

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

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
July 28, 2014

PETITIONERS,
on behalf of STUDENT,¹

Date Issued: July 25, 2014

Petitioners,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Student Hearing Office,
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioners (the Petitioners or PARENTS), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In their Due Process Complaint, Petitioners seek reimbursement from DCPS for Student's private placement at NONPUBLIC SCHOOL.

Student, an AGE child, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on April 30, 2014, named DCPS as respondent. The parties

¹ Personal identification information is provided in Appendix A.

met for a resolution session on May 14, 2014 and did not reach an agreement. On May 14, 2014 and May 29, 2014, I convened telephone prehearing conferences with counsel to discuss the hearing date, issues to be determined and other matters. On May 19, 2014, the Petitioners filed an amended due process complaint, as a result of which the timelines for this due process proceeding began anew. The 45-day period for issuance of this decision began on June 19, 2014.

The due process hearing was held before this Impartial Hearing Officer on June 23 and June 25, 2014 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioners appeared in person, and were represented by PETITIONERS' COUNSEL and PETITIONERS' CO-COUNSEL. Respondent DCPS was represented by CITY ELEMENTARY SCHOOL 1 PRINCIPAL and DCPS' COUNSEL.

PARENT 1 testified and Petitioners called as witnesses EDUCATIONAL CONSULTANT, PSYCHOTHERAPIST and Nonpublic School DIRECTOR. DCPS called as witnesses CITY ELEMENTARY SCHOOL 2 PRINCIPAL and City Elementary School 1 Principal. Petitioners' Exhibits P-1 through P-125 were admitted into evidence with the exception of Exhibits P-1, P-25, P-27, P-34, P-37, P-41, P-45, P-46, P-57, P-64, P-82, P-88, P-98, P-104, P-113, P-114, P-118, P-119 and P-120 which were not offered. Exhibits P-2, P-4 through P-7, P-23, P-35, P-36, P-40, P-42, P-51, P-53 through P-56, P-58, P-59, P-97, P-105, P-110 and P-112 were admitted over DCPS' objections. Respondent's Exhibit R-1 was admitted into evidence without objection. Exhibits R-2 through R-5 were not offered. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the May 29, 2014 Revised Prehearing Order:

- Whether DCPS denied Student a FAPE by failing to timely find him eligible for special education services, which should have occurred around August 2012 and failing to timely develop an IEP;
- Whether DCPS denied the Student a FAPE by failing to permit the Parents to have meaningful participation in the IEP development/placement decision making process;
- Whether DCPS' IEP for Student is inappropriate because it does not provide Student a self-contained setting in "Specials" classes and at lunch and recess;
- Whether DCPS denied Student a FAPE by failing to propose an appropriate placement and/or location of services that can implement his October 2013 IEP.

For relief, Petitioners seek reimbursement for Student's private placement at Nonpublic School for the 2013-2014 school year, with all related services and costs, DCPS funding for Student to attend Nonpublic School for the 2014-2015 school year and a determination that Nonpublic School is Student's current educational placement.

FINDINGS OF FACT

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

1. Student, an AGE child, resides with Parents in the District of Columbia. Student is currently enrolled in GRADE at Nonpublic School. Testimony of Parent 1.
2. Student is a "child with a disability" as defined by the IDEA and eligible for

special education and related services under the primary disability classification Multiple Disabilities (MD), based upon concomitant underlying impairments, Specific Learning Disability (SLD) and Other Health Impairment (OHI). Exhibit P-16.

3. Student was adopted by Parents in 2008 when he was a toddler. Before his adoption, Student reportedly received inconsistent care from multiple caregivers including relatives and foster care providers. Exhibit P-32.

4. Student attended INDEPENDENT PRESCHOOL and PRIVATE KINDERGARTEN before his enrollment in City Elementary School 1 at the beginning of the 2012-2013 school year. Exhibit P-71, Testimony of Parent 1. At Private Kindergarten, Student had been placed in regular education and, according to Parent 1, had been on grade level. Exhibit P-15, Testimony of Parent 1.

