

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

2012 SEP 27 AM 9:08

OSSE
STUDENT HEARING OFFICE

Parents,¹
On behalf of, Student,

Petitioner,

Date Issued: September 27, 2012

Hearing Officer: Melanie Byrd Chisholm

v.

District of Columbia Public Schools,
Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a _____ year old female, who is currently an _____ grade student attending School A. The student's most recent individualized education program (IEP) lists Specific Learning Disability (SLD) as her primary disability and provides for her to receive four (4) hours per week of specialized instruction outside of the general education setting, twelve (12) hours per week of specialized instruction inside of the general education setting; fifteen (15) minutes per month of behavioral support services outside of the general education setting and various postsecondary transition services.

On July 27, 2012, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to develop an appropriate IEP for the student in December 2010 by failing to include appropriate goals, appropriate present levels of performance, appropriate specialized instruction and speech language therapy as a related service; placing the student in an environment with large class sizes and distracting behaviors by other students; failing to develop an IEP for the student by the time the student's December 2010 IEP expired; and by failing to provide the student's parents with the student's complete school records. As relief for this alleged denial of FAPE, Petitioner requested reimbursement for the costs, including tuition, related services and mileage for transportation, of School A for the 2011-2012 school year; and placement at, funding for and transportation to School A for the 2012-2013 school year.

¹ Personal identification information is provided in Appendix A.

Fifteen (15) days after the Petitioner filed the Complaint, DCPS had not held a Resolution Meeting. Therefore, on August 13, 2012, the Petitioner requested that the Hearing Officer begin the 45-day timeline pursuant to 34 CFR §300.510(b)(5). Accordingly, the parties agreed that the 45-day timeline started to run on August 14, 2012, the day following the Petitioner's request to begin the timeline, and ends on September 27, 2012. The Hearing Officer Determination (HOD) is due on September 27, 2012.

On August 14, 2012, Respondent filed an untimely Response to the Complaint. In its Response, Respondent asserted that DCPS provided IEPs for the student with goals based upon valid evaluation data and which were reasonably calculated to provide the student with educational benefit; the placement determined by the IEP Team was based on the student's IEP, which was developed with the parent's participation and in the least restrictive environment (LRE) for the student; DCPS made a FAPE available to the student and the parent rejected the offer of FAPE; the location of services offered by DCPS is appropriate for the student and within the discretion of the local educational agency (LEA); the student was withdrawn by the parent and unilaterally placed in a private school therefore the student is only entitled to child find and a services plan since DCPS made FAPE available to the student; the parents did not provide timely notice of their intent to privately place with student and seek public funding and intended to place the student privately well in advance of the appropriate process as outlined in the Individuals with Disabilities Education Act (IDEA); the placement requested by Petitioner is an attempt to gain a maximum education at public expense; School A is an inappropriate placement for the student and does not satisfy the requirements for a nonpublic placement pursuant to the District of Columbia Municipal Regulations (DCMR); and once the student withdrew from DCPS, DCPS no longer had access to the student's records.

On August 21, 2012, Hearing Officer Melanie Chisholm convened a Prehearing Conference and led the parties through a discussion of the issues, relief sought and related matters. During the Prehearing Conference, the Respondent clarified that the Motion to Dismiss contained within the Respondent's Response was a general motion and not a formal motion to be decided by the Hearing Officer. The Hearing Officer issued the Prehearing Order on August 21, 2012. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order.

On August 24, 2012, Petitioner filed a Motion to Bar Respondent's Evidence. The Petitioner argued that since DCPS did not provide access to the student's records "without unnecessary delay" before the due process hearing, the only viable remedy would be to bar DCPS' evidence in the due process hearing. The Petitioner further argued that getting the records five days before the 5-day disclosure deadline would not allow the parents the opportunity to have sufficient time to review the records in a meaningful fashion. On August 29, 2012, Respondent filed a Response to Petitioner's Motion to Bar Respondent's Evidence. The Respondent argued that since the student was withdrawn from DCPS, DCPS no longer maintained the student's records and that DCPS provided the parent access to all records within its custody and control. The Respondent further argued that if the Petitioner were harmed by not receiving the records at an earlier date, the appropriate remedy would be a continuance because

the Hearing Officer does not have the authority to prevent a party from presenting evidence. On August 29, 2012, the Respondent provided Petitioner an electronic copy of the student's records.

On August 29, 2012, Petitioner filed Disclosures including thirty-nine (39) exhibits and six (6) witnesses.² On August 29, 2012, Respondent filed Disclosures including five (5) exhibits and ten (10) witnesses.

The due process hearing commenced at approximately 9:29 a.m. on September 6, 2012 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2006. The Petitioner elected for the hearing to be closed.

Prior to discussing objections of proposed exhibits, the Hearing Officer heard arguments from both parties regarding Petitioner's August 24, 2012 Motion to Bar Evidence. The Hearing Officer requested that the Petitioner identify Respondent's exhibits which were not previously in the possession of the Petitioner and which, if admitted into the record, would prejudice the Petitioner. The Petitioner represented that Respondent's Exhibits 2 and 3 were not previously in the possession of the Petitioner. The Hearing Officer noted that Respondent's Exhibit 2 was included in Petitioner's Exhibit 20, containing handwritten notes by the parent, and asked the Petitioner to identify any discrepancies in the documents. The Petitioner did not identify any significant discrepancies between the two documents. The Hearing Officer also asked the Petitioner to explain why five days was not adequate time for the Petitioner to review the student's progress reports (Respondent's Exhibit 3). The Petitioner argued that five days was not adequate time for the Petitioner to thoughtfully review the documents. The Respondent argued that the parent had previously received the progress reports because progress reports are sent to parents at the end of each quarterly reporting period. Reasoning that the Petitioner had to have the December 2010 IEP in order to file the present claim; the issues of whether DCPS failed to maintain the student's records and failed to allow the parents to inspect and review the student's records were issues outlined in the Prehearing Order to be determined by the Hearing Officer; and that Petitioner had adequate time to review the student's progress reports, the Hearing Officer denied the Petitioner's Motion to Bar Respondent's Evidence. The Hearing Officer notes that Respondent's Exhibits 1-3 are found in Petitioner's Exhibits 16, 20 and 24 and were later identified as documents provided to Petitioner's counsel by the parents.

Petitioner's Exhibits 1-27 and 35-39 were admitted without objection. The Hearing Officer admitted Petitioner's Exhibits 28-34 over Respondent's objections, finding the exhibits relevant, able to be authenticated and/or proper pursuant to 34 CFR §300.512. The Hearing Officer admitted Respondent's Exhibits 1-5 over Petitioner's objections contained within the Petitioner's Motion to Bar Respondent's Evidence.

