

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

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

OSSE
Student Hearing Office
September 23, 2013

Parent,¹ on behalf of,
Student,*

Petitioner,

Date Issued: September 22, 2013

v.

Hearing Officer: Melanie Byrd Chisholm

District of Columbia Public Schools,

Respondent.

Case No: [REDACTED]

Hearing Date: September 13, 2013

Room: 2004

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a fourteen (14) year old [REDACTED] who is a 9th grade student attending School B. The student's most recent individualized education program (IEP) lists Other Health Impairment (OHI) as his primary disability and provides for him to receive fifteen (15) hours per week of specialized instruction outside of the general education environment.

On [REDACTED], 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 changing the student's educational placement from School A to School B; providing the student with an inappropriate IEP in May of 2013 in order to "shoe-horn" the student into a placement at School B while failing to take into account the student's needs and without justification or supporting data; reducing the student's hours of specialized instruction without justification or data on May 20, 2013; and providing an inappropriate IEP because the IEP contains goals that are aligned with the 8th grade common core standards and are not individualized or based on the needs or current abilities of the student. As relief for the alleged denials of FAPE, the Petitioner requested for the student's IEP to include 31 hours per week of specialized instruction outside of the general education environment; placement in and funding for a private special education day school; transportation as a related service; and compensatory education.

¹ Personal identification information is provided in Appendix A.

*The student is a minor.

On July 19, 2013, Respondent filed a copy of the May 20, 2013 Prior Written Notice (PWN) as a “Response.” The “response” was timely. In its “Response” and verbally during the prehearing conference, Respondent asserted that: the student is transitioning to high school for the 2013-2014 school year; the student’s hours of specialized instruction were reduced in order for the student’s receiving school to design the appropriate specialized instruction for the student to participate in the inclusion diploma track; the student’s test scores, informal assessments and classroom observations were used to determine the reduction of the student’s specialized instruction; the student’s record indicates that he may not require 31 hours per week of specialized instruction outside of the general education environment; and the student received grade letters “A’s” and “B’s,” even with significant absences, during the 2012-2013 school year.

On July 23, 2013, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on August 9, 2013, following the conclusion of the 30-day resolution period, and ends on September 22, 2013. The Hearing Officer Determination (HOD) is due on September 22, 2013.

On August 7, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on August 8, 2013. 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 however the Petitioner noted disagreement to the Hearing Officer’s description of the Respondent’s “Response.” On September 9, 2013, the Hearing Officer communicated to the Petitioner that the description was in no way a factual statement of the content of Respondent’s “Response.”

On September 6, 2013, Petitioner filed Disclosures including twenty-three (23) exhibits and five (5) witnesses.² On September 5, 2013, Respondent filed Disclosures including twenty-two (22) exhibits and four (4) witnesses.

The due process hearing commenced at approximately [REDACTED] on [REDACTED] at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed.

Petitioner’s Exhibits 8-22 were admitted without objection. Petitioner’s Exhibit 1 was admitted, over Respondent’s objection, as evidence of the Petitioner’s requested compensatory education not for the truth of the document. Petitioner’s Exhibits 2-4 were withdrawn by Petitioner. Petitioner’s Exhibits 5-7 were admitted, over Respondent’s objection, because the documents were found to be relevant historical data regarding the student and the only evidence in the record of the student’s most recent evaluations. Respondent’s Exhibit 23 was admitted, over Respondent’s objection, because the document appeared to complete and recent.

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

³ The hearing was scheduled to begin at 9:00 a.m. At 9:00 a.m. the Hearing Officer and Petitioner’s attorney were present. Respondent’s attorney arrived at 9:06 a.m. and the Petitioner arrived at 9:11 a.m.

Respondent's Exhibits 1-3, 5 and 7-22 were admitted without objection. Respondent's Exhibits 4 and 6 were not admitted because the documents were not relevant to the issues to be determined.

The hearing concluded at approximately [REDACTED] on [REDACTED], 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 on May 20, 2013, specifically reducing the student's specialized instruction from 31 hours per week outside of the general education environment to 15 hours per week of specialized instruction outside of the general education environment and changing the student's placement from a public separate school to a program within a regular public school?
2. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP for the student on May 20, 2013, specifically by failing to develop appropriate annual academic goals based on the student's unique needs and present level of performance?