5. In the years before they enrolled Student at City Elementary School 1, the Parents had him evaluated for speech-language functioning, developmental functioning, cognitive level, motor and sensory (Occupational Therapy) functioning, visual abilities, and neuropsychological functioning. Exhibits P-2 through P-6, P-8 through P-10, P-12 through P-16. Following an evaluation in May 2012 at NEUROLOGY CLINIC, Student was reported as a child with a history of neglect, speech delay, fine motor delay, and learning disability. The examining neurologist, NEUROLOGIST, reported that Student's exam was remarkable for overflow movements (*i.e.* neuromotor abnormalities) but his assessment was not remarkable for Attention Deficit-Hyperactivity Disorder (ADHD). In a follow-up exam in August 2012, Neurologist diagnosed Student with ADHD and Learning disability. Exhibits P-15, P-16.

6. PARENT 2, who has a background as a psychiatric social worker, met with City Elementary School 1 Principal before Student enrolled to alert the principal to

potential issues. Testimony of Parent 1, Exhibit P-24.

7. On October 9, 2012, a Student Support Team (SST) meeting was convened for Student at City Elementary School 1. At the meeting, it was reported that Student had the tendency to shut down when angry, upset, criticized or corrected. He was reported to be below grade level in reading, writing and math. He was reported to have a hard time self-regulating. At the SST meeting, behavioral goals set included Student's being able to establish and sustain friendships and for Student to use more vocabulary - rather than being oppositional – to express his feelings. A follow-up meeting was scheduled for November 6, 2012. Exhibit P-17.

8. In November 2012, the Parents provided City Elementary School 1 copies of Student's education records and prior assessments obtained by the Parents. Exhibit P-18.

9. Student received a follow-up evaluation on January 15, 2013 at Neurology Clinic. He was reported then to be doing well at City Elementary School 1. His Parents expressed concerns about his reading progress being slow and about his expressive speech. Neurologist repeated her prior diagnoses of ADHD and Learning disability. Exhibit P-20.

10. On March 21, 2013, Parent 1 made a written referral for Student to receive an initial evaluation for special education and related services. On the referral form, Parent 1 reported that Student was having trouble communicating at school; that he had difficulties with articulation, word sequencing and retrieval; that his writing was often illegible and that his reading was slow and effortful. The Parents had also requested orally, at a February 25, 2013 parent-teacher conference, that Student be evaluated. Exhibit P-22.

11. At a Multidisciplinary Team (MDT) meeting on April 17, 2013 at City Elementary School 1, attended by both Parents, the Parents described Student's history, his academic progress at Private Kindergarten and their concerns about his increasing frustration because he could not keep up with his classmates in reading and writing. CLASSROOM TEACHER described Student's transition to City Elementary School as difficult, and reported that although Student had made some progress academically in fall 2012, he had since become stagnated in reading. She reported that Student was at least one year below grade level in reading and writing, and that he was inconsistent in math. The MDT team decided that the DCPS school psychologist and related service providers would determine what additional testing was needed. The Parents signed a consent for evaluations. Exhibit P-24.

12. Student was seen again at Neurology Clinic on May 13, 2013. He was diagnosed with Speech Delay, along with ADHD and Learning Disability. Exhibit P-29.

13. On May 29, 2013, Student's MDT team met again at City Elementary School 1. The MDT team determined that Student was eligible for special education and related services under the Primary Disability OHI-ADHD. Exhibits P-38, P-39, P-40, P-42.

14. An IEP meeting was convened to develop Student's initial IEP on June 28, 2013. Both Parents and Educational Consultant attended the meeting. The June 28, 2013 IEP included annual goals for Mathematics, Reading, Written Expression, Speech and Language, Emotional, Social and Behavioral Development, and Motor Skills/Physical Development. For Specialized Instruction, the IEP provided Student 46 hours per month outside general education and 15 hours per month inside general education. For related services, the IEP provided 120 minutes per month of Behavioral Support

Services, 240 minutes per month of Occupational Therapy and 360 minutes per month of Speech-Language Pathology. In addition, the IEP provided Student 120 minutes per month of Speech-Language Consultation Services. In the Least Restrictive Environment (LRE) narrative, the IEP team reported that Student required pull-out hours and specialized instruction outside the general education setting (less distraction and small group). Exhibit P-49. Parent 1 did not agree with the IEP because he thought that with Student's being pulled out of the classroom so often, he would have difficulty with transitions. Testimony of Parent 1.

