DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE STUDENT HEARING OFFICE 2012 AUG 14 AM 8:58

On behalf of, Parents,[1] Student, Petitioner,

Date Issued: August 13, 2012

Hearing Officer: Melanie Byrd Chisholm

v.

District of Columbia Public Schools, Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a year old male, who is currently a rising grade student attending School A. The student's current individualized education program (IEP) lists Specific Learning Disability (SLD) as his primary disability and provides for him to receive thirty (30) minutes per day of specialized instruction outside of the general education setting for mathematics, and thirty (30) minutes per day of specialized instruction outside of the general education setting for reading.[2]

On May 30, 2012, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by reducing the service hours on the student's IEP from 31.25 hours per week of specialized instruction to five hours per week of specialized instruction on his May 7, 2012 IEP; not ensuring that the IEP contained provisions to address the student's executive functioning deficits; changing the student's least restrictive environment (LRE) from a full time special education placement to a general education program; not providing a program/placement with small classes with a low student teacher ratio for all instruction, remedial math and writing instruction in addition to the grade level curriculum, extensive assistive technology (AT)

---

[1] Personal identification information is provided in Appendix A.
[2] While the student's May 7, 2012 IEP lists thirty (30) minutes per day of specialized instruction outside of the general education setting for mathematics and for reading, the Hearing Officer finds that DCPS proposed one (1) hour per day of specialized instruction outside of the general education setting for mathematics and for reading as documented in the May 7, 2012 Prior Written Notice.

integrated into delivery of the curriculum, and accommodation in a diploma granting program; concluding that the general education setting was appropriate for the student; failing to consider any potential harmful effect on the child or on the quality of services that he needs; and failing to provide an accurate and complete prior written notice on May 7, 2012.

In the May 30, 2012 Due Process Complaint, as relief for this alleged denial of FAPE, Petitioner requested, that the student's placement continue a School A pursuant to the Stay Put provision of the Individuals with Disabilities Education Act (IDEA) pending the outcome of the dispute between his parents and DCPS; that the student's be provided with a full-time IEP that gives him access to the general curriculum with small classes for all instruction, remediation in math and written language in addition to the general education curriculum in math and English, accommodations and support to address his executive functioning deficits, AT integrated into the curriculum delivery and tutoring; placement and funding at School A for the 2012-2013 school year; and reimbursement for any expenses the parents incur for the tuition for the student at School A for the 2012-2013 school year.

On June 8, 2012, Respondent filed its Response to the Complaint. In its Response, Respondent asserted that DCPS has not denied the student a FAPE by failing to develop an appropriate IEP on May 7, 2012; failing to offer the student an appropriate placement for the 2012-2013 school year; failing to give consideration to any potential harmful effect on the child or on the quality of services that the student needs in deciding that the student does not need an full time special education placement outside the general education setting; or failing to issue an appropriate prior written notice. DCPS further asserted that the student's IEP can be implemented in the general education environment at the student's neighborhood school; the student is achieving at levels that demonstrate that the student does not require a full time setting outside of the general education environment; School A is not implementing the goals and objectives in the student's IEP; School A is not an appropriate placement for the student; and the location of services is at the discretion of the public agency.

On June 15, 2012, the parties participated in a Resolution Meeting. The parties failed to reach an agreement during the meeting however agreed to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on June 30, 2012, following the conclusion of the 30-day resolution period, and ends on August 13, 2012.

On June 21, 2012, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. During the Prehearing Conference, the parties agreed that the student completed the 2011-2012 school year at School A and that the District of Columbia Office of the State Superintendent of Education (OSSE) has issued a Certificate of Approval (COA) to School A. The Hearing Officer issued the Prehearing Order on June 21, 2012. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order.

On July 9, 2012, the Petitioner filed a Motion for Stay Put Protection alleging that the parents are entitled to an order for automatic injunctive relief mandating that, during the pendency of the appeal, DCPS preserve the student's current educational placement at School A. On July 12, 2012, Respondent filed an Opposition to Petitioner's Motion for Stay Put arguing that there will be evidence presented at the hearing that School A is not implementing the student's IEP, that this proceeding will be resolved prior to the new school year which makes the motion moot and since placement refers to the services themselves and not to the location of service, petitioner's motion is without merit and should be denied. On July 16, 2012, Petitioner filed a Motion for Leave to File a Reply Memorandum to DCPS' Opposition to Petitioner's Motion for Stay Put Protection and a Reply Memorandum to DCPS' Opposition to Petitioner's Motion for Stay Put Protection.

