

District of Columbia
Office of the State Superintendent of Education

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

2012 JUN 18 AM 9:20
OSSF
STUDENT HEARING OFFICE

Confidential

<p>Parent on behalf of the Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
---	--

¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on May 23, 2012, resumed on May 24, 2012, and concluded on June 4, 2012, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Student Hearing Office 810 First Street, NE, Washington, and D.C. 20003, in Hearing Room 2006 on the first two days of hearing and in Hearing Room 2003 on June 4, 2012.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age in grade and has been determined eligible as a child with a disability under IDEA with a classification of specific learning disability ("SLD"). The student was found eligible for special education services on January 28, 2009, while in third grade attending a District of Columbia Public Schools ("DCPS") elementary school (hereinafter referred to as School A) during School Year ("SY") 2008-2009.

The student and his younger sister were adopted from Russia by his parents when the student was age eight and came to the United States for the first time in 2008 having had no formal schooling up to that point and speaking no English. The student began attending School A in April 2008 soon after arriving in the United States and immediately began receiving instruction at School A in English as a second language. The student is termed an English Language Learner ("ELL"). When the student started at School A he was placed in a second grade classroom and was assigned to third grade for the following school year SY 2008-2009.

DCPS had a bilingual psychological evaluation and a speech language evaluation conducted in December 2009 and January 2009 respectively. The psychological evaluation suggested the student had a learning disability and recommended special education services. The speech language evaluation noted the student's lack of proficiency in English but did not find that he had a language disorder that warranted speech and language services.

On January 28, 2009, a team met and reviewed the student's evaluations and determined him eligible with the SLD classification. The student's initial IEP prescribed 10 hours per week of specialized instruction outside the general education setting. The IEP contained accommodations for the standardized testing and in the general education setting and prescribed extended school year services ("ESY"). Along with the specialized instruction the student continued to receive two hours of ELL instruction per week.

The student made academic progress; however, by fourth grade his parents and classroom teacher were concerned that the pace of his growth was below expectations. Consequently, in December 2009, his special education teacher conducted an educational re-evaluation to determine the student's baseline functioning in academics. His teacher noted in the evaluation the student's English oral language and academic skills were low compared to others at his grade

level. In January 2010 a diagnostic report rated the student's grade equivalent scores in reading at the kindergarten level.

At the start of the student's fifth grade year, SY 2010-2011, the student changed special education teachers and his former special education teacher became his general education classroom teacher. The student had a good working relationship with this teacher and he and the new special education teacher regularly conferred with each other regarding the student's classroom work and progress during fifth grade. The student made academic progress but remained significantly below grade level in his academic skills.

On January 26, 2011, the student's IEP was changed to increase the specialized instruction to a total of 12.5 hours weekly: 5 hours in reading, 5 hours in math and 2.5 hours in written expression. The IEP was amended to include 1 hour per month of consultative speech language pathology. The IEP also noted that the student required ELL services of 5.25 hours per week to aide his English language acquisition and comprehension.

The student was scheduled to conclude his time at School A and move to middle school at the end of SY 2010-2011. However, in the middle of that school year the student's parents requested that DCPS allow the student to remain at School A in fifth grade for an additional year to assist in his emotional development.

The School A principal allowed the student to remain at School A in fifth grade for a second year. However, the parents expected the student to remain with the same classroom general teacher who had previously been his special education teacher. When School A's principal changed the student to another fifth grade classroom at the start of SY 2011-2012 the parents expressed to the School A principal dissatisfaction with her decision and her refusal to place the student with his previous classroom teacher.

The parents thereafter obtained two independent evaluations: educational and speech language and requested the evaluations be reviewed by DCPS and that an IEP team be convened to review the student's IEP. DCPS convened an IEP meeting in early November 2011. DCPS noted that it needed additional time to review the student's recent speech language evaluation and agreed to reconvene the IEP on January 10, 2012, to review the evaluation and review the student's IEP.

On January 6, prior to the IEP meeting being reconvened the parent's attorney sent a letter to DCPS addressed to the student's special education teacher informing of the parent's intention to enroll the student at the _____ School, a private full-time special education school, and to and seek DCPS funding for the student's educational placement at the _____ School. The letter noted the parent's belief the student required full-time special education services and that sufficient services were not available and had not been offered at School A.

DCPS reconvened the student's IEP meeting on January 11, 2012. The IEP team met and amended the student's IEP to increase the student's specialized instruction to 15 per week, and to provide direct speech and language services consistent with the recommendations of the independent speech and language evaluation. The team also amended the student's IEP goals based on recommendations of the parents' educational consultant. The IEP also noted the

student continued to require ELL support and that he was receiving 3 hours of ELL services per week.

DCPS staff left the meeting expecting the student would remain at School A with the IEP changes. However, the student did not return to School A after the January 11, 2012, IEP meeting and the parents enrolled the student at the _____ School where he was attending at the time of the due process hearing.

On March 13, 2012, Petitioner filed a due process complaint alleging DCPS denied the student a free and appropriate public education (“FAPE”) by failing to provide the student an appropriate IEP and placement. As relief Petitioner seeks reimbursement of the tuition for the student attending the _____ School for the second half of SY 2011-2012.

DCPS filed a response to the complaint on March 28, 2012. DCPS asserted the student has not been denied a FAPE and that DCPS offered the student an IEP, placement and location of services that were appropriate and the student’s least restrictive environment.

At the March 26, 2012, resolution meeting the parties did not resolve the issue. The parties agreed that the resolution period would continue for the full thirty days. Thus, the 45-day timeline ended and the Hearing Officer’s Determination (“HOD”) was originally due on May 27, 2012.

A pre-hearing conference was conducted on April 3, 2012, at which the issues to be adjudicated were discussed and determined. On April 6, 2012, the Hearing Officer issued a pre-hearing order stating the issue to be adjudicated and setting hearing dates.