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 has a seizure disorder. (Petitioner's Exhibit 6; Respondent's Exhibit 13; Parent's Testimony)
3. The student has poor short term memory. (Petitioner's Exhibit 7; Parent's Testimony)
4. During the 2011-2012 and 2012-2013 school years, the student attended School A. (Petitioner's Exhibits 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18; Respondent's Exhibits 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, 14, 16, 19, 20 and 21; Parent's Testimony)
5. School A was a public separate day school. (Advocate's Testimony)

6. During the 2011-2012 school year, the student demonstrated leadership skills, was easily distracted and was a pleasure to have in class. (Petitioner's Exhibit 5)
7. The student was reevaluated in November 2011. (Petitioner's Exhibit 7)
8. In November 2011, the student scored a 100% on his short cycle assessment for reading. (Petitioner's Exhibit 7)
9. The short cycle assessment for reading measured the student's ability to determine story elements and scored near the lower end of the average range for reading (Petitioner's Exhibit 7)
10. In November 2011, the student had emerging skills in writing and was able to write a simple sentence. (Petitioner's Exhibit 7)
11. On March 15, 2012 the student was functioning at the 4.1 grade level equivalency in Broad Math, at the 4.6 grade level equivalency in Math Calculation Skills, at the 6.6 grade level equivalency in Math Fluency and at the 3.5 grade level equivalency in Applied Problems. (Petitioner's Exhibits 8, 9 and 13; Respondent's Exhibits 1, 2 and 12)
12. In March 2012, the student was functioning in the low average range in written expression. (Petitioner's Exhibit 8; Respondent's Exhibit 1)
13. In January 2013, the student's IEP Team determined that a high school diploma track is appropriate for the student. (Petitioner's Exhibits 9, 13, 14, 15, 16 and 17; Respondent's Exhibits 2, 9, 10 and 12; Parent's testimony)
14. On April 11, 2013, at the end of the third quarter during the 2012-2013 school year, the student was progressing toward mastery of all of his IEP goals. (Petitioner's Exhibit 21; Respondent's Exhibit 5)
15. For the third quarter of the 2012-2013 school year, the student earned an "S" in Extended Literacy, a "B" in English 8, a "B" in Pre-Algebra, a "B" in Science 8, a "B+" in U.S. History/Geography, an "A" in Health and Physical Education, an "S" in Computer Applications, an "A" in Art and an "S" in Library Media. (Respondent's Exhibit 19)
16. On May 20, 2013, the student's IEP Team met to discuss the student's placement and a reduction in the hours of the student's specialized instruction. (Petitioner's Exhibits 12, 13, 14, 15, 16, 17 and 18; Respondent's Exhibits 7, 8, 9 and 10; Parent's Testimony)
17. The parent was informed that the May 20, 2013 IEP Team meeting was to "discuss placement for the student transitioning to high school" and to "amend the IEP to reduce the hours in order for the student to matriculate in the inclusionary model/diploma track." (Petitioner's Exhibits 13, 14, 15, 16, 17 and 18; Respondent's Exhibits 8, 9 and 10; Parent's Testimony)
18. The parent participated in the May 20, 2013 meeting (Petitioner's Exhibits 12, 13, 14, 17 and 18; Respondent's Exhibits 7, 8 and 9; Parent's Testimony)
19. On May 20, 2013, the student had scored at the Basic level in reading on his most recent DC CAS; the student was able to read 110 words per minute; the student had a cumulative reading performance rate of 90%, a comprehension rate of 75%, a vocabulary rate of 100% and a word zone rate of 100%. (Petitioner's Exhibit 13; Respondent's Exhibit 12)