At the close of Petitioner's evidence, Respondent moved for a Directed Verdict on all five (5) issues in the Prehearing Order. The Hearing Officer denied the Motion for Directed Verdict on Issues #1 and #2 as outlined in the Prehearing Order; and granted the Motion for Directed Verdict for Issues #4 and #5 as outlined in the Prehearing Order (*Whether DCPS failed to maintain the student's educational records and whether this failure constitutes a denial of a FAPE; and whether DCPS failed to allow the parent to inspect and review the student's*

² A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

educational records and whether this failure constitutes a denial of a FAPE) finding that there was no evidence presented by Petitioner which suggested that any procedural violation that may have occurred impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child or caused a deprivation of educational benefit. The Hearing Officer reserved ruling on Issue #3 as outlined in the Prehearing Order (Whether DCPS failed to review the student's December 2010 IEP at least annually and whether that failure constitutes a denial of a FAPE).

The hearing concluded at approximately 3:52 p.m. on September 7, 2012, following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

ISSUES

The issues to be determined are as follows:

1. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP for the student in December 2010, specifically, by failing to develop an IEP with specific goals unique to the student, thirty-one (31) hours of specialized instruction per week outside of the general education environment and ninety (90) minutes per week of speech-language therapy?
2. Whether DCPS denied the student a FAPE by failing to offer an appropriate placement for the student in December 2010, specifically, placement in a private special education day school?
3. Whether DCPS failed to review the student's December 2010 IEP at least annually and whether that failure constitutes a denial of a FAPE?

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student was adopted in 2007, as a young teenager. At that time, the student spoke Language and had taken English lessons one (1) time per week after she learned she would be adopted by an American family. (Mother's Testimony)

3. School aged children can be expected to use a new language socially in eighteen (18) to thirty-six (36) months after entering a new culture. (Petitioner's Exhibit 30)
4. The student was found eligible for special education and related services in 2008 as a student with a SLD. (Petitioner's Exhibits 1, 2, 3 and 4)
5. The student has a low average IQ. (Petitioner's Exhibit 14)
6. The student is an English Language Learner (ELL) and requires ELL support in the educational environment. (Petitioner's Exhibits 1, 2, 3, 5, 7, 8, 9, 16, 17, 18, 19, 29, 30 and 31; Respondent's Exhibit 1; Special Education Coordinator's Testimony)
7. The student functions very well around nondisabled peers. She is very social, interactive, pleasant and a "normal" teenager. While at School B, the student participated in track, volleyball and a drama production. (Petitioner's Exhibits 16, 18, 20 and 24; Respondent's Exhibit 2; Special Education Teacher's Testimony; Social Worker's Testimony)
8. The student does not exhibit any inappropriate behaviors in the academic environment. (Petitioner's Exhibits 7, 13, 14, 18, 20, 21, 24 and 30; Respondent's Exhibit 2; Mother's Testimony; School A Administrator's Testimony; Special Education Teacher's Testimony; Social Worker's Testimony)
9. The student is devoted to completing her assignments and is able to seek assistance when needed. (Petitioner's Exhibits 7, 13, 14, 18, 20, 21, 24 and 30; School A Administrator's Testimony)
10. The student is able to successfully participate in music, art and physical education with non-disabled peers and without specialized instruction. (Petitioner's Exhibits 13 and 21)
11. On November 19, 2009, DCPS administered a speech-language reevaluation to the student in order to reassess the student's communication skills and determine her current levels of performance to compare to prior assessment results. The Speech Language Reevaluation report was completed on December 4, 2009. (Petitioner's Exhibit 16; Respondent's Exhibit 1)
12. The IEP for the student dated December 10, 2009 which contains signatures from all members of the student's IEP Team. (Petitioner's Exhibit 19)
13. The IEP dated December 10, 2009 prescribes two and one half (2.5) hours per week of specialized instruction outside of the general education environment, two and one half (2.5) hours per week of specialized instruction within the general education environment and sixty (60) minutes per week of behavioral support services outside of the general education environment. (Petitioner's Exhibit 19)
14. On December 11, 2009, the MDT determined that documentation did not support a continued speech language impairment that adversely affected oral communication in the student's academic environment, social and/or vocational development and that the student did not require speech-language intervention to address the previously diagnosed language impairment. The MDT determined that modifications and/or accommodations could be provided to meet the communication needs of the student. Therefore, the student was exited from speech-language as a related service. (Petitioner's Exhibits 16 and 17; Respondent's Exhibit 1; Special Education Coordinator's Testimony)
15. Both parents attended the student's December 11, 2009 IEP Team meeting. (Petitioner's Exhibit 17)

16. Neither the student's December 4, 2009 Speech Language Reevaluation nor the December 11, 2009 MDT's determination to exit the student from speech were challenged by the student's parents. (Petitioner's Exhibit 17)
17. The December 11, 2009 draft IEP prescribes one hundred fifty (150) minutes per week of specialized instruction outside of the general education environment, one hundred fifty (150) minutes per week of specialized instruction inside the general education environment, fifty (50) minutes per week of behavioral support services outside of the general education environment and fifty (50) minutes per week of speech language pathology. (Petitioner's Exhibit 17)
18. The Mother's handwritten notes on the December 11, 2009 draft IEP indicate that the IEP Team agreed that the student would be in ELL for two periods, one of which was math, each at two hundred fifty (250) minutes per week; in a special education math class for two hundred fifty (250) minutes per week; in a Reading 180 class for two hundred fifty (250) minutes per week; have support in her general education science class; and would have some participation in general education math. (Petitioner's Exhibit 17)
19. The Mother, in her handwritten notes on the student's December 11, 2009 draft IEP, did not alter the amount of time for behavioral support services but crossed out the time for speech language pathology, indicating that the IEP Team agreed in the December 11, 2009 meeting that speech language pathology services would end for the student in December 2009. (Petitioner's Exhibit 17)
20. The student's draft IEP dated December 11, 2009 IEP is signed only by the student's mother. (Petitioner's Exhibit 17)
21. The student's IEP Team met and developed an IEP on June 16, 2010. All members of the student's IEP Team were present for the meeting and the IEP contains input from the parents and the parent's advocate and was created after multiple meetings and multiple rounds of corrections. (Petitioner's Exhibit 20; Advocate's Testimony)
22. The student's June 16, 2010 IEP prescribed four (4) hours per week of specialized instruction outside of the general education environment, twelve (12) hours per week of specialized instruction inside of the general education environment and fifteen (15) minutes per month of behavioral support services outside of the general education environment. (Petitioner's Exhibit 20)
23. For the 2009-2010 school year, the student received the grade letter "A" in English as a Second Language (ESL) science, Newcomer English Language Literacy, Beginning English as a Second Language, music and physical education. The student received the grade letter "B" in math, and ESL social studies. The student was on the Honor Roll during the 2009-2010 school year. (Petitioner's Exhibit 13; Mother's Testimony)
24. On December 10, 2010, the student was functioning at the 3.1 grade level equivalent in Broad Reading, at the 4.6 grade level equivalent in Broad Math and at the 3.0 grade level equivalent in Broad Written Language. (Petitioner's Exhibit 23)
25. The last IEP developed by DCPS for the student was developed on December 15, 2010. (Stipulated Fact)
26. At the December 15, 2010 IEP Team meeting, the student had received four (4) A's, two (2) B's and one (1) C, in grade level courses, on her most recent report card.