On April 10, 2011, Petitioner filed a motion to continue the hearing due to the unavailability of one of Petitioner’s witnesses on the scheduled hearing dates. The motion was granted and the HOD due date was extended nine days and hearing dates were set for May 23 and May 24, 2012. On April 13, 2012, the Hearing Officer issued a revised pre-hearing order noting the new hearing dates.

The hearing was convened on May 23, 2012, and due to conclude on May 24, 2012. On May 24, 2012, at the end of Respondent’s case Petitioner’s counsel stated there was insufficient time for him to conduct cross-examination and requested a second continuance to allow for another day of hearing. The motion was granted and the HOD due date was extended eleven days. The final day of hearing, which included the cross-examination of Respondent’s final witness and closing arguments by both counsel, was June 4, 2012.

ISSUE: ²

The issue adjudicated is:

² The alleged violations and/or issues listed in the complaint do not directly correspond to the issues outlined here. The Hearing Officer restated the issues in the pre-hearing order and at the outset of the hearing and the parties agreed that these were the issues to be adjudicated.

answers to questions. The student was either with the ELL teacher alone or with no more than two other students. The ELL students were at various levels, sometimes some at level beyond 1 or 2. At the conclusion of SY 2007-08 the student could count from 1 to 10, say "Yes" and "No", had worked on addition facts and letter recognition and learned school social behaviors. He gradually began to express himself independently in phrases and more complex thoughts. testimony, Petitioner's Exhibits 2-3)

4. In December 2008 an independent bilingual psychological evaluation was conducted of the student assessing both his cognitive and academic abilities. The evaluation indicated that with regard to the student's cognitive abilities his verbal reasoning skills were below average and his non-verbal abilities were average. The evaluator theorized that the student might have a language-based disability. The student's academic assessments indicated below average performance in reading and math. The evaluator concluded that the evaluation scores suggested the student had an innate learning disability and recommended special education services. The evaluator also strongly suggested the student receive intense psychotherapy to address reported traumas he experienced prior to his adoption. (Petitioner's Exhibit 4-3, 4-4, 4-5)
5. The student's academic assessments indicated below average performance with math reasoning standard scores on the WIAT⁵ of 68, listening comprehension 67, spelling 62, word reading 59, and reading comprehension 51. He had better developed skills in oral expression 87 and numerical operations 82. Although oral expression was the student's biggest strength, it still placed him only in the low average range of academic functioning. The evaluator concluded that the scores suggested an innate learning disability may be present and she recommended special education services for the student. (Petitioner's Exhibit 4-3, 4-4, 4-6)
6. In January 2009 DCPS conducted a speech/language evaluation that noted the student did not yet have English language proficiency but concluded the student did not have a language disorder that would impact his ability to access the general education curriculum. His receptive and expressive English vocabulary scores were at the 5-1 and 4-0 age level respectively. The student's scores in the area of English language comprehension and expression were noted to be well below average which the evaluator noted would be expected considering his limited English immersion at that time. The evaluator also noted the student's grammatical errors were consistent with native Russian speakers learning English and consistent with how Russian grammatical structures differ from English. His language skills were that of a 5 to 6 year old except in the area of syntax construction that was near age 3. The evaluator noted that research indicated a timeframe of 5 to 7 years is necessary for an individual to achieve advanced second language proficiency. At the time the student had had less than one continuous year of English language immersion. (Petitioner's Exhibit 5-3, 5-4, 5-5, 5-6)
7. On January 28, 2009, a team met and reviewed the student's evaluations and determined him eligible with the SLD classification and concluded that his disability impacted his participation in the general education curriculum in the areas of math, written expression

⁵ Wechsler Individual Achievement Test – Second Edition (WIAT-II)

and reading. The student's initial IEP prescribed 10 hours per week of specialized instruction outside the general education setting with goals in reading, math and written expression. The IEP contained accommodations for the standardized testing and in the general education setting and prescribed extended school year services ("ESY"). The IEP noted the student received supplemental supports and services including ELL classes and accommodations and modifications in the general education setting. Along with the specialized instruction the student continued to receive two hours of ESL instruction per week. (Petitioner's Exhibits 7-2, 8-1, 8-3, 8-4, 8-5, 8-6, 10-1)

8. For the remainder of his third grade year (SY 2008-2009) the student's reading, language arts and math services were provided both by the ELL teacher and his special education teacher in a small group setting. The student participated in a general education curriculum for science, social studies, art, music, health and physical education. On the student's report card the teacher comments noted that in the first two advisories his reading and English language abilities were developing and he had a tendency to be unfocused in the classroom. The third advisory comments noted the addition of special education services and that he had made significant progress with the small group instruction in reading and math. The fourth advisory report noted the student was much more vocal in the classroom and had made strides in reading and math during his first full year at School A. In his ELL instruction the student was working on sentence paragraph writing and his ELL teacher assisted him with work being presented in his general education classrooms including content vocabulary in science and social studies. He showed marked progress in speaking English. testimony, Petitioner's Exhibits 2-3, 3-3)

9. However by fourth grade (SY 2009-2010) the student's parents and classroom teacher were concerned that the pace of his academic growth was below expectations. Consequently, in December 2009, when the student was age 10 and 2 months his special education teacher conducted an educational re-evaluation⁶ to determine the student's baseline functioning in academics. The evaluation noted the student's English oral language and academic skills were low compared to others at his grade level. He was average in math calculation skills, low in mathematics, written language and written expression and very low in broad reading. The teacher acknowledged that the student received 10 hours of specialized instruction and two hours per week of ESL instruction from the ESL specialist and noted "[the student's] overall reading ability is negligible, reading tasks above 2.0 level will be quite difficult for him." He recommended reading comprehension instruction across content areas and that the student's cognitive abilities be reassessed to rule out intellectual deficiency. The student had the following scores on the evaluation:

(Petitioner's Exhibits 10-1,10-5, 10-6,10-7, 10-9)

	Standard Score	Grade Equivalency	Age Equivalency
Oral Language	86	2.3	7-11

⁶ Woodcock Johnson III tests of achievement.