On July 27, 2012, Petitioner filed a Prehearing Memorandum of Law. On July 27, 2012, Respondent's counsel requested clarification regarding the Hearing Officer's expectations for a Prehearing Memorandum of Law. On July 27, 2012, the Hearing Officer clarified that Prehearing Memorandums of Law were neither requested nor expected from the parties.

On July 24, 2012, Petitioner filed Disclosures including forty-four (44) exhibits and nine (9) witnesses.[3] On July 24, 2012, Respondent filed Disclosures including four (4) exhibits and two (2) witnesses.

The due process hearing commenced at approximately 9:01 a.m. on July 31, 2012 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2006. The Petitioner elected for the hearing to be closed.

Petitioner's exhibits 1-43, including Exhibit #34A, were admitted without objection. Respondent's exhibits 1-4 were admitted without objection. Prior to the parties' Opening Statements, the Hearing Officer addressed the Motion for Stay Put filed by Petitioner on July 9, 2012, specifically, the Hearing Officer denied the Petitioner's Motion for Stay Put Protection finding that stay put is an issue to be decided in the matter and that since the student completed the 2011-2012 school year at School A and the Hearing Officer Determination (HOD) is due in this matter before the beginning of the 2012-2013 school year, the issue is moot.

The hearing concluded at approximately 4:14 p.m. on August 1, 2012, following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

[3] A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

ISSUES

The issues to be determined are as follows:

1. Whether the student is entitled to the stay-put provisions pursuant to 20 U.S.C. §1415(j) and 34 CFR §300.518(a) pending the resolution of the dispute between the parents and DCPS?
2. Whether DCPS failed to provide the student a FAPE by reducing the amount of specialized instruction the student receives from 31.25 hours per week to five (5) hours per week on the student's May 7, 2012 IEP?
3. Whether DCPS failed to provide the student a FAPE by failing to include goals and objectives, accommodations and modifications and assistive technology to address the student's executive functioning deficits on the student's May 7, 2012 IEP?
4. Whether DCPS failed to provide the student a FAPE by changing the student's placement/location of services from a private day school to a general education program on the student's May 7, 2012 IEP?
5. Whether the student's May 7, 2012 IEP Team failed to consider any potential harmful effect on the student or on the quality of service that the student needs in selecting the student's placement during the student's May 7, 2012 IEP Team meeting?
6. Whether School A is an appropriate placement/location of services for the student, specifically, whether School A is the least restrictive environment for the student and whether School A is able to implement the student's IEP?
7. Whether DCPS failed to provide the student's parents with appropriate prior written notice of its proposed change to the student's educational placement during the student's May 7, 2012 IEP Team meeting and, if so, whether the failure constitutes a denial of FAPE?

FINDINGS OF FACT

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

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Petitioner's Exhibits 10, 16, 26, 36 and 41; Respondent's Exhibits 1 and 4)
2. School C is a private special education day school with a student population close to the size of School A. The student experienced anxiety at School C. (Petitioner's Exhibits 11, 12 and 13; Social Worker's Testimony; Mother's Testimony)
3. The student had a positive transfer from School C to School A at the start of the 2011-2012 school year. (Social Worker's Testimony; Mother's Testimony)
4. The student's March 14, 2011 IEP addressed the student's difficulty in interpreting social cues through seven social-emotional goals. DCPS and the parents agreed to remove these goals and behavioral support services from the student's IEP on January 12, 2012 because School A did not offer behavioral support services. (Petitioner's Exhibits 10, 16 and 17; Mother's Testimony)

