District of Columbia

Office of the State Superintendent of Education

Office of Review and Compliance
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Confidential

STUDENT[1], by and through his Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent.	HEARING OFFICER'S DETERMINATION Hearing Officer: Coles B. Ruff, Esq.

2011 SEP -6 AM 10:08
OSSE
STUDENT HEARING OFFICE

[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 August 19, 2011, and concluded on September 1, 2001, at the OSSE Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2009 and Hearing Room 2008 respectively.

BACKGROUND:

Student or "the student" is age and has been determined eligible as a child with a disability under IDEA with a disability classification of specific learning disability ("SLD"). The student attends a District of Columbia public school (DCPS) hereinafter referred to as "School A." During the 2011-2012 school year, the student was in the sixth grade at School A. The student has attended School A since at least first grade, when he was first determined eligible for special education services.

The student's most recent individualized educational program ("IEP"), developed March 1, 2011, prescribes 22.5 hours of specialized instruction and 1 hour of behavior support services weekly in an "out of general education" setting.

Petitioner filed the due process complaint on June 21, 2011, alleging, *inter alia*, that DCPS had developed an inappropriate IEP for the student and provided an inappropriate educational placement. Petitioner alleged the student is in need of a full-time IEP and placement as evidenced by his lack of progress in the years he has attended School A. Petitioner seeks as relief: (1) amendment of the student's IEP to reflect full-time services and a full-time placement, and (2) placement and DCPS funding at School where the student has been accepted.

DCPS asserts the student's IEP is calculated to provide educational benefit; he has made some academic progress and the student's current IEP, placement and location of services are appropriate.

The parties attempted a resolution session during the 30-day resolution period. However, a meeting was never held and at the end of the thirty-day resolution period the parties agreed to proceed to hearing. Thus, the 45-day timeline began on July 21, 2011, and ends September 4, 2011, when the Hearing Officer's Determination ("HOD") is due.

The Hearing Officer convened a pre-hearing conference ("PHC") in this matter on July 26, 2011.[2] The conference was conducted by telephone. Participating in the conference were

[2] The pre-hearing conference was held on the first date that counsel were available.

Petitioner's Counsel Domiento C.R. Hill, Esq.[3] and DCPS Counsel Victoria Healy, Esq. A pre-hearing order ("PHO") was issued on July 29, 2011.

ISSUE: [4]

The issue adjudicated is:

> Whether DCPS denied the student at Free and Appropriate Public Education ("FAPE") by failing to develop an appropriate IEP with full-time rather than part-time special education services and by failing to provide him an appropriate educational placement? [5]

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-16 and DCPS Exhibit 1-8) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: [6]

1. The student is age and has been determined eligible as a child with a disability under IDEA with a disability classification of specific learning disability ("SLD"). The student attends a DCPS, School A. During the 2011-2012 school year the student was in the sixth grade at School A. The student has attended School A at least since first grade, when he was initially determined eligible for special education services. (Parent's testimony, Petitioner's Exhibit 8-7)

2. In March 2006 DCPS conducted a psycho-educational evaluation of the student when he

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[3] Mr. Hill was standing in for Mr. Nahass as Petitioner's counsel during the pre-hearing conference.

[4] The alleged violations and/or issues listed in the complaint may not directly correspond to the issues outlined here. However, the parties agreed at the hearing that the issues listed here and as stated in the pre-hearing order are the issues to be adjudicated. Following the PHC, Petitioner's counsel communicated with the Hearing Officer and DCPS counsel by email dated August 11, 2011, that he was withdrawing the claim of failure to implement the student's IEP as was alleged in the complaint. Petitioner's counsel stated Petitioner has already received compensatory education for the alleged violation. Thus, only two of the three issues alleged in the complaint were adjudicated.

[5] Petitioner alleges the student is need of a full time special education IEP and placement and the IEP/placement proposed by DCPS, as well as the location of services, is inappropriate. Petitioner alleges the student has made little if any academic progress with his current IEP and placement. Petitioner is only challenging the appropriateness of the IEP developed by DCPS on March 1, 2011.