Broad Reading	61	1.7	7-0
Broad Math	74	2.0	7-4
Broad Written language	73	1.9	7-5
Math Calculation Skills	95	3.8	9-3
Written Expression	77	2.1	7-6
Academic Skills	76	2.5	7-11
Academic fluency	62	1.3	6-5
Academic Applications	61	1.3	6-8

10. In January 2010 a diagnostic report rated the student's grade equivalent scores in reading at the first month of kindergarten level and in math at the first month of first grade. (Petitioner's Exhibits 13-1, 14-1)
11. The student's parent noted the student made some progress and the student was able to communicate better. However, in the parent's observation the student's sister who is one year younger seemed to be progressing faster academically. The student spent hours each day working on homework that in the parent's opinion was slow and laborious. He couldn't read all the assignments or complete them on his own and reading was frustrating for him. There was some improvement but writing remained problematic and seemed to have trouble with his math retention. (Father's testimony)
12. In January 2010 DCPS conducted a psychological re-evaluation of the student that included cognitive and behavioral assessments. He was administered the TONI-3⁷, a language free measure of intellectual functioning. The assessments determined the student show no signs of intellectual processing difficulties and his cognitive abilities were in the average range. The student seemed to function at a higher level when asked to recall or engage in working memory tasks that utilized visual cues as opposed to verbal linguistic strategies. Despite some reported difficulty with attention problems, withdrawal and functional communication in his home environment, the evaluator determined that overall the student's general level of functioning fell within the average range in both his home and school environments. The evaluator interviewed the student's ELL teacher who noted the student enjoyed working on math more than reading and seemed to be quiet in his general education classes. Conversely in his special education classes the student was reported to be more open and friendly with his classmates who reciprocated. (15-5 15-6, 15-7, 15-8, 15-9)
13. In March 2010 DCPS conducted a follow-up speech language evaluation. The evaluator compared the student's assessments results to those of his January 2009 evaluation. The evaluator noted the student's receptive vocabulary continued to be below the normal

⁷ Test of Nonverbal Intelligence – Third Edition

limits as compared to his same aged native English speaking peers. However, when comparing receptive vocabulary score from 2009 to 2010 the scores had increased approximately 1 year 4 months in age equivalency within a 1 year 1 month period. His expressive vocabulary score increased 2 years 6 months within a 1 year 1 month period. The student's comprehension and expression of English as measured by the CASL⁸ demonstrated an age equivalency growth of 1 to 3 years on most of the language subtests. The evaluator concluded the student had communication skills that continued to increase toward English language proficiency and he demonstrated an appropriate capacity to learn receptive and expressive vocabulary and overall communication concepts in English. She noted in her report that research indicates that the usual timeframe for an ESL student to achieve the language proficiency of a native English speaking child is from 5 to 7 years. At that point the student had approximately 2 years of English language immersion. Again, the evaluator concluded the student did not present with a communication disorder that would impact his ability to access the general education curriculum. She recommended the student continue or increase ELL services focusing on vocabulary and English grammar rules and usage and that he be provided classroom supports such as extended time repetition of directions and visual and continued exposure to English speaking peers. Consultative speech language services of 90 minutes per month were added to the student's IEP as of March 23, 2010. The student's March 23, 2010, IEP continued to note the student's supplemental services of ELL classes and classroom small group interventions and modified input-output requirement. (17-3, 17-4, 17-5, 17-6, 17-7, 18, 19-16, 19-18)

14. On September 8, 2010, DCPS generated a report that measured the student's English language proficiency from May 2009 to May 2010. His grade level English reading and writing proficiency seemed unchanged; his English listening and speaking proficiency seemed to increase. The report noted the following measures: (Petitioner's Exhibit 21-1)

Date	Grade	Listening	Reading	Speaking	Writing	Composite
5/1/2009	3	3.4	1.9	3.3	2.5	2.3
5/1/2010	4	5	1.9	2.4	2.5	2.7

15. The student's June 2010 IEP progress report noted that the student was progressing on all his math, reading and written expression goals, but had not yet mastered the goals. The student's special education teacher noted with regard to reading "[the student] is able to read text from the performing grade level materials with frequent redirections. Although his pace of reading is markedly lower than desired, his improvement continues to be evident [grade equivalent] 2.5." The speech language pathologist noted the student was making progress on his IEP communication/speech and language goals. (Petitioner's Exhibit 20-1 through 6)
16. At the start of the student's fifth grade year, SY 2010-2011, the student changed special education teachers and his former special education teacher became his general education

⁸ Comprehensive Assessment of Spoken Language

classroom teacher. The student had a good working relationship with this teacher and he and the new special education teacher regularly conferred with each other regarding the student's classroom work and progress during fifth grade. testimony)

17. The student's most recent DCPS special education teacher, began providing the student specialized instruction at the start of SY 2010-2011. At the time the student's IEP March 23, 2010, IEP was in effect. conferred with the student's previous special education teacher and they agreed the student educational program was appropriate because he could be provided differential instruction in the general education setting while receiving pull out specialized instruction from Ms. The student made marked progress testimony)
18. In January 26, 2011, the student's specialized instruction was increased to include 5 hours in reading, 5 hours in math and 2.5 hours in written expression and 1 hour per month in consultative speech language pathology. The IEP noted that the student's present levels of performance in reading was ? and at second grade level and in writing at the first grade level. The IEP also noted that the student required ELL services of 5.25 hours per week to aid his English language acquisition and comprehension. (Petitioner's Exhibit 26-9, 26-17, 26-24)
19. During the IEP meeting the student academic progress was discussed at great length and there were discussion of various modifications to his program. The School A special education coordinator on occasion visit the student's classroom and reviewed the delivery of services to the student. She believes the student was benefitting from the specialized instruction, ELL services and from being with non-disabled peers. Given that he had not been in an educational setting prior to coming to the US his time at School A his English skills developed and it was appropriate in her opinion to continue to have ELL services. testimony⁹)
20. During SY 2010-2011 the student made marked progress in reading, writing and math. testimony, DCPS Exhibit 7C)
21. The student was scheduled to conclude his time at School A and move to middle school at the end of SY 2010-2011. However, the student's parents requested that DCPS allow the student to remain at School A in fifth grade for an additional year to assist in his emotional development. On January 24, 2011, a psychologist that the student's parents engaged to work with the student sent a letter to School A recounting her work with the student over the previous ten months and recommending the student remain at School A another year. She cited the student's emotional development and the need to work on his socialization skills in a small familiar classroom and stay with his younger sister who also attended School A as reasons for his need to remain at School A. (Petitioner's Exhibit 25-4)