15. Student received a psychiatric evaluation on July 12, 2013 at MEDICAL CENTER. The examining psychiatrist diagnosed Student with Anxiety Disorder Not Otherwise Specified, Reading Disorder and Developmental Coordination Disorder. The psychiatrist reported that it did not seem that Student had ADHD. Exhibit P-50.

16. Over the summer of 2013, Student participated in an intensive speech-language program at PRIVATE SUMMER SCHOOL. Exhibits P-54, P-55.

17. Student's IEP team convened again on August 29, 2013. The Parents provided additional independent assessments of Student. No changes were made to the June 28, 2013 IEP. Testimony of Parent 1.

18. Student was seen again at Neurology Clinic on September 6, 2013. Neurologist repeated Student's diagnoses of Speech Delay, Learning Disability and ADHD. ADHD was reported as not appearing to be as prominent of an issue. Exhibit P-68.

19. On August 14, 2013, a neuropsychological evaluation of Student was conducted at Medical Center. The examiner reported that diagnostically, Student met criteria for moderate expressive language impairment, Executive Functioning Deficit

and Specific Learning Disabilities in reading, math and written expression. Exhibit P-71. On September 25, 2013, Parent 1 provided the neuropsychological report to SCHOOL PSYCHOLOGIST and City Elementary School 1. Exhibit P-73.

20. On October 16, 2013, Student's IEP team at City Elementary School 1 convened to review his IEP. Both Parents, their attorney and Educational Consultant attended. Student's disability classification was changed to MD (with concomitant impairments SLD and OHI). His Special Education Services were increased to 24.5 hours per week outside general education. The revised IEP provided 120 minutes per month of Behavioral Support Services, 240 minutes per month of Occupational Therapy (OT), and six hours per month of speech-language services. In the Least Restrictive Environment (LRE) narrative of the October 16, 2013 IEP, the IEP team reported that Student requires a structured, yet flexible and stimulating classroom setting, outside the general education setting, that integrates necessary strategies and supports throughout the structured and unstructured activities and that he requires "few changes in room or schedule to reduce times for transition." Exhibit P-84. This was a determination by the IEP team that Student requires a full-time, outside of general education, setting. Exhibit P-96. The Parents disagreed with the IEP, primarily because it did not require that Student be segregated from non-disabled peers at lunch and recess and because the IEP team did not discuss the school location where the IEP would be implemented. Exhibit P-87.

21. City Elementary School 1 was not able to implement an IEP that called for a full-time outside of general education placement. Testimony of City Elementary School 1 Principal. A referral was made to DCPS' Location of Services (LOS) team to identify a site that would be able to implement the IEP. Exhibit P-96. On November 7,

2013, DCPS provided written notice to the Parents that City Elementary School 2 had been identified as the site where Student would receive special education services and education. Exhibit P-91.

22. Educational Consultant visited City Elementary School 2 two times on behalf of the Parents. On her first visit in November 2013, she met with the City Elementary School 2 Principal, who erroneously thought that Student was in a higher grade class. When he realized his error, the principal told Educational Consultant he would get back to her. When that did not happen, Educational Consultant arranged to visit City Elementary School 2 again on December 18, 2013. On that visit, she met with the special education coordinator. She learned that the program offered for Student was a non-categorical Kindergarten through 2nd grade (K-2) class. The program, consisted of two classes, each staffed by a special education teacher, a classroom aide and a behavior technician. When Educational Consultant visited, the two classes had been combined because only about seven children were attending. Testimony of Educational Consultant, Exhibit P-108.

