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OSSE  
 Office of Dispute Resolution  
 May 18, 2016

**Confidential**

Parent on Behalf of Student <sup>1</sup> ,  Petitioner,  v.  District of Columbia Public Schools (“DCPS”) [LEA}  Respondent.  Case # 2016-0052  Hearing Officer: Coles B. Ruff, Esq.  Date Issued: May 18, 2016	<b>HEARING OFFICER’S DETERMINATION</b>  Hearing Dates:    May 10, 2016 &    May 11, 2016  <u>Representatives:</u> Counsel for Petitioner: Alana Hecht, Esq. Disability Law Group, P.C. 37 Florida Avenue, NE Suite 700 Washington, D.C. 20002  Counsel for Respondent LEA: Daniel McCall, Esq. Office of the General Counsel District of Columbia Public Schools 1200 First Street, NE, 10 <sup>th</sup> Floor Washington, D.C. 20002
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<sup>1</sup> Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to

## **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 May 10, 2016, and concluded on May 11, 2016, 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 2006.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student is age \_\_\_\_\_ and in grade \_\_\_\_\_.<sup>2</sup> During school year (“SY”) 2014-2015 the student attended a District of Columbia Public Schools (“DCPS”) [REDACTED] school (“School A”). The student was found eligible for special education and related services pursuant to IDEA at School A on May 28, 2015, with a disability classification of specific learning disability (“SLD”).

On June 17, 2015, DCPS developed an individualized educational program (“IEP”) for the student. DCPS proposed to implement the student’s IEP at School A. The student’s parent (“Petitioner”) notified DCPS that she disagreed with the IEP and the proposed placement at School A, and that she would be unilaterally placing the student at a private special education school located in the District of Columbia (“School B”) for SY 2015-2016.

On March 4, 2016, Petitioner filed the due process complaint alleging, inter alia, the IEP and placement DCPS developed and proposed on June 17, 2015, are inappropriate. Petitioners seek as relief that the Hearing Officer finds DCPS denied the student a Free Appropriate Public Education (“FAPE”). Petitioner requests an order requiring DCPS to reimburse the parent for the tuition and costs she incurred for the student’s placement at School B. Petitioner requests that the Hearing Officer order DCPS to place and fund the student at School B through the remainder of SY 2015-2016 and revise the student’s IEP consistent with the services provided the student at School B.

On March 14, 2016, DCPS filed a timely response to Petitioner’s complaint in which it denies that it failed to provide the student with a FAPE. DCPS contends the student’s June 17, 2015, IEP was reasonably calculated to provide the student with educational benefit. DCPS contends that the student’s IEP can be implemented at School A, his neighborhood school, and that the placement proposed is appropriate and is the student’s least restrictive environment (“LRE”).

The parties participated in a resolution meeting on March 18, 2016, did not resolve the complaint and did not mutually agree to directly proceed directly to hearing. The 45-day period began on April 4, 2016, and ends [and the Hearing Officer’s Determination (“HOD”) is due] on May 18, 2016.

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<sup>2</sup> The student’s current age and grade are in indicated in Appendix B.

The Hearing Officer convened a pre-hearing conference (“PHC”) on the complaint on April 1, 2016, and issued a pre-hearing order (“PHO”) on April 6, 2016, outlining, inter alia, the issues to be adjudicated.

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

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP in June 2015 because:
  - a. The hours of specialized instruction and the setting of special education were insufficient to meet the student’s needs;
  - b. It fails to specify information about the student’s placement, including that the LRE was a separate special education day school;
  - c. The goals on the IEP were not comprehensive or sufficient to meet the needs of the student, including in the areas of phonic awareness/ reading remediation, social skills instruction, word retrieval, the use of assistive technology, executive functioning, sustaining/building attention and focus, the use of organizers and maps, pre-writing skills, and spelling skills.
  
2. Whether DCPS denied the student a FAPE by failing to offer the student an appropriate educational placement in June 2015 because:
  - a. no educational placement was ever offered to the student, or in the alternative,
  - b. the educational placement offered lacked:
    - i. the ability for the student to be educated in an environment that did not include non-disabled peers;
    - ii. integration of related services into the classroom;
    - iii. a focus on social skills training, executive functioning; building and sustaining concentration and focus;
    - iv. an avenue for the student to work on speech and language deficits (i.e. word retrieval);
    - v. appropriate assistive technology for the student;
    - vi. a program designed to address the student’s need for remediation/phonics and,
    - vii. the highly structured setting DCPS recommended in its evaluation of the student.
  
3. Whether DCPS denied the student a FAPE such that Petitioner’s unilateral placement of the student at the School B requires that DCPS provide Petitioner with reimbursement of the school tuition and related education costs, including transportation.

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

## **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 43 and Respondent DCPS's Exhibits 1 through 12) that were admitted into the record and are listed in Appendix A.<sup>4</sup> Witnesses are listed in Appendix B.

