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OSSE
Office of Dispute Resolution
December 22, 2014

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Date Issued: December 21, 2014</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on November 5, 2014, November 6, 2014, and concluded on December 1, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003 on all days. The case was concluded with the filing of written closing arguments on December 8, 2014.

BACKGROUND AND PROCEDURAL HISTORY:

The student is _____ determined eligible for special education services pursuant to IDEA with a disability classification of specific learning disability (“SLD”).

In 2012 the student’s parent enrolled her in a private full time special education school (“School A). She began fifth grade at School A at the start of school year (“SY”) 2013-2014. In October 2013 the student’s father (“Petitioner”) contacted the student’s neighborhood DCPS middle school (“School B”) to discuss educational options for the student’s transition to middle school for SY 2014-2015.

On January 13, 2014, DCPS convened a meeting discuss Petitioner’s request and the student’s referral for special education services. Petitioner had submitted to DCPS several evaluations as well as the student’s individualized educational program (“IEP”) from School A.

On March 24, 2014, DCPS convened a meeting at which DCPS found the student eligible for special education and advised Petitioner that DCPS wanted to conduct additional evaluations including an occupational therapy (“OT”) evaluation and an speech language evaluation. Petitioner provided consent for the additional evaluations.

After performing the additional evaluations, DCPS convened an IEP meeting on June 2, 2014. During this meeting DCPS presented a draft IEP for the student that prescribed 19 hours of specialized instruction per week outside of general education; 120 minutes per month occupational therapy outside of general education; and, 180 minutes per month of speech language services outside of general education and 180 minutes per month of speech language services inside general education. DCPS had not yet completed all the evaluations and rescheduled the the meeting to finalize the student’s IEP.

On July 31, 2014, DCPS convened another IEP meeting for the student. The team determined the student required 15.75 hours of specialized instruction per week outside of general education in the areas of reading, math and written expression; 120 minutes per month occupational therapy outside of general education; and, 180 minutes per month of speech language services outside of general education and 180 minutes per month of speech

language services inside general education and following consultative services: 15 minutes per month of OT and 90 minutes per month speech language pathology.

The parent's educational consultant visited School B prior to the start of SY 2014-2015 and met with the School B special education coordinator ("SEC") about how the student's DCPS IEP could be implemented and the services that could be provided to the student at School B. The SEC did not have a copy of the IEP that had been developed on July 31, 2014, and relied upon Petitioner's description of the amount of specialized instruction to inform him of how the IEP could be implemented.

On August 4, 2014, Petitioner received an email from DCPS that included the student's IEP and advised him that he DCPS would be sending a location of services letter as soon as it located an appropriate school.

Petitioner did not enroll the student at School B at the start of SY 2014-2015 and the student continued to attend School A for sixth grade for SY 2014-2015 at Petitioner's expense.

Petitioners filed a due process complaint in this matter on September 5, 2014, asserting DCPS denied the student a free appropriate public education ("FAPE") because it did not have an IEP in effect at the start of SY 2014-2015 and did not develop an appropriate IEP because the IEP lacked a full time out of general education placement.

Petitioner seeks as relief an order requiring DCPS to reimburse petitioner for the educational expenses related to the students placement at School A for SY 2014-2015, and the student's continued placement at School A until DCPS identifies and makes an appropriate placement and/or location for the student's services available.

DCPS filed a timely response to the complaint on September 16, 2014. DCPS denied any alleged violation(s) or that it failed to offer a FAPE to the student. DCPS asserted on the August 4, 2014, DCPS proposed a placement for the student for SY 2014-2015 of 15.75 hours per week of specialized instruction outside general education, 1.5 hour per week of speech services outside general education; and 30 minutes per week of occupational therapy outside of general education. The team determined that this placement was the least restrictive environment ("LRE") for the student and DCPS advised Petitioner that the home campus ("School B") can implement the student's IEP and placement and that the school was the location of services for the student.

A resolution meeting was held on September 22, 2014. The case was not resolved. The parties did not mutually agree to proceed to hearing. The 45-day period began on October 5, 2014, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on November 19, 2014. On the second day of hearing Petitioner completed his case but there was insufficient time for Respondent's case and DCPS counsel moved for a continuance and extension of the HOD due date which was unopposed. The motion was granted and the hearing was resumed on December 1, 2014. At the conclusion of the hearing on December 1, 2014, Petitioner requested an extension of the HOD due date to allow for written closing arguments. The motion was granted and the HOD due date was extended to December 21, 2014.

The Hearing Officer convened a pre-hearing conference on October 1, 2014, and issued a pre-conference order on October 13, 2014, outlining, inter alia, the issues to be adjudicated.