23. Students in the K-2 program proposed for Student at City Elementary School 2 are mainstreamed with general education students for “Specials” classes (physical education, art, music, and library) and for lunch and recess. They have one one-hour Specials course per day, with 20 to 24 students in the class. Testimony of Educational Consultant, Exhibit P-108, Testimony of City Elementary School 2 Principal.

24. Educational Consultant observed that the students in the City Elementary School 2 program included 7 children, all of whom were at Kindergarten or first grade level. Educational Consultant described Student’s profile to one of the special education

teachers, who responded that Student would be “socially, emotionally and academically out of place” in the program. Testimony of Educational Consultant, Exhibit P-108.

25. On November 20, 2013, an IEP meeting was convened at City Elementary School 1 to explain to Parents the location of services decision made for Student. LOS REPRESENTATIVE explained to Parents that City Elementary School 2 had been offered for Student and she stated that the location could meet the requirements of Student’s October 16, 2013 IEP. The Parents informed the team that they rejected the offer of the City Elementary School 2 program. Exhibit P-96.

26. On November 15, 2013, the Parents requested DCPS to provide Home/Hospital Instruction to Student for the reason that Student was unable to function in his placement at City Elementary School 1. They provided a physician verification, which attested that Student had significant anxiety and learning issues and that he had regressed in terms of his ability to manage anxiety and succeed in school. The request sought Home/Hospital Instruction until Student was transitioned to a new placement. Exhibits 93-94. DCPS approved the request and provided home instruction to Student from November 21, 2013 through January 9, 2014. In January 2014, DCPS discontinued home instruction because it maintained that the district had offered Student a location of services to implement his IEP. Testimony of Parent 1.

27. On December 11, 2013, DCPS mailed a letter to Parents offering City Elementary School 3 as an alternative location of services for Student. DCPS’ letter stated that either City Elementary School 2 or City Elementary School 3 could fully implement the October 16, 2013 IEP. Exhibit P-106. On January 6, 2013, Parent 1 went to City Elementary School 3 to meet with the special education coordinator. That person had no knowledge of Student. She confirmed that City Elementary School 3 had

a K-2 non-categorical program, but the program did not provide full-time outside of general education instruction. The special education coordinator said that the Parents and Educational Consultant could visit the program and that she would get back to them. On January 22, 2014, the Parents heard that they would not be able to see the program. They were not told any reason. Testimony of Parent 1.

28. On December 18, 2013, after Educational Consultant had visited City Elementary School 2, the Parents visited Nonpublic School. Student was accepted at the school and was enrolled on January 23, 2014. He has attended Nonpublic School since that date. Testimony of Parent 1.

29. On January 9, 2014, the Parents provided notice by electronic mail to the DCPS Chief of Special Education of their rejection of DCPS' proposals to place Student at City Elementary School 2 or City Elementary School 3, that they intended to enroll Student at an appropriate private placement and to seek reimbursement from DCPS. Exhibit P-109.

30. Nonpublic School is a special education day school in suburban Maryland. It has an enrollment of less than 40 students in grades Pre-K through 5. Most of the children at the school have emotional disturbance disabilities. All students receive counseling. Testimony of Director.

31. At Nonpublic School, Student is placed in a class of 8 students, staffed with a special education teacher and an assistant. The school is implementing Student's October 16, 2013 IEP, which is appropriate for him. Student has done well in the program. He initially had a "rocky" transition, but has settled down. Testimony of Director, Testimony of Educational Consultant, Exhibit P-121.

32. Nonpublic School holds a full Certificate of Approval from OSSE.

Certificates of Approval are issued to nonpublic schools and programs that meet federal and state standards and are regularly monitored to ensure the educational needs of DC students are supported by highly trained professionals in safe, learning environments. Hearing Officer Notice. The tuition cost is approximately \$61,000 per year, plus charges for related services. Testimony of Director. The Parents have paid all of Student's expenses at Nonpublic School since he enrolled in January 2014. Testimony of Parent 1.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioners in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

1. Did DCPS deny Student a FAPE by failing to timely find him eligible for special education services, which should have occurred around August 2012 and failing to timely develop an IEP?