20. On May 20, 2013, the student had difficulty with incorporating multi-syllabic words using repetition and being constant and precise. (Petitioner's Exhibit 13; Respondent's Exhibit 12)
21. On May 20, 2013, the student was writing on a 5th grade level. (Petitioner's Exhibit 13; Respondent's Exhibit 12)
22. On May 20, 2013, the student had an extremely creative mind, was able to formulate imaginative thoughts and understood the process needed to construct a logical coherent document however the student struggled with the application needed to write legible documents and employ conventions of language. (Petitioner's Exhibit 13; Respondent's Exhibit 12)
23. On May 20, 2013, the student needed to work on organizational design, conventions of language, capitalization, punctuation and writing in-depth documents. (Petitioner's Exhibit 13; Respondent's Exhibit 12)
24. The student's May 20, 2013 IEP contains annual goals in the areas of mathematics, reading and written language. There are no annual goals for other subject areas or for related services. (Petitioner's Exhibit 13; Respondent's Exhibit 12)
25. The mathematics goals on the student's May 20, 2013 IEP include goals for "growth" in mathematics, representing an expression in a variety of forms, demonstrating an ability to solve algebraic expressions, interpreting data and understanding how to solve problems with multiple operations. (Petitioner's Exhibit 13; Respondent's Exhibit 12)
26. The reading goals on the student's May 20, 2013 IEP include goals for increasing reading accuracy and fluency, developing text organization and structure skills and returning to the text to locate information, support conclusions and answer questions. (Petitioner's Exhibit 13; Respondent's Exhibit 12)
27. The written expression goals on the student's May 20, 2013 IEP include goals for conducting a three to five paragraph essay, revising writing, summarizing how an author uses work choice and spelling. (Petitioner's Exhibit 13; Respondent's Exhibit 12)
28. The annual goals on the student's May 20, 2013 IEP are identical to the annual goals on the student's January 30, 2013 IEP. (Petitioner's Exhibits 9 and 13; Respondent's Exhibits 2 and 12)
29. The student's May 20, 2013 IEP includes the classroom accommodations of repetition of directions, reading test questions (in math, science and composition), calculators, preferential seating, extended time on subtests and breaks during subtest (Petitioner's Exhibit 13; Respondent's Exhibit 12)
30. The student's May 20, 2013 IEP Team reduced his hours of specialized instruction from 27.5 hours per week outside of the general education environment to 15 hours per week outside of the general education environment. (Petitioner's Exhibits 9, 13, 14, 16 and 17; Respondent's Exhibits 2, 9 and 12)
31. The student's May 20, 2013 IEP Team intended for the student to be educated in an inclusion model. (Petitioner's Exhibits 13, 14, 15, 16 and 17; Respondent's Exhibits 9, 10 and 12)
32. During the student's May 20, 2013 IEP Team meeting, the parent indicated that she was considering other LEAs in which to enroll the student and desired for the student to be able to participate in Reserve Officers' Training Corps (ROTC) and football.

33. During the student's May 20, 2013 IEP Team meeting, the parent informed the IEP Team that she had decided to enroll the student in LEA 2, which could provide the student with ROTC, football (in coordination with another local educational agency (LEA)) and an inclusion model with 15 hours in specialized instruction. (Petitioner's Exhibits 14 and 15; Respondent's Exhibits 9 and 10)
34. During the May 20, 2013 meeting, the parent agreed with the IEP Team's determination regarding the student's specialized instruction and program. (Petitioner's Exhibit 14; Respondent's Exhibit 9)
35. The District of Columbia has adopted the Common Core Standards as its general education curriculum. (School C Head of School's Testimony)
36. School B is able to implement the student's IEP.⁴ (Special Education Coordinator's Testimony)
37. School B is able to implement 27.5 hours of specialized instruction outside of the general education environment. (Special Education Coordinator's Testimony)
38. The Parent provided credible testimony. Her testimony aligned with the documents in the record.
39. The Advocate provided credible testimony regarding what she believed to be true. However the Advocate did not attend the student's May 20, 2013 IEP Team meeting, has not been to School B this school year and has not spoken with student's teachers or any other school personnel on behalf of the student.
40. The School C Head of School provided credible testimony regarding the School C program.
41. The Special Education Coordinator was qualified as an expert in the coordination of special education services and provided credible testimony regarding the coordination of special education services and the programs offered at School B. However, the Special Education Coordinator's testimony regarding the Paced Interim Assessment (PIA) did not align with the Hearing Officer's understanding of the PIA and the Special Education Coordinator was not knowledgeable about the student's attendance at School B.⁵

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:

⁴ On direct examination, the Respondent asked no questions to the Special Education Coordinator regarding School B's ability to implement the student's IEP. On cross examination, the Petitioner solicited the testimony from the witness and then moved to strike the witness' testimony. The Petitioner argued that the Respondent was presenting a new defense not included in the Prehearing Order or in the 5-day Disclosures. The Respondent reiterated that DCPS' sole defense was that the reduction in the hours of specialized instruction on the student's IEP on May 20, 2013 was appropriate for the student. The Hearing Officer denied the Petitioner's motion. School B's ability to implement the student's IEP was asked by the Petitioner, not the Respondent, and is not an issue for the Hearing Officer to determine.