- (Petitioner's Exhibit 24; Respondent's Exhibit 2; Mother's Testimony; Special Education Teacher's Testimony; Special Education Teacher's Testimony)
27. The present levels of performance in the student's December 15, 2010 IEP are derived from the student's December 2010 Woodcock Johnson assessment, a comparison between the student's September 2009 and December 2010 Woodcock Johnson assessments, the Gray Diagnostic Reading Test - 2 (GDRT), the student's most recent DC BAS, student reports, attendance reports, parent information and anecdotal information from the student's teachers. (Petitioner's Exhibit 24; Respondent's Exhibit 2; Special Education Teacher's Testimony)
 28. The student's present levels of performance come from a variety of sources and provide both objective and subjective bases of the student's educational needs resulting from her disability. (Petitioner's Exhibit 24; Respondent's Exhibit 2)
 29. The "Needs" and "Impact on the Student" sections under each Area of Concern on the student's December 15, 2010 IEP are aligned with the present levels of performance and include accommodations and modifications necessary for the student to make progress in the general education curriculum. (Petitioner's Exhibit 24; Respondent's Exhibit 2)
 30. The student's December 15, 2010 IEP has reading goals related to reading from an appropriate text and identifying story elements, reading aloud from familiar text with fluency and pacing, identifying phonological awareness, using cueing strategies to construct meaning to new text and decoding real and nonsense words; written language goals related to using correct spelling, punctuation and capitalization, writing stories with a beginning middle and an end and writing information on a topic; and math goals related to simplifying numerical expressions, applying the order of operations to real numbers, identifying key words in word problems, understanding long division, finding a linear function describing a line and calculating and applying ratios and percentages. (Petitioner's Exhibit 24; Respondent's Exhibit 2)
 31. The goals on the student's December 15, 2010 IEP are largely similar to the goals on the student's June 16, 2010 IEP. (Petitioner's Exhibits 20 and 24; Respondent's Exhibit 2)
 32. The specialized instruction proposed by the student's December 15, 2010 IEP Team was identical to the specialized instruction on the student's June 16, 2010 IEP which was developed with the input of the parent's advocate and in the course of multiple meetings with multiple corrections. (Petitioner's Exhibits 20 and 24; Respondent's Exhibit 2; Mother's Testimony; Advocate's Testimony)
 33. The student's December 15, 2010 IEP Team based the amount of specialized instruction in her IEP on prior information, the student's current progress, reports from the student's teachers and the student's academic functioning. (Petitioner's Exhibit 24; Petitioner's Exhibit 2; Special Education Teacher's Testimony)
 34. The student's December 15, 2010 IEP contains accommodations to address the student's communication needs including breaking assignments into smaller, more manageable pieces; preferential seating; visual and verbal prompts to begin and maintain a task; teacher check for understanding; and pre-teaching of vocabulary. (Petitioner's Exhibit 24; Respondent's Exhibit 2)

35. The parents initiated the activities required for the student's admission into School A at the beginning of the student's second semester of the 2010-2011 school year. (Mother's Testimony)
36. During the 2010-2011 school year, the student made progress toward all of her IEP goals however did not master all of her IEP goals. (Petitioner's Exhibit 20; Respondent's Exhibit 3; Mother's Testimony; Special Education Teacher's Testimony)
37. The student is able to participate in the general education curriculum with supports. (Petitioner's Exhibits 13, 17, 18, 19, 20, 21 and 24; Respondent's Exhibit 2 and 3; School A Administrator's Testimony; Special Education Teacher's Testimony; Special Education Coordinator's Testimony)
38. The only point during the 2010-2011 school year where the student's grades declined, is when the student's parents made the decision to have the student attend the Lindamood-Bell program daily during the student's ELL World History class. (Mother's Testimony; Special Education Teacher's Testimony)
39. In order to return to School B from the Lindamood-Bell program, the student independently traveled by the public metro bus. (Mother's Testimony)
40. The student completed the 2010-2011 school year at School B. (Stipulated Fact)
41. The student concluded the 2010-2011 school year with grade letters A's and B's. (Mother's Testimony; Special Education Teacher's Testimony; Special Education Coordinator's Testimony)
42. The student began School A at the beginning of the 2011-2012 school year. (Stipulated Fact)
43. School A is a private special education day school. (School A Administrator's Testimony)
44. During the 2011-2012 school year, School A did not offer a curriculum aligned with the DC Standards of Learning. (Program Manager's Testimony)
45. During the 2011-2012 school year, the student's math, science and elective teachers at School A were not certified in special education. The student's English, literacy and history teachers were certified in special education. The student's English and literacy classes were taught by the same teacher. (School A Administrator's Testimony)
46. For the 2012-2013 school year, the student's English, math, science and foreign language teachers at School A do not hold the certifications required by DCPS. (School A Administrator's Testimony)
47. School A does not offer ELL classes or services needed by the student. (Speech Language Pathologist's Testimony)
48. On March 9, 2011, the parents, through their attorney, sent a letter to the School B principal requesting an IEP Team meeting. (Petitioner's Exhibit 25)
49. On August 24, 2011, the parents, through their attorney, sent letter to the School B principal stating that "based on DCPS' failure to respond" to the attorney's request for an IEP meeting and request for placement and funding in an "alternate placement," the parents have withdrawn the student and placed her in a private special education school. (Petitioner's Exhibit 25)

50. The student's September 7, 2011 Comprehensive Speech Language Assessment recommends that the student receive speech language intervention. (Petitioner's Exhibit 30)
51. The student's September 12, 2011 IEP from School A has reading goals related to inferential and literal comprehension including finding specific story elements, and decoding unfamiliar words; written language goals related to demonstrating effective use of the writing process, demonstrating knowledge of revising and editing and effective paragraphs including developing a five paragraph structured essay using an organizational pattern; and math goals related to demonstrating knowledge of sequencing skills and the use of algorithms, demonstrating proficiency using tools and measurement skills and demonstrating effective math language skills. The IEP also includes a goal for the student to understand common vocabulary items such as names of animals and musical instruments and goal related to translating math words into English. (Petitioner's Exhibit 29)
52. On September 15, 2011, the student was functioning at the 3.6 grade level equivalent in Broad Reading, at the 3.7 grade level equivalent in Broad Math and at the 3.5 grade level equivalent in Broad Written Language. (Petitioner's Exhibit 27)
53. School B administratively withdrew the student on September 16, 2011 because the student failed to report to school prior to the LEA's "drop date." The student was not officially withdrawn from DCPS by her parents. (Special Education Coordinator's Testimony)
54. The Educational Consultant's testimony regarding the appropriateness of School B was not creditable. Although the Educational Consultant was retained by the parents to provide services during the period the student was attending School B, the Educational Consultant never observed the student in School B. During his observation at School B, the Educational Consultant did not observe all of the classes to which the student was assigned, including the ELL classes that DCPS provided to the student. The Educational Consultant did not speak with the Special Education Coordinator or the student's case manager to confirm that the classes visited were the classes to which the student would have been assigned. Further, the Educational Consultant testified that it is inappropriate for the student to be in general education classes because she is "not capable of reading and writing on grade level" however both School A and School B educators testified that the student is capable of participating in grade level courses, with supports, and progressing on a diploma track. (Educational Consultant's Testimony; School A Administrator's Testimony; Special Education Teacher's Testimony; Special Education Coordinator's Testimony)

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the

evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. See *N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Board of Education v. Rowley*, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

In *Rowley*, the Supreme Court of the United States held that the term “free appropriate public education” means “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped.” A student’s IEP must be designed to meet the student’s unique needs and be reasonably calculated to provide the student with some educational benefit, but the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student’s abilities. (*Rowley, supra*, 458 U.S. 176 at p. 200.)

