



## **JURISDICTION:**

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on March 18, 2014, and concluded on March 19, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2004.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student \_\_\_\_\_ resides with his parent in the District of Columbia. He is a child with a disability pursuant to IDEA with a disability classification of specific learning disability (“SLD”). For several years the student has been attending a private full-time special education school (“School A”) located in Washington, D.C.

As a result of two previous due process hearings before two different Hearing Officers, two Hearing Officer’s Determinations (“HOD”) were issued regarding the student, the first on June 26, 2011, and the second on July 10, 2012. Both Hearing Officers determined School A was not the least restrictive environment (“LRE”) for the student and denied the student’s prospective placement at School A.

Nonetheless, both Hearing Officers ordered DCPS to reimburse the student’s parents for the cost of the student’s attendance at School A for denials of a free and appropriate public education (“FAPE”) that both Hearing Officers found DCPS to had caused. The June 26, 2011, HOD reimbursed the parent for school year (“SY”) 2011-2012 and the July 10, 2012, HOD reimbursed the parents for SY 2012-2013.

The July 10, 2012, HOD ordered DCPS to convene an individualized educational program (“IEP”) meeting and develop an IEP and issue a prior notice regarding DCPS’ decision for the student to attend his local DCPS school (“School B”). Although the July 10, 2012, HOD ordered that the IEP meeting be convened within forty-five (45) calendar days of the issuance of the HOD, the required IEP meeting was held on February 19, 2013.

At the February 19, 2013, meeting DCPS developed an IEP that prescribed the following weekly services for the student: 10 hours of specialized instruction outside general education and related services. DCPS agreed to forward of copy of the IEP to the parent. On March 7, 2013, DCPS provided the student’s parent a letter informing that School B was being offered as the location to implement the February 19, 2013, IEP along with a prior written notice that informed the parent of the changes that had been made to the student’s IEP as a result of the February 19, 2013, IEP meeting.

On December 12, 2013, Petitioner filed the current due process complaint and alleged, inter alia, the February 19, 2013, IEP DCPS developed is inappropriate because it does not prescribe that the student be provided with all services outside general education and that DCPS denied the parent participation in the decision making process of determining the student’s school location.

Petitioner seeks as relief an order directing DCPS to reimburse the parents for all costs incurred by the parents for the student's education at School A for SY 2013-2014 that DCPS be ordered to continue the student's placement and funding at School A through the end of SY 2013-2014.

DCPS filed a timely response to the complaint on December 20, 2013. DCPS denied any alleged denial of a free and appropriate public education ("FAPE"). DCPS asserted, inter alia, it provided an IEP that is reasonably calculated to provide the student with educational benefit and a placement in the least restrictive environment and DCPS timely provided a location of service (LOS) that can implement the IEP and placement. A FAPE has been made available and rejected by the parent. Thus, this parent has clearly established the intent to keep this child in the private school. DCPS pointed out two Hearing Officers have previously determined that School A is not the LRE for the student.<sup>2</sup>

A resolution meeting was held on January 10, 2014. The complaint was unresolved and the parties did not mutually agree to proceed directly to hearing. The 45-day period began on January 12, 2014, and ended (and the Hearing Officer's Determination ("HOD") was originally due ) on February 25, 2014.

A pre-hearing conference was convened on January 13, 2014, and a pre-hearing conference order was issued outlining, inter alia, the issues to be adjudicated. During the pre-hearing conference the parties agreed to hearing dates that were beyond the HOD due date due to the unavailability of counsel and witnesses and then due to inclement weather on the hearing dates that were originally proposed. The motion was unopposed and granted.

The parties appeared for hearing on March 18 and March 19, 2014. At the conclusion of the hearing Petitioner requested the opportunity to submit written closing arguments and moved for a second continuance and extension of the HOD due date which was granted. The HOD due date was extended to April 11, 2014. The parties submitted written closing arguments on March 31, 2014.

#### **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 10 and Respondent's Exhibits 1 through 12) that were all admitted into the record and are listed in Appendix A. Witnesses a listed in Appendix B.

