of parents)

VI. DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Act (IDEA), 20 U.S.C. ¶ 1400 *et seq.,* guarantees "all children with disabilities" "a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. ¶ 1400 (d)(1)(A). The IDEA defines FAPE as

> 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 State educational agency..., (c) Are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 – 300.324.

Central to the IDEA's guarantee of FAPE "is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982). The educational agency must provide a "basic floor of opportunity" for students with disabilities. It need not provide the best education possible, but the educational benefit must be more than de minimus or trivial. *Polk v. Central Susquehanna Intermediate Unit 16,* 331 IDELR 10 (3rd Cir. 1988).

As a condition of receiving funds under the Act, IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See,* 20 U.S.C. ¶ 1413. In addition, school districts must develop comprehensive plans for meeting the special education needs of disabled students. *See,* 20 U.S.C. ¶ 1414(d)(2)(A). These plans or Individualized Education Programs (IEPs), must include "a statement of the child's present levels of educational performance, ... a statement of measurable annual goals, [and] a statement of the special education and related services ... to be provided to the child...." 20 U.S.C. ¶ 1414(d)(1)(A).

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 the 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.

Petitioner has the burden of proof in this case. *Schaffer et al. v. Weast,* 546 U.S. 49 (2005).

A. The Provision of FAPE from August 2009 to February 16, 2010

The IDEA explicitly provides that school systems have an ongoing duty to provide a FAPE to all identified students. 34 CFR § 300.17. In fulfilling this duty, the IDEA requires that, "At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP...." 34 CFR § 300.324(b). Petitioner had unilaterally placed the student at the for the 2008-2009 school year. The parents could have determined to leave the student at the as a unilateral private placement, in which event DCPS would have had no obligation to develop and IEP or propose a placement for the student. However, this is not what the parents did. Instead, Petitioner sent a letter to DCPS as early as March 13, 2009, informing DCPS that the parents were requesting that DCPS fund the student at the for the 2009-2010 school year. This letter triggered the obligation for DCPS to develop an IEP and propose a placement for the 2009-2010 school year. The student's previous DCPS IEP expired on June 2009. In developing an annual IEP, the school system must consider each student's progress during the previous school year, any regression, changes in the student's profile, new evaluations, and any other relevant information. 34 CFR § 300.324.

DCPS utterly failed in its obligation to develop an IEP for the student. Petitioner notified DCPS of its desire to have DCPS fund the student at the for the 2009-2010 school year in March 2009. Petitioner heard nothing from DCPS thereafter. At Petitioner's initiative, Angela Hunter of DCPS was invited to attend the student's annual IEP meeting at the in May 2009. Shortly following this meeting, on June 3, 2009, Petitioner sent a copy of the student's IEP to Ms. Hunter and reiterated their request that DCPS make a placement decision for the student for the 2009-2010 school year. July 16, 2009, over four months after Petitioner first requested that DCPS fund the student for the 2009-2010 school year, DCPS finally sent an LOI to the parents attempting to set up a meeting. DCPS makes much of the fact that the meeting did not occur until August 26, 2009, because the parents were on vacation during late July and early August, but fails to explain why a meeting did not occur in the five previous months.

A meeting was finally held on August 26, 2009, but it was not an IEP meeting. The only persons present at the meeting were counsel for each party, the parents, and Ms. Hunter. DCPS had no information concerning the student's progress during the previous school year, any regression, changes in the student's profile, new evaluations, or any other relevant information except for the student's 2009-2010 IEP. 34 CFR §

300.324. Indeed, the upshot of the meeting was that DCPS would gather all new information about the student from the and the meeting would reconvene thereafter. The parents fully cooperated and signed a consent form so that DCPS could obtain the information. Furthermore, the parents sent information to DCPS themselves in early September. DCPS transferred responsibility for scheduling the IEP meeting to another DCPS employee, Gayle Hall. The parents sent numerous e-mail and phone messages to Ms. Hall inquiring about the meeting. Finally, on November 24, 2009, Petitioner filed the present due process complaint. The filing of the complaint appears to have awakened DCPS from its torpor, and on December 3, 2009, Petitioner received an LOI to hold an IEP meeting on January 7 or 14, 2010.