In the present matter, the student was adopted in 2007, as a young teenager. At that time, the student spoke Language and had taken English lessons one (1) time per week after she learned she would be adopted by an American family. The student has a low average IQ and was identified as a student with disabilities in 2008 and attended DCPS schools from 2008-2011.

The Petitioner alleged that DCPS failed to provide the student a FAPE by failing to develop an appropriate IEP for the student in December 2010, specifically, by failing to develop an IEP with specific goals unique to the student, thirty-one (31) hours of specialized instruction per week outside of the general education environment and ninety (90) minutes per week of speech-language therapy; and by failing to offer an appropriate placement for the student in December 2010, specifically, placement in a private special education day school.

Issue #1
IEP Goals

The IDEA regulations at 34 CFR §300.320(a)(2)(i) require that a child’s IEP include a statement of measureable annual goals, including academic and functional goals designed to meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum and meet each of the child’s other educational needs that result from the child’s disability. The student’s December 15, 2010 IEP includes goals related to the student’s reading, written language, math and social/emotional deficits.

The present levels of performance in the student's December 15, 2010 IEP are derived from the student's December 2010 Woodcock Johnson assessment, a comparison between the student's September 2009 and December 2010 Woodcock Johnson assessments, the GDRT-2, the student's most recent DC BAS, student reports, attendance reports and anecdotal information from the student's teachers. The student's present levels of performance come from a variety of sources and provide both objective and subjective bases of the student's educational needs resulting from her disability. The "Needs" and "Impact on the Student" sections under each Area on Concern on the student's December 15, 2010 IEP are aligned with the present levels of performance and include accommodations and modifications necessary for the student to make progress in the general education curriculum.

For example, the student's present level of performance in math notes that the student "struggles with two or more digit multiplication and division problems." In the "Needs" section of math, the team indicated that the student "needs further support in the areas of long division, multiplication, fractions and order of operations to complete grade level assignments." The IEP Team also indicated that the student needs assistance with step by step instructions, extended time on assignments and restated directions for simplification. In the "Impact on the Student" section, the IEP Team reasoned that the student's processing speed and working memory challenges "impact her ability to move at the same pace as students in the general education setting without modifications and accommodations." The December 15, 2010 IEP follows with a goal for the student to "develop an understanding of long division problems and apply it to adding and subtracting fractions with like and unlike denominators."

The Petitioner neither presented evidence of why the goals on the student's December 15, 2010 IEP were inappropriate for the student nor presented evidence of goals that would have been appropriate for the student. Further, there was no evidence presented which suggested that the student's parents asked for revised or additional goals during the student's December 15, 2010 IEP Team meeting. In fact, the goals on the student's December 15, 2010 IEP are largely similar to the goals on the student's June 16, 2010 IEP which was developed with the input of the parent's advocate and in the course of multiple meetings with multiple corrections. The present levels of performance, the needs statements, the impact statements and the student's goals in all areas of need are aligned on the student's December 15, 2010 IEP. Therefore, the Hearing Officer concludes that the student's academic and functional goals on her December 15, 2010 IEP were designed to meet the student's needs that result from her disability. DCPS did not deny the student a FAPE by failing to develop an IEP with specific goals unique to the student on December 15, 2010.

Specialized Instruction

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 (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)).

Prior to the development of the student's December 15, 2010 IEP, the record is unclear which IEP School B was implementing for the student. The student's IEP Team met and developed an IEP on June 16, 2010. While, the record does not contain evidence of whether the

June 16, 2010 IEP was finalized, it is clear that all members of the student's IEP Team were present on June 16, 2010 and the parent's notes on the IEP indicate that the IEP contains input from the parents and the parent's advocate and was created after multiple meetings and multiple rounds of corrections. However, the June 16, 2010 IEP in the record contains a "draft" stamp across the pages and the student's IEP progress report from December 1, 2010 suggests that School B was implementing the student's December 11, 2009 IEP.

The record is also unclear as to the amount of time of specialized instruction on the student's December 2009 IEP. The record includes a "draft" copy of an IEP for the student dated December 11, 2009 and signed, at the bottom of the page, by the parent. No other signatures appear on this IEP. This December 11, 2009 typed IEP prescribes one hundred fifty (150) minutes per week of specialized instruction outside of the general education environment, one hundred fifty (150) minutes per week of specialized instruction inside the general education environment, fifty (50) minutes per week of behavioral support services outside of the general education environment and fifty (50) minutes per week of speech language pathology. The Mother's handwritten notes on the draft copy indicate that the IEP Team agreed that the student would be in ELL for two periods, one of which was math, each at two hundred fifty (250) minutes per week; in a special education math class for two hundred fifty (250) minutes per week; in a Reading 180 class for two hundred fifty (250) minutes per week; have support in her general education science class; and would have some participation in general education math. The Mother did not alter the amount of time for behavioral support services but crossed out the time for speech language pathology, indicating that the IEP Team agreed in the December 11, 2009 meeting that speech language pathology services would end for the student in December 2009.

The record also contains an IEP for the student dated December 10, 2009, without a "draft" stamp and signed by the parent on December 24, 2009. This IEP also contains signatures from all members of the IEP Team. The IEP dated December 10, 2009 prescribes two and one half (2.5) hours per week of specialized instruction outside of the general education environment, two and one half (2.5) hours per week of specialized instruction within the general education environment and sixty (60) minutes per week of behavioral support services outside of the general education environment.

The student's June 16, 2010 IEP prescribed four (4) hours per week of specialized instruction outside of the general education environment, twelve (12) hours per week of specialized instruction inside of the general education environment and fifteen (15) minutes per month of behavioral support services outside of the general education environment. The specialized instruction proposed by the student's December 15, 2010 IEP Team was identical to the specialized instruction on the student's June 16, 2010 IEP. The 2009-2010 school year ended on June 17, 2010.