## **FINDINGS OF FACT: <sup>5</sup>**

1. During SY 2013-2014, while attending a DCPS ██████████ the student was operating below grade level and DCPS provided him interventions. The student made some academic growth, but by the end of SY 2013-2014 he was still operating far below expectations for his grade level in reading and math. Consequently, his teacher suggested that he be retained. (Petitioner's Exhibit 3-6)
2. Petitioner obtained an independent psycho-educational assessment of the student on June 20, 2014. The evaluator assessed the student's cognitive and academic functioning. His cognitive functioning was average. His reading skills were at kindergarten level except for his reading fluency, which was below kindergarten level. In general, the student was able to identify the individual sounds that letters make and to read some sight words. However, he was unable to read simple sentences or sound out letter blends. He also had difficulty decoding nonsense words. (Petitioner's Exhibit 9-1, 9-2, 9-3, 9-4, 9-5, 9-6)
3. The student's written language functioning was at first-grade level except his writing fluency, which was at kindergarten level. The student's math functioning was at low first-grade level except math fluency, which was at kindergarten level. (Petitioner Exhibit 9-6, 9-7)
4. Petitioner enrolled the student at a private school at the start of SY 2014-2015, hoping to provide him a lower teacher-to-student ratio to address his academic deficits. However, because of Petitioner's concern that the student was physically harmed at the school, she withdrew him from the private school and in December 2014 enrolled him in School A, a different DCPS school than he had previously attended. (Parent's testimony)
5. In December 2014 Petitioner provided School A with a copy of the student's June 2014 independent psycho-educational assessment and requested a meeting to review the evaluation and discuss interventions and additional testing for the student to determine why he was not showing academic progress. (Petitioner's Exhibit 1-13, 1-18).

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<sup>4</sup> Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

<sup>5</sup> The evidence (documentary and/or testimony) that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. 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.

6. In early January 2015 Petitioner raised her concerns to School A staff about the student being bullied by other School A students. (Petitioner's Exhibit 1-15, 1-16, 1-17)
7. On January 29, 2015, School A convened a team meeting to review the student's independent assessment and discuss Petitioner's concerns about the student's academic performance and her request for additional testing. Petitioner, the student's classroom teacher, the school psychologist, a special education teacher, a reading specialist and the school principal participated in the meeting. The team discussed the student's reading, spelling and math skills and concluded the student would be provided interventions for at least six weeks before evaluations would be conducted. (Petitioner's Exhibit 10-1, 10-2, 10-3)
8. On February 26, 2015, School B convened an initial meeting to review the student's current performance and a plan for interventions that would be provided over the next few weeks. (Petitioner's Exhibit 11)
9. On March 25, 2015, School B prepared an analysis of existing data ("AED") and on March 26, 2015, convened a meeting with the parent to review the results of the interventions that had been provided the student and review the AED. The team concluded that additional evaluations would be conducted, and Petitioner signed a consent form for the evaluations. (Petitioner's Exhibits 12, 13, 14)
10. In April and May 2015 DCPS conducted a comprehensive psychological evaluation, an occupational therapy ("OT") assessment and a speech and language evaluation. (Respondent's Exhibit 1, 2, 3)
11. The OT evaluation report noted the student had below-average visual motor skills, low average visual perceptual skills, required a one-to-one ratio to complete tasks, and had difficulties maintaining focused attention for task completion. The report made the following recommendations, among others: modified written classwork through the use of handouts, a construction paper screen, decreased visual clutter, several other classwork modifications, preferential seating and simplified directions. (Respondent's Exhibit 2-9, 2-10)
12. On May 6, 2015, DCPS completed a speech and language evaluation. During the assessment, the student could follow 1 to 3 step directions, adequately describe his wants and needs and made appropriate social interaction. However, the student had difficulty understanding nonverbal cues and body language of others. The speech language pathologist determined the student's expressive and receptive language and vocabulary scores were within normal limits and concluded, pursuant to DCPS guidelines, that the student did not qualify for speech language services. However, she recommended strategies to foster the student's continued language development. (Witness 5's testimony, Respondent's Exhibit 3-4, 3-5)