ISSUES:²

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to have an IEP in effect for the student at the start of SY 2014-2015.³
2. Whether DCPS denied the student a FAPE by failing to provide an appropriate IEP and placement⁴ and/or location of services⁵ for SY 2014-2015.

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 31 and Respondent's Exhibits 1 through 12) that were all admitted into the record and are listed in Appendix A.⁶ Witnesses a listed in Appendix B.

² 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. The issues to be adjudicated as set forth in the pre-hearing order and un-objected to by the parties prior to the hearing did not include a challenge to the DCPS proposed IEP either because of an uncompleted evaluation or because the IEP goals and/or supports did not address anxiety. At the outset of the hearing Petitioner was given an choice of whether to seek leave to amend the complaint or file a subsequent complaint to specifically allege that the proposed IEP was inappropriate because DCPS had failed to conduct the subsequent evaluation to determine the educational impact of anxiety on the student. Petitioner chose not to seek an amendment or withdraw and re-file the complaint to assert that additional issue and/or claim. Rather, Petitioner chose to proceed to hearing on the issues as defined in the pre-hearing order.

³ Petitioner asserted an IEP was not in effect because DCPS did not propose a location of services.

⁴ Petitioner asserted the student is in need of an IEP with full time out of general education services.

⁵ Petitioner also asserted that School B cannot implement the student's DCPS IEP properly in an appropriate setting that meets the student's needs.

⁶Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

FINDINGS OF FACT:⁷

1. The student is _____ determined eligible for special education services pursuant to IDEA with a disability classification of SLD. (Petitioner's Exhibit 2-1)
2. The student attended kindergarten and first grade in _____ Maryland prior to moving with her parents out of the country where she attended a private school for second and third grade, where there was a student to teacher ratio of 6 to 2 and where initially she made academic improvements. While she was attending the private school the student's parents had her evaluated in July 2011 to determine her cognitive abilities and academic skills as she was delayed relative to her school peers. At the time of the evaluation the student was age 8 years - 8 months. (Parent's testimony, Petitioner's Exhibit 10-1, 10-2, 17-1)
3. The independent evaluator determined that the student's verbal intelligence was average and her perceptual reasoning was low average. Her academic achievement was low average for reading and low in math. The evaluator determined there was a discrepancy between the student's cognitive abilities and her academic achievement and diagnosed her with a learning disability. In addition, the evaluator assessed for and concluded the student had clinically significant difficulties with attention and impulsivity and difficulties in social communication and pragmatic language. (Petitioner's Exhibit 10-2, 10-5, 10-9, 10-10)
4. During the time the student was attending school outside the United States she began to display severe anxiety that resulted in her parents engaging the services of a therapist for the student. The student also began taking medication for Attention Deficit Hyperactivity Disorder ("ADHD") in September 2011 and has continued her medication regimen since. (Parent's testimony, Petitioner's Exhibit 9-2)
5. After returning to the Washington, D.C. area the student's parent enrolled her for fourth grade at School A, a private full time special education school in 2012. The student began to display far less anxiety once she began attending School A and for the first time began to acquire friends. The student began fifth grade at School A at the start of SY 2013-2014. In October 2013 Petitioner contacted School B, the student's neighborhood DCPS middle school, to discuss educational options for the student's transition to middle school for SY 2014-2015. (Parent's testimony, Petitioner's Exhibit 9-3, 17-1)
6. On November 8, 2013, School A provided DCPS a referral report for the student completed by the student's School A teacher with information requested by DCPS as

⁷ 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.

a part of the process of fulfilling Petitioner's request for services for the student. The report noted the student's academic strengths of number sense, addition and subtraction skills, sound symbol relationships for consonant and developing creative ideas for writing. The report also noted the student struggles with problem solving concepts, time, geometry, measurement, decoding and comprehension spelling and sentence structure. The report also noted the student's reading level was first grade and that she benefits from small group instruction of 1 to 1 or 2 to 1, where she can get explicit instruction without distraction and she benefits from modified materials with larger print and fewer words on a page. (Respondent's Exhibit 3-1)