⁹ Designated as expert in special education programming and placement for children with learning disabilities

22. The School A principal allowed the student to remain at School A in fifth grade for a second year. However, the parents expected the student to remain with the same classroom general teacher who had previously been his special education teacher. Instead the School A principal changed the student to another fifth grade classroom. The parents expressed to the School A principal their dissatisfaction with this decision and the principal's refusal to place the student with his previous classroom teacher. Nonetheless, the student was changed to another classroom teacher for SY 2011-2012 and the parents expressed disappointment the student would not remain with the same teacher.
testimony, Petitioner's Exhibit 29-2)
23. The parents wanted the student to repeat fifth grade and acknowledged the student's progress in reading after his new special education teacher began instructing him. The student's mother also acknowledged the student's improved reading ability and her belief the student purposefully resisted reading even though he was capable. During his fifth grade year the mother also acknowledged she was considering what the best school setting for the student would be for the following year and whether the student should attend the neighborhood middle school or some other private general education or special education schools and expressed intention to have the student apply to some of them. Following SY 2010-2011 the student attended summer school during the summer of 2011.
testimony, DCPS Exhibit 4 page 101, 104, 105)
24. After a couple of years when there was little progress and he never got a benchmark to know that the student's gaps were closing. He had a couple of friends and he did not interact with many kids and on occasion was bullied. An accumulation of conditions over time culminated in the parents removing the student from School A. The parents applied to _____ in the fall of 2011. (Father's testimony)
25. Until the fall of 2011-2012 School A's principal believed she and the student's parents and the school staff worked cooperatively regarding the student's education. The principal acknowledged that the relationship became more contentious when she refused to allow the student to remain with same classroom teacher for SY 2011-2012 and the student's father sent a letter to her supervisor protesting the decision. The principal had chosen to put the student on the teaching team with his sister and the parent wanted the student to remain with his previous general education teacher who had been his special education teacher before. The principal never told the parent the reason because the parent never requested a meeting on the matter.
testimony)
26. Soon after the start of SY 2011-2012, the parents obtained two independent evaluations of the student, an educational and speech language evaluation, and later requested that the evaluations be reviewed by DCPS. On September 5, 2011, the parents' educational consultant, Dr. Laura Solomon, conducted a diagnostic education evaluation with the following assessments: Woodcock-Johnson 3 (WJ-3), Peabody Picture Vocabulary Test, Achenbach Child Behavior checklist and Achenbach teacher report form and conducted an observation of the student and interviews with the parents, the special education teacher and the student. Dr. Solomon compared the student's WJ-3 scores from 2009 and those she obtained in September 2011. Dr. Solomon recommended the student be immediately placed in a full-time nonpublic special education school such as the .

School or the School so that more intensive intervention could begin.
(Petitioner’s Exhibit 31-14)

27. The student’s scores on the evaluation noted the following academic scores:

(Petitioner’s Exhibit 10-1,10-5, 10-6,10-7, 10-9)

	2009		2011	
	Standard Score	AE	Standard Score	AE
Oral Language	86	7-11	N/A	N/A
Broad Reading	61	7-0	59	7-6
Broad Math	74	7-4	73	8-10
Broad Written language	73	7-5	52	7-2
Math Calculation Skills	95	9-3	86	10-3
Written Expression	77	7-6	57	7-3
Academic Skills	76	7-11	68	8-3
Academic fluency	62	6-5	55	7-3
Academic Applications	61	6-8	57	7-4

28. On October 6, 2011, the parent had a comprehensive speech language evaluation conducted of the student by the School. She noted the student showed progress in certain areas in speech and language and there were some areas in which he did not show growth such as syntax and using word endings but instead showed regression. The evaluator determined the student had significant weaknesses in auditory processing, receptive and expressive oral language, social pragmatic skills and oral phonological awareness. She diagnosed a mixed receptive and expressive language disorder. She also diagnosed a reading disorder due to the student’s significant weakness in reading fluency and comprehension. The evaluator noted “the student’s linguistic skills at this time provide an extremely insufficient foundation for the increasingly complex language demands of late elementary school and junior high. He has not made the progress one would expect from a typically developing ELL student. The service and accommodation provided thus far have not been sufficient.” Stages of second language acquisition can also be considered in determining if a child learning a second language has an underlying language disorder impeding his ability to attain English language proficiency. The evaluator recommended the student receive direct speech and language services. She recommended that [the student] receive speech and language services three times weekly, in the form of two individual, 45 minute sessions and one small group, 45 minute session per week and integrated services by a speech language pathologist should also be

provided to ensure the transfer and maintenance of new skills in the classroom and the integration of speech and language goals with the curriculum. (Petitioner's Exhibit 32-22, 32-23)