13. Petitioner engaged the services of an independent educational consultant who, in May 2015, prepared an educational evaluation of the student assessing his cognitive and academic functioning, reviewing his educational records, and conducting a classroom observation. The consultant prepared an evaluation report dated May 30, 2015, that included several recommendations. (Petitioner's Exhibit 15)
14. The parent's educational consultant observed the student at School A in April 2015. During the observation the student exhibited avoidance behaviors--getting up and walking around, impulsivity and distractedness. (Witness 3's testimony)
15. In conducting her evaluation, the DCPS psychologist reviewed the 2014 independent psycho-educational assessment and the consultant's educational assessment; conducted teacher, parent and student interviews; performed or a classroom observation; and assessed the student's cognitive, academic and behavioral functioning. The student's cognitive functioning was average. His academic functioning was below average in math, reading and written language. The student was unfocused, wandering the classroom during the psychologist's observation. (Witness 6's testimony, Respondent's Exhibit 1-1, 1-2, 1-3, 1-4, 1-5, 1-12, 1-13)
16. The DCPS psychologist recommended that the student be provided specialized instruction due to his below-average scores in reading, mathematics and written expression. The evaluator also recommended, among other things, that the student be provided a well-structured learning environment that is carefully planned and consistently implemented in terms of physical arrangement, schedule of activities and expected behaviors. (Witness 6's testimony, Respondent's Exhibit 1-13)
17. During SY 2014-2015 at School A, the student was consistently operating below grade level and required significant prompting in work habits and personal and social skills. He did not perform well on assignments and made little if any progress. Because of his poor performance, the student felt humiliated and demoralized and began to hate school. (Parent's testimony, Petitioner's Exhibits 4-5, 4-6, 4-7, 6)
18. On May 28, 2015, DCPS convened an eligibility meeting. Petitioner and her educational consultant participated. The team determined the student was eligible for special education and related services with the disability classification of SLD and agreed to reconvene to develop the student's IEP. (Respondent's Exhibit 5)
19. The School A special education teacher conducted preliminary screening of the student including sight word, spelling and math assessments to obtain baseline data to include in the AED and to prepare the academic portions of the draft IEP. (Witness 4's testimony)
20. The hours of specialized instruction proposed in the draft IEP were derived using a matrix the DCPS central office created that considers a student's performance and growth in specific areas. Using this matrix and the data on the student, the special education teacher along with the School A special education coordinator ("SEC") determined the

number of hours of specialized instruction that the student required. (Witness 4's testimony)

21. Prior to the IEP meeting, School A provided Petitioner and her educational consultant a draft of the student's proposed IEP. The consultant provided DCPS written comments and suggested changes to the draft IEP. (Petitioner's Exhibit 25)
22. The consultant recommended, among other things, that DCPS add assistive technology in order for the student to access fluency programs in math and reading, and that the student have access to word prediction software and audio books. The consultant recommended additional goals be added to the student's IEP in the area of mathematics, and raised concerns about goals needed to address the student's deficits in reading and phonics, as well as in his social and emotional functioning. (Witness 3's testimony, Petitioner's Exhibit 25)
23. On June 17, 2015, DCPS convened an IEP meeting. Petitioner and her educational consultant participated. The School A special education teacher facilitated the IEP meeting and presented the sections on reading, writing and math. The team reviewed the consultant's comments and suggestions and each of the goals were discussed and agreed to by the team in the areas of math, reading and written expression. However, all of the changes in the goals that the consultant requested were not made because the DCPS team members believed the concerns or targeted skills in those suggested changes were addressed in other goals or areas of the IEP. (Witness 4's testimony, Witness 7's testimony, Respondent's Exhibits 6-1, 7-1, 7-2, 7-3)
24. The DCPS psychologist as a member of the team determined that the student has a specific learning disability in letter and word recognition, reading comprehension, math word problems, written expression and spelling. A goal was included in the student's IEP for every area of concern mentioned in the DCPS psychologist's evaluation. (Witness 6's testimony)
25. The DCPS team believed that existing programs in the school would cover math fluency and, because the text would be read to the student, there was no need for him to use audio books. Word-prediction software exists on school computers that could be used to help the student develop sentences; therefore, the DCPS team members did not believe it was necessary to place specific software in the student's IEP. The DCPS team members believed the student's needs could be met with the programs and resources available to the student at School A and there was no need for assistive technology ("AT") in the student's IEP. There was no request made at the meeting that an AT evaluation be conducted. (Witness 4's testimony)
26. The team addressed the word retrieval concern in the student's reading goals. The student's social skill development was addressed with emotional and behavioral support goals. The IEP included strategies to assist student with focus and attention. The student's IEP includes classroom aides and services, including, but not limited to,

frequent breaks and priority seating, reduced visual clutter and increased white space. (Witness 4's testimony, Respondent's Exhibit 6-15)