The Parents enrolled Student in City Elementary School 1 at the beginning of the 2012-2013 school year. Previously Student had attended only nonpublic schools. Student was initially found eligible for special education services in May 2013, following an oral request from the Parents in late February 2013 that he be evaluated. The Parents contend that Student should have been suspected of being a child with a

disability and evaluated as soon as he enrolled in City Elementary School 1. DCPS maintains that because Student was new to its program in the fall of 2012 and had not been receiving special education services at his prior school, it acted appropriately in allowing Student time to adjust to City Elementary School 1 and by attempting the SST intervention process before evaluating Student for special education.

The IDEA requires Local Education Agencies (LEA) to have a comprehensive “Child Find” system to ensure that all children who are in need of early intervention or special education services are located, identified, and referred appropriately. *See* 20 U.S.C. § 1412(a)(3). Under the IDEA, “a school district must ‘identify and evaluate all students who are reasonably suspected of having a disability under the statute[.]’ This implicitly requires that districts identify students ‘within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability. But ‘a school’s failure to diagnose a disability at the earliest possible moment is not *per se* actionable, in part because some disabilities are notoriously difficult to diagnose and even experts disagree about whether [some] should be considered a disability at all.’ ‘In sum, schools need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities, especially at a time when young children are developing at different speeds and acclimating to the school environment.’” *K.A.B. ex rel. Susan B. v. Downingtown Area School Dist.* 2013 WL 3742413, 5 (E.D.Pa. July 16, 2013), quoting *D.K. v. Abington School Dist.*, 696 F.3d 233, 249-25 (3rd Cir. 2012). *See, also, e.g., G.G. ex rel. Gersten v. District of Columbia*, 924 F.Supp.2d 273, 279 (D.D.C.2013). (School is obligated to evaluate a student once that student is suspected of having a disability.)

The Parents’ contention in this case that DCPS should have considered evaluating Student at the beginning of the 2012-2013 school year is not supported by the evidence.

At his prior school, Student was not receiving special education services. He had been placed in regular education and, according to Parent 1, had been on grade level. The Parents, who had obtained an extremely comprehensive battery of independent evaluations of their son before enrolling him at City Elementary School 1, did not request that he be evaluated for special education eligibility until late February 2013. Classroom teacher reported that although Student initially had a difficult transition when he started at City Elementary School 1, he had made some progress academically in the fall of 2012. City Elementary School 1 convened a Student Support Team (SST) meeting in October 2012 to develop interventions to help Student build friendships and to vocalize his feeling without resorting to oppositional behaviors. In January 2013, the Parents reported to Student's neurologist at Neurology Clinic that Student was doing well at City Elementary School 1.

After the Parents requested that Student be evaluated for special education, DCPS completed the evaluations, and Student was determined eligible, within three months, well within the time limits set by District law. *See* D.C.Code § 38–2561.02(a) (“DCPS shall assess or evaluate a student who may have a disability and who may require special education services within 120 days from the date that the student was referred for an evaluation or assessment.” *Id.*) In compliance with the IDEA, the City Elementary School 1 IEP team timely developed Student's initial IEP on June 28, 2013. *See* 34 CFR § 300.323(c)(1) (Public agency must ensure that a meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services.) I conclude, therefore, that the evidence does not establish that DCPS denied Student a FAPE by failing to timely find him eligible for special education services or by failing to timely develop his initial IEP.

2. – Is DCPS’ October 16, 2013 IEP inappropriate because it does not provide Student a self-contained setting in “Specials” classes and at lunch and recess?
 - Did DCPS deny Student a FAPE by failing to permit the Parents to have meaningful participation in the IEP development/placement decision making process?

The Parents next contend that DCPS’ October 16, 2013 IEP was inappropriate for Student because it did not specify that Student would be provided Specials classes in an outside general education setting or that Student would not interact with nondisabled peers at lunch and recess. The Parents also argue that they were denied the right to participate fully in the IEP development process, because the site location was decided by the DCPS LOS team instead of the IEP team.