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<sup>2</sup> DCPS also filed a motion to dismiss which was denied by order dated January 30, 2014. DCPS renewed its motion following the presentation of Petitioner's case and it was denied. Although DCPS counsel reasserted the arguments made in its motion in its closing arguments the Hearing Officer deems it denied based upon the conclusions made in the January 30, 2014, order.

## **ISSUES:** <sup>3</sup>

### **The issues adjudicated are:**

1. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP at the February 19, 2013, IEP meeting because the amount of specialized instruction proposed to implement the IEP goals is not sufficient. Petitioner's alleges the student is need of full time out of general education services.
2. Whether DCPS denied the student a FAPE by failing to propose an appropriate location of services (by proposing School B and not an appropriate location) that can meet the student's needs because at the location proposed (1) the general education classes proposed for the student were too large, (2) the educational material was presented in a manner that was not appropriate for the student, (3) the pace of instruction was too quick and (4) the move to School B would have been harmful to the student emotionally and educationally.
3. Whether DCPS denied the student a FAPE by denying the parent meaningful participation by not including the parent in the decision to change the student's school location from School A to School B.
4. Whether DCPS denied the student a FAPE by failing to issue a proper prior notice assigning the student to attend School B following the February 19, 2013, IEP meeting.

## **FINDINGS OF FACT:** <sup>4</sup>

1. The student \_\_\_\_\_ resides with his parent in the District of Columbia. He is a child with a disability pursuant to IDEA with a disability classification of SLD. For several years the student has been attending a private full-time special education school, School A, which is located in Washington, D.C. The student is currently in seventh grade and has been at School A since third grade. (Parent's testimony, Respondent's Exhibit 8-1)
2. The student has been determined to have high cognitive abilities (a full scale IQ score of 130 as measured in Spring 2010) and clear strengths in math and weaknesses in reading and written expression. On January 30, 2013 the student was administered the Woodcock Johnson

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<sup>3</sup> The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

<sup>4</sup> The evidence that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

III Tests of Achievement at School A when he was age twelve -seven months (12-7). The student had the following scores:

<u>Cluster/Test</u>	<u>Standard Score</u>	<u>Age Equivalent</u>
Brief Achievement	90	10-6
Broad Reading	89	10-5
Broad Math	111	15-4
Broad Written Language	80	9-4
Brief Reading	93	10-10
Brief Math	115	16-11
Brief Writing	73	8-3
Written Expression	97	12-0
Academic Knowledge	119	19
Letter -Word Identification	92	10-8
Reading Fluency	78	8-11
Calculation	106	13-10
Math Fluency	98	12-4
Writing Fluency	99	12-5
Passage Comprehension	96	11-5
Applied Problems	115	23

(Petitioner's Exhibits 5-1, 7-2)

3. In two previous HODs regarding the student, issued on June 26, 2011, and July 10, 2012, two different Hearing Officers determined School A was not the student's LRE and denied prospective placement at School A. Nonetheless, both Hearing Officers ordered DCPS to reimburse the student's parents for the cost of student's attendance at School A for denials of FAPE that both Hearing Officers found DCPS to have caused. The June 26, 2011, HOD reimbursed the parents for SY 2011-2012 and the July 10, 2012, HOD reimbursed the parents for SY 2012-2013. (Respondent's Exhibits 3-17, 6-4, 6-12, 6-13)
4. The July 10, 2012, HOD ordered DCPS to convene an IEP meeting and develop an IEP and issue a prior notice regarding DCPS' decision for the student to attend School B, his local DCPS school. Although the July 10, 2012, HOD ordered that the IEP meeting be convened within forty-five (45) calendar days of the issuance of the HOD, the required IEP meeting was held on February 19, 2013. (Respondent's Exhibit 6-13)
5. The student's parent attended the February 19, 2013, IEP meeting at School B along with an educational consultant whose services the parent has engaged since Fall of 2011 to assist with the student's IEP development, his programming and placement. The School A team participated in the meeting by telephone. The DCPS participants included the School B assistant principal, a general educator and special educator. The purpose of the meeting was to develop an IEP and recommend services for the student. The meeting was collaborative and well run with good participation on both sides. (Witness 1's testimony)