During the 2010-2011 school year, the student was progressing toward all of her IEP goals. While the student's progress report indicate that the student's progress toward her December 11, 2009 IEP goals were being measured, if, in fact, the student's June 16, 2010 IEP was finalized, the Petitioner did not meet its burden in proving that the student was not making progress toward those goals as well. Both Petitioner's and Respondent's witnesses testified that

the student is able to participate in the general education curriculum with supports. At the December 15, 2010 IEP Team meeting, the student had received four (4) A's, two (2) B's and one (1) C, in grade level courses, on her most recent report card. It was not contested that the student concluded the 2010-2011 school year with grade letters A's and B's. The only point during the 2010-2011 school year where the student's grades declined, is when the student's parents made the decision to have the student attend the Lindamood-Bell program during the student's ELL World History class.

The student's December 15, 2010 IEP Team based the amount of specialized instruction in her IEP on prior information, the student's current progress, reports from the student's teachers and the student's academic functioning. Both the Special Education Teacher and the Special Education Coordinator testified that the specialized instruction in the student's December 15, 2010 IEP was sufficient to support the student's continued progress in the general education curriculum and to implement the student's IEP.

The Petitioner argued that the services in the student's December 15, 2010 IEP were inappropriate because the student did not master all of her IEP goals and because "after five years of services from DCPS" the student continued to function below significantly grade level. This argument is not compelling. First, the student did not receive five years of services from DCPS. The student began receiving services from DCPS in May 2008 and was removed from DCPS at the conclusion of the 2010-2011 school year. At the time of the student's initial placement, the student did not speak English and required ELL support, the need for which continued throughout her tenure at DCPS. It is not unusual for a school aged student to take up to three years to use a new language after entering a new culture.

Second, the appropriateness of the IEP goals is to be assessed from the perspective of the student's December 15, 2010 IEP Team, not a hindsight view of whether the student mastered all of the goals (*see Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, *citing Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041). Likewise, the "fact that the goals remained the same does not compel the inference that no progress occurred, in view of the evidence in the record indicating that [the student] did in fact make progress." *W.R. v. Union Beach Board of Education*, No. 09-2268, 2010 WL 1644138 n.4 (D.N.J. April 22, 2010), *aff'd*, 414 F. App'x 499 (3d Cir. 2011); *see also James D. v. Board of Education of Aptakasic-Tripp Community Consolidated School District No. 102*, 642 F. Supp. 2d 804, 827 (N.D. Ill. 2009) ("mere fact that a student's IEP goals are continued does not necessarily mean that ... similar IEPs were not reasonably calculated to confer educational benefit").

Finally, evidence shows that the student derived educational benefit from her December 15, 2010 IEP, by progressing toward all of her IEP goals, commensurate with her abilities; and by receiving above-average grades in all of her classes, even though she did not master all of her IEP goals (*see Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist.*, No. 196 (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450). Under *Rowley*, the factual showing required to establish that a student received some educational benefit is not demanding. A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no

progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. *Id.* While the parents felt as if the student was not making progress, the student is a student with SLD and is an English language learner. The student was not performing on grade level in all areas however she was making progress at School B. The student had A's and B's and was progressing toward her IEP goals. The Hearing Officer concludes that the student's December 15, 2010 IEP included the personalized instruction with sufficient support services necessary to permit the student to benefit educationally from that instruction. DCPS did not deny the student a FAPE by failing to develop an IEP for the student with thirty-one (31) hours of specialized instruction per week outside of the general education environment on December 15, 2010.

Speech Language Therapy

On November 19, 2009, DCPS administered a speech-language reevaluation to the student. The reevaluation was conducted in order to reassess the student's communication skills and determine her current levels of performance to compare to prior assessment results. The report of the reevaluation was completed on December 4, 2009. Within the report, the evaluator concluded that the student presented with communication skills that were adequate for language learning and did not present with an underlying communication disorder that would impact her ability to learn English given her exposure to an immersion in the language. The evaluator noted that the student exhibited hearing, articulation, voice, fluency and pragmatic language abilities appropriate for her age and within the range of normal. The student's December 11, 2009 MDT determined that the student no longer met the criteria for speech and language services.

Based on the student's December 11, 2009 MDT's determination that the student was no longer eligible for speech language services, the student's December 15, 2010 IEP Team did not include speech language services on her IEP. Furthermore, although the Petitioner presented evidence of a speech language evaluation administered to the student on September 7, 2011 and testimony from School A's speech language therapist, this information was not available to the student's IEP Team on December 15, 2010. On December 15, 2010, the student's parents neither requested that speech language be offered to the student nor requested another speech language evaluation for the student.

There is nothing in the record which indicates that the student's parents challenged the December 4, 2009 evaluation or disagreed with the IEP Team's decision on December 11, 2009. In fact, the student's mother's handwritten notes on the student's December 11, 2009 draft IEP indicate an end date of December 2009 for the student's speech language services and "agreed in 12/11 meeting" initialed by the parent. While the Petitioner attempted to present evidence to dispute the December 4, 2009 evaluation, the Respondent argued, and the Hearing Officer agreed, that any challenge to the December 4, 2009 evaluation and December 11, 2009 MDT determination was barred by the statute of limitations. Pursuant to 34 CFR §300.507(b), a due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint. Both parents were present at the December 11, 2009 meeting where the MDT reviewed the student's December 4, 2009 evaluation and determined that the student was no longer eligible for speech language services. The Petitioner's challenge to the

validity of this evaluation and the MDT's determination during the December 11, 2009 IEP Team meeting expired on December 11, 2011.

Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041. The student was exited from speech language services on December 11, 2009. On December 15, 2010, the information available to the IEP Team indicated that the student was not in need of speech language therapy and only required accommodations in the classroom to assist the student in understanding the requested task. The student's December 15, 2010 IEP included *inter alia* the accommodations of breaking assignments into smaller, more manageable pieces; preferential seating; visual and verbal prompts to begin and maintain a task; teacher check for understanding; and pre-teaching of vocabulary. The Hearing Officer concludes that DCPS did not deny the student a FAPE by failing to include ninety (90) minutes of speech language therapy on her December 15, 2010 IEP.

The Petitioner failed to meet its burden with regard to Issue #1.

Issue #2

Pursuant to 34 CFR §300.116(b)(2), the child's placement must be based on the child's IEP. Placement decisions can only be made after the development of the IEP. *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 441 IDELR 178 (4th Cir. 1988). While the Petitioner argued that the goals in the student's December 15, 2010 IEP were not specific for the student, the Petitioner did not present evidence of how or why the goals were inappropriate or what goals would have been appropriate for the student. Based on the goals in the student's December 15, 2010 IEP, the hours of specialized instruction agreed upon by the IEP Team, in the general education setting and outside of the general education setting, were appropriate to implement the goals.

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 Supp. 2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. §1412(a)(5)); 5 DCMR §3011 (2006). The IDEA creates a strong preference in favor of "mainstreaming" or insuring that handicapped children are educated with non-handicapped children to the extent possible. *Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Ill. State Bd. of Educ.*, 184 F.3d 912, 915 (7th Cir. 1999). Furthermore, children with disabilities are only to be removed from regular education classes "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 CFR §300.114(a)(2).