29. On October 11, 2011, the parent's attorney forwarded Dr. Solomon's report to School A and requested the evaluation be reviewed and requested an IEP team meeting be scheduled. (Petitioner's Exhibits 33)
30. On November 9, 2011, the parent's attorney provided School A a copy of the October 6, 2011, School Speech and language evaluation. DCPS convened an IEP meeting on November 10, 2011. DCPS determined because of the recently provided speech language evaluation DCPS would conduct a review of the evaluation prior to final action on the student's IEP. The DCPS speech language pathologist who had conducted the two previous speech and language evaluations of the student reviewed the School evaluation (Petitioner's Exhibits 31, 32, 33, 34, 35, 36, 38, 39, 40).
31. The DCPS speech language pathologist who conducted the first two evaluations of the student reviewed the October 6, 2011, School speech language evaluation and participated in the student's January 11, 2012, IEP meeting and helped draft the communication goals portion of the January 11, 2012, IEP. She immediately realized that the School evaluation had errors and received the corrected version after the January 2012 IEP meeting. However, despite the errors she believed the evaluation was accurately scored and administered. Although the student showed growth in his language skills each year, the gaps were not being bridged and she suggested some direct speech language services and everyone agreed to the direct and consultative speech language services. (testimony)
32. On January 6, prior to the IEP meeting being reconvened the parent's attorney sent a letter to DCPS addressed to the student's special education teacher informing her of the parent's intention to enroll the student at School, a private full-time special education school and to seek DCPS funding for the student's educational placement at School. The letter noted the parent's belief that the student required full-time special education services and that sufficient services were not available at School A and had not been offered by School A. The letter stated: "Of course, we will be happy to discuss all of this at the IEP meeting on January 10th and to reconfirm this notice, should that be appropriate after the discussion. Should the parents continue on with placement at School they will seek funding from the District of Columbia Public Schools." (Petitioner's Exhibit 52)
33. DCPS reconvened the student's IEP meeting on January 11, 2012. There was a report during the meeting about the student's progress in special education, general education and ELL classes. The team reviewed the speech and educational and language evaluation. The IEP team amended the student's IEP to increase the student's specialized instruction to 15 hours per week and to provide direct and consultative speech and language services consistent with the recommendations of the independent speech and language evaluation. The student's hours of specialized instruction were increased to provide 7.5 hours per week in reading, 5 hours per week in math and 2.5 hours in written

expression for a total of 15 hours per week in specialized instruction outside the general education setting. The student's IEP goals were changed based on recommendations of the parents' educational consultant. testimony, Petitioner's Exhibit 55-1 through 20)

34. The January 11, 2012, IEP also noted the student continued to require ELL support and that he was receiving 3 hours of ELL services per week and his ELL, general education, and special education teachers would "collaborate weekly to provide the most comprehensive support to [the student] as possible." The IEP noted the student would receive "one-on-one or small group supports and accommodations including redirection, extended time, breaks, modified assignments and tests, simplification of directions," all to allow him ability to focus on the material presented. The parents never objected about the student being in ELL services. testimony, Petitioner's Exhibit 55-19)
35. A DCPS staff who participated in the IEP January 11, 2012, IEP meeting included the School A principal, the student's special education teacher, his former general education teacher, the School A special education coordinator, the speech language pathologist, the school psychologist and the student's ELL teacher. All the DCPS staff agreed with the IEP that was developed and that the IEP prescribed the student's least restrictive environment ("LRE"), that he was benefitting from being with non-disabled peers, and the IEP could be implemented at School A. At the conclusion of the meeting there was a discussion that the school staff would come up with a list of lunch-time activities for the student that would also support his academic development. There was nothing said about the parents withdrawing the student. testimony, testimony, testimony, Petitioner's Exhibits 55-20)
36. The School A staff who testified at the meeting disagreed that the student needed to be in a full time special education setting all day and believed it was beneficial for him to be with non-disabled peers for modeling and to gain social and communication skills. The School A staff did not recall that at the meeting the student's parents or their representatives stated they were rejecting the IEP and placement at School A and would seeking funding of a private placement for the student. The principal did not receive a letter after the IEP meeting notifying her that the parents were rejecting the IEP and placement. testimony, testimony, testimony, testimony, testimony, testimony)
37. The student's class schedule at School A indicates that excluding lunch and recess of 1 hour per day the student was in the general education classroom for approximately 8.5 hours per week including special courses of physical education classes, library and art. When he was in the general education setting he was with approximately 24 students. He was in social studies and science one hour per week and would be there usually for hands-on experience and in social studies he was there with the other students and the material would be modified for him. If the new IEP had been implemented at School A he would have received 15 hours of specialized instruction, 3 hours of ELL services and 1 hour of speech and language services for a total of 19 hours. testimony, Petitioner's Exhibits 30, 55-18, 55-19)

38. DCPS staff left the meeting expecting the student would remain at School A with the IEP changes. However, the student did not return to School A after the January 11, 2012, IEP meeting and the parents enrolled the student at _____ where he was in attendance at the time of the due process hearing. _____ testimony, _____ testimony)
39. When the student did not return to School A and the School A staff was informed by the student's sibling that he was attending a different school, the principal requested the parent formally withdraw the student from School A which was later done. _____ testimony)
40. The student has been attending _____ in Silver Spring, Maryland, since mid January 2012. _____ is a private day school for student language based learning disabilities in fifth through twelfth grade. There is a middle division (grades 5-8) and upper division (grades 9-12). The middle division currently has 50 students and the upper division has 55 students. There are no general education students. Some of the students are publicly funded and 33 students are funded by the District of Columbia. Students who are publicly funded and privately funded are engaged in the same educational program. However, students from the District of Columbia receive DC curriculum standards. The school's tuition rate is approved by OSSE and _____ currently holds an OSSE certificate of Approval. There is a rolling admissions policy and application starts with pre-screening and a two-day student visit to the school after which teachers make informal assessments and provide the admission committee feedback on the applicant. Upon entering the student has formal and informal testing. Because the student had been formally tested recently formal testing was not completed for him at _____. The middle division is not graded and students are matched by abilities. The student is the lowest level operating student. The school has approximately 30 instructional staff members most of whom are certified in special education and some certified in the content area they teach. _____ testimony, Petitioner's Exhibit 71)
41. _____ has two speech language pathologists, one full time and one part time. There are three full time counselors on staff. The classrooms have a maximum teacher to student ration of 1 to 8. Generally, there are six students in each classroom with one teacher and no aide. The students participate in reading groups assigned by reading levels. There are no more than three students per reading specialist. The school's model employs a model where the speech language pathologist is in the classroom for "push-in" services. The student was started at the lowest reading level - less than first grade. He had little confidence and it took him about a month and a half to engage in the instruction. _____ testimony, Petitioner's Exhibit 71)
42. At _____ the student is receiving instruction in reading, writing, science and special education from certified special education teachers. His music and social studies teachers are not special education certified just certified in their subject area. The student's health class is taught by the school nurse who is not a certified teacher. Each day the student receives 45 minutes of instruction in reading, writing math and science, art and music. He receives social skills counseling once per week for 45 minutes. _____ testimony, Petitioner's Exhibit 71)