The IEP meeting was finally held on January 8, 2010. A Prior Notice of Placement (PNOP) was not issued until February 16, 2010. Putting aside for the moment whether the IEP and/or PNOP were final or appropriate, it is undisputed that the student did not have an IEP in place until at least January 8, 2010, and did not have a placement in which to execute the IEP until at least February 16, 2010. Therefore, DCPS violated both the procedural and substantive requirements of the IDEA and denied the student FAPE from the commencement of the 2009-2010 school year through February 16, 2010.

When, as in this case, a public school system has failed to provide an appropriate education, reimbursement for a private school placement is "proper under the Act" if the education provided by the private school meets the Act's educational goals. *Carter v. Florence County*, 950 F.2d 156, 163 (4th Cir. 1991) *aff'd* 510 U.S. 7 (1993); *Burlington*, 471 U.S. at 370. "Where a public school system has defaulted on its obligations under the IDEA, a private school placement is 'proper under the Act' if the education by said school is 'reasonably calculated to enable the child to receive educational benefits." *Wirta v. District of Columbia*, 859 F. Supp. 1,5 (D.D.C. 1994); *Alfonso v. District of Columbia*, 422. F. Supp. 2d 1, 5 (D.D.C. 2006); *Board of Education of Murphysboro v. Illinois*, 41 F.3d 1162, 1168 (7th Cir. 1994)(holding that in the absence of an appropriate school system proposal the *only* question for the court to decide was whether the parent's choice of placement would confer educational benefits); *see also Diamond v. McKenzie*, 602 F. Supp. 632, 639 (D.D.C. 1985) (*"Moreover, this Court can see no valid reason why a hearing officer cannot consider a placement proposed by the parents as well as one proposed by DCPS*"). In *Branham v. District of Columbia*, the Circuit Court of Appeals listed a set of "relevant" factors that may be considered in determining whether a particular placement is appropriate for the student, including (1) the nature and severity of the disability; (2) the specialized needs of the student; (3) the link between those needs and the services offered; (4) the placement's cost; (5) and the extent to which the placement is the least restrictive educational environment. *Branham v. D.C.*; 427 F.3d 7,12 (D.C. Cir. 2005).

Since the start of the 2008-09 school year the student has been attending the is an approved, non-public program for students with language-based learning disabilities. The student is in a class taught by a certified special education teacher. His class is also staffed with graduate-level teaching assistants, a speech-language pathologist who carries the certificate of clinical competence, and an

occupational therapist. Both the speech-language pathologist and the occupational therapist are integrated into the classroom. DCPS uses the as a placement for students through the IEP process. The unchallenged testimony of demonstrate that the student is acquiring the foundational skills for academic success. He is more comfortable in his surroundings, experiencing a better self-image, making friends, and demonstrating progress across all areas. is an appropriate placement for the student.

DCPS has failed to provide the student with an appropriate IEP or placement and the student is entitled to reimbursement for his placement at the from the beginning of the 2009-2010 school year through February 16, 2010.

B. Parental Participation in the IEP Decision-Making Process

In developing an IEP, school districts must take steps to ensure that one or both of the parents of a child are present at an IEP meeting and have an opportunity to participate in the development of their child's IEP. 34 CFR § 300.322. Likewise, IDEA requires school districts to ensure parent involvement in a placement decision for their child. 34 C.F.R. § 300.501 (c). Parent participation is a corner-stone of the IDEA process. *See, Hoing v. Doe,* 484 U.S. 305, 327 (1988). "Congress repeatedly emphasized through the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness. *Id.* at 311-312, *See also, Rowley* at 458 U.S. at 205-06. Furthermore, the IDEA provides that a hearing officer may find that a child did not receive a FAPE if a procedural violation "significantly impeded the parent's opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or caused a deprivation of educational benefit." 20 USC § 1415(f)(3)(E)(ii).