⁵ On the record, the Petitioner's attorney vehemently opposed the Special Education Coordinator's credibility, specifically stating that the witness "blatantly lied" regarding the Petitioner's request for records. However, the record does not include evidence that Petitioner's attorney directly requested records directly from the witness as testified by the witness.

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).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), 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.” 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. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

Issue #1

The Petitioner alleged that DCPS failed to develop an appropriate IEP for the student on May 20, 2013, specifically reducing the student’s specialized instruction from 31 hours per week outside of the general education environment to 15 hours per week of specialized instruction outside of the general education environment and changing the student’s placement from a public separate school to a program within a regular public school.

During the 2011-2012 and 2012-2013 school years, the student attended School A. School A was a public separate school. In November 2011, the student was reevaluated. At that time, the student scored 100% on the short cycle assessment for reading which measured his ability to determine story elements and scored near the lower end of the average range for reading. In November 2011, the student had emerging skills in writing and was able to write a simple sentence. During the course of the 2011-2012 school year, the student was easily distracted, a pleasure to have in class and demonstrated leadership skills. In March 2012, the student scored at the 4.1 grade level equivalency in Broad Math, at the 4.6 grade level equivalency in Math Calculation Skills, at the 6.6 grade level equivalency in Math Fluency and at the 3.5 grade level equivalency in Applied Problems. In March 2012, the student was functioning in the low average range in written expression.

In January 2013, the student had scored at the Basic level in reading on his most recent DC CAS; the student was able to read 110 words per minute; the student had a cumulative reading performance rate of 90%, a comprehension rate of 75%, a vocabulary rate of 100% and a word zone rate of 100%. In January 2013, the student’s IEP Team determined that the student was on track to graduate high school with a diploma.

The third quarter of the 2012-2013 school year ended approximately on April 11, 2013. For the third quarter, the student earned an “S” in Extended Literacy, a “B” in English 8, a “B” in Pre-Algebra, a “B” in Science 8, a “B+” in U.S. History/Geography, an “A” in Health and Physical Education, an “S” in Computer Applications, an “A” in Art and an “S” in Library Media. Additionally, at the end of the third quarter of the 2012-2013 school year, the student was progressing toward mastery of all of his IEP goals.

In May 20, 2013, the student’s IEP Team met to discuss the student’s placement and a reduction in the hours of the student’s specialized instruction. More specifically, the May 20, 2013 IEP Team meeting was to “discuss placement for the student transitioning to high school” and to “amend the IEP to reduce the hours in order for the student to matriculate in the inclusionary model/diploma track.” The parent participated in the May 20, 2013 IEP Team meeting.

The student’s May 20, 2013 IEP continued the annual goals from the student’s January 30, 2013 IEP in the areas of mathematics, reading and written language. The student’s May 20, 2013 IEP contained no annual goals for other subject areas or for related services. The student’s May 20, 2013 IEP also included the classroom accommodations of repetition of directions, reading test questions (in math, science and composition), calculators, preferential seating, extended time on subtests and breaks during subtest.

At the May 20, 2013 IEP Team meeting, the student’s IEP Team reduced the hours of specialized instruction on the student’s IEP from 27.5 hours per week outside of the general education environment to 15 hours per week of outside of the general education environment. The parent did not disagree with the IEP Team’s decision at that time however the parent indicated that she was considering other LEAs in which to enroll the student. The parent informed the IEP Team that she desired for the student to be able to participate in ROTC and football and that she had decided to enroll the student in LEA 2, which could provide the student with ROTC, football (in coordination with another LEA) and an inclusion model with 15 hours in specialized instruction.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student’s needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). For an IEP to be “reasonably calculated to enable the child to receive educational benefits,” it must be “likely to produce progress, not regression.” *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted). 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’s evaluation data included in the record indicates that the student has needs in the subject areas of mathematics, reading and written expression and in the area of distractibility. While the PWN stated that student data were reviewed as a basis for the proposed