27. Petitioner's consultant wanted executive functioning addressed in the OT portion of the IEP. The DCPS team members believed this was addressed with the classroom aids and services, specifically the use of maps, graphic organizers and VIN diagrams, and other items being added to the accommodations page of the IEP. (Witness 4's testimony, Respondent's Exhibit 6-17)
28. The IEP developed at the June 17, 2015, meeting prescribed the following services: 8 hours per week of specialized instruction inside general education, 6 hours per week of specialized instruction outside general education, and the following related services outside general education: 120 minutes per month of OT and 60 minutes per month of behavioral support services. The IEP also prescribed 60 minutes per month of behavioral support services inside general education. DCPS proposed to implement the student's IEP at School A. (Respondent's Exhibit 6-1, 6-15)
29. The IEP includes goals in the areas of math, reading, written expression, emotional social and behavioral development, and motor skills and physical development. There was a specific goal for behavior support to address the student's response to being "intentionally taunted, teased and harassed" by other students. (Respondent's Exhibit 6-5, 6-6, 6-7, 6-8, 6-9, 6-10, 6-11, 6-12, 6-13, 6-14)
30. The team did not discuss how the specialized instruction hours would be provided. There was no specific discussion of placement in terms of the setting in which services would be rendered except that some instruction would be provided in general education and some outside general education. (Witness 3's testimony)
31. The student's schedule as to when the services would be delivered would not have been determined until the start of SY 2015-2016. (Witness 4's testimony)
32. There was no discussion of the use of the matrix during the IEP meeting, and the matrix was not presented to the team for its review or consideration in discussing the hours of specialized instruction that the student would be provided. (Witness 4's testimony, Witness 7's testimony)
33. The IEP included a page entitled "Least Restrictive Environment" that denoted the hours of instruction and related services that would be provided to the student outside general education. This page also states the reasons the services cannot be provided in the general education setting and describes the supplemental support and services that were previously attempted in a general education setting. (Respondent's Exhibit 6-16)
34. During the June 17, 2015, IEP meeting the consultant stated that she and Petitioner believed the student was in need of all instruction and services outside general education at a separate school and made that request to the team. (Testimony 4's testimony, Witness 7's testimony)

35. Petitioner's educational consultant felt that the student needed one-on-one instruction and appropriate services could only be provided by two private schools. School B was one the two. (Witness 3's testimony, Petitioner's Exhibit 39)
36. On July 9, 2015, Petitioner notified DCPS that she disagreed with the IEP and the student's proposed placement at School A and she would unilaterally place the student at School B. Petitioner unilaterally placed the student at School B, which he has been attending since the start of SY 2015-2016. The parent had already enrolled the student in School B's summer program. Consistent with Petitioner's letter to DCPS, the student began attending School B at the start of SY 2015-2016. (Parent's testimony, Petitioner's Exhibit 29)
37. On July 23, 2015, DCPS responded to Petitioner's letter. DCPS advised Petitioner that it had offered a FAPE: the student had an appropriate IEP and placement in his LRE and DCPS was willing to immediately implement the student's IEP at School A. (Respondent's Exhibit 10)
38. School B is a private special education school serving students from first through twelfth grades with SLD disability and/or ADHD. There is no opportunity at School B for the student to be with non-disabled peers. School B currently has between 370 to 400 students. School B's [REDACTED] division, in which the student is enrolled, has 90 students in grades [REDACTED] through [REDACTED]. School B has an OSSE certificate of approval ("COA") and annual tuition of \$43,000. Related services are billed separately. Speech/language is \$97 per hour for group therapy and \$120 per hour for individual therapy. Occupational therapy ("OT") is also \$120 per hour. (Witness 2's testimony)
39. School B's [REDACTED] division has seven classrooms with a maximum class size of fourteen students. Each classroom has one certified special education teacher, an assistant and a teaching intern. School B provides multisensory instruction and uses the common core state standards for language arts and math and research based programs in reading and math. The specialized reading programs include the following: Wilson Reading System, Wilson Foundations, and Corrective Reading. Which program School B uses for each student depends on a student's individual needs. Although School B has a reading specialist, the classroom teacher is typically responsible for providing reading and math instruction. (Witness 2's testimony)
40. At School B speech language ("S/L") therapy and OT are provided as integrated services in the classroom. Each classroom has special education teacher, and a dedicated S/L and OT provider to assist in co-planning and co-teaching a class period twice per week. There are other school-wide programs that focus on social-skills development for community building and behavior modification. There are structures and equipment available to assist with students' executive functioning and are used as appropriate depending on a student's individual needs. All students are given curriculum-based assessments to develop individual learning programs. (Witness 2's testimony)