There is no question but that the parents were full participants at the January 8, 2010, IEP meeting in the development of the goals and objectives in the IEP. Indeed, a number of additional objectives were added to the IEP at the request of the parents and the participants. The fact that the IEP's goals and objectives were significantly revised makes all the more glaring the fact that the parents had absolutely no meaningful participation in the determination of program hours and placement.

A school system's predetermination of a program or placement is illegal and runs counter to the purpose of the IDEA. In *Spielberg v. Henrico County Pub. Sch.*, 858 F.2d 256, 258-259 (4th Cir 1988) the Fourth Circuit found that the school district violated the parents' procedural rights when it decided to change the student's placement before holding an IEP meeting. The Sixth Circuit reached a similar decision in *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir 2004), finding that, "The District Court erred in assuming that merely because the Deals were present and spoke at the various IEP meetings, they were afforded adequate opportunity to participate. Participation must be more than a mere form; it must be *meaningful*." *Deal,* 392 F.3d at 858 (*citing W.G. v. Board of Trustees of Target Range School District No 23*, 960 F.2d 1479, 1485 (9th Cir 1992).

When a school system makes a decision about programming or placement prior to the IEP meeting and simply presents it as an "offer" that cannot be changed, there has clearly been predetermination. *Ms. S. ex rel. G. v. Vashon Island School Dist.*, 337 F.3d 1115, 1131 (9th Cir.2003) ("[A] school district may not enter an IEP meeting with a 'take it or leave it' position, and if it does so, then even the parents' decision not to cooperate thereafter may not excuse the district's error.") In enacting the IDEA, Congress certainly anticipated that schools may, at times, refuse to make placements requested by parents. *Brown v. Bartholomew Consolidated Sch. Corp.*, 2005 WL 552194 at 5 (S.D. Ind. 2005). These refusals do not contravene the purpose of the statute as long as school officials consider the different views of parents and their experts. *Id.* By failing to do so, the school system denies the parents the right to meaningfully participate in the process. *Id.*

The fact that the parents disagreed with the DCPS program and placement does not, by itself, show that they did not participate meaningfully. *Paolella v. District of Columbia*, 2006 WL 3697318 (2006)(unpublished opinion). However, once the parents make their request or objection known, the school system must engage in some sort of meaningful discussion to support its recommendation and the reasons for the proposal. *Paolella ex rel. Paolella v. District of Columbia*, 210 Fed.Appx. 1, 1-2 (C.A.D.C. 2006) (unpublished). However, in this case, the record is clear that even before the parent walked into the IEP meeting, DCPS had determined that the student would receive 12.5 hours of specialized instruction and would be placed at in the SAM program. Furthermore, there was no one at the IEP meeting who could explain how DCPS came up with 12.5 hours or how the student's IEP could be implemented with only 12.5 hours of specialized instruction. the SEC, was the person who had determined the student's program and placement. She was not at the IEP meeting. Even though additional objectives were added to the student's IEP there was no possibility of a discussion, meaningful or otherwise, concerning an increase in the number of hours of specialized instruction in the student's IEP or concerning the student's placement. The fact that the SAM model takes as its premise that any and all students can be taught in a general education setting would in and of itself preclude any such discussion.

DCPS predetermined the student's program and placement prior to the January 8th IEP meeting and denied the parents meaningful participation in the decision-making process, thus constituting a denial of FAPE.

C. Are the proposed IEP and placement from the January 8, 2010 IEP meeting appropriate?

1. The IEP

Concerning the IEP, the central question is whether the IEP's provision of 12.5 hours per week of specialized instruction within a general education classroom is appropriate. There is no dispute in the record about the fact that the student has severe learning disabilities that affect every part of his educational experience. Even at the the student is one of the neediest students. He is a bright

child who is completing the third grade barely able to read, write, or spell. He has significant speech and language deficits and is in need of occupational therapy. The student has ADHD and requires constant prompting and redirection, and, the student has a fragile learning self-image. Both witnesses from the and the educational advocate testified to the student's need for a full-time educational program and to the fact that the student is thriving in his present setting at the (an opinion DCPS did not disagree with). None of these witnesses believed that the student's significant needs could be addressed in a general education setting with 12.5 hours of specialized instruction. witnesses essentially wrote the IEP which DCPS adopted. They testified that this was a full-time IEP that could not be implemented within the program and placement offered by DCPS.