6. The School B team accepted the vast majority of the goals from the student's School A IEP and included them in the DCPS IEP. The parent's consultant was in agreement with the content of the IEP, the present levels of performance and the goals. The parent's consultant was not in agreement with the level of specialized instruction that was prescribed in the student's DCPS IEP. He believed the student was and is in need of a full time out of general education placement. DCPS did not explain how the IEP would be implemented at School B just that it would be implemented. (Witness 1's testimony)
7. At the meeting the DCPS proposed to provide the student 11 hours of specialized instruction outside general education. The student's parents and their consultant disagreed because the student is currently in a full-time placement and receives 30 hours of specialized instruction per week. They expressed that a change in hours would be detrimental to the student and they had concern about that transition to another school particularly "one with much less instruction." The DCPS meeting notes indicate that the team discussed the student's test scores, grades, work samples, evaluations, etc. used in determining placement. (Respondent's Exhibit 9-2)
8. The student's parent considered the February 19, 2013, IEP meeting to be well organized and well attended. The team went through the IEP in great detail. The parent, however, was concerned about the amount of specialized instruction and that at School B the student would go in and out of general education. The parent did not believe DCPS was willing to discuss the particulars of how the IEP goals that were agreed upon could be accomplished in approximately a third of the time that the student is provided instruction at School A and with a higher student/teacher ratio. The DCPS team members stated that they would make accommodations and would ensure the IEP was implemented. As a result the student's parent did not feel that DCPS seriously considered his input. He does not recall asking for any specific hours in any of the academic areas that were prescribed in the IEP. (Parent's testimony, Respondent's Exhibit 9)
9. The student's parent observed School B on February 19, 2013, before the IEP meeting. Based on his brief observation the parent thinks the school building is too large and too chaotic for the student to attend. He thinks DCPS did not consider the harmful affects to the student in moving the student from his current school to School B. The parent believes the student would be at risk at School B. The student would not ask questions in fear of being judged and jeered. By contrast the student's interest and confidence in academics is rising since he has been attending School A. In the last year his ability to read is rising. There have been no behavior problems for the student at School A. (Parent's testimony)
10. Following the February 19, 2013, meeting the parent did not inform DCPS that he would decline the student's placement at School B and does not recall that he ever enrolled the student at School B. The student's parent has a contract with School A and pays the student's current tuition in installments. There are no payments currently past due. The student's parent has not yet signed a contract for the student to attend School A next school year and the student's IEP meeting at School A is upcoming. (Parent's testimony)