43. At the student is being instructed in the Lindamood Bell reading program. His reading instructor at believes the student is very delayed and exhibits problems with phonemic awareness and discriminating sounds and especially vowel sounds. He has a hard time with auditory discrimination, reading fluency and cannot decode words well. The school used the student's scores on his most recent evaluation conducted by Dr. Solomon and the Wilson Assessment of Decoding and Encoding, and the Comprehensive Test of Phonemic processing to establish a baseline and place him appropriately. The student is in the lowest level instruction group at the school. He is being instructed at first grade level in phonics and is testing at a second grade level for comprehension. He started with instruction on vowel sounds and then blending. He receives reading instruction every day for 45 minutes in a group of 3 students. He said at first he was not good at it. He is now working at a high first grade level. His reading teacher cannot speak about the extent to which his bilingualism affected his academic progress. She acknowledged that if he did not have access to schooling it would impact his academic functioning and progress. testimony¹⁰)
44. The evaluator who conducted the October 6, 2011, speech language evaluation observed the student at a day prior to the hearing. During the observation the student did not speak above two to three word utterances and it was difficult for him to process oral directions so the teachers helped him with one-step directions. With leading questions he was able to complete the writing assignment. The evaluator was of the opinion the student requires a full-time program for students with learning disabilities and expected that his English language learning would continue. testimony, Petitioner's Exhibit 32-23)
45. The student's IEP progress reports indicate that while at School A he was making progress with his IEP goals. The student was reading at a pre-kindergarten level when he started at School A and at a first grade level when he began with the last DCPS special education teacher and he was operating at 2.5 instructional grade level and working on some grade level work in math when he left School A. The student's DCPS special education teacher surmises that the student was taken out of a known environment at School A where he was progressing and it is understandable he might display some skill regression in a new setting until he is acclimated. testimony, DCPS Exhibit 4)
46. The student's DCPS ELL teacher did not consider the student to be operating on a first grade level in reading while he was attending School A. When the student left School A he was at level 3 language level and she did not expect him to be at the grade level and he fell well within the 5 to 7 year span of gaining proficiency. Just before he left School A she began using the Wilson reading program with him to reinforce phonics. During the student's years at School A his ELL teacher was satisfied with his progress in speaking English given where he started.¹¹ testimony)

¹⁰ Certified as an expert in reading instruction of learning disabled students.

¹¹ Contrary to statement attributed to her in Dr. Solomon's report, the ELL teacher testified she did not

47. Dr. Laura Solomon, the educational consultant engaged by the parents, reviewed the student's prior evaluations and conducted her own assessments and observed the student at School A. The parents engaged her to make recommendations about the student's educational programming and placement. In her opinion there is some indication of progress in some areas of discrete speech language as evidenced by second and third DCPS speech language evaluations. She also concluded the student demonstrated progress in untimed pencil and paper math. In all other areas she did not detect progress. She concluded based on her evaluation that the student shows a discrepancy between his ability and performance and is severely learning disabled in reading in the mid first grade to mid second grade level. Dr. Solomon believed the student's records and evaluations indicate that over time he has made very little progress in decoding and thus reading comprehension. She did not consider him a reader or a writer. He was assessed as average in math and borderline in math fluency. (Dr. Solomon's testimony¹², Petitioner's Exhibit 31)
48. DCPS was provided Dr. Solomon's evaluation report and she participated in the student's January 11, 2012, IEP meeting and provided input on the IEP goals. She observed that there was only one IEP goal that the student had previously mastered. At the meeting the Dr. Solomon agreed with the goals in the January 11, 2012, IEP, but advocated for the student to be provided a full time special education instruction across the school day. However, she acknowledged that if the student had been with his DCPS special education teacher throughout the school day and not in the general education classes he would have been in an appropriate educational setting at School A. (Dr. Solomon's testimony, Petitioner's Exhibit 31)
49. Dr. Solomon observed the student at School A in September 2011 in his reading and spelling and art and science classes. She believes the student made no progress in any of his general education classes. She gave the student no pre or post test to the student in any of the general educational disciplines. She did not observe the student in music, computer lab, social studies, or physical education. When Dr. Solomon attempted to observe the student in one of these general education classes the student was not in the room. He was in the bathroom playing and the teachers did not notice his absence until she brought it to their attention. When she observed him in art class she thought the activity presented by the teacher was excellent but beyond the student's instructional level. In her opinion there were too many instructions given and the student could not understand them. She had no problem with the special education instruction the student was receiving and would have left him with his special education teacher all day everyday for the remainder of the 2011-2012 school year if that had been offered by DCPS. (Dr. Solomon's testimony)
50. Dr. Solomon observed the student after he began attending _____ She observed that that there was a difference between the student's attention and performance and participation when he was provided small group instruction in a special education vs. in

report to her that the student does not fit in with his general education classmates and never told her that he had made no progress in three years and did not have a discussion about his progress.

¹² Designated an expert witness.

the general education setting she observed him in at School A. (Dr. Solomon'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.

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. ¹³ *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.

ISSUE: Whether DCPS denied the student FAPE by failing to provide the student an appropriate IEP and placement by failing to prescribe full-time out of general education level of services.

Conclusion: The evidence demonstrates the student was denied a FAPE because the student's January 11, 2012, IEP is inappropriate because it does not prescribe sufficient specialized instruction in all academic areas and thus does not prescribe an appropriate educational placement. However, the Hearing Officer is not convinced that evidence demonstrates the student must be totally removed from all general education peers and thus concludes that the parents' remedy for reimbursement of the School is inappropriate because the school is not the least restrictive environment for the student.