7. On December 17, 2013, a DCPS school psychologist conducted an observation of the student in her classroom at School A. The psychologist noted among other things in her observation report that the student required more individualized attention to complete the written assignment compared to her classmates. (Petitioner's Exhibit 20-1, 20-2)
8. At School A the student receives 35 hours of specialized instruction per week as well as integrated services from a speech-language therapist and an occupation therapist. During fourth grade the student also received individual speech language therapy of 90 minutes per week. (Petitioner's Exhibit 9-1, 9-6, 9-7)
9. On January 13, 2014, DCPS convened a meeting to discuss Petitioner's request and the student's referral for special education services. Petitioner had submitted to DCPS several evaluations as well as the student's IEP from School A. (Petitioner's Exhibit 8-3)
10. A DCPS psychologist conducted a review of the student's July 29, 2011, independent psychological evaluation and drafted a report in which she concluded that based upon the findings in the independent evaluation the student appeared to meet the criteria for special education as a student with SLD and/or other health impairment. (Respondent's Exhibit 6-1, 6-10)
11. On March 12, 2014, a DCPS occupational therapist conducted a review of the student's most recent occupational therapy ("OT") evaluation and conducted an observation of the student in her classroom at School A. The DCPS occupational therapist noted the need for an updated OT evaluation. (Petitioner's Exhibit 16)
12. DCPS convened a meeting on March 24, 2014, at which DCPS found the student eligible for special education with the SLD classification and advised Petitioner that DCPS wanted to conduct additional evaluations including an OT evaluation and a speech language evaluation. Petitioner provided consent for the additional evaluations. Initially DCPS did not draft an IEP because the student was not attending a DCPS school. (Parent's testimony, Petitioner's Exhibit 8-1, 8-4, 8-5)
13. DCPS conducted a comprehensive speech and language re-evaluation on April 15, 2014, and April 22, 2014. The DCPS evaluator reviewed the student's previous speech

language evaluation conducted by School A in February 2013. The DCPS evaluator assessed the student, interviewed the student's School A classroom teacher and conducted a classroom observation of the student. The DCPS evaluator concluded the student demonstrated impulsiveness in answering questions, difficulty sustaining attention, fidgeting, extra verbal cueing and extra verbal repetition and the need for breaks and positive reaction to verbal and tangible reinforcement. The student's oral speech language skills revealed strengths with articulation, voice fluency and vocabulary skills and weaknesses in the areas of semantics, understanding word meaning associations, following multistep directions with increased language terms and well as using grammar and thought organization skills appropriately to convey her thoughts, ideas and or generate questions appropriately. (Petitioner's Exhibit 13-11)

14. The DCPS evaluator determined there was a discrepancy between the student's expressive language index score of 98 and her receptive language index score of 72 indicating a relative weakness with her receptive language/processing skills and her pragmatic language skills presented in the average range. The evaluator recommended the student be monitored in and practice conversational rules, participate in unstructured group activity and well as giving or asking for information appropriately when needed. The evaluator noted the student continued to make gains but still displayed weaknesses in semantics, following multistep directions and thought/organization skills. (Petitioner's Exhibit 13-11)
15. On May 20, 2014, DCPS conducted an OT reevaluation of the student. The DCPS evaluator reviewed the student's previous speech language evaluation conducted in July 2011. The DCPS evaluator interviewed the student's School A classroom teacher, the student and her father and conducted a classroom observation of the student. The DCPS evaluator concluded the student needed support in sensory processing, motor planning, letter reversals and in-hand manipulation. (Petitioner's Exhibit 17-1, 17-2, 17-6, 17-7)
16. The evaluator noted that the student's difficulties in sensory processing impact her ability to learn and participate in the general education setting and she at times disengaged from learning due to her under responsive sensory system and distraction by sensory seeking behaviors. The evaluator noted that although the student's grasp pattern on writing instruments is functional it is likely to lead to hand fatigue which may make her reluctant to share all of her knowledge in written communication and her letter reversals may impact her ability to accurately share her thoughts and ideas. The evaluator made several recommendations to the student's educational staff to assist in her learning given her OT profile. (Petitioner's Exhibit 17-6, 17-7)
17. On May 27, 2014, DCPS conducted a comprehensive psychological reevaluation of the student. The DCPS psychologist conducted assessments of the student, interviewed the student and noted her previous classroom observations of the student and her review of the student's 2011 psychological evaluation. The psychologist also reviewed the results of a Woodcock Johnson III administered to the student in May 2013 by School A that reflected the student's difficulty in reading comprehension, math calculation and spelling. The DCPS psychologist administered a WISC-IV and the student was assessed

as low average in verbal comprehension, borderline in perceptual reasoning and working memory, average in processing speed, with a borderline full scale IQ score of 78. (Petitioner's Exhibit 9-1, 9-10, 9-13)