11. At the February 19, 2013, meeting DCPS developed an IEP that prescribed the following weekly services for the student: 10 hours of specialized instruction in reading, written expression and math outside general education as follows: 2.5 hours in reading, 2.5 hours in written expression, and 5 hours in math. The IEP also prescribed the following related services: 60 minutes of occupational therapy per month outside general education, 45 minutes per week of speech and language pathology outside general education, 45 minutes per day of speech-language pathology inside general education, and 45 minutes per week of consultative behavioral support services. (Respondent's Exhibits 8-1, 8-14, 8-15, 9-2, 10-1, 10-2, 10-3, 10-4)
12. On March 7, 2013, DCPS provided the student's parent a letter informing that School B was being offered as the location to implement the February 19, 2013, IEP along with a prior written notice that informed the parent of the changes that had been made to the student's IEP as a result of the February 19, 2013, IEP meeting and the notes from the February 19, 2013, meeting that indicated what documentation the team reviewed in making its decision. (Respondent's Exhibits 8-1, 8-14, 8-15, 9-2, 10-1, 10-2, 10-3, 10-4)
13. The parent's educational consultant noted the following about the student: the student has high ability but his academic achievement and been far less due to difficulties in oral expression, attention, and executive functioning. He has tremendous belief in what he thinks he should do. He is a perfectionist and competitive child who tries hard and when he does not do as well as he thinks he should he gets down on himself. (Witness 1's testimony)
14. The parent's educational consultant considers the amount of services prescribed in the student's DCPS IEP as insufficient. He agreed that student required specialized instruction in reading, written expression and math. The 2.5 hours per week in reading was insufficient. The student needs to be provided the instruction daily especially as a student who has been involved in the reading intervention programs that have been used at School A. Thirty minutes per day is insufficient. The student now receives 45 minutes to an hour per day - this is what is current program calls for. The consultant has the same opinion as to the other areas of instruction: the student's needs instruction in written expression and math of 45 minutes to one hour per day. (Witness 1's testimony, Petitioner's Exhibit 10-14)
15. The student's disability impacts in the areas of reading, written expression, math and executive functioning. He has a noted history of slow progress even under the best of circumstances. In order for him to make the kind of progress that he is capable of with his high ability he benefits from a small structured environment. (Witness 1's testimony)
16. The student currently receives 31 hours of instruction at School A. The consultant expressed concern that if that many hours are needed by School A to implement the student's IEP then it seems unlikely that DCPS could implement a comparable IEP with only 10 hours. The consultant disagreed at the meeting that the goals would be or could be implemented with the level of specialized instruction in the IEP: 10 hours of specialized instruction. The consultant did not disagree with any of other components or

contents of the February 19, 2013, IEP. (Witness 1's testimony, Petitioner's Exhibits 7, 10-14)

17. In March 2013 the parent's educational consultant observed a special education classroom at School B and was in the building a total of an hour and forty minutes and observed two classes a special education class and a general education class. He was impressed with special education teacher, the environment and structure of the classroom. The consultant believed that environment would be sufficient for the student. The general education science class he observed was fast paced. He walked away thinking the language of instruction in the classroom was loud and fast paced and would be difficult for the student to manage. (Witness 1's testimony)
18. The consultant expressed his opinion that School B is not appropriate for the student to be successful and that the size of the classes are too big and the way material is being presented and the pace of instruction in general education are inappropriate. The size of the school is too big with too much action. The student's needs transitions that are structured and predictable so he can stay on task and he believes that moving the student to School B would be harmful to the student. The student needs to be in a setting where the transitions and organization and what he does from day to day is structured, predictable and routine for him and where the sensory input around him is modulated so that he can navigate, remain on task and not be distracted. (Witness 1's testimony)
19. The parent's consultant also observed the student at School A and believes the student has benefitted from being there. His reading levels have improved by two to three grade levels in math and his written expression numbers are improving slowly, but still improving. The student's ability to complete assignments and organize and write and orally express are improving slowly. (Witness 1's testimony)
20. School A is an independent school geared to students with a variety of disabilities specializing with students with high IQ and challenging deficit areas in reading, writing and executive functioning. School A is an art-based school where learning is achieved through a variety of mediums. The school has a small teacher to student ratio and caters to students' specific needs. It has a small student body; there are 81 students in the junior high division with approximately 40 students in each grade. Fifteen of those students are funded by the District of Columbia. Each class ranges from 3 to 10 students and physical education ("PE") has up to 20 students. Typically there is one teacher in the classroom. Related services are integrated into the classroom: one speech-language therapist and occupational therapist are frequently working inside the classroom collaborating with the teacher to ensure students' individual goals are met as well as providing structural supports to all the students. School A is approved by OSSE. (Witness 2's testimony)
21. The student is bright and has significant challenges with expressive and receptive language. He seems to cope with the challenges by being polite and wanting to please. For instance, he is anxious about doing an assignment correctly when assigned writing tasks in class and often jumps in before the teacher has completed giving the assignment to ask questions or he will often assume what is being asked and the teacher will have to

regroup him. When he begins writing assignments he struggles to organize his thoughts. He has a lot of ideas but they are scattered and he might appear that he knows what to do but when he puts it on paper it is clear that he does not have the organization to proceed with the writing assignment. When the student was in the intermediate program at School A during the previous school years he was accustomed to a lower teacher to student ratio where he got immediate support, recognition and affirmation that he is completing work correctly. His teacher to student ratio is now about six to seven students on average to one teacher. (Witness 2's testimony)