action on May 20, 2013, the Parent gave creditable testimony that data were not reviewed during the May 20, 2013 IEP Team meeting. Nonetheless, the Hearing Officer concludes that the student's May 20, 2013 IEP reflected the results of the student's evaluations and established annual goals related to the needs identified in the evaluations, including providing classroom and testing accommodations to address the student's distractibility. While the student's evaluation data identified deficits for the student in the areas of mathematics, reading and written expression, the student was able to function within the low average range in reading and written expression. The student's math deficits ranged from one year behind grade level to four and one half years behind grade level. There was no allegation or indication in the record that the student required related services or that the diploma track is inappropriate for the student.

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). Placement decisions must be determined individually based on each child's abilities, unique needs and IEP, not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. *See Analysis and Comments to the Regulations*, 71 Federal Register 46540:46588 (14 August 2006); *see also Letter to Anonymous*, 21 IDELR 674 (OSEP 1994) (clarifying that the LEA does not have a "main goal" which it must achieve when making a placement decision and that what is pertinent in making the placement decision will vary based upon the child's unique and individual needs.)

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). In determining the least restrictive environment, consideration is given to the types of services that the child required." *Id.* 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). 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). Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act. *DeVries by DeBlaay v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). In selecting the least restrictive environment, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs. 34 CFR §300.116(d).

The student has a seizure disorder and poor short term memory. The student's evaluations clearly indicated that the student has needs in the areas of mathematics, reading, written expression and distractibility. There was no evidence presented which indicated that the student had needs in other subject areas or in non-academic classes. While it can be presumed that the student's deficits in reading would affect his performance in other subject areas, the student's May 20, 2013 included the classroom accommodation of reading test questions and

extended time on subtests. Additionally, while it is possible that the student's distractibility would affect him in all areas, the student's May 20, 2013 IEP included classroom modifications to address distractibility such as repetition of directions, preferential seating, extended time on subtests and breaks during subtest.

The student's May 20, 2013 IEP Team determined that an inclusion model was appropriate for the student to progress on the diploma track. In the meeting, the parent indicated that she desired for the student to receive 15 hours per week of specialized instruction in an inclusion model as well as ROTC and football. While the Petitioner argued that the student's IEP was "changed to fit the diploma track," the record indicates that all members of the student's IEP Team, including the parent, determined that this change was an appropriate change for the student.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it. *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *affd*, 512 U.S. 246 (1994). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. There was no evidence presented which suggested that the student is unable to participate in general education classes other than mathematics, reading and written expression or that the student is unable to participate in the general education setting in non-academic courses, lunch or assemblies. There was no evidence presented which suggested that the nature or severity of the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. There was no evidence presented which suggested that the student's needs are such that he should not have opportunities to study and to socialize with nondisabled peers. Finally, there was no evidence presented which suggested that there is any potential harmful effect on the student or on the quality of services that he will receive by being transitioned to a less restrictive environment.

For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. *Gregory K. v. Longview School Dis.* (9th Cir. 1987) 811 F.2d 1307. The Hearing Officer concludes that the student's May 20, 2013 IEP was designed to meet the student's unique

needs, comported with the student's IEP, and was reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. DCPS did not deny the student a FAPE by changing the student's IEP to 15 hours per week of specialized instruction outside of the general education environment or by changing the student's placement from a public separate school to a program within a regular public school.

Even if DCPS committed a procedural violation in preparation for or during the student's May 20, 2013 IEP Team meeting, the procedural violation 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 her child or cause a deprivation of educational benefit. *See* 34 CFR §300.513(a)(2). Further, even had the Hearing Officer found, based on the student's success in School A, that the student continued to require 27.5 hours per week of specialized instruction outside of the general education environment, the Hearing Officer would not have found that the student required placement in a separate school.