18. The DCPS psychologist also administered the WIAT-II that assessed the student's skills in reading, math and written expression. The student demonstrated average oral language skills but was below average in total reading, basic reading, reading comprehension and fluency, and written expression. The student scored in the very low range for math and low range in math fluency. The student's total achievement score of 70 placed her performance at the second percentile. The DCPS psychologist concluded the student met the criteria for SLD classification and recommended the student continue to have a highly structured specialized education program that uses multiple presentation formats including visual, auditory, kinesthetic and tactile modalities. (Petitioner's Exhibit 9-5, 9-6, 9-22)
19. After performing an additional evaluation, DCPS convened an IEP meeting on June 2, 2014. During this meeting DCPS presented a draft IEP that prescribed that student be provided 19 hours of specialized instruction per week outside of general education⁸; 120 minutes per month occupational therapy outside of general education; and, 180 minutes per month of speech language services outside of general education and 180 minutes per month of speech language services inside general education. Because remaining evaluations had not yet been completed another IEP meeting was scheduled. (Witness 1's testimony, Respondent's Exhibit 8-1, 8-11)
20. On July 7, 2014, an independent auditory processing evaluation was conducted of the student and on July 29, 2014, a DCPS audiologist conducted a review of the evaluation. The evaluator determined the student's hearing was normal and concluded the student did not have an auditory processing disorder, but noted the student might have difficulty remembering auditory information. (Witness 7's testimony, Petitioner's Exhibit 19, Respondent's Exhibit 7-6)
21. On July 31, 2014, DCPS convened another IEP meeting for the student. The team determined the student required 15.75 hours of specialized instruction per week outside of general education⁹ in the areas of reading, math and written expression; 120 minutes per month occupational therapy outside of general education; and, 180 minutes per month of speech language services outside of general education and 180 minutes per month of speech language services inside general education and the following consultative services: 15 minutes per month of OT and 90 minutes per month speech language pathology. (Respondent's Exhibits 9-1, 9-12)

⁸ The IEP prescribed 7 hours per week in reading, 2 hours per week of specialized instruction in written expression, and 2 hours per day (10 per week) in math.

⁹ The IEP prescribed 7 hours per week in reading, 3.75 hours per week of specialized instruction in written expression, and 1 hour per day (5 per week) in math.

22. The parent and his educational advocate participated in the July 31, 2014, IEP meeting and neither requested a specific number of hours of specialized instruction to be reflected in the services page of the IEP but simply requested that the student have a full time out of general education IEP and specialized instruction throughout the school day.¹⁰ (Witness 1's testimony)
23. The student's July 31, 2014, IEP includes academic goals in math, reading, written expression, communication/speech and language, motor skills/physical development. The student's IEP has 5 math goals, 4 reading goals, and 6 goals in written expression. In each of these areas the IEP notes that the student cannot learn and progress at the same rate as her peers; she needs specialized instruction, as well as extra time and practice with skills not needed by her typically learning peers. (Petitioner's Exhibit 2-3, 2-4, 2-5, 2-6, 2-7, 2-8, 2-9, 2-10, 2-11)
24. At the July 31, 2014, IEP meeting the team discussed the student's history of anxiety and whether anxiety was currently effecting her in the school environment. The parent provided DCPS consent to conduct an evaluation of the educational impacts of anxiety on the student. There was also a request for an assistive technology evaluation. (Witness 1's testimony, Petitioner's Exhibit 4)
25. The DCPS speech language evaluator participated in the student's IEP meeting. The evaluator expressed an opinion that the student's exposure to non-disabled would be beneficial to the student in developing pragmatic skills by having role models to practice those skills and that the student's needs could be met in a DCPS placement and she agreed with the IEP proposed by DCPS on July 31, 2014. She understood based upon discussions at that meeting that the student's IEP would be implemented at School B and believed that was made clear to the meeting participants. (Witness 6's testimony)
26. Petitioner he did not receive a completed copy of the student's IEP at the July 31, 2014, meeting and DCPS verbally advised him that the student's IEP could be implemented at School B. (Witness 9's testimony)
27. On August 4, 2014, Petitioner received an email from DCPS that included the student's July 31, 2014, IEP and advised him that DCPS would be sending a location of services letter as soon as it located an appropriate school. Petitioner never received a letter from DCPS identifying the location where the student's IEP would be implemented. (Parent's testimony, Petitioner's Exhibit 5)
28. Petitioner and his educational consultant visited School B prior to the start of SY 2014-2015 and met with the School B SEC about the services that could be provided to the

¹⁰ The expert witness testified that the team developed an IEP that included 22.75 hours of specialized instruction and was uncertain the student neighborhood school could implement the IEP. However, the documentary evidence does not reflect this and the Hearing Officer did not credit this portion of the testimony. There were only two IEP documents disclosed and neither prescribed 22.75 hours of specialized instruction. Nonetheless, the consultant and the parent still believed even 22.75 hours of specialized instruction was insufficient.