22. At School A the student takes the following classes: English, reading, math, social studies, history, science and a full year of PE. His English class focuses on writing multi-paragraph essays, grammar, diagramming sentences and vocabulary and developing a sequential pattern with his writing. He has reading with a group of 5 to 6 students where he works on comprehension, vocabulary and decoding and encoding strategies. Math is a relative strength for the student but the language of math is difficult and his inattention and eagerness to be correct impacts his ability to get things done in math class. In social studies the student is focusing on the geography of the world, cultural differences about the world and history. Science focuses on the common core standards and life sciences. He has a full year of PE and an elective of robotics that focuses on science and art. The physical education teacher is not a special education teacher but is a certified teacher in physical education and there is a second teacher in the PE class. Not all the student's current teachers at School A are certified special education teachers. His math and PE teachers do not have the special education certification. (Witness 2's testimony)
23. The student has an IEP that has been developed by School A through which the student's instruction at School A is provided. The IEP pinpoints areas that are challenges for the student and provides guidance for the student's teacher to hone in on those areas so the student can assess the curriculum more successfully. The junior high director at School A offered an opinion of whether the goals in the student's School A IEP could be implemented in a part-time or inclusion program in which the student is with general education students some of the day. She stated that the student presents well in the classroom but requires more of the teacher's time to provide him extra support and reassurance. He has a fragile ego and is concerned about not coming across as not knowing something. He will not ask questions in a large group and has to have a lot of trust with his teacher to be able to ask questions when he doesn't know something. He internalizes a lot of his feelings about his academic struggles. (Witness 2's testimony, Petitioner's Exhibit 7)
24. If the student were with general education students he would need to be in a small class with few students in order to be successful. A classroom of six or seven students is his ideal learning environment and is what he requires to be successful. He needs a class that will be stimulating because he is so bright but supportive to break down assignments and his workload. (Witness 2's testimony)
25. The student has made progress at School A but still has weaknesses. His reading, writing, math scores are still low. One would expect the student to be in top classes but

he is not. School A allows the student to thrive and display his strengths. Quarterly grade reports are provided to the student and most of his current grades are As and Bs. (Witness 2's testimony)

26. The student has strong receptive vocabulary and strengths in social programmatic skills. He has significant linguistic executive functioning deficits that impact his ability to function in the academic classroom. When given a task in class he struggles with being able to interpret what is being asked of him and breaking it down into steps and monitoring his progress through those steps. He has difficulty with language comprehension and expression and his ability to organize language. He has difficulty with this both verbally and in writing. He has trouble at the sentence level to organize his thoughts and express them. (Witness 3's testimony, Petitioner's Exhibit 6)
27. The student has difficulty adhering to the classroom expectations. He needs frequent breaks and needs consistent supports. He will often move around the room and distract others and make off-topic remarks he has difficulty with impulsivity. He has difficulty with self-monitoring and using language to get out of situations he finds himself and deal with them in the classroom. He has anxiety with test taking and needs constant approval from the teacher before attacking a task. (Witness 3's testimony, Petitioner's Exhibit 6)
28. The student's School A speech-language therapist works with the student once per week in his reading class and once per week for 45 minutes individually. In the individual speech-language therapy sessions the therapists helps the student with strategies for approaching classroom assignments and completing homework. The student's School A speech-language therapist has seen some progress from the therapy. (Witness 3's testimony)
29. A DCPS special education coordinator observed the student at School A in a prior school year (2011) when DCPS was in the process of developing and proposing a prior IEP for the student. DCPS previously proposed a "part time" IEP because of the student's superior intelligence and proposed services to address his deficits. To the DCPS staff the hours of specialized instruction in the IEP seem to match the goals in the areas of concern to be addressed. Typically in determining the amount of hours of specialized instruction in a DCPS IEP one generally looks at how low the student skills are and start with an hour or two hours a day and increase the services hours if needed. The student's skill levels seemed to warrant 1.5 to 2 hours per day of specialized instruction. (Witness 4's testimony, Respondent's Exhibit 8)
30. School B is a middle school that serves grades 6, 7 and 8. The school has a total of 1,044 students, 10% (130 to 140 students) who are provided special education services. School B has a team of 12 special education teachers and each teacher has a caseload of approximately 12 students. The special education teachers can provide resource small group instruction and/or individualized support for students in the general education classroom co-teaching with the general education teacher. School B is flexible in designing the instruction to meet a student's needs. The school has six classes per day