5. On May 7, 2012, the student's IEP Team met to conduct a triennial review of the student's eligibility. Present at this meeting were, the parents, the School A Head of School, the School A Counselor, two of the student's School A teachers, the Progress Monitor acting as the LEA representative, the DCPS psychologist, a DCPS social worker, the School D special education coordinator, a School D general education teacher and a School D special education teacher. Representatives from School D attended because School D is the student's home school, School A could not guarantee that School A teachers would be available to attend the meeting and School A was unable to provide a certified special education teacher to attend the meeting. The teachers from School D had not taught or met the student. (Petitioner's Exhibits 24, 26 and 28; Respondent's Exhibit 1; Mother's Testimony; Counselor's Testimony; Head of School's Testimony; Progress Monitor's Testimony)
6. On May 7, 2012, the student's IEP Team reduced the hours of specialized instruction outside of the general education environment on the student's IEP from 31.25 hours per week to five (5) hours per week and changed the student's placement from a private special education day school to a DCPS public school. Following the initial proposal of five (5) hours per week of specialized instruction outside of the general education environment, DCPS increased its proposal to ten (10) hours per week of specialized instruction outside of the general education environment in an attempt to mirror the services the student was receiving at School A. (Petitioner's Exhibit 26, 27, 28 and 30; Respondent's Exhibit 1; Mother's Testimony; Progress Monitor's Testimony)
7. There was much "passionate" debate at the May 7, 2012 IEP Team meeting and the IEP Team did not agree whether School A was/was not implementing the student's IEP and whether the student was/was not successfully functioning in a general education environment. (Petitioner's Exhibit 28; Counselor's Testimony; Head of School's Testimony; Mother's Testimony; Progress Monitor's Testimony)
8. The academic goals on the student's May 7, 2012 IEP are appropriate for the student. During the May 7, 2012 IEP Team meeting, the parents did not request any additional goals on the student's IEP. (Petitioner's Exhibits 10, 16, 17, 26, 28 and 30; Respondent's Exhibit 1; Mother's Testimony; Progress Monitor's Testimony)
9. The May 7, 2012 written notice contains a description of the proposed or refused action and a description of the information used as a basis for the proposed or refused action but does not contain a description of other options considered by the IEP Team and the reason for rejecting them or a description of other factors related to the proposal or refusal. (Petitioner's Exhibit 27; Respondent's Exhibit 2)
10. The student is diagnosed with attention deficit disorder (ADD) inattentive type, a learning disorder not otherwise specified (LD-NOS) and a mood disorder, which is stabilized. The student has difficulty maintaining focus, prioritizing and recognizing important from unimportant. (Petitioner's Exhibits 36 and 41; Respondent's Exhibit 4; Social Worker's Testimony; Mother's Testimony; Evaluator's Testimony)
11. The student has a history of anxiety which is managed through medication and applying coping strategies. (Petitioner's Exhibits 36 and 41; Respondent's Exhibit 4; Social Worker's Testimony; Mother's Testimony; Evaluator's Testimony)

12. The student has a full-scale IQ of 84, which falls in the low average range. However, the student's IQ is not an adequate estimate of his overall cognitive abilities. (Petitioner's Exhibits 36 and 41; Respondent's Exhibit 4; Evaluator's Testimony)
13. The student's verbal and visual categorization and classification skills are in the high average and very superior ranges, respectively; his verbal story recall is in the high average range; his verbal fluency is in the high average range. The student's visual-motor integration skills, free recall of visual information, psychomotor speed, impulse control and cognitive flexibility are in the mild-moderate deficit to borderline ranges. (Petitioner's Exhibits 36 and 41; Respondent's Exhibit 4)
14. The student's overall reading skills are scattered, with relative strength in his reading vocabulary (low average to average ranges) and weaknesses in his single-word reading and phonics skills (borderline and low average ranges, respectively). His math skills are generally borderline, except when the student is asked to solve simple math problems as quickly as possible, where the student is in the low average range. The student's writing skills are in the low average range, except in the Written Expression test, which are in the mild deficit range. (Petitioner's Exhibits 36 and 41; Respondent's Exhibit 4; Evaluator's Testimony; Counselor's Testimony; Mother's Testimony)
15. The student is learning at the rate expected of his age. (Petitioner's Exhibit 36; Evaluator's Testimony)
16. The student is not performing on grade level in math, reading and written language however is on grade level in all other subjects. The student has difficulty with math functions and received "remedial" support for math in School A. The student also received "remedial" support in writing by being placed in a $6^{th}/7^{th}$ grade writing class. (Petitioner's Exhibits 20, 21, 22, 23, 26, 36, 39, 40 and 41; Respondent's Exhibit 1; Counselor's Testimony; Mother's Testimony; Evaluator's Testimony)
17. The student has creative ideas however his writing is disorganized, his spelling is poor, he misuses words and he does not complete sentences. (Petitioner's Exhibit 28; Respondent's Exhibit 3)
18. The student needs a small class size for math, reading and written language. (Petitioner's Exhibits 10, 26, 36 and 41; Respondent's Exhibits 1 and 4; Mother's Testimony; Social Worker's Testimony; Evaluator's Testimony)
19. The student requires the testing accommodations of small group testing, additional time on tests, frequent breaks during tests, extra time for projects, modified assignments, checking for understanding, repetition of directions, use of a calculator and use of a computer or word processor for written work. (Petitioner's Exhibits 10, 26, 36 and 41; Respondent's Exhibits 1 and 4; Mother's Testimony; Social Worker's Testimony; Evaluator's Testimony)
20. The student struggles with understanding verbal and written directions. (Petitioner's Exhibits 36, 40 and 41; Respondent's Exhibit 4; Social Worker's Testimony; Mother's Testimony)
21. The student struggles with abstract concepts within the general education curriculum. (Petitioner's Exhibits 20, 21, 22, 23 and 36; Respondent's Exhibit 4; Evaluator's Testimony)
22. The student is eager to learn, motivated, wants to be challenged academically and prefers an educational environment with a diverse student population. He is diligent