student at School B. The SEC did not have a copy of the student's IEP that had been developed on July 31, 2014, and relied upon Petitioner's description of the amount of specialized instruction to inform him of how the IEP could be implemented. Based upon being told incorrectly the IEP prescribed 22.5 hours of specialized instruction per week the SEC indicated she would need to craft an unusual schedule that would require that the student to spend a part of her time in a class with students with intellectual disabilities ("ID"). (Witness 1's testimony)

29. The DCPS representative made a mistake in the email she sent Peititioner by referencing a location of serivces letter. She never intended to send a location letter as its was made clear at the IEP meeting that the IEP that was developed could be implemented at the student's neighborhood school. The DCPS representative later called the School B SEC to see if the parent had been to the school with his educational consultant. She was informed the parent had come to School B and the DCPS representative then sent the SEC her a copy of the student's IEP. As a matter of routine in writing a new IEP DCPS will have a conversation with the school location team to ensure they can implement the IEP and the DCPS representative did so with the School B SEC. (Witness 9's testimony)
30. School B has a total of 390 students including 50 special education students. School B has a full time psychologist, social worker, speech language provider and an occupational therapist. School B has three special education teachers who serve grades 6 through 8. After the student's parent visted School B in August 2014 the School B SEC later found out from DCPS central office that the student's IEP had 15 hours specialized instruction and not the amount she was told by the student's parent when he visisted. School B can implement the student's current DCPS IEP. School B has two specialized programs for Autism and ID students; however, the student would be provided her specialized instruction in self contained special education classrooms. (Witness 5's testimony)
31. Petitioner did not enroll the student at School B at the start of SY 2014-2015 and did not call the DCPS representative who had sent him the student's IEP to inquire about the mentioned location of services letter he simply visited School B once he was provided the student's IEP and inquired as how the IEP could be implemented. The student continued to attend School A for sixth grade for SY 2014-2015 at Petitioner's expense. Petitioneener believes the student feels safe and happy at School A and she has made academic and social progress there. As of the time of the due process hearing the Petitioner had paid School A \$21,000 toward the student's School A tuition for SY 2014-2015. \$19,000 remains to be paid under Petitioner's current contract with School A. He is required to make 10 equal payments and started in June 2014. If the student is removed from School A during the school year Petitioner may be reimbursed for some of the unused tution. (Parent's testimony)
32. School A has an OSSE certificate of approval and its tuition costs are approved by OSSE. At School A the student is provided speicalized instruction in reading, writing and math, a student to staff ratio of 2 to 1 and an average class size of six students using

specialized instruction programs. The student is provided instruction by certified special education teachers. However, the student's science class size is larger with a student to teacher ratio of 9 to 1. The student attends a daily physical education class which has more students than her other classes with approximately 16 students and a teacher to staff ratio of 8 to 1. Her physical education class is not instructed by a special education teacher. The student is provided lunch in her classroom but has recess with all students: approximately 70 students. (Witness 4's testimony, Petitioner's Exhibit 27)

33. At School A the student is provided a highly structured approach to assist her in reading and writing effectively. The student is provided frequent review and repetition due to her memory and her executive functioning difficulties. In the non-academic portions of the school day the student is provided assistance with segmenting work provided to her which assists her in completing projects. Based upon the student's academic, and language deficits and executive functioning difficulties the School A administrator is concerned that in a general education setting the student might be overwhelmed in a large middle school setting and she might not be provided sufficient attention and support to meet her needs. The administrator has no concerns with the student being around general education students but has concern about the possible demands in a general education setting compared to a self-contained special education environment. (Witness 4's testimony, Petitioner's Exhibits 22, 23)
34. The student has above average fine motor and visual motor skills and high average scores in overall visual perception. The student has difficulty in the cognitive components of planning and executing. She displays sensory seeking behavior and seeks sensory information to get to a level where she can attend. This sensory seeking impacts the student's ability to focus and attend to the task at hand and inhibits her ability to complete tasks in a specific timeframe. The student requires motor breaks and a sensory diet. The student also has boundary issues of getting in other people's personal space and is sensitive to environmental stressors. Noise and unstructured environments would cause the student stress. In a large classroom setting the student is likely to have difficulty focusing. (Witness 2's testimony, Petitioner's Exhibits 2-10, 16-2)
35. The student is provided integrated speech language services in her School A written language classroom. The student must be provided repetition and different modalities of instruction for her to retain what she has been taught. She has to be continually monitored to ensure she is on task and understands what she has been instructed to do in the classroom. Her ability to simply understand and retain what is being provided to her verbally is limited and she must be provided visual information to support what is presented auditorily. The student usually needs more checking in by a teacher or staff member in the classroom than her peers and her written language work product is usually of limited quality. (Witness 3's testimony, Petitioner's Exhibit 14)
36. Petitioner's educational consultant stated his opinion based on review of the student's evaluations and educational records and observing her in a non-academic class at School A that the degree of the student's academic deficits, her attention and auditory processing and anxiety impacts her ability to progress academically and her ability