All of DCPS' witnesses testified that the student's IEP could be implemented at However, significantly, none of them explained how the student's IEP could be implemented. By the end of the hearing, the Hearing Officer had no better idea of how planned to implement the IEP than she had before the hearing began, beyond knowing that the SAM model could work for any and all students.

Dr. Sailor testified concerning how the SAM model works. The model makes a lot of sense for the vast majority of students, including most special education students. This, of course, assumes that the model is being properly implemented and that SAM schools have the resources needed for this implementation. However, Dr. Sailor knew very little about the student beyond having reviewed his IEP. He did not explain how the student's IEP would be implemented at Dr. Sailor emphasized that SAM was a data based model and that data collection and response to data was central to the program. However, Dr. Sailor did not provide any data concerning the success of the SAM model in other jurisdictions or, more importantly, the success of the SAM model at Dr. Sailor did say that it takes three years for a school to fully implement the SAM model and reach a grade of 2.5. is presently at the 1.5 level. In particular he did not address the success of the SAM model for students with disabilities as severe as this student's. Dr. Sailor strongly believes that all students can be educated in a general education setting. Under no circumstances would he ever testify that a student needed a full time special education setting. The sole exception appears to be for student's whose behavior is too violent to allow them into a general education classroom. Likewise, now that is a SAM model school it believes that all students can be educated within the SAM model. What seems clear is that questions of program and placement are not being determined on the individualized basis required by the IDEA, but rather begin with the assumption that the child will be placed in a general education setting at

DCPS presented no meaningful evidence suggesting that the ECPS IEP is appropriate for the student. DCPS has denied the student FAPE by proposing an inappropriate IEP for the student.

2. The Placement

Once an IEP is developed, the school district must determine an appropriate placement for the child that is designed to meet the child's needs as set out in the IEP. Placement decisions must be made in conformity with the child's IEP. 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006). Thus, it is the IEP which determines whether a placement is appropriate, not the other way around. *See, Rourke v. District of Columbia,* 460 F.Supp.2d 32, 44 (DDC 2006).

If there is an appropriate public placement available that is "reasonably calculated to enable the child to receive educational benefits," the District need not consider private placement. This is true even though a private placement might better serve the child, *See Hendrick Hudson Dist. Bd. Of Educ. V. Rowley,* 458 U.S. 176, 207 (1982). However, "[i]f no suitable public school is available [DCPS] must pay the costs of sending the child to an appropriate private school." *Jenkins v. Squillacote,* 935, F.2d 303, 305 (D.C. Cir. 1991). See also, *Burlington School Committee v. Mass. Dept. of Education, 471 U.S. 359 (1985) and Florence County School District Four v. Carter, 510 U.S. 7 (1993).*

The Hearing Officer has already ruled that the student's IEP in terms of the number of hours of specialized instruction and placement in a general education setting is inappropriate. The evidence shows that the student requires a full-time special education program in a self-contained classroom setting. The placement (or location) at is unable to provide the student with either. Therefore, it is an inappropriate placement for the student.

It should also be noted that it is not clear that DCPS has even issued a valid PNOP to The IDEA is clear about the notice that a school system must provide a parent when it proposes or refuses to change a portion of the student's educational program:

> Written prior notice to the parents of the child, in accordance with subsection (c)(1) of this section, whenever the local educational agency--
>
> (A) proposes to initiate or change; or
>
> (B) refuses to initiate or change,
>
> the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