The record contains evidence that the student benefits from interaction with non-disabled peers, especially in non-academic activities. The student is not challenged by "going into" social situations. She participated in volleyball, track and a drama production at School B and has friends. The student is a "normal" teenager in her social/emotional functioning and does not exhibit any inappropriate behaviors in the academic environment. The student has a low average IQ and while the student's disabilities create the need for some specialized instruction outside of the general education setting, the evidence supports the Respondent's position that the education

of the student in regular classes with the use of supplementary aids and services can be achieved satisfactorily. The student's December 15, 2010 IEP prescribes a total of sixteen (16) hours per week of specialized instruction, which, at fifty (50) minutes each, supports the student in four (4) academic classes per day. There was no evidence presented which suggested that it is inappropriate for the student to participate in music, art, physical education, assemblies, lunch or other elective courses with non-disabled peers and without specialized instruction.

Although the Plaintiffs were not satisfied with DCPS' offer of FAPE, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. District of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (stating that the IDEA does not provide for an "education ... designed according to the parent's desires") (citation omitted). In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. *Id.* What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In the present matter, the parents are loving and dedicated parents who clearly desire an excellent education for their child. While the parents were not satisfied with the level of progress the student was making at School B and are now happy with the student's progress at School A, DCPS is not required to place the student in School A, as the preference of the parent. The student received educational benefit at School B, and while she may be receiving a greater educational benefit at School A, the program proposed by DCPS on December 15, 2010 was adequate to confer educational benefit.

The Hearing Officer concludes that at the December 15, 2010 IEP Team meeting, the student's IEP Team developed an appropriate IEP for the student and determined an appropriate placement, in the least restrictive environment for the student, based on the IEP developed. On December 15, 2010, the nature or severity of the student's disability did not warrant additional removal from the general education environment. There is no evidence that supports the contention that this student, who is able to appropriately interact with non-disabled peers in non-academic activities and who was making academic progress toward grade level standards, required placement in a more restrictive environment. DCPS did not deny the student a FAPE by failing to offer the student a placement in a private special education day school at the student's December 15, 2010 IEP Team meeting.

The Petitioner failed to meet its burden with regard to Issue #2.

Issue 3

March 9, 2011 Request

Pursuant to the IDEA regulations at 34 CFR §300.324(b), each public agency must ensure that the IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals and in the general

curriculum, if appropriate; the results of any reevaluation conducted under §300.303; information about the child provided to, or by, the parents, as described under §300.305(a)(2); the child's anticipated needs; or other matters. The U.S. Department of Education Office of Special Education Programs (OSEP) has interpreted this section to mean that there should be as many meetings a year as any one child may need, and public agencies should grant any reasonable parent request for an IEP meeting. If the public agency refuses to convene an IEP meeting to determine whether the child's IEP should be changed, the public agency must provide written notice to the parent of the refusal, including an explanation of why the agency determined that conducting the meeting is not necessary to ensure that provision of FAPE to the student. 64 Federal Register 12476-12477 (March 12, 1999).

In the present matter, the parents, through a letter from the parents' attorney to the School B principal, requested an IEP Team meeting on March 9, 2011 to "discuss our request for DCPS to provide alternative services." On that date, the student's December 15, 2010 IEP had not expired. There is no evidence which suggests that DCPS responded to the parents' request for an IEP meeting, either by scheduling a meeting or by providing written notice of the refusal to conduct the meeting. DCPS had the obligation to schedule the meeting, and by not scheduling the meeting violated the provisions of 34 CFR §300.324(b).

The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. While DCPS committed a procedural violation by not scheduling an IEP meeting at the parents' request on March 9, 2011, there is nothing in the record which indicates that the student's needs had changed from December 15, 2010 until March 9, 2011, the date of the request. Therefore, although DCPS committed a procedural violation, since the Hearing Officer concluded that the student's December 15, 2010 was reasonably calculated to confer educational benefit, the failure of DCPS to schedule an IEP meeting three months after the student's IEP was developed did not impede the child's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child or cause a deprivation of educational benefit.

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On August 24, 2011, the parents' attorney sent another letter to the School B principal stating that "based on DCPS' failure to respond" to the attorney's request for an IEP meeting and request for placement and funding in an "alternate placement," the parents have withdrawn the student and placed her in a private special education school. The record does not contain a prior request from the parent for placement and funding in an "alternate placement." The School B Special Education Coordinator testified that School B administratively withdrew the student on September 16, 2011 because the student failed to report to school prior to the LEA's "drop date" and the student had not been officially withdrawn by her parents. Although the student's December 15, 2010 IEP expired on December 15, 2011, the Respondent argued that DCPS was not obligated to develop an IEP for a student who "left" the school system. DCPS further argued that the student was only entitled to equitable services since the parent did not intend the keep

the student in DCPS therefore excepting DCPS from the responsibility to make FAPE available to the student.

The IDEA its regulations contemplate that when disagreements between parents and school boards concerning placement decisions arise, they will be resolved by a Hearing Officer. *See Yates v. Charles County*, 212 F. Supp. 2d 470, 37 IDELR 124 (D.MD 2002). The regulations expressly provide that either a “parent or a public agency may file a due process complaint” when there is a dispute about a child’s educational placement or the provision of FAPE to the child. *See* 34 CFR §300.507(a)(1). While DCPS witnesses testified that School B was only aware that the student was no longer attending School B when the student failed to appear for the 2011-2012 school year, the preponderance of the evidence is that the parents informed School B of their intention to unilaterally withdraw the student, based on an alleged denial of FAPE, on August 24, 2011. At that point, it was DCPS’ responsibility to file a due process complaint to challenge the parent’s action and to continue to make a FAPE available to the student.

DCPS inappropriately classified the student as a student parentally-placed in a private school as defined by 34 CFR §300.130 rather than a student unilaterally placed in a private school when FAPE is at issue pursuant to 34 CFR §300.148. The student retained the right to have an IEP Team meeting held on or before December 15, 2011. The Hearing Officer concludes that the failure of DCPS to reschedule the IEP Team meeting on or before December 15, 2011 was a violation of 34 CFR §300.324(b).

By failing to conduct an IEP meeting for the student on or before December 15, 2011, DCPS failed to make FAPE available to the student. However, in this case, the harm to the student is limited. The Hearing Officer concluded, in the analysis for Issues #1 and #2, that the IEP developed for the student on December 15, 2010 was reasonably calculated to confer educational benefit and that the student’s placement pursuant to her December 15, 2010 IEP was appropriate. The record contains nominal evidence that the student’s needs and academic functioning had significantly changed from December 15, 2010 to December 15, 2011. In fact, the student’s Woodcock Johnson assessment scores on September 15, 2011 were only slightly different than the student’s Woodcock Johnson assessment scores from December 10, 2010. The student’s Broad Reading and Broad Written Language scores slightly increased and the student’s Broad Math score slightly decreased.