[6] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

was age and in grade. The assessment revealed that the student had low average cognitive functioning but when adjusted for non-verbal assessment using the TONI-3 the student's cognitive abilities clearly fell in the average range. The student's academic achievement was about one to one and half years behind age equivalent peers. Based on the student's academic achievement the evaluator determined the student was operating significantly below age expectancy and recommended the student receive specialized instruction. The student's academic achievement was assessed using the YCAT and the student obtained the following scores: (Petitioner's Exhibit 3-5, 3-6)

	Percentile	Stand. Score	Age Eq.
General Information:	48	99	7-0
Reading:	6	77	5-5
Mathematics:	26	90	6-5
Writing:	19	87	6-2
Spoken Language:	10	81	5-9
Early Achievement Composite	12	81	5-10

3. During the 2006-2007 school year while in first grade the student's initial IEP was developed and prescribed 10 hours of specialized instruction weekly in an out of general education setting. The student's specialized instruction hours remained the same in his subsequent IEPs until they were increased in July 2010 (Petitioner's Exhibit 8-7, 8-1, 9-1, 11-8)

4. On January 9, 2009, when the student was age and in the grade at School A, DCPS conducted a Woodcock Johnson III Tests of Achievement (WJ-3). The student's academic achievement in Reading since first grade (four school years later) had only progressed a little more than one grade level. His Math achievement had progressed approximately three grade levels. However, the student was four grades levels behind in Reading and two grade levels behind in Math. The student had the following scores on the WJ-3: (Petitioner's Exhibit 5-2)

	Raw	Age Eq.	Percentile	Stand. Score	Grade Eq.
Letter Word Identification:	27	7-0	1	64	1.7
Calculation:	15	9-4	36	95	3.8
Spelling:	21	7-6	3	72	1.8
Passage Comprehension:	13	6-8	1	65	1.3
Applied Problems:	30	9-0	32	93	3.5

Writing Samples:	9-A	7-7	13	83	2.0

5. During the 2009-2010 school year the student was in a general education classroom at School A with approximately 25 students, one teacher and one aide. The student did not do well in the general education classroom that school year, made limited progress and needed a small group setting in order to make any academic progress at all. testimony)

6. The student received Wilson Reading Program instruction during the 2009-2010 school year, his grade year. A reading inventory was used to assess the student three times during the school year. The student has severe reading struggles and when he began the program he was performing at the early first grade level. He ended the school year at about beginning of second grade level in Reading. The student needs a great deal of repetition. The Wilson Reading Program was well suited for the reading difficulties the student was having. A student should use the Wilson program for approximately one hour to ninety minutes per day. testimony)

7. At the student's July 13, 2010 IEP, the student's special education services were increased. The IEP prescribed the following weekly services: 10 hours of specialized instruction in Reading, 7.5 hours of specialized instruction in Math and 5 hours of specialized instruction in Written Expression. The student was also to receive 30 minutes of behavior support services in the general education setting and 1 hour outside the general education setting weekly. The IEP included academic goals in Reading, Math and Written Expression with anticipated dates of achievement by May 1, 2011. (Petitioner's Exhibit 11-8)

8. The parent was hopeful that School A would be a successful place for the student. However, since the third grade the student has made little if any academic progress. The parent has been frustrated that the student has not progressed academically over the years and basically has been at the same level of academic ability for years. The parent works with the student daily on his school work. She works with him using computer software and he can perform second and third grade work with some proficiency. However, when they attempt any higher level work he is unable to perform the work. The student has been receiving some tutoring which has helped because it is one-on-one attention. The parent feels the student should be getting more assistance than he is receiving at School A. (Parent's testimony)

9. The parent engaged the services of an educational advocate to assist her in IEP meetings and communication with School A staff relating to the student's special education needs and services. On November 3, 2010, DCPS convened an IEP meeting for the student that the parent and her educational advocate attended. The team noted the student appeared to have been making progress regarding his social emotional goals. The student's special education case manager, however, expressed that the student could not do 6th grade work even with supports. The student's teacher noted the student was actually operating on a first to second grade level in Reading and could perform first grade Math but had difficulty recalling information once it was taught. The team noted that since being in the sixth grade, which is considered middle school, the student was actually receiving 17.5

hours of specialized instruction rather than that the 22.5 his IEP prescribed. When he moved to sixth grade his program was changed to allow for a middle school program and he was in a general education classroom for Science, Social Studies and Art.
The parent and her advocate requested that the student's special education services be increased due to the student's apparent academic stagnation. The student's classroom teacher and his Wilson Reading teacher noted that the student needed constant repetition and redirection. The special education teacher stated that if the student had additional needs for more specialized instruction she might not be able to accommodate it due to her already busy schedule. The team agreed that prior to increasing the student's services DCPS would conduct a psycho-educational assessment and reconvene to reconsider the student's IEP. testimony, testimony, Petitioner's Exhibit 12-2)

10. The student's teacher administered the WJ-3 Tests of Achievement on November 10, 2010, when he was age 11 years and 10 months. More than a year after his previous assessment the student demonstrated little if any academic progress, although his specialized instruction had been increased in his most recent IEP. The student scores on the WJ-3 were: (Petitioner's Exhibit 7-6)