41. School B began providing the student services from the start of SY 2015-2016 and on October 27, 2015, developed an individual learning plan (“ILP”) that prescribed that the student receive specialized instruction for 33.5 hours per week outside of general education with integrated speech and language and occupational therapy services. The ILP also prescribed 45 minutes per week of individual speech language services and 45 minutes per week of group speech language services. (Petitioner’s Exhibit 34-1)
42. Since attending School B, the student has been receiving reading remediation and integrated speech and language services delivered in the classroom. School B also recommended both individual and group speech and language therapy once per week. However, Petitioner could not afford both so group therapy was chosen. (Witness 1's Testimony)
43. School B provides the student with two reading classes per day in the form of a morning reading group and an afternoon reading class. The reading class offers one-to-one instruction using the Wilson reading program. The student has been making slow and steady progress; however, he is still far below his grade level in reading. (Witness 1's Testimony, Witness 2’s testimony)
44. When the student arrived at School B, he was virtually illiterate. He knew a handful of sight words. He has difficulty with sound manipulation, substitution, segmenting and blending sounds in words, usually developed in kindergarten. He is impacted by his dyslexia in reading and writing and is below grade level in math. He came with a handful of second grade math skills but no understanding of what he was doing with them and could neither explain nor consistently complete second-grade math problems. (Witness 2’s testimony)
45. Given the student’s learning needs across all areas, he needs the structure and support and small group sizing. School B puts the student in as small a group as possible for instruction. Even in groups of four to five, the student begins to be distracted and is distracting to other students. By contrast, in groups of two or when in one-to-one instruction, the student is focused and prepared to work. It is difficult for the student to read social situations. His social pragmatic language skills impact his interaction with peers. He needs frequent redirection in larger groups but is responsive to redirection. The student has and enjoys recess with the entire School B [REDACTED] division student body. (Witness 2’s testimony)
46. The student is now reading and decoding reading is at the pre-primer (pre-kindergarten) level. The student is not yet at the point of being able to read paragraphs and thus has to have his assignments read to him. The student also gets support in math and because of his reading difficulties has to be read math word problems. The student is responding to School B's program and is making slow but steady progress in reading, math and written expression. (Witness 1’s testimony, Witness 2’s testimony)
47. Since the student has been attending School B, he is now motivated to learn to read, has immersed himself in school and is feeling more confident. (Parent’s testimony)

48. School B staff is of the opinion that the student is not yet ready to return to a general education school. For now he needs the structure and support and small size and environment that School B can provide. In all areas he continues to require specialized instruction. (Witness 1's testimony, Witness 2's testimony)
49. School B staff believes that the student would be harmed if he had to be educated with his non-disabled peers as he still struggles with peer interactions. In the opinion of the Petitioner's educational consultant, who testified as an expert witness, the student is in his LRE at School B and the student's level of deficits can only be addressed with the manner of instruction that he is provided at School B. (Witness 1's Testimony, Petitioner's Exhibit 39-16)
50. The student's ILP identifies the student's strengths and areas of need in reading, written language, math, academic behavior/executive functioning, social behavior, and speech/language. The ILP also provided a listing of classroom and testing accommodations. There is no individualized assistive technology in the student's ILP. (Witness 1's Testimony, Witness 2's testimony, Petitioner's Exhibit 34-2, 34-3, 34-4, 34-5, 34-6, 34-7, 34-8)
51. Petitioner made her first payment to School B for the student to attend in March 2015. Since the student has been attending School B, the parent has paid School B and/or is obligated to pay School B a total of \$9,842.25 for SY 2015-2016. (Petitioner's Exhibit 31-1)
52. On May 3, 2016, School B developed an IEP for the student for next school year. He was given the K2 testing in reading and still scored in the first percentile. The student's IEP goals were based on the progress he has made and determined what he should be able to make within the next year. (Petitioner's Exhibit 42-1, 43-1)

#### **CONCLUSIONS OF LAW:**

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. <sup>6</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE 1:** Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP in June 2015 because:

- a. The hours of specialized instruction and the setting of special education were insufficient to meet the student's needs;
- b. It fails to specify information about the student's placement, including that the LRE was a separate special education day school;
- c. The goals on the IEP were not comprehensive or sufficient to meet the needs of the student, including in the areas of phonic awareness/ reading remediation, social skills instruction, word retrieval, the use of assistive technology, executive functioning, sustaining/building attention and focus, the use of organizers and maps, pre-writing skills, and spelling skills.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that the student's June 17, 2015, IEP is inappropriate because it lacks sufficient hours of specialized instruction and does not specifically indicate the student's LRE and placement on the continuum of placements.

FAPE means "special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. Â§ 1401(9); see 34 C.F.R. Â§ 300.17; DCMR 5-E3001.1.

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<sup>6</sup> The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). See 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. "The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction:" *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005), quoting *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009) ("IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.").

*Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200 (1982), the Hearing Officer must first look to whether the State complied with the procedures set forth in the IDEA, and second, whether an individualized educational program developed through the IDEA's procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. *Id.* at 206-07

The court judges the IEP prospectively and looks to the IEP's goals and methodology at the time of its implementation. *Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008); *District of Columbia v. Walker*, 2015 WL 3646779, \*6 (D.D.C. Jun. 12, 2015) (the "adequacy of an IEP can be measured only at the time it is formulated, not in hindsight.").