- i. Appropriateness of October 16, 2013 IEP

In *K.S. v. District of Columbia*, 962 F.Supp.2d 216 (D.D.C.2013), U.S. District Judge Boasberg reviewed case law precedents on the requirements for an appropriate IEP:

The IEP must be formulated in accordance with the terms of IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 204, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. *See* [20 U.S.C.] § 1412(a)(5)(A). . . . IDEA provides a “basic floor of opportunity” for students, *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034, rather than “a potential-maximizing education.” *Id.* at 197 n. 21, 102 S.Ct. 3034 . . .

Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so”; thus, “the court judges the IEP prospectively and looks to the IEP’s goals and methodology at the time of its implementation.” Report² at 11 (citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)). . . .

² U.S. Magistrate Judge Kay’s Report and Recommendation, June 10, 2013

An IEP, nevertheless, need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. Dist. of Columbia*, 238 F.Supp.2d 127, 139 (D.D.C.2002) (IDEA does not provide for an "education . . . designed according to the parent's desires") (citation omitted). While parents may desire "more services and more individualized attention," when the IEP meets the requirements discussed above, such additions are not required.

K.S., 962 F.Supp.2d at 220-222.

In this case, the Parents claim that the October 16, 2013 IEP was inappropriate because it did not provide for Student's Specials classes (physical education, art, music and library) to be provided in an outside of general education, self-contained, setting. In my Findings of Fact, I have found to the contrary that the IEP required that all of Student's academic courses be provided outside general education. As City Elementary School 2 Principal testified, art, music, library and physical education are academic subjects. The Parents also contend that the IEP should have required that Student be segregated from his nondisabled peers for lunch and recess. However, the Parents' expert, Psychotherapist, testified that at the October 16, 2013 IEP meeting, she had emphasized the importance of Student's being with positive (non-disabled) role models during lunch and recess. *See Exhibit P-87, p. 39.* ("I actually think pulling him out of anything is detrimental to him. I think he needs to be with kids and have consistency as much as he possibly can, given his trauma history.") City Elementary School 1 Principal also testified that Student "thrived" at lunch and recess with non-disabled peers and really enjoyed those times. I find, therefore, that the Parents have not shown that lunch and recess in a self-contained setting was the least restrictive environment for Student or that the October 16, 2013 IEP was inadequate for not providing for lunch and recess in the outside of general education setting.

ii. Parents' Participation in Development of IEP

The IDEA requires that for all IEP team meetings, the education agency take steps to ensure that the parent is present or is afforded the opportunity to participate. *See* 34 CFR § 300.322(a). Conduct by the district that seriously infringes upon a parent's opportunity to participate in the IEP formulation process will result in a denial of a FAPE. *See, e.g., A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C.2005). Although the Parents, as well as their attorney, Educational Consultant and expert neuropsychologist, all were active participants in the October 16, 2013 IEP meeting, the Parents contend that their opportunity to participate was unlawfully circumscribed because, under DCPS procedures, it was left to the DCPS LOS team to identify a site to implement the IEP and Student's IEP team was excluded from that process.

The IDEA requires parental involvement regarding any decisions “on the educational placement of their child.” *See Aikens v. District of Columbia*, 950 F.Supp.2d 186, 190 (D.D.C. 2013), citing 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(a)(1), 300.327. It appears to be unsettled in this jurisdiction whether DCPS' delegation of site selection to its LOS team comports with the requirements of the IDEA for parental involvement in placement decisions. *See, e.g., Aikens v. District of Columbia*, 950 F.Supp.2d 186, 191 (D.D.C.2013) (“[E]ducational placement refers to ‘the classes, individualized attention and additional services a child will receive—rather than the ‘bricks and mortar’ of the specific school.” *Id.*, citing *T.Y. v. N.Y.C. Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir.2009); *James v. District of Columbia*, 949 F.Supp.2d 1343 (D.D.C.2013) (“While the IDEA requires a student's parents to be part of the team that creates the IEP and determines the educational placement of the child, it does not explicitly require parental participation in site selection.” *Id.* at 138, citation and

internal quotation omitted.) *But see Eley v. District of Columbia*, 2014 WL 2507937, 11 (D.D.C. Jun. 4, 2014) (Location where educational services are to be implemented is a vital portion of a student’s educational placement.)