demonstrate her understanding in every academic course as well as in elective courses. He believes the student needs an educational setting that has a small class size in a highly specialized program that presents information in multiple modalities with at least 2 to 1 support as is provided to her at School A. This expert witness expressed an opinion that the hours of specialized instruction in the DCPS IEP is far from appropriate and the student would not make progress in the general education setting. (Witness 1's testimony)

CONCLUSIONS OF LAW:

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

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. 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. ¹¹ *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.

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).

¹¹ 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.

ISSUE 1: Whether DCPS denied the student a FAPE by failing to have an IEP in effect for the student at the start of SY 2014-2015.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS failed to have an IEP and/or location of service in place for the student at the start of SY 2014-2015.

Essentially, Petitioner asserts that DCPS failed to have an IEP in effect for the student at the start of SY 2014-2015 up to and including the date of the hearing because no location of services was proposed by DCPS prior to the start of the current school year. However, the evidence demonstrates that at the conclusion of the IEP meeting DCPS informed Petitioner that the student's IEP could be implemented at the student's neighborhood school.¹² The evidence demonstrates that following that meeting Petitioner along with his educational consultant visited School B and met with the School B special education coordinator prior the start of SY 2014-2015. There is evidence Petitioner received an email from the DCPS representative informing that he would be provided a location of services letter also and perhaps there was a basis for confusion by Petitioner about the location DCPS was proposing. That portion of the letter was an error.

Despite this error, DCPS provided Petitioner a copy of the student's IEP and informed Petitioner at the IEP meeting that the IEP could be implemented at the neighborhood school. The evidence demonstrates that Petitioner was in communication with the DCPS representative directly prior the meeting and although he was not obligated to do so for any clarification did not seek to clarify the location issue through any call or letter prior to filing the due process complaint.¹³ At least by the time DCPS' response to the complaint was filed and a resolution meeting held Petitioner was certainly on notice that the proposed location to implement the student's that DCPS was offering was School B. Based on the evidence the Hearing Officer does not conclude that DCPS failed to have an IEP and/or location to implement the IEP in effect at the start of SY 2014-2015 and concludes there was no denial of a FAPE to the student in this regard.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to provide an appropriate IEP and placement and/or location of services for SY 2014-2015.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the IEP drafted by DCPS for the student on July 31, 2014, prescribes an insufficient amount of specialized instruction outside general education and thus the placement prescribed by that IEP is inappropriate. However, there was insufficient evidence that the student should be totally removed from her non-disabled peers.

A primary purpose of the enactment of IDEA was "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education,

¹² FOF #s 26, 29

¹³ FOF # 27, 31

employment, and independent living[.]” 20 U.S.C. § 1400(d)(1)(A); § 1412 (a)(1)(A) (“A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21”).

To ensure access to a free appropriate public education for children with disabilities, “the child's parents, teachers, school officials, and other professionals collaborate in a 'multi-disciplinary team' to develop an individualized educational program [IEP] to meet the child's unique needs.” *Smith v. Dist. of Columbia*, No. 12-2058, 2014 WL 1425737 (D.D.C. Mar. 14, 2014) (citing *D.K. v. Dist. of Columbia*, 983 F. Supp. 2d 138, 141 (D.D.C. 2013) (citing 20 U.S.C. § 1414(d)(1)(B)); see also *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 519 (D.C. Cir. 2005); *Dist. of Columbia v. Wolfire*, No. 12-01527, 2014 WL 169873 (D.D.C. Jan. 16, 2014); *Dist. of Columbia v. Oliver*, No. 13-00215, 2014 WL 686860 (D.D.C. Feb. 21, 2014).

“The IEP is the “centerpiece” of the IDEA’s system for delivering education to disabled children,” *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have “complied with the procedures set forth in the Act.” *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be “reasonably calculated to enable the child to receive educational benefits.” *Rowley*, 458 U.S. at 206-07.

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.” *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009).