each is an hour (30 hours of instruction per week) and a 30-minute lunch period.  
(Witness 5's testimony)

31. School B can provide the services in the student's IEP both specialized instruction and the related services. DCPS School B staff believes there are sufficient hours in the IEP to implement the student's goals listed in the IEP in reading, writing and math. The special education teacher who participated in the February 19, 2013, meeting is no longer employed with DCPS and was responsible for drafting the goals and recommending the level of specialized instruction in the IEP. School B can implement an IEP with as many as 25 hours of specialized instruction. Currently one student at School B is provided between 20 to 25 hours of special education services outside the general education classroom. This is about the maximum number of special education hours that School B has the ability to do in at one time. (Witness 5's testimony, Respondent's Exhibits 8, 9)

### **CONCLUSIONS OF LAW:**

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--  
(a) Are provided at public expense, under public supervision and direction, and without charge;  
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.<sup>5</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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<sup>5</sup> The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

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. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE 1:** Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP at the February 19, 2013, IEP meeting because the amount of specialized instruction proposed to implement the IEP goals is not sufficient. Petitioner's alleges the student is need of full time out of general education services.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that the student's February 19, 2013, IEP is inappropriate because it does not prescribe a sufficient amount of hours of specialized instruction. However, Petitioner did not present sufficient evidence that student is in need of "full-time" specialized instruction where he is totally secluded from his non-disabled peers.

Petitioner presented evidence that demonstrates the student has high cognitive ability and significant academic strengths particularly in math. But the evidence also demonstrates the student has significant deficits in reading, written language and executive functioning and benefits from being in a structured educational setting with a low student to teacher ratio. It is undisputed that the student's DCPS IEP developed on February 19, 2013, contains sufficient, academic goals and related services. Petitioner has challenged the amount of specialized instruction that IEP prescribes in order to meet the goals in the IEP.

DCPS has proposed that the goals can be implemented with 10 hours per week of specialized instruction outside the general education classroom. Petitioner presented multiple witnesses most of who testified as experts that the student requires instruction with a low student to teacher ratio as he is provided at School A. However, only one of Petitioner's expert witnesses who was not an employee of School A testified as to the number of hours of specialized instruction the student actually does require more than DCPS proposed.<sup>6</sup>

Despite the testimony offered by the School A personnel about the student's strengths, challenges, services and progress at School A, Petitioners consultant and expert witness testified that the student should receive at least an hour each day in each of the three areas of reading, written instruction and math. This amounts to a total of 15 hours of specialized instruction per week in reading, writing and math. Neither this expert witness, nor any of the School A staff who testified that the student must or should receive all instruction in all subject areas through specialized instruction and there was no testimony offered that the student needs to be totally excluded from interaction with his non-disabled peers.<sup>7</sup>

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<sup>6</sup> FOF # 14

<sup>7</sup> Although the witness testified the student needs a separate day school the Hearing Officer did not find this comment convincing given the other evidence that the student could be instructed in a less restrictive setting.

Petitioner's other expert witness from School A testified that the student could be in classes with general education students but the student to teacher ratio would need to be 5 or 6 students per teacher. In addition, at School A the student currently receives instruction from at least two general education teachers and in P.E., he is in a class of twenty students albeit there is second teacher present.