	Grade Eq.	Stand. Score	Age Eq.
Broad Reading:	1. 8	59	7-2
Broad Written Language:	2.6	71	8-0
Written Expression:	2.4	68	7-9
Academic Skills:	2.4	71	7-10
Academic Applications:	2.1	68	7-7

11. DCPS completed a psycho-educational evaluation of the student on November 16, 2010. The evaluator noted the concern for the student's lack of sustained academic progress. Although the student had excellent school attendance, the evaluator noted the student has difficulty keeping pace with his peers in the general education setting and when tests are timed he cannot complete the assignments. The evaluator conducted a classroom observation of the student and concluded the student needs a great deal of structure in order to access the demands of the curriculum. The evaluator conducted a Wechsler Intelligence Scale for Children -Fourth Edition ("WISC-IV). The student had a full scale IQ of 80; both his verbal and nonverbal reasoning abilities fell in the low average range. Given the student's low average cognitive abilities and low academic achievement the evaluator recommended the student be in a small structured classroom with specialized academic support that allowed adequate time to ensure he masters the concepts and operations taught and his reading skills be developed through phonetic analysis and sight word recognition to promote reading comprehension and fluency. "The instruction should be specific, simple and given slowly; one at time vocabulary should not be complex but age appropriate." (Petitioner's Exhibit 7-11)

12. On February 15, 2011, an IEP meeting was convened at School A to review the student's evaluation. The parent's educational advocate attended. The team agreed that based on the student cognitive abilities he should be able to make greater academic progress and he had not made any significant progress in the past few years. The advocate stated that the student was in need of a smaller more structured full time special education program to address his lack of progress. The student's teachers agreed that the student was in need of a low student to teacher ratio. A full time special education program could not be provided at School A. There was no IEP produced at the meeting and the DPCS members of the team agreed to reconvene on March 1, 2011, to complete the student's IEP. testimony, Petitioner's Exhibit 13-5)

13. On March 1, 2011, DCPS convened an IEP meeting to review and revise the student's IEP. The academic goals in the IEP were identical to the student's previous IEP. The behavioral support services were reduced to allow more time for specialized instruction which remained the same at 22.5 hours per week but were not prescribed in specific subject areas. The student had not mastered the IEP goals in his previous IEP thus they were carried over into the new IEP. The advocate expressed her dissatisfaction with the draft IEP but did not suggest any other IEP goals or modifications to the goals. Despite, the new evaluation and several IEP meetings over the school year there were no changes made to the student's IEP from the July 2010 IEP. The student's special education teacher noted that the student was eager, respectful and struggles across the board but requires significant instruction to gain progress. She expressed limited ability to address the student's concerns and desired more time with the student to make an impact. testimony)

14. At the March 1, 2011, meeting the team discussed the student's progress. No one was satisfied with the progress the student was making. His progress was inconsistent and he demonstrated difficulty with retention even though he had previously mastered material. The psychologist participating in the meeting shared that the student's progress would be slow based on his learning disability and that emotional factors could play a role his rate of academic progress. The school was aware the student was receiving outside counseling and requested some data from that counseling to coordinate efforts to perhaps develop a behavior intervention plan. testimony)

15. The student's IEP goals from the July 2010 were carried over because a year had not passed and there was not yet a need to change the goals. The anticipated date the goals would be achieved was extended to December 1, 2011. The student's hours of specialized instruction were unchanged from the IEP in June 2010. The special education teacher expressed concern about not being able to handle the all her responsibilities and her scheduled was changed and she worked with the student all day. The number of hours of specialized instruction (22.5) in the student's March 3, 2011 IEP was determined in collaboration with his special education and general education teacher. The number of children the student has instruction with was reduced in late February or March 2011. During the latter part of the 2010-2011 school year the student's schedule was as follows: He was with the special education teacher most of the day. He had Reading and Math

with only his sibling and the special education teacher for about an hour and a half then two other students came in until lunch time. After lunch the student had specials classes (Music, Art, Spanish and/or PE) and the special education teacher accompanied the student to those classes. From 2:00pm to 3:00pm each day he attended a Wilson Reading Program group with a total of four other students. The other students had reading deficits but were not necessarily special education students. The Wilson reading group is not taught by a special education teacher. The student's special education teacher, however, left the school in April or May 2011. testimony)