It is not necessary to decide in this case whether DCPS’ delegation of site selection to its LOS team is permitted by the IDEA, because I find that the Parents were involved in the initial IEP placement decision for Student. DCPS notified the Parents on November 7, 2013 that Student would receive his special education services at City Elementary School 2. The Parents and their Educational Consultant were allowed to visit the school and observe the proposed program. When the Parents objected to the location, a subsequent IEP meeting was convened on November 20, 2013, where the Parents expressed their concerns. Although at the end of the meeting, DCPS refused to change the proposed location and the Parents rejected the site, I find that DCPS complied with the IDEA’s requirement to involve the Parents in this placement decision. *Cf. T.Y., supra*, 584 F.3d at 420 (“The parents’ actions suggest that they seek a “veto” over school choice, rather than “input”—a power the IDEA clearly does not grant them.” *Id.*)

3. Did DCPS deny Student a FAPE by failing to propose an appropriate placement and/or location of services that can implement his October 2013 IEP?

DCPS proposed only City Elementary School 2 to implement Student’s October 16, 2013 IEP.³ The Parents contend that this location was inappropriate because it did

³ On December 11, 2013, DCPS offered the Parents City Elementary School 3 as an “alternative Location of Service.” However Parent 1 testified, without rebuttal, that the Special Education Coordinator at City Elementary School 3 told him that the program was not 100 percent outside of general education and that, after initially inviting the Parents to visit City Elementary School 3 and “take a look,” DCPS withdrew its invitation. DCPS offered no evidence at the due process hearing about the City Elementary School 3 program or whether it was capable of implementing Student’s IEP. I find from the preponderance of the evidence that City Elementary School 3 was not

not offer full-time outside of general education programming and because Student's placement in a class of younger children, with much lower academic and functioning levels, was not suitable. DCPS maintains that the K-2 program at City Elementary School 2 was capable of implementing Student's IEP and that the IDEA does not require placement of a child with a disability in a class with children of the same age or at a similar level of functioning.

After Student's IEP was revised on October 16, 2013, DCPS was required to offer Student a placement capable of implementing the IEP. *See O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 53 (D.D.C.2008) (DCPS is required to offer the student "placement in a school that can fulfill the requirements set forth in the IEP.") The K-2 program at City Elementary School 2 offered only general education instruction for "Specials" classes – physical education, art, music and library. For these courses, Student would have been placed, for one hour each day, in a general education classroom of 20 to 24 children. Clearly this did not meet the October 16, 2013 IEP's requirement to provide Student instruction in an outside of general education setting in all academic courses. In addition, when Petitioners' expert, Educational Consultant, visited City Elementary School 2 to observe the class, one of the special education teachers told her that Student would be socially, emotionally and academically out of place with the younger, lower functioning, children in the program. I find that the assignment of Student to City Elementary School 2 did not fulfil the requirements for outside of general education programming in Student's IEP and that the offered program was not "sufficient to meet the educational needs of the student." *See A.M. v.*

offered by DCPS as a school capable of fulfilling Student's IEP needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991) (DCPS' obligation to match child with school capable of fulfilling child's educational goals and requirements.)

District of Columbia, 933 F.Supp.2d 193, 203 (D.D.C.2013).

Reimbursement for Unilateral Private School Placement

The Parents seek reimbursement from DCPS for their expenses for Student to attend Nonpublic School from January 2014 through the end of the 2013-2014 school year. In his decision in *K.E. v. District of Columbia*, 2014 WL 242986 (D.D.C. Jan. 23, 2014), U.S. District Judge Walton explained the circumstances under which parents must be reimbursed for private school expenses:

Under the IDEA, parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Florence Cnty. Sch. Dist. 4 v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284, (1993) (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,” 34 C.F.R. § 300.148(c) (2012); *see also Florence Cnty.*, 510 U.S. at 15, 114 S.Ct. 361 (parent may only receive tuition reimbursement “if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act”); *Holland v. District of Columbia*, 71 F.3d 417, 420 n. 3 (D.C.Cir.1995) (noting that the circuit has ordered reimbursement “where the public agency violated [the IDEA] and the parents made an appropriate placement”).