Additionally, the student’s September 12, 2011 IEP from School A includes academic goals on a similar functional level to the instructional goals on the student’s December 15, 2010 IEP. For example, the student’s December 15, 2010 IEP has reading goals related to reading from an appropriate text and identifying story elements, reading aloud from familiar text with fluency and pacing, identifying phonological awareness, using cueing strategies to construct meaning to new text and decoding real and nonsense words; written language goals related to using correct spelling, punctuation and capitalization, writing stories with a beginning middle and an end and writing information on a topic; and math goals related to simplifying numerical expressions, applying the order of operations to real numbers, identifying key words in word problems, understanding long division, finding a linear function describing a line and calculating and applying ratios and percentages. The student’s September 12, 2011 IEP has reading goals

related to inferential and literal comprehension including finding specific story elements, and decoding unfamiliar words; written language goals related to demonstrating effective use of the writing process, demonstrating knowledge of revising and editing and effective paragraphs including developing a five paragraph structured essay using an organizational pattern; and math goals related to demonstrating knowledge of sequencing skills and the use of algorithms, demonstrating proficiency using tools and measurement skills and demonstrating effective math language skills such as understanding math vocabulary.

There is evidence that the speech language evaluation conducted by School A on September 7, 2011 suggested that the student may be eligible for speech language services. DCPS has not convened an IEP Team meeting to review this evaluation and had DCPS convened the student's IEP Team on or before December 15, 2011, this information would have been available to the IEP Team. The Hearing Officer notes that after the conclusion of the 2010-2011 school year, the parents had no personal contact with School B, did not request an IEP meeting for the student and did not provide any additional information regarding the student's current needs or progress to School B.

Additionally, even had DCPS held an IEP Team meeting on or before December 15, 2011, the student's Mother made it clear that she enrolled the student at School A because "based on [her] cumulative experience at DCPS" she did not believe that she would see a change in the student's academic functioning and that she "could not see [the student] going into the world" based on her progress in DCPS and would not allow the student to remain in a DCPS school. The Hearing Officer concludes that DCPS failed to review the student's December 2010 IEP, at least annually, and that this failure constitutes a denial of a FAPE in that the failure impeded the child's right to a FAPE. The harm to the student however, for this denial, was limited, which the Hearing Officer has considered in the crafting of a remedy.

The Petitioner met its burden with respect to Issue #3.

Requested Relief

In this matter, the parents seek an award of reimbursement for tuition for School A for the 2011-2012 school year and prospective placement and funding for School A for the 2012-2013 school year. A board of education *may* be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parent, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parents' claim (emphasis added). *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 (2d Cir. 2005).

The first step in the *Burlington/Carter* analysis is to determine if the services offered by the board of education were inadequate or inappropriate. The Hearing Officer has determined that the student's December 15, 2010 IEP was appropriate. The Petitioner did not prove by a preponderance of the evidence that the services offered by the board of education were inadequate or inappropriate. Therefore, the parent's claim for reimbursement from the beginning of the 2011-2012 school year until December 15, 2011 is unfounded.

The Hearing Officer has found that DCPS denied the student a FAPE by failing to review the student's IEP, at least annually, on or before December 15, 2011. Therefore, the remaining analysis for the request of reimbursement for the 2011-2012 school year will focus on the time period from December 15, 2011 until June 10, 2012. From December 15, 2011 until present, DCPS has not reviewed and revised the student's December 15, 2010 IEP. Therefore, the services offered by DCPS are inadequate in that they are nonexistent. However the record indicates on December 15, 2011, the only potential significant change in the student's academic and functional needs was the student's possible eligibility for speech language services. In other words, with the exception of the absence of speech language services, the student's December 15, 2010 IEP was still appropriate on December 15, 2011.

The second step in the *Burlington/Carter* analysis is determining if the services selected by the parents were appropriate. The Hearing Officer concludes that the services selected by the parent were not appropriate for the student. First, School A does not offer ELL classes or services needed by the student. While the student's English speaking skills have greatly improved and her Language skills have decreased, the student still requires ELL support. In fact, the student's September 12, 2011 IEP from School A includes a goal for the student to understand common vocabulary items such as names of animals and musical instruments and goal related to translating math words into English. Further, during the 2011-2012 school year, School A did not offer a curriculum aligned with the DC Standards of Learning as required by the DCMR. The District of Columbia requires that nonpublic special education school or programs that serve District of Columbia students with disabilities ensure instructional alignment with the District of Columbia's learning standards, grades, promotion, and graduation requirements. 5 DCMR §A-2805.2. The Petitioner did not present evidence which suggested that the student was not in need of one of classes required by DC but not offered by School A during the 2011-2012 school year. Additionally, effective no later than school year 2011-2012, each member of the teaching staff at a nonpublic special education school shall hold a teaching certification from the state or district in which the school is located, to the same level as required for teaching staff in public schools of that state or district. 5 DCMR §A-2823.2. During the 2011-2012 school year, the student's math, science and elective teachers were not certified in special education. Likewise, for the 2012-2013 school year, the student's English, math, science and foreign language teachers do not hold the certifications required by DCPS.

Finally, the nature and severity of the student's disability does not require a setting as restrictive as a private special education day school. The student has a low average IQ and both School A and School B witnesses testified that the student is able to participate in the general education curriculum with supports. The student is very social, interactive, pleasant and a "normal" teenager. She is able to participate in extra-curricular activities with non-disabled peers. The student achieved above-average grades in general education classes during the 2009-2010 and 2010-2011 school years. There was no evidence presented which suggested that it is inappropriate for the student to participate in music, art, physical education, assemblies, lunch or other elective courses with non-disabled peers and without specialized instruction.

Further, even had the Petitioner met the second step, equitable considerations, the third step in the *Burlington/Carter* analysis, would limit the parent's claim. The Petitioner requested

reimbursement for the costs, including tuition, related services and mileage for transportation, of School A for the 2011-2012 school year. However, the Petitioner did not present evidence sufficient to prove that the parents paid tuition at School A for the student for the 2011-2012 school year. The student's Mother testified that she did not know when a deposit was made and did not know when a first payment was made. While she stated that tuition was paid, she did not know when tuition was paid or the exact amount of tuition for School A. The Mother testified that School A's tuition was "around or . Additionally, the Mother stated that she did not know the cost for related services and gave an estimated range for the cost of the bus. The testimony regarding the cost of the bus was in conflict with the Petitioner's request for mileage reimbursement. The Petitioner did not present evidence as to the distance from the Petitioner's home to School A.

Next, the Mother testified that she did not remember when she sought out information for the student to attend School A, that she did not remember when she applied to School A, did not remember when the student was accepted to School A, did not remember when the student participated in the interview for School A and did not remember when the student attended School A for a day, as a requirement for admission. The Mother stated that all of these activities "must have" occurred between "January and July." The IDEA regulations at 34 CFR §300.148(d) state that the cost of reimbursement described in paragraph (c) of this section may be reduced or denied if (i) at the most recent IEP Team meeting that the parents attended prior to removal of the child from 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 (d)(1)(i) of this section (emphasis added).