16. The student received behavioral support services from a DCPS certified social worker during the 2010-2011 school year. The student was given 90 minutes at first which was reduced to 60 minutes per week. The social worker worked with the student on staying on task, staying focused and maintaining self control, in addition to problem solving skills and coping skills. Over the year he demonstrated significant progress in staying on task. The social worker also worked with the student on peer relationships. Sometimes he would go into the classroom with the student to assist in those goals. testimony)

17. During the 2010-2011 school year the student received the following grades: (DCPS Exhibit 1)

	First Adv.	Second Adv.	Third Adv.
Middle School Math:	C	C	B
Language Arts:	F	F	C
Elective:		B-	A
Advisory MS:	P	P	P
World Geography:	C	C-	C+
Science:	C	A	

18. For the first two reporting periods of the 2010-2011 school year the student demonstrated progress in all his IEP goals and reported on the IEP progress reports. (DPCS Exhibit 5)

19. The parent's educational advocate conducted a classroom observation of the student in May 2011. For the first hour and half there were only two students working with the special education teacher. For the rest of the morning a few other special education students joined in the classroom instruction. There were never more than five students in the classroom during the observation. Other than during his lunch time, the student was receiving instruction in a small group setting. He was no longer participating in his special subjects, such a Social Studies, Art, or PE with general education students. testimony)

20. The student has been interviewed by and accepted for admission at the School is a private full time special education school that serves students from pre-K to 12th grade. The school uses a multisensory approach to education and student to teacher ratio from 8 to 1 in lower grades to 10 to 1 in high school. The school has a total of 220 students. The staff reviewed the student's application file. He will be going to the seventh grade and has been diagnosed with SLD and is below grade level in all areas and needs behavior support dealing with low self-esteem anxiety and depression. The file was reviewed and the student was accepted. The student's profile indicates his difficulty is language based. His struggles would be similar to those of other students there. He would be in class 7B and would be the seventh boy with three girls who are all functioning a grade or two above or below the student. Two head teachers would be assigned to teach English and Social Studies and the other teachers would teach Math and Science with an assistant teacher shared between the two classrooms. The two classrooms are across the hall from each other. The student would stay with 7B for all classes including specials. Based on his psychological report the student benefits from small group instruction and intensive decoding instruction in English and Reading and he is likely to gain a couple of years growth in a year or two and the goal is to get him back to the general education setting with the proper supports. The cost of is per year plus costs for related services and the rates are consistent with rates approved by DCPS. testimony, Petitioner's Exhibit 16)

21. has afterschool sports JV and Varsity and offers involvement with dramatic plays for the middle and high school each year. The school follows the DCPS curriculum and students can obtain a DCPS diploma. The school's teaching philosophy and methodology is research based regardless of the level of student's academic testing. The students may be more effective in classroom and the school thus uses a portfolio method to measure student's progress. Instruction is differentiated in each class and for each student. The school uses the Lexia computer based reading program for students with reading deficiencies and the program is administered by a reading specialist. For Math the school has a Title 1 teacher and does math drills based on Title 1 standards. The Lexia is research based and is done on computers so students can work at their own pace. A student's progress is monitored by quarterly IEP updates and measurements relative to goals. In the classroom each student has a portfolio that covers both IEP goals and other information. In the upper grades the students take charge of what work will be included in the portfolio. There are bi-weekly written reports to parents by mail. A standard ungraded progress report in lower school assesses different skills and whether they learned the requirements of the DCPS curriculum. testimony, Petitioner's Exhibit 16)

The student has visited School for a few weeks and is very excited about attending there and excited by the academic instruction he received during the time he visited. (Parent'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.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [7] *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 a FAPE by failing to develop an appropriate IEP with full-time rather than part-time special education services and by failing to provide him an appropriate educational placement?

Conclusion: The student's demonstrated academic stagnation over the years and lack of academic progress demonstrate the student is in need of a full time special education IEP and placement. The student's current placement and location of services, School A, is unable to provide the student the required services and is inappropriate. Petitioner sustained the burden of proof by a preponderance of the evidence.

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")).

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[7] 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.

20 U.S.C. 1414(a)(i) defines Individualized Education Program 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.

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

The evidence clearly demonstrates that the student has made limited academic progress over the six years that he has received special education services at School A. Although his cognitive abilities have been assessed in the low average range he clearly has the cognitive ability to achieve at academic levels far greater that he has over the last few years. The student's initial and subsequent IEPs from first grade prescribed that he receive 10 hours of specialized instruction outside the general education setting. This level of services was maintained for four school years. In that time the student's reading abilities progressed a single grade level. Yet, no additional supports or specialized instruction was put in place until the student began receiving the Wilson Reading Program in 5th grade. During the 5th grade the student was struggling in a general education classroom with 25 students. The student's 5th grade classroom teacher credibly testified the student clearly needed small group instruction to even make minimal progress.