Based upon all this evidence the Hearing Officer concludes the student does not require that all his instruction through out the school day be provided with specialized instruction and/or by a special education teacher, or that the student needs to be totally excluded from interaction with his non-disabled peers.

The Hearing Officer concludes there is insufficient evidence the student requires a full-time out of general education placement as he is provided at School A and concludes as was determined in two previous HODs <sup>8</sup> that School A does not represent the student's restrictive environment as required under IDEA in the provision of FAPE.

The Hearing Officer, however, concludes principally from the Petitioner's expert witness that the IEP that has developed for the student is inappropriate because it does not prescribe at least 15 hours of specialized instruction in the areas of reading, written expression and math. The evidence does not support a conclusion that any other elements of the IEP are deficient or that Petitioner challenged or proved any other elements were inappropriate. Consequently, the Hearing Officer directs in the Order below that the student's IEP is immediately amended to prescribe 15 hours of specialized instruction of 1 hour per day in each affected area, reading, written expression and math, consistent with the recommendation of expert testimony rendered in this hearing.

**ISSUE 2:** Whether DCPS denied the student a FAPE by failing to propose an appropriate location of services (by proposing School B and not an appropriate location) that can meet the student's needs because at the location proposed (1) the general education classes proposed for the student were too large, (2) the educational material was presented in a manner that was not appropriate for the student, (3) the pace of instruction was too quick and (4) the move to School B would have been harmful to the student emotionally and educationally.

**Conclusion:** Petitioner sustained the burden of proof that the location of services that DCPS proposed, School B, was inappropriate for the student.

Petitioner presented evidence from both the parent's educational consultant and expert witness and the parent based on their limited observation of School B that the school environment is too large with too many students and that student would be unable to successfully negotiate such a school setting, albeit their observations were brief and the consultant was the only witness to observe classrooms at School B. He found the special education setting acceptable and believed the student would benefit from such a setting. However, based on his observation of a single general education classroom and the

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<sup>8</sup> Respondent asserted that the previous determination(s) that School A was not the student's LRE precluded the Petitioner from challenging that determination. The Hearing Officer concludes that the challenge could be reasserted based upon the February 19, 2013, IEP that was not in existence when the other HODs were issued.

school building itself he thought it inappropriate because of the pace and language of instruction he observed in that classroom.

On the other hand, DCPS' witness testified that School B has 1044 students and approximately 130 special education students and that each special education teacher is assigned approximately twelve students. There was no testimony offered by DCPS that specifically spoke to the general education classes and the general environment in the school from which the Hearing Officer could conclude, given the observation of Petitioner's witness of the pace and language of instruction, that the general education setting at School B would or could meet the student's needs or that refuted the testimony of this witness. In addition, DCPS presented no evidence that countered the parent's concern that the student would be harmed by a move to such a large, active and highly populated school particularly without sufficient and specific supports for his transition to such a setting. Absent any evidence by DCPS in this regard to counter the evidence presented by Petitioner the Hearing Officer must conclude Petitioner sustained the burden of proof on this issue.

**ISSUE 3:** Whether DCPS denied the student a FAPE by denying the parent meaningful participation by not including the parent in the decision to change the student's school location from School A to School B.

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence.

The evidence in this case demonstrates that the February 19, 2013, IEP meeting was well organized, well attended and there was a thorough discussion of the student's needs, goals and in developing his IEP. The disagreement arose when the team determined the number hours of specialized instruction that the student would be provided and the setting. The notes from that meeting indicate that there was a discussion and consideration of the parent's position regarding the level of services.<sup>9</sup>

The parent and his consultant also testified that they both shared in the meeting their views and desires for the student's educational programming and placement. Although parent in particular testified that he felt his concerns were not being considered the evidence simply points to a disagreement between the parent and his representative and the DCPS team members. There was insufficient evidence from which the Hearing Officer could conclude that at that meeting this disagreement and DCPS' actions impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

As to the student's school location once the IEP was finalized DCPS issued a location of services letter along with prior notice informing the parent that DCPS was offering to implement the student's IEP at School B. After a review of controlling decisions in this jurisdiction the Hearing Officer concludes that decision to place the student at School B was a location of services decision that was within DCPS discretion.