An IEP 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). While parents may desire "more services and more individualized attention," when the IEP meets the requirements discussed above, such additions are not required. See, e.g., *Aaron P. v. Dep't of Educ., Hawaii*, No. 10-574, 2011 WL 5320994 (D. Hawaii Oct. 31, 2011) (while "sympathetic" to parents' frustration that child had not progressed in public school "as much as they wanted her to," court noted that "the role of the district court in IDEA appeals is not to determine whether an educational agency offered the best services available"). Ultimately, a school district provides a FAPE so long as a child receives some educational benefit. *O.S. by Michael S. and Amy S. v. Fairfax County Sch. Bd.*, 115 LRP 50343 (4th Cir. October 19, 2015).

Pursuant to 34 C.F.R. § 300.115: (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. (b) The continuum required in paragraph (a) of this section must— (1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

The Hearing Officer after careful consideration concludes that the preponderance of the evidence demonstrates that the IEP DCPS developed is inappropriate because it did not prescribe sufficient hours of specialized instruction outside general education, and the student should have been provided all instruction outside general education.

The evidence demonstrates that the service hours for specialized instruction and the setting in which they would be delivered were determined prior to the IEP meeting using a matrix that was not shared with or explained to the team. Although the IEP was a draft and the services hours from the matrix could have been modified during the meeting, the evidence indicates the hours of instruction were not discussed at the meeting and the hours in the student's finalized IEP wound up being the hours that were derived from the matrix.

The evidence demonstrates that the student was operating more than [REDACTED] years behind grade level in reading and was also significantly delayed in math and written expression. At School A the student consistently demonstrated avoidance behaviors, distractedness and wandering.<sup>7</sup> The student had difficulty with non-verbal cues and reading social situations.<sup>8</sup> Consequently, the DCPS psychologist recommended that the student be placed in a well-structured learning environment that is carefully planned and consistently implemented in terms of physical arrangement, schedule of activities and expected behaviors.<sup>9</sup>

Although during SY 2014-2015 the student did not have the benefit of any of specialized instruction and behavior support services that were in the IEP DCPS developed, the student was provided interventions at School A and made little if any progress. He felt humiliated and demoralized at the end of the school year as a result of his experience at School A.<sup>10</sup> In addition, the student was bullied such that it was necessary for a specific IEP behavior support goal about bullying to be included in the IEP.<sup>11</sup> This in and of itself raises concerns for the Hearing Officer regarding whether School A was a safe learning environment that was appropriate for the student.

Although the DCPS witnesses gave their opinion that the IEP that was developed was appropriate for the student and that he would benefit from being with non-disabled peers during instruction that was not directly related to reading, writing and math, the Hearing Officer was unconvinced by this testimony, given the level of the student's deficits and the horrendously unsuccessful year he had at School A during SY 2014-2015, that the amount of specialized instruction as well as the setting in which it was to be provided was sufficient.

In addition, the evidence indicates that the specific hours of specialized instruction that was placed in the IEP was determined by a matrix DCPS uses that was not shared with the entire IEP

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<sup>7</sup> FOF # 14, 15

<sup>8</sup> FOF #12

<sup>9</sup> FOF # 16

<sup>10</sup> FOF #17

<sup>11</sup> FOF # 29

team.<sup>12</sup> Even with the intense services that student has been provided since attending School B for nearly a full academic year, with all instruction outside general education, the student has made slow but steady progress yet remains years behind in reading skills.

Consequently, the Hearing Officer concludes that the number of hours in the IEP, although they could have been increased later after the IEP was implemented at School A, were woefully insufficient at the time of the June 17, 2015, meeting, to address the student's severe academic deficits. The IEP prescribed too few hours of specialized instruction and should have prescribed all instruction outside general education. The Hearing Officer concludes that, based upon the information available to the team at the time the June 17, 2015, IEP was developed, the student's LRE should have been at least a placement where he was totally removed from general education for all instruction. This failure was a denial of a FAPE to the student.

Petitioner asserts that the student's IEP is also inappropriate because it fails to specify information about the student's placement, including an LRE of a separate special education day school, and the goals are not comprehensive or sufficient to his needs. The evidence demonstrates that the IEP's LRE page simply listed the hours of specialized instruction and related services that would be provided outside general education and reasons the services cannot be provided in the general education.<sup>13</sup>

There appears to be no express requirement under IDEA that an IEP include a determination of a student's LRE. The June 17, 2015, IEP has a page specifically entitled LRE. However, the page does not specifically state what the student's LRE is on the continuum of alternative placements. Petitioner has cited a recent case that supports her position that the lack of a LRE discussion and designation in the IEP renders the IEP defective.<sup>14</sup>

In light of the fact that the Hearing Officer has already determined that the student's IEP is

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<sup>12</sup> FOF #s 20, 30, 32