Once the IEP has been developed, “the school system must provide an appropriate placement that meets those needs and, if an appropriate public placement is unavailable, the school system must provide an appropriate private placement or make available education-related services provided by private organizations to supplement a public placement.” *Petties v. Dist. of Columbia*, 238 F. Supp. 2d 114, 116 (D.D.C. 2002) (citing 20 U.S.C. § 1412(a)(10); 34 C.F.R. §§ 300.349, 300.400-402.); see also *S.S. ex rel. Street v. Dist. of Columbia*, No. 13-557, 2014 WL 4650885 (D.D.C. Sept. 19, 2014) (“A student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP.”) (citations omitted).

Conformity with the dictates of IDEA also requires that children with disabilities be educated in the least restrictive environment: “To the maximum extent appropriate, children with disabilities[] ... are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A); see also *N.T. v. Dist. of Columbia*, 839 F. Supp. 2d 29, 35 (D.D.C. 2012) (IDEA

requires local education agencies to place students with disabilities in "the least restrictive environment possible") (citations omitted).

It is settled that IDEA's "broad remedial reach" encompasses "requir[ing] an LEA to provide tuition reimbursement as compensation when a parent enrolls a disabled child in a private school due to the LEA's deficiencies in providing a FAPE." *L.R.L. ex rel. Lomax v. Dist. of Columbia*, 896 F. Supp. 2d 69, 76 (D.D.C. 2012) (citation omitted); see also Oliver, 2014 WL 686860 ("[T]he remedial authority for which the Act provides 'includes tuition reimbursement for parents who unilaterally place their child in private school[.]'" (citing 20 U.S.C. § 1412 (a)(10)(C)(ii)); cf. *Dist. of Columbia v. Vinyard*, 971 F. Supp. 2d 103, 115 (D.D.C. 2013) ("Tuition reimbursement for private school tuition when the school district denied a child a FAPE was first recognized by the Supreme Court as part of the courts' broad authority to 'grant such relief as the court determines [is] appropriate.'" (quoting *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368 (1985)) (citation omitted).

"Parents who unilaterally place their child at a private school without the consent of school officials [do] so at their own financial risk." *K.E. v. Dist. of Columbia*, No. 13-0084, 2014 WL 242986 (D.D.C. Jan. 23, 2014) (citation omitted). "Parents in such situations may be reimbursed only if 'the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.'" *Id.* (citations omitted); see also 20 U.S.C. § 1412(a)(10)(C)(ii) (stating that reimbursement may be appropriate if "the agency had not made a free appropriate public education available to the child in a timely manner prior to [the private-school] enrollment").

Put another way, "[t]he reviewing court may grant tuition reimbursement if: '(1) the public placement violated the IDEA and (2) the private school placement was proper under the Act.'" *Jalloh v. Dist. of Columbia*, 968 F. Supp. 2d 203, 210 (D.D.C. 2013) (citation omitted); see also Oliver, 2014 WL 686860 ("[W]hen a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits []' -- the same standard by which the appropriateness of a public school's IEP is assessed.") (citation omitted). Thus, parents are not entitled to tuition reimbursement where "the educational program and site proposed by DCPS comply with IDEA's FAPE requirement." *James v. Dist. of Columbia*, 949 F. Supp. 2d 134, 139 (D.D.C. 2013); see also *Walker v. District of Columbia*, 2014 WL 3883308 (D.D.C. Aug. 6, 2014).

Accordingly, reimbursement of tuition may be ordered as a remedy for denial of FAPE only upon a two-pronged showing: (1) the LEA "[did not] make FAPE available to [a child eligible for special education services] in a timely manner"; and (2) "the private school placement [selected by the child's parents] is appropriate."

An inadequate IEP is a necessary but insufficient condition for private school placement and reimbursement. Although the District must pay for private school placement "if no suitable public school is available[,] ... if there is an appropriate public school program available ... the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." *N.T.*, 839 F. Supp 2d at 34 (citation omitted), 35 n.3

(hearing officer could consider whether parental placement was the least restrictive environment in evaluating whether tuition reimbursement was the proper remedy for denial of FAPE) (citations omitted); see also K.E., 2014 WL 242986 ("Since the IDEA does not require a school district to pay for a private school education simply because that opportunity would be ideal for a student, the Court is unpersuaded by the plaintiffs' contention that any private school that provides a child an educational benefit is appropriate.") (citation omitted). *Pinto, et al., Plaintiffs, v. District of Columbia* 64 IDELR 103 (D.C.C. 2014)

Petitioner in this case asserts the student is in need of an IEP with full time out of general education services and the current IEP is deficient because it does not prescribe all services outside general education.