Here, the parents did not inform the December 15, 2010 IEP Team that they were rejecting the placement proposed and intended to enroll their child in a private school. In fact, the student completed the 2010-2011 school year at School B. On March 9, 2011, the parents' attorney sent a letter to the School B principal requesting an IEP meeting to "discuss our request for DCPS to provide alternative services." On August 24, 2011, the parents' attorney sent another letter to the School B principal stating that "based on DCPS' failure to respond" to the attorney's request for an IEP meeting and request for placement and funding in an "alternate placement," the parents have withdrawn the student and placed her in a private special education school. This notice was sent after the beginning of the DCPS 2011-2012 school year and after the parents had enrolled the student in School A.

The written notice from the parents' attorney to School B was not sent was sent ten (10) business days prior to the removal of the child from the public school, as required by 34 CFR §300.148(d)(1)(ii). All of the processes for the student to be admitted to and enrolled in School A were completed between "January and July," giving the parents ample opportunity to notify DCPS of their intent to enroll the student in a private school at public expense, yet the parents did not inform School B of their intent until August 24, 2011, after the beginning of the DCPS 2011-2012 school year and five business days before the student's first day of school at School A.

Additionally, the student's Mother made it clear that she enrolled the student at School A because "based on [her] cumulative experience at DCPS" she did not believe that she would see a change in the student's academic functioning and that she "could not see [the student] going into the world" based on her progress in DCPS and could not allow the student to remain in a DCPS school. Further, while the Educational Consultant testified that he observed classes at School B to determine the appropriateness of School B as a potential placement for the student, the Hearing Officer does not find this specific testimony creditable. First, the Educational Consultant observed School B in Spring semester of 2012 and although retained by the parents to provide services during the period the student was attending School B, never observed the student in School B. Next, the Educational Consultant did not observe all of the classes to which the student was assigned, including the ELL classes that DCPS provided to the student. The Educational Consultant did not speak with the Special Education Coordinator or the student's case manager to confirm that the classes visited were the classes to which the student would have been assigned. Finally, the Educational Consultant testified that it is inappropriate for the student to be in general education classes because she is "not capable of reading and writing on grade level" however both School A and School B educators testified that the student is capable of participating in grade level courses, with supports, and progressing on a diploma track. The Hearing Officer believes that it is more likely that the Educational Consultant, retained by the parents, visited School B in order to provide testimony at the due process hearing as to why School B was an inappropriate placement and/or not the "best" environment for the student, rather than visiting School B to provide an objective assessment as to whether the School B program is able to confer educational benefit.

For the request for the prospective placement for the 2012-2013 school year, the Hearing Officer must also consider the factors in *Branham v. District of Columbia*, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005). These considerations include the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the private school; the placement's cost; and the extent to which the placement represents the LRE. As discussed above, the nature and severity of the student's disability is not such that requires placement in a private special education school. The student is able participate in the general education curriculum with supports and is able to attain average to above-average grades. The student does not have behavior issues and she is able to navigate independently within the community. The student has special education needs which include the need for specialized instruction within and outside of the general education environment and the need for ELL services. School A is not able to offer specialized instruction, delivered by a special education teacher, for the student's English, math, science and foreign language classes. Likewise, School A is unable to offer the ELL services needed by the student in order to support the student's academic progress in an English-speaking school. The yearly tuition for School A is "around \$35,000 or \$36,000." This does not include the cost for related services, extra-curricular activities or transportation. While this cost is considerable, the Hearing Officer is unable to compare the costs of School A and the program offered by DCPS based on the disparate nature of the two programs. Finally, as discussed in Issue #2, School A is not the LRE for the student.

The Hearing Officer concludes that the parents are not entitled to reimbursement for the 2011-2012 school year because the Petitioner did not meet all factors in the *Burlington/Carter* analysis and that the student is not entitled to placement at School A for the 2012-2013 school year based on the *Branham* analysis. However the student is entitled to an equitable remedy because of DCPS' failure to make FAPE available to the student upon the expiration of the student's December 15, 2010 IEP.

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003).

In the present matter, the Petitioner only requested, as relief, reimbursement for School A for the 2011-2012 school year and placement in and funding and transportation for School A for the 2012-2013 school year. The Hearing Officer concludes that these remedies are inappropriate for DCPS' failure to conduct an IEP meeting, at least annually, for the student, especially given that the evidence suggests that the student's December 15, 2010 IEP, with the possible exception of speech language services, remained appropriate beyond December 15, 2011. However, when an LEA deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or Hearing Officer fashioning appropriate relief may order compensatory education. *Reid* at 522-523. *See also Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36, 49 IDELR 38 (D.D.C. 2007). If a parent presents evidence that her child has been denied a FAPE, she has met her burden of proving that the child may be entitled to compensatory education. *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 49 IDELR 183 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010).

The Hearing Officer has the obligation to determine an equitable remedy, based on the facts in this specific case, given that there has been a denial of FAPE. In this case, DCPS' failure to convene an IEP meeting on or before December 15, 2011, impeded the child's right to a FAPE by inappropriately classifying the student as a student parentally-placed in a private school and entitled to equitable services rather than appropriately classifying the student as a student unilaterally placed in a private school when FAPE is at issue and entitled to FAPE and by not reviewing the student's need for speech language services as recommended by the student's September 7, 2011 Comprehensive Speech Language Assessment.

During the period of the denial of FAPE, beginning December 15, 2011, the student was enrolled at School A and was receiving specialized instruction outside of the general education environment for literacy, English and history and was receiving speech language services. In other words, during the period of the denial of FAPE, the student was receiving educational benefit. Additionally, as discussed above, the harm to the student for DCPS' denial of FAPE was limited. Therefore, the Hearing Officer concludes that an appropriate remedy is for DCPS to reimburse the parents for a portion of the cost of the child's tuition at School A for the period of December 15, 2011 – September 26, 2012 as compensatory education. Specifically, the

Hearing Officer concludes that DCPS should reimburse the parents for one third of the cost of tuition for December 15, 2011 – June 10, 2012 and August 31, 2012 – September 26, 2012. Since the Petitioner did not provide specific evidence of the cost of the student's tuition at School A, the Hearing Officer is basing the calculation on the Mother's testimony of "\$35,000 or \$36,000" per year and, for equitable purposes, using the \$35,000 estimate. The costs of any other expenses that may have been paid by the parents to School A is decidedly not included within the calculation.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. Within fifteen (15) school days from the date of this Order, DCPS convene an IEP Team meeting for the student to review the student's September 7, 2011 Comprehensive Speech Language Assessment and to develop an IEP for the student.
2. Within sixty (60) business days after the receipt of confirmation of the parent's full payment of tuition for School A for the 2011-2012 school year and the first semester of the 2012-2013 school year, DCPS, as compensatory education, reimburse the parents. Should the parents present a receipt of payment of less than per year, DCPS must reimburse the parents for one third of the payment, minus the costs of expenses other than tuition (e.g. extra-curricular activities, student activities, related services, transportation, tutoring).
3. Issues #1 and #2 are dismissed with prejudice.
4. All other relief sought by Petitioner herein is **denied**.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: September 27, 2012


Hearing Officer