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<sup>9</sup> FOF #s 7, 8

The standard set out by the United States Supreme Court in determining whether a child is receiving a FAPE, or the “basic floor of opportunity” is whether the child has access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Rowley* 458 U.S. at 201. The IDEA, according to *Rowley* imposes “no additional requirement that the services so provided be sufficient to maximize each child’s potential commensurate with the opportunity provided other children.” Id at 198 A.I ex rel. *Iapalucci v. District of Columbia* 402 F. Supp. 2d 152, 167 (D.D.C. 2005)

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

**ISSUE 4:** Whether DCPS denied the student a FAPE by failing to issue a proper prior notice assigning the student to attend School B following the February 19, 2013, IEP meeting.

**Conclusion:** Petitioner did not sustain the burden of proof that DCPS failed to provide a proper prior notice.

The evidence demonstrates that DCPS provided Petitioner a prior notice along with the documentation met the requirements of IDEA.<sup>10</sup> Although Petitioner asserts the notice did not meet the requirements outlined by the prior HOD, this hearing is not the proper forum to challenge DCPS’ compliance with a prior HOD. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of proof on this issue.

**REMEDY:**

Petitioner seeks as relief for the denials of FAPE that have been proved that DCPS be ordered to reimburse the parent for the student’s attendance at School A for SY 2013-2014 and prospectively place the student at School A. Earlier in this HOD the Hearing Officer declined to grant for the reasons stated the student’s prospective placement at the School A. However, as to reimbursement Petitioner has demonstrated that School A meets the standard of a parental proposed placement that the Hearing Officer is to consider in determining whether reimbursement is appropriate. Although DCPS asserted in its written closing argument that Petitioner was not entitled to reimbursement because he did not appropriately inform DCPS that he was refusing the offer of FAPE at School B and was seeking reimbursement prior to the filing

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<sup>10</sup> FOF # 12

of complaint, this defense was not raised prior to the hearing. Nor was Petitioner put on notice in the fashioning of the issues prior to the hearing that such an additional burden of proof needed to be met. Consequently, the Hearing Officer orders as relief that the parent be reimbursed for the student's attendance at School A from the start of SY 2013-2014 until the date DCPS issues a prior notice and offers a FAPE to the student pursuant to this Order.

**ORDER:<sup>11</sup>**

1. The student's IEP is immediately amended to prescribe 15 hours of specialized instruction per week - 1 hour per day in each the affected areas: reading, written expression and math consistent with the recommendation of expert testimony rendered in this hearing and DCPS shall, within five (5) school days of the issuance of this Order issue a prior notice of the change in the IEP.
2. Within ten (10) school days of the issuance of this Order DCPS shall determine an appropriate school location at which the student's IEP will be implemented and offer to the provide a FAPE to the student consistent with that IEP and give particular attention to the student's needs in making a transition to another school location and develop a plan to address reasonable concerns for his smooth transition including the fact that he has been accustomed to a setting with a low student to teacher ratio.
3. DCPS shall, within thirty (30) calendar days of the issuance of this Order and after being provided documentation of payment by the student's parent, reimburse the student's parent the tuition and related services costs for the student's attendance at School A from the start of SY 2013-2014 until the date DCPS issues a prior notice and an offer of a FAPE to the student pursuant to the above provisions of this Order.
4. Petitioner's request for the student's prospective placement at School A and any other requested relief is hereby denied.

**APPEAL PROCESS:**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**

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**Date: April 11, 2014**

<sup>11</sup> Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis. The parties may mutually agree that the parent will be reimbursed for the student's attendance at School A through the end of SY 2013-2014 if they mutually determine the student should remain at School A through the remainder of the school year.