<sup>13</sup> FOF # 33

<sup>14</sup> *Brown v. District of Columbia*, 67 IDELR 169, April 13, 2016 [I]t appears that no provision of the statute or regulations, by express terms, requires that an IEP include a determination of a student's least restrictive environment and appropriate placement [along the continuum of placements]. However, the undersigned finds that the statute and regulations, read in context, in fact impose such requirement. 20 U.S.C. § 1414(d)(1)(A)(i)(V) (providing that an IEP must include "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in activities described in subclause (IV)(cc)[.]"); see also A.I. ex rel. Iapalucci, 402 F. Supp. 2d at 159 (holding that an IEP must include, among other things, a statement regarding "the child's ability to interact with non-disabled children")... In sum, given the emphasis the IDEA places on the concept of an LRE and the central role the IEP plays in the broader statutory framework, it only makes sense that -- as the Magistrate Judge concluded -- an IEP team is required to discuss a student's specific LRE and the IEP is required to include at least a brief description of it. If that were not the case, it would be very difficult to ensure that the IEP "enable[s] the child to achieve passing marks and advance from grade to grade" in the 'least restrictive environment' possible." Dixon, 83 F. Supp. 3d at 232 (quoting K.S., 962 F. Supp. 2d at 220). Perhaps more importantly, it would undermine a student and parent's right to engage in the collaborative process engineered to create an IEP "tailored to address the specific needs of each disabled student." Stein, 709 F. Supp. 2d at 70 (citing Iapalucci, 402 F. Supp. 2d at 163-64). Therefore, because the plaintiff's IEP fails to discuss his LRE, as well as appropriate alternative placements, the Court finds that his IEP is legally deficient."

inappropriate because it lacks sufficient hours of specialized instruction, the Hearing Officer further concludes in reviewing the rationale set forth in the case Petitioner has cited that the June 17, 2015, IEP is also further defective because it did not adequately set forth the student's LRE along the continuum of alternative placements.

Petitioner also asserts that the student's LRE should be a separate school. While there was significant and credible testimony that the student had difficulty with his peers while attending School A, during which he was provided no specialized education and related services, and there was testimony that even at School B the student has difficulty with instruction in groups larger than five student, there was insufficient evidence that the student cannot be with general education students at any part of a school day or in any school setting such that a separate school is necessarily his LRE.

Although the School B staff opined that the student would be harmed by being with non-disabled peers, the Hearing Officer did not credit this portion of their testimony as Petitioner's witnesses had never observed the student in an educational setting with non-disabled peers. They could only attest to the fact that the student, in an academic setting, should be in a small group, and that he has difficulty navigating social situations and reading social cues. There was testimony, however, that the student has recess with the entire School B [REDACTED] division student body. The Hearing Officer is thus unconvinced that the student could not to some degree be in a setting with non-disabled peers.

However, it is clear from the evidence that at the School A setting, the student was bullied and had difficulty with his peers and made little if any academic progress. Of the placements available for the student in this proceeding between School A or School B, it is abundantly clear to the Hearing Officer that School A is not an appropriate school placement for the student.

The Hearing Officer concludes based on the evidence presented that School B, in this instance, must be the student's prospective placement, as there were no other school placements from which to choose for the student to attend for SY 2015-2016 given that his placement at School A is inappropriate.

Although the Hearing Officer directs in the order below that the student should be placed at School B for the remainder of SY 2015-2016, whether the student's IEP for the following school year should designate a separate day school should be determined by a team based upon the student's progress as of the time a team reviews the student's IEP and placements for SY 2016-2017.

As to whether the student's IEP was inappropriate because it lacked comprehensive goals to meet his specific needs, Petitioner did not sustain the burden of proof by a preponderance of the evidence. The Hearing Officer was unconvinced by the evidence that the student's IEP goals were insufficient to meet his needs. The evidence demonstrates that although Petitioner's consultant preferred that the student's word retrieval be provided with instruction and speech language therapy as is done at School B, there was equally convincing evidence that the word retrieval can be accomplished with instruction only and it is incorporated in the student's academic goals in the IEP. Similarly, the evidence demonstrates that in the IEP that was

developed on June 17, 2017, all the concerns alleged by Petitioner to be lacking were addressed, albeit not in a manner the consultant preferred, but in a manner that seasoned educators at School A had concluded could be met with by incorporating these areas in other goals, services, aides and accommodations in the IEP.<sup>15</sup>

**ISSUE 2.** Whether DCPS denied the student a FAPE by failing to offer the student an appropriate educational placement in June 2015.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS offered an inappropriate placement that did not meet the student's needs.

The "educational placement" consists of: (1) the education program set out in the student's IEP, (2) the option on the continuum in which the student's IEP is to be implemented, and (3) the school or facility selected to implement the student's IEP. *Letter to Fisher*, 21 IDELR 992 (1994).

In this jurisdiction, the educational placement is based upon the child's IEP, and the school designated by the public agency to implement the child's IEP is the location of services. *Johnson v. District of Columbia*, 2012 L 883125 (D.C.C., March 16, 2012). The school district is not required to maximize or provide the best program; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit the child to benefit from the instruction. *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982).