¹³ 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.

The IDEA ensures that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. §1400(d)(1)(A). The IDEA guarantees children with disabilities the right to a FAPE. *Id.* In seeking an appropriate education for students with disabilities, the child's parents, teachers, school officials, and other professionals collaborate to develop an IEP to meet the child's unique needs. See 20 U.S.C. §1414(d)(1)(B). "The IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir.2005) (quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203 (1982)). Local school officials utilize the IEP to assess the student's needs and assign a commensurate environment. See 20 U.S.C. § 1414(d)(1)(A).

The IEP team, consisting of the student's parents, teachers, and other local education personnel, examines the student's educational history, progress, recent evaluations, and parental concerns prior to implementing a free appropriate public education for the student. *Id.* To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003).

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also *Scott v. District of Columbia*, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

20 U.S.C. 1414(a)(i) defines IEP as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes a statement of the child's present levels of academic achievement and functional performance." It includes measurable goals, statements of related services, assistive technology and other appropriate accommodations. It is developed by the IEP team which consists of the child's parent, general education teachers, LEA special education teachers and anyone deemed as a necessary participant by reason of the services provided to the student. The IEP is the centerpiece or main ingredient of special education services.

The evidence in this case clearly demonstrates that when the student arrived at his DCPS neighbor elementary school in April 2008 at age eight he only spoke Russian and had had no schooling. He was at the time beginning his education in a foreign land and with language skills already at least three to four years begin behind his native English speaking peers. The student was immediately provided English instruction and began to learn English and others subjects. The evidence demonstrates the student gained some proficiency in speaking, reading, and writing

English over the four years he attended School A. The evidence also demonstrates that DCPS provided the student specialized instruction and reading, writing and math and ELL instruction in speaking, reading and writing English as well as provided consultative speech language services. Despite the services the student's progress was slow. He was reading, speaking and writing English but remained at least four grade levels behind in his academic performance.

DCPS made adjustments to the student's IEP over the years, but the educational gap the student began with when he arrived at School A was not shrinking. The evidence demonstrates, based upon the testimony of Dr. Solomon and her recent evaluation data, that the student was benefiting from the specialized instruction he was receiving, and the evidence demonstrates he was benefiting from his individualized and small group ELL instruction, but the evidence does not demonstrate the student was benefiting as much from his hours in the general education setting where he was in classrooms with as many as 24 students. The student's evaluation data and the testimony demonstrate that his English language development may have benefited from being in those classes but his academic development has not shown any accelerated progress.

The Hearing Officer is convinced by evidence including Dr. Solomon's limited observation of the student in the general education setting at School A that the student was not benefiting academically from the general education classes and was in need of small group instruction in the remaining academic subjects. The Hearing Officer is convinced by the evidence in the student's recent evaluations showing he has made marginal gains and perhaps regression in written language that the student is in need of more specialized instruction in the areas of reading, writing and math and that all the student's instructional hours during the school day should be in a small group specialized instruction. Although, on January 11, 2012, DCPS amended the student's IEP to reflect increased services, the level of services, based on the evidence, is inadequate. Thus, the Hearing Officer concludes the student's January 11, 2012, IEP is inappropriate because it does not prescribe that all the student's instructional hours are in the out of general education setting and thus the educational placement prescribed by the IEP is also inappropriate.

The hearing officer concludes therefore, that the student's IEP was deficient in the amount of specialized instruction that was prescribed and that he should have been provided at least 26.5 hours of specialized instruction in addition to his one hour of related services per week. There was no evidence the student could not be with general education peers for lunch and recess and needed to be in a school building with only special education students. Consequently, the Hearing Officer will order that the student's DCPS IEP be amended to prescribe 26.5 hours of specialized instruction in out of general education setting and that DCPS meet to amend the IEP and to determine an appropriate placement/location of services for the student for ESY and or SY 2012-2013.

Petitioner asserted that the student's January 11, 2012, IEP violated the IDEA because it did not provide for full time out of general education level of services. Full time out of general education services does not necessarily mean a student is totally removed from the general education setting and has no contact with non-disabled peers. In the case at hand the student is an ELL student. He came to the United States four years ago speaking no English and having

had no prior schooling. When he arrived at School A speaking only Russian he was already eight years old and apparently starting from scratch learning to speak, read and write English as well as navigate in an English speaking school. He was immediately provided ELL services and continued to receive those services for the four years he attended School A. Credible testimony from his ELL teacher demonstrates that each year she provided him individual and small group instruction in speaking, reading and writing English for two to three hours per week. In addition, the ELL teacher collaborated with the student's special education and general education teacher to assist in providing the student support. The student arrived at School A and the lowest level of English speaking and left two levels higher. Nonetheless, the student's IEP was inappropriate because it did not prescribe all academic instruction in an out of general education setting.

If DCPS has been unwilling or unable to modify the IEP to meet the student's needs for specialized instruction in all academic areas then private placement and reimbursement might be an appropriate remedy. See, e.g. *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

Petitioner has removed the student from School A and placed the student at the School and is seeking reimbursement. The evidence demonstrates that the School can provide the student special education and related services in all subject areas. However, the Hearing Officer is not convinced by the evidence that student should be totally removed from a setting that will allow him contact with any non-disabled peers. The evidence demonstrates the School does not afford the student an opportunity to interact with non-disabled peers.

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; 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.")

In addition, a school district is not required to implement a program that will maximize the handicapped child's potential. *Rowley*, 458 U.S. at 198-99. Rather, a handicapped child has a right to "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. Rowley explained that implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 200-02.

Although a parental placement need not be the least restrictive environment. See *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 83-84 (3rd Cir. 1999); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 775, 770 (6th Cir. 2001), the Hearing Officer can determine whether Chelsea was the least restrictive environment in evaluating whether private placement was the proper remedy. See, e.g., *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005); *Kerkham v.*

Superintendent, D.C. Public Schools, 931 F.2d 84, 87 (D.C. Cir.)