K.E., 2014 WL 242986 at 5.

In this decision, I have found that DCPS denied Student a FAPE by failing to offer him a suitable school location that was capable of implementing the placement requirements of Student’s October 16, 2013 IEP. The Parents have therefore established the first condition, failure to make FAPE available, required for reimbursement. With regard to the second requirement for reimbursement, 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.” *See Florence County, supra*, 510 U.S. at 11, 114 S.Ct. 361. A finding that a private placement is proper “is not

solely dependent on a determination that the private placement is an appropriate placement, but rather is informed based on a factual analysis of all of the events that lead to the selection.” *K.E., supra* at 9 (citing *Maynard v. District of Columbia*, 701 F.Supp.2d 116, 124–25 (D.D.C.2010)).

The evidence, both objective and subjective, in this case is undisputed that Student is receiving educational benefits from Nonpublic School. Notably, Educational Consultant, who observed Student in March and June 2014, reported that Student was composed, exhibited a calm demeanor, was productive, communicative and actively involved in learning. She opined that Nonpublic School is appropriate for and beneficial to Student. The Director from Nonpublic School likewise testified that Student is “doing a great job” at Nonpublic School and is benefitting from the program. Parent 1 testified that Student is making progress on Nonpublic School and is happy about the learning process.

Counsel for DCPS argues that Nonpublic School is not the least restrictive environment for Student. DCPS is correct that the Hearing Officer may consider whether Nonpublic School was the least restrictive environment in evaluating whether the Parents’ private placement was proper. *See N.T. v. District of Columbia*, 839 F.Supp.2d 29, 35 n.3 (D.D.C.2012). However, in this case, Student’s DCPS IEP team determined that he required all of his academic instruction in an outside-of-general education setting. DCPS has not identified any other school, public or private, that was capable of implementing Student’s IEP in a setting less restrictive than that of Nonpublic School. Finally, I note that Nonpublic School has been approved by OSSE as meeting federal and District standards to serve the educational needs of DC students. I conclude therefore that Student’s placement at Nonpublic School is proper and

appropriate under the U.S. Supreme Court's *Carter* criteria and that the Parents should be reimbursed by DCPS for covered tuition and related services expenses.

Placement for the 2014-2015 School Year

Parents also request that I order DCPS to fund Student's continued enrollment at Nonpublic School for the 2014-2015 school year. Although the [LEA] must pay for private school placement "[i]f no suitable public school is available[,] . . . if there is an appropriate public school program available . . . the [LEA] need not consider private placement, even though a private school might be more appropriate or better able to serve the child." *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34 (D.D.C.2012), quoting *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991). In this case, there was no evidence that DCPS is unwilling to identify a suitable public school for Student for the 2014-2015 school year. Because this decision will be issued several weeks prior to the new school year, there remains sufficient time for DCPS to offer a suitable location that would be able to implement the requirements of Student's IEP, which must include all academic instruction in an appropriate outside general education setting. Accordingly, I will deny, without prejudice, the Parents' request that DCPS be ordered to fund Student's enrollment at Nonpublic School for the next school year and I will order DCPS to offer Student a suitable location of services, that is capable of implementing his October 16, 2013 IEP, within ten business days of this decision.

ORDER

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

ORDERED:

1. DCPS shall promptly reimburse Parents for Student's tuition expenses and all covered related services and costs for his attendance at Nonpublic School from January 2014 through the end of the private school's 11-month 2013-2014 school

year program;

2. Petitioners' request for an order for DCPS to fund Student's enrollment at Nonpublic School for the 2014-2015 school year is denied without prejudice. DCPS is ordered to offer Student a suitable location of services, capable of fulfilling the requirements of the October 16, 2013 IEP, no later than August 8, 2014; and

All other relief requested by Petitioners herein is denied.

Date: July 25, 2014

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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