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision (1) is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; (2) is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA that mandate that to the maximum extent possible, disabled children are to be educated with their nondisabled peers and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; (3) is determined annually; (4) is based on the child's IEP; and (5) is as close as possible to the child's home. 34 C.F.R. 300.114, 34 C.F.R. 300.116.

The IDEA only mandates a "basic floor of opportunity." *Id.*; *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995). To accomplish this, an IEP must only "be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." *Chambers v. Sch. Dist. of Philadelphia Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir. 2009) (quoting *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004)).

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<sup>15</sup> FOF #s 24, 25, 26, 27

The evidence demonstrates that at School A the student did poorly academically and had social, emotional and behavioral difficulties with his peers and was even bullied such that a goal in his IEP related to his being bullied. As the parent credibly testified, by the end of the student's year at School A he was demoralized and hated school. In addition, the placement proposed in the June 17, 2015, IEP only indicated the service hours and the setting in which the hours would be delivered, but did not describe the program the student would be attending or give any specifics that would have caused the parent to expect anything different than the experienced at School A during SY 2015-2016.

The Hearing Officer has already determined that the IEP DCPS proposed was inappropriate. DCPS proposed to implement an inappropriate IEP at a school in which the student had already been unsuccessful. Consequently, the Hearing Officer concludes that Petitioner sustained the burden of proof by a preponderance of the evidence that the placement DCPS proposed for the student to attend pursuant to the June 17, 2015, IEP was inappropriate and denial of a FAPE.

**ISSUE 3.** Whether DCPS denied the student a FAPE such that Petitioner's unilateral placement of the student at School B requires that DCPS provide Petitioner with reimbursement of the school tuition and related education costs, including transportation.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that Petitioner is entitled to reimbursement of the costs she incurred for the student attending School B during SY 2015-2016.

Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, do so at their own financial risk. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)).

Parents may receive tuition reimbursement only upon a finding that the LEA violated the IDEA, that the private school placement was an appropriate placement, and that [the] cost of the private education was reasonable[.] *Holland v. District of Columbia*, 71 F.3d 417, 425 (D.C.Cir.1995) (citing *Florence County School District Four v. Carter*, 510 U.S. at 15, 114 S.Ct. 361).

The evidence supports a finding that Petitioner was justified in unilaterally placing the student at School B at the start of SY 2015-2016. The evidence also demonstrates that School B can provide the student with educational benefit and meets the criteria the Hearing Officer is to consider in determining a prospective placement for the student for the remainder of SY 2015-2016.<sup>16</sup> *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005)<sup>17</sup> Accordingly, in

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<sup>16</sup> FOF #s 38, 39, 40, 46, 47

<sup>17</sup> "A hearing officer or court may award a prospective private placement as relief to ensure that a child receives the education required by the IDEA in the future where a balance of the relevant factors justifies such a placement. In addition to the conduct of the parties, which is always relevant in fashioning equitable relief, the following factors must be balanced before awarding such relief: the nature and severity of a student's disability; the student's specialized individual educational needs; the link between those needs and the services offered by the private school; the private school placement's costs; and the extent to which the placement represents the least restrictive

the order below DCPS is directed to place and fund the student at School B for the remainder of SY 2015-2016 and reimburse the parent for the costs she has incurred.<sup>18</sup>

**ORDER:**<sup>19</sup>

1. Within ten (10) school days of the issuance of this order DCPS shall place and fund the student at School B (The Lab School of Washington) for the remainder of SY 2015-2016.
2. Within thirty (30) calendar days of the issuance of this order DCPS shall reimburse Petitioner the costs she incurred for the student attending School B during SY 2015-2016 in an amount not to exceed \$9,842.25, contingent upon Petitioner providing DCPS proof of payment of that amount to School B.
3. Within fifteen school days of the issuance of this order DCPS shall convene an IEP meeting at School B with a DCPS representative participating and develop an IEP for the student for SY 2015-2016, consistent with the services that are currently being provided to the student at School B and paid for by Petitioner.
4. On or before August 20, 2016, DCPS shall convene an IEP meeting at School B to review the student's progress during SY 2015-2016 with a DCPS representative participating and develop an appropriate IEP for the student for SY 2016-2017 and determine an appropriate school placement and within five (5) business days of the IEP meeting issue a prior written notice regarding the IEP developed and school placement proposed.
5. All other requested relief is denied.

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environment.”

<sup>18</sup> The total amount the parent is to be reimbursed is \$9,842.25. There was no evidence of any other expenses incurred for other costs such as transportation.

<sup>19</sup> Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

**APPEAL PROCESS:**

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

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: May 18, 2016**

Copies to:      Counsel for Petitioner: Alana Hecht, Esq.  
                         Counsel for DCPS: Daniel McCall, Esq.  
                         ODR, OSSE & CHO