The overwhelming evidence demonstrates, despite the DCPS witnesses' testimony to the contrary, that the student has severe academic deficits and needs specialized instruction in all academic subjects, and even to some degree in classes that do not require that she read or write, due to her learning disability and speech and language deficits, inattention and sensory seeking behaviors. The IEP that DCPS has devised prescribes 15.5 hours per week or approximately three hours per day of specialized instruction. This would mean that the student would spend at least half her school day in general education. The evidence demonstrates that the student would likely be overwhelmed and unable to follow instruction and keep pace with her non disabled peers in that level of general education classes. The student's evaluations conducted independently, by School A and by DCPS, and the experience of those individuals who have worked closely with the student indicate that the student requires a highly structured specialized education program that uses multiple presentation formats including visual, auditory, kinesthetic and tactile modalities.¹⁴

The IEP that DCPS developed for the student on July 31, 2014, prescribed 15.5 hours of specialized instruction outside general education. This implies that the student would be required to be in a general education setting for part of her academic instruction and would not be provided specialized instruction in reading, writing and written expression in all academic subjects throughout the school day. Consequently, the Hearing Officer concludes the IEP as developed on July 31, 2014, was not reasonably calculated to provide the student educational benefit based upon the evidence that before the IEP team and thus the student was denied a FAPE. Consequently, the Hearing Officer will direct in the order below that the student's IEP be amended to reflect that the student's IEP prescribe at least 25 hours of specialized instruction per week.¹⁵

There is also an area of concern, specifically anxiety, that has not been fully determined and considered by an IEP team as whether the student's social and emotional functioning is such that she cannot at all be with her general education peers. Consequently, the Hearing Officer directs in the order below that DCPS complete an evaluation regarding any educational impact that anxiety may have on the student, along with the AT evaluation and make a

¹⁴ FOF #s 18, 33, 34, 35

¹⁵ The Hearing Officer has derived this number of hours by excluding the number of related service hours prescribed in the student's IEP from the total number of instructional hours per week that is typically in a DCPS IEP based upon 27.5 hours per week of instruction.

determination following those evaluations of the student's appropriate educational placement.

Although Petitioner's expert witnesses among others testified that the student requires total removal from general education the Hearing Officer did not find this portion of the testimony convincing. At School A the student takes physical education with a group as large as 16 students and that instruction is not conducted in by special education teacher. IDEA defines special education to include instruction in physical education. In addition, the School A administrator testified that there is no indication the student cannot be with general education students. Based upon these factor the Hearing Officer is not convinced that the student must be totally removed from her non-disabled peers and that a separate school is the student's least restrictive environment on the continuum of placements. Therefore, the Hearing Officer will not grant the requested remedy of the student's prospective placement at School A.

However, the Hearing Officer concludes that School A meets the requirements that the Hearing Officer must consider in determining reimbursement for a private school placement and concludes based on the evidence that at School A the student has received educational benefit. Therefore, in the order below the Hearing Officer directs the DCPS reimburse Petitioner for the costs of the student attending School A until DCPS provides the student an appropriate IEP and placement.

Peittioner asserted that even if DCPS had proposed School B as the student's location of services School B cannot implement the student's DCPS IEP in an appropriate setting that meets the student's needs. Because the student's IEP has been determined to be inappropriate there is no reason to now consider the appropriateness of School B in implementing the student's IEP as that component of the issue has become moot until DCPS complies with the order below and develops an IEP for the student and proposes a placement and location to implement her IEP.

ORDER:¹⁶

1. The student's IEP is hereby amended to prescribe 25 hours per week of specialized instruction outside general education in addition to the current related services.
2. DCPS shall, within fifteen (15) school days of the issuance this order conduct an assessment of the student's social/emotional functioning with particular focus on the educational impact of anxiety on the student and shall also conduct an assistive technology assessment.
3. DCPS shall, within fifteen (15) school days of the completion of evaluations directed to be conducted by this order, convene an IEP meeting to review those

¹⁶ 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. In addition, if there is any delay in conducting the evaluation and/or convening the meeting ordered herein that is the result of Petitioner's action or inaction that period of delay shall be excluded for any reimbursement Respondent is required to provide Petitioner pursuant to this order.

evaluations, make appropriate adjustments to the student's IEP and educational programming that the team deems appropriate and make a determination regarding the student's educational placement and location of services for the remainder of SY 2014-2015.

4. As remedy for the denial of FAPE determined herein DCPS shall, within thirty calendar days of its receipt of proof of payment from Petitioner, reimburse Petitioner the cost of the student's attendance at the Lab School of Washington from the start of SY 2014-2015 up to including the date DCPS proposes a placement and location of services pursuant to this order.
5. All other requested relief is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.

Hearing Officer

Date: December 21, 2014