20 U.S.C. § 1415(b)(3). Moreover, 20 U.S.C. § 1415(c)(1), sets forth specific content that must be included in the prior notice, including a detailed explanation as to why the school system is refusing to change the placement, a description of other options

considered, and a statement of the parents' due process protections. None of this appears in the February 16, 2010 PNOP provided to the parents. Without a proper prior notice, the parents have nothing to respond to, and are left completely in the dark about the educational future of their child. *See*, *Stevens v. McKenzie*, C.A. 85-318 (D.D.C. 1985) (holding, "It is the Notice of Proposed Change in Education Program which must be utilized to advise the parents of the nature of the proposed change and the reasons for proposal. Absent compliance with the notice requirements, it is difficult for parents, and indeed the Court, to determine whether DCPS has undertaken the type of evaluation and consideration required by the [IDEA] . . . .

DCPS' proposed placement to is inappropriate and denies the student FAPE.[3]

As has been discussed above, the is a proper placement for the student.

C. Is DCPS absolved on its duty to evaluate if the parents had no plan to enroll the student in a DCPS school?

At the hearing, DCPS appeared to suggest that if the parents had no intention of enrolling their child in a DCPS school, DCPS had no obligation to develop an IEP and propose a placement for the student. This position is inconsistent with the law. So long as the parents cooperate and adhere to the procedures set forth in the Act, their ultimate intent is irrelevant. In *Weast v. Schaffer*, 240 F.Supp.2d 396, 408 (D.Md 2002), the Court carefully explained, "the critical consideration is not parental intent to place their child privately, but whether they cooperated in good faith to attempt to develop an IEP to the maximum extent possible." In *Sarah M. v. Weast*, 111 F.Supp.2d 695, 701 n.6 (D. Md 2000), the Court explained:

> But ultimately whether parents have a truly open mind about the matter is not the test. Parents may be committed to private school for their child whatever the school authorities may propose. They may honestly feel that the best the school authorities can offer their child is not enough. This cannot ipso facto mean that the parents, as citizens and taxpayers, lose the right to seek a "free appropriate public education" for their child. So long as they make a bona fide effort to develop an IEP for the child and otherwise follow appropriate procedural requirements, they can take their chances, place their child in private school, and attempt to convince an ALJ and/or court later on that the offering of the school authorities does not measure up to a "free appropriate public education" for the child.

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[3] Even if DCPS' proposed program and placement were appropriate, the Hearing Officer under her equitable powers would require that DCPS fund the student at for the remainder of the school year. It would be extremely detrimental to the student's educational progress to move him with less than three months remaining in the school year.

In the instant case, the parents cooperated fully with DCPS in developing an IEP and a proposed placement. Indeed, had the parents not vigorously initiated and pursued the development of an IEP it is unlikely DCPS ever would have developed one.

D. Remedy

Petitioner is entitled to be reimbursed for all expenses incurred in educating the student at the for the 2009-2010 school year. Additionally, Petitioner is entitled to reimbursement at the until such time as DCPS provides an appropriate IEP and placement at another school.

IEP is to be adopted by DCPS and is to govern the educational program for the student. The goals and objectives in the DCPS proposed IEP and the IEP are almost identical. However, the goals drafted by the are better drafted for the program the student will be attending.

VII. SUMMARY OF RULING

1. DCPS denied the student FAPE from the start of the 2009-2010 school year through February 16, 2010 because it failed to provide any IEP or placement for the student.

2. DCPS denied the student FAPE following February 16, 2010 to the present because it has provided an inappropriate IEP and placement.

3. DCPS has denied the student FAPE because the parents were not provided a meaningful opportunity to participate in the program and placement decisions for their child.

4. DCPS is to continue funding the student at the through the end of the 2009-2010 school year regardless of whether it offers the parents an appropriate IEP and placement.

VIII. ORDER

It is hereby **ORDERED** that

1. DCPS shall fund the student at the until such time as it provides another appropriate IEP and placement, but at least through the end of the 2009-2010 school year.

2. DCPS shall reimburse the parents for all expenses incurred in sending their child to the from the start of the 2009-2010 school year to the present.

3. Any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, shall extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.

/s/ Jane Dolkart
Impartial Hearing Officer

Date Filed: March 13, 2010