34 C.F.R. § 300.114 provides:

- LRE requirements.(a) General. (1) Except as provided in Sec. 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and Sec. Sec. 300.115 through 300.120.
- (2) Each public agency must ensure that--
- (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
- (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

In addition, pursuant to D.C. Code § 38-2561.02 (c)

Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter:

- (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
- (2) Private or residential District of Columbia facilities; and
- (3) Facilities outside of the District of Columbia.

Although Dr. Solomon's evaluation demonstrates the student made only marginal progress at School A, she stated that she would have been perfectly fine to leave the student at School A with his special education teacher and that the student's performance and lack of meaningful participation in his general education classes is what disturbed her. She did not however, observe the student in his other general education settings including lunch, recess, or even physical education.

Although there was some testimony by the parent that the student was bullied by another student, this testimony did not convince the Hearing Officer that the student was in danger or unable to navigate and enjoy peer relationships such that he needed to be removed from all contact with his non-disabled peers. On the contrary, there was credible testimony from the School A staff that he got along with classmates and actually benefits from being with non-disabled peers at least for English language development.

There was evidence that when the student first began to attend _____ he was reluctant to participate and expressed that he did not know how to do the work he was presented. In the four

months he has attended there is has apparently begun to demonstrate skills closer to the level that the evidence demonstrates he was performing when he left School A. There was credible testimony from both _____ and _____ that the student was reading and speaking at English at least on a second grade level and doing some math on 5th grade level.

When the student's IEP was amended at the January 11, 2012, meeting DCPS added direct speech language services in addition to the consultative services that were already being provided, the student's IEP goals were changed to reflect the suggestions of Dr. Solomon and the student's specialized instruction was increased. The ELL services were also continued and mentioned in the student's IEP. It appears from the evidence that at the meeting neither the parents nor any of their representatives explicitly stated that they were rejecting the IEP or placement or that the student would not return to School A. The School A staff did not realize the student was not returning until informed by the students sister weeks later. Nonetheless, Petitioner's January 6, 2012, letter stated the parent intention to enroll the student at _____ and seek reimbursement.

The DCPS staff made an accommodation to the parents to allow the student to remain at School A in fifth grade another year and the parents efforts to find another school for the student were accelerated when the student was not assigned to his previous classroom general education teacher. Nonetheless, DCPS seemed to make a good faith effort to modify the student IEP and support him continuing at School A.

Petitioner did not contest that any part of the student's IEP other than the level of instructional services (specialized instruction) and thus the placement was inappropriate. Petitioner seeks reimbursement for tuition and costs at _____ because the January 11, 2012, IEP was inadequate. An inadequate IEP is a necessary but, in the Hearing Officer opinion, an insufficient condition in this instance for private school placement and reimbursement.

Although the District must pay for private school placement "[i]f no suitable public school is available[,] ... if there is an appropriate public school program available ... the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991) (citations and quotations omitted).

34 C.F.R. § 300.148 provides:

(a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with Sec. Sec. 300.131 through 300.144.

(b) Disagreements about FAPE. Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in Sec. Sec. 300.504 through 300.520.

(c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in

a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

(d) Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied--

(1) If--

(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in Sec. 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) Exception. Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement--

(1) Must not be reduced or denied for failure to provide the notice if--

(i) The school prevented the parents from providing the notice;

(ii) The parents had not received notice, pursuant to Sec. 300.504, of the notice requirement in paragraph (d)(1) of this section; or

(iii) Compliance with paragraph (d)(1) of this section would likely result in physical harm to the child; and

(2) May, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if--

(i) The parents are not literate or cannot write in English; or

(ii) Compliance with paragraph (d)(1) of this section would likely result in serious emotional harm to the child.

As previously stated On January 6, 2012, five days prior to the student's IEP meeting the parent's attorney sent a letter to School A stating that the letter was notice the parents intended to place the student at _____ and seek reimbursement from DCPS. There was testimony from the DCPS witnesses that the parent did not reiterate at the meeting intention to place the student at _____ and seek reimbursement. On the other hand DCPS made good faith efforts to amend the students IEP include increasing his level of special education services and left the meeting still looking for additional activities the student could participate in during the lunch and recess period and left with the impression the student would remain at School A. However, the student did not attend School A after the meeting the school did not know the student was not returning until the school called and asked the parent to submit documentation of withdrawal from School A. This may not rise to the level of bad faith on the part of the parent or their representatives but it was least in the Hearing Officer's opinion is was unreasonable action and is thus considered by the Hearing Officer as an additional cause affecting the decision on remedy.

In this case Petitioner did not argue or demonstrate that School A or another D.C. public school could not provide the student an appropriate education with specialized instruction in all academic areas. In fact, the Petitioner's consultant and expert witness stated that she would be content if the student's special education teacher had him throughout the entire school day. However, the evidence does not indicate this was something that the Petitioner asked for at the meeting, or that the parent's would have actually accepted.

The Hearing Officer concludes that _____ has no non-nondisabled students. Thus, _____ would not be the least restrictive environment for the student. It was also not been demonstrated that DCPS cannot provide the student an appropriate placement the Hearing Officer concludes DCPS is not required to pay for the student's placement at _____. See *N.T. et al v. District of Columbia* 58 IDELR 69 citing *Jenkins, 935 F.2d at 305; cf. School Comm. Of Town of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359, 373-74 (1985) (parents who unilaterally place their children in private school "do so at their own financial risk.")

ORDER:

1. The student's January 11, 2012, IEP is hereby amended to prescribe 26.5 hours per week of specialized instruction in the out of general education setting.
2. DCPS shall within ten (10) business days of the issuance of this order convene an IEP meeting to amend the student's IEP as prescribed above and to determine whether the student is in need of ESY services and to determine an appropriate placement/location of services for the student for ESY and/or SY 2012-2013.
3. The remedy to for reimbursement for the student's attendance at the _____ School is hereby 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

Coles B. Ruff, Esq.
Hearing Officer
Date: June 16, 2012