DCPS took steps to increase the student's special education services in July 2010 as he was entering sixth grade. His IEP was amended to include 22.5 hours of specialized instruction and 90 minutes of behavioral support services. However, because the student's schedule was changed to accommodate a middle school schedule of changing classes he only received 17.5 hours of the specialized instruction the IEP prescribed. This was a critical time when the student needed more services not less to address the significant academic deficits he was experiencing. He was already in sixth grade and reading on a second grade level. Rather than immediately implement the parent's requested increase in services, DCPS conducted an evaluation which confirmed the student had adequate cognitive abilities to learn and his severe learning disabilities that needed to be addressed through, as the evaluator noted "a small structured classroom with specialized academic support that allowed adequate time to ensure he masters the concepts and operations taught and his reading skills be developed through phonetic analysis and sight word recognition to promote reading comprehension and fluency. The instruction should be specific, simple and given slowly one at time vocabulary should not be complex but age appropriate."

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.

34 C.F.R. § 300.116 provides:

> In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that--
> (a) The placement decision--
> (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
> (2) Is made in conformity with the LRE provisions of this subpart, including Sec. Sec. 300.114 through 300.118;
> (b) The child's placement--
> (1) Is determined at least annually;
> (2) Is based on the child's IEP; and
> (3) Is as close as possible to the child's home;
> (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
> (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
> (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

DCPS has attempted over the years to ensure that this student was educated with his non-disabled peers as the law requires. However, this attempt has proved strikingly unsuccessful. The evidence, including the student's recent evaluation, demonstrates that he is clearly in need of intensive special education services in a full-time out of general education setting. By contrast the IEP and placement DCPS offered on March 1, 2011, was the same IEP that had been drafted for the student in July 1, 2010. There were no substantive changes in the IEP. School A began to implement that IEP by having the special education teacher work exclusively with the student and a few other special education students and then accompany the student the remainder of the day to his special general education classes. Yet the student's teacher in each of the IEP meetings from November 2010 through March 2011 repeatedly noted the student's difficulty in retaining information even after he had mastered skills. The School A special education coordinator noted that even after this arrangement had been made to provide the student more services, that special education teacher left the school in April or May. It is unclear whether the student continued with this same schedule with another special education teacher or not. The staff has been apparently in a quandary about how to address this student's unique learning needs. The student is now supposed to be in the seventh grade and apparently is still reading on a second grade level. DCPS suggests the solution is more of the same -

an unchanged IEP and more time with a special education teacher. It is admirable that DCPS began to provide the student the Wilson Reading Program and he made some degree of progress in his reading. However, it is clear the student, based on his most recent evaluation, has had apparent stagnation of academic achievement over the years and difficulties in retaining information learned and is clearly in need of more than can be offered him at School A. The student's academic deficits and unique learning disabilities warrant a lower student to teacher ratio and more specialized instruction than DCPS has offered and than can be provided in the placement and location DCPS put forth. The evidence demonstrates that School A cannot implement a full time special education program. This Hearing Officer concludes that the IEP developed for the student including the educational placement and LRE are inappropriate for this student and result in a denial of FAPE. The student cannot remain in an inappropriate program which the evidence demonstrates School A has become for this student.

The student has visited, been interviewed, and accepted by DCPS is obligated to provide the student an appropriate placement. The Hearing Officer concludes, based on the evidence of the services that can be provided to the student, that can provide educational benefit consistent with "decisions in *Burlington and Carter*... when a school district fails to provide FAPE and the private-school placement is appropriate. *Forest Grove District v. T.A.* 129 S. Ct. 2484 (U.S.S.C. 2009)

However, 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.*

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.

Accordingly, the Hearing Officer directs DCPS to place and fund the student on an interim basis at the and within forty-five (45) calendar days convene a MDT/IEP meeting to review and revise the student's IEP to prescribe a full time special education placement and determine appropriate placement for the remainder of 2011-2012 school year.

ORDER:

1. DCPS shall place and fund the student on an interim basis at School and provide transportation services.

2. DCPS shall within forty-five (45) calendar days of the issuance of the Order convene a MDT/IEP meeting to review and revise the student's IEP to prescribe full time special education services and a full time placement and review the student's progress since attending and determine the appropriate placement for the student for the remainder of the 2011-2012 school year.

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).

Coles B. Ruff, Esq.
Hearing Officer
Date: September 4, 2011