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

Issue #2

An IEP must include a statement of measurable 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. 34 CFR 300.320(a)(2)(i). The content of an IEP is a team decision 34 C.F.R. §§ 300.320 300.323. *See also*, D.C. Code §§ 30.3007.1 & 3008.1. IEP Teams are required to consider all the relevant information before them. *Id.* In reviewing whether an IEP provides a student a FAPE as required by IDEA, a hearing officer must consider whether the district complied with IDEA's procedural requirements and determine whether the program was reasonably calculated to enable the student to receive educational benefit. *Rowley*, 458 U.S. at 207.

The Petitioner alleged that on May 20, 2013 DCPS failed to develop appropriate annual academic goals based on the student's unique needs and present level of performance. On May 20, 2013, the student's IEP Team met to discuss the student's placement and a reduction in the hours of the student's specialized instruction. There was no evidence presented which suggested that the student's annual goals were discussed on May 20, 2013. In fact, the annual goals on the student's May 20, 2013 IEP are identical to the annual goals on the student's January 30, 2013 IEP. Nonetheless, the student's May 20, 2013 IEP contains annual goals in the areas of mathematics, reading and written expression.

The mathematics goals on the student's May 20, 2013 IEP include goals for "growth" in mathematics, representing an expression in a variety of forms, demonstrating an ability to solve algebraic expressions, interpreting data and understanding how to solve problems with multiple operations. On May 20, 2013, the student's most recent Woodcock Johnson III indicated that the student was functioning at the 4.1 grade level equivalency in Broad Math, at the 4.6 grade level equivalency in Math Calculation Skills, at the 6.6 grade level equivalency in Math Fluency and at the 3.5 grade level equivalency in Applied Problems. There was no evidence presented which suggested that representing an expression in a variety of forms, demonstrating an ability to solve

algebraic expressions, interpreting data and understanding how to solve problems with multiple operations are skills which cannot be achieved by students functioning at the academic level as this student or are not based on the student's unique needs.

The reading goals on the student's May 20, 2013 IEP include goals for increasing reading accuracy and fluency, developing text organization and structure skills and returning to the text to locate information, support conclusions and answer questions. The student's present level of performance for reading on May 20, 2013, indicated that the student scored at the Basic level in reading on his most recent DC CAS; that the student was able to read 110 words per minute; the student had a cumulative reading performance rate of 90%, a comprehension rate of 75%, a vocabulary rate of 100% and a word zone rate of 100%. The student's baseline data indicated that he had difficulty with incorporating multi-syllabic words using repetition and being constant and precise. There was no evidence presented which suggested that increasing reading accuracy and fluency, developing text organization and structure skills and returning to the text to locate information, support conclusions and answer questions are skills which cannot be achieved by students functioning at the academic level as this student or are not based on the student's unique needs.

The written expression goals on the student's May 20, 2013 IEP include goals for conducting a three to five paragraph essay, revising writing, summarizing how an author uses work choice and spelling. The student's present level of performance for written expression on May 20, 2013 indicated that the student had an extremely creative mind, was able to formulate imaginative thoughts and understood the process needed to construct a logical coherent document however the student struggled with the application needed to write legible documents and employ conventions of language. The student's written expression baseline data indicated that the student needed to work on organizational design, conventions of language, capitalization, punctuation and writing in-depth documents. Overall, the student was writing on a 5th grade level. There was no evidence presented which suggested that conducting a three to five paragraph essay, revising writing, summarizing how an author uses work choice and spelling are skills which cannot be achieved by students functioning at the academic level as this student or are not based on the student's unique needs.

A student's IEP goals should be designed to enable the child to be involved in and make progress in the general education curriculum. The District of Columbia has adopted the Common Core Standards as its general education curriculum. Developing IEP goals with the Common Core Standards as a guide helps to enable an LEA to ensure that the student will be involved in and make progress in the general education curriculum. Here, DCPS may have used the Common Core Standards as a guide to develop the student's annual goals however there was no evidence presented which suggested that the annual goals on the student's May 20, 2013 IEP were inappropriate for the student or not based on the student's unique needs and present level of performance.

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. Here, the Hearing Officer concludes that the Petitioner did not present sufficient evidence to prove that DCPS failed to develop appropriate annual academic goals

based on the student's unique needs and present level of performance on the student's May 20, 2013 IEP or that the student's goals were not reasonably calculated to enable the student to receive educational benefit.

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

ORDER

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

The due process complaint in this matter is **dismissed** with prejudice. All 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 22, 2013


Hearing Officer