in turning in his work and ensuring that he has completed all assignments. He has a positive attitude and a strong work ethic. (Petitioner's Exhibits 12, 20, 21, 22, 23, 39, and 40; Social Worker's Testimony; Mother's Testimony)

23. The student desires to have peer relationships with students at or above his cognitive functioning level and without behavior problems. (Mother's Testimony; Social Worker's Testimony)
24. The student is easily distracted and needs a predictable and routinized schedule. (Petitioner's Exhibits 36 and 41; Respondent's Exhibit 4; Mother's Testimony; Social Worker's Testimony; Evaluator's Testimony)
25. During the 2011-2012 school year at School A, the student performed well in the general education classes of Civics, physical science, computers, art and physical education taught by general education teachers. (Petitioner's Exhibits 20, 21, 22 and 23; Head of School's Testimony; Progress Monitor's Testimony)
26. The student is able to successfully, independently travel to School A on the metro 45 minutes to one hour, one-way each day, during the standard morning rush hour. (Mother's Testimony)
27. In School A, 25% of the students do not have an identified disability. Only one other student in the student's classes during the 2011-2012 school year had an IEP. (Head of School's Testimony)
28. None of the instructional staff at School A is certified in special education. (Counselor's Testimony; Head of School's Testimony; Progress Monitor's Testimony)
29. The teachers at School A teach the State of Virginia general education curriculum. (Petitioner's Exhibit 14; Head of School's Testimony)
30. The School A program is similar to an inclusion program. (Head of School's Testimony)
31. School A enrolls no more than ten (10) students in each academic class. For nonacademic classes, School A had "no more than" twenty (20) students in physical education and up to fifteen (15) students in elective courses. (Counselor's Testimony; Head of School's Testimony)
32. School A tuition is $31,950 per year and the fee for after-school study hall is $15.00 per day. (Head of School's Testimony)
33. The student completed the 2011-2012 school year at School A. (Stipulated Fact)
34. School B is within one (1) mile of the student's house. (Mother's Testimony; Progress Monitor's Testimony)
35. School B offers an array of special education services including inclusion classes, pull-out services and self-contained classes. (Progress Monitor's Testimony)
36. School B has a computer lab and a diverse student population. (Petitioner's Exhibit 43)
37. The first day of the 2012-2013 school year for DCPS is August 27, 2012. (Stipulated Fact)

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

Issue #1

If the parent of a child receiving services pursuant to the IDEA believes his or her child's IEP or school placement is inadequate, the parent may file a "due process complaint." 20 U.S.C. § 1415(b)(7)(A); § 1415(k)(3). The IDEA regulations further provides that except as provided for placement during disciplinary appeals, during the pendency of a proceeding regarding a due process complaint, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement. *See* 34 CFR §300.518(a).

The "stay put provision" has been interpreted as imposing an automatic statutory injunction, like the automatic stay in bankruptcy. *Casey K. ex rel. Norman K. v. St. Anne Cmty High Sch. Dist.,* 400 F.3d 508, 511 (7th Cir.2005) (citations omitted). Once a due process complaint has been filed, a parent can invoke the stay-put provision when the school district proposes a change in the child's "then-current educational placement." 20 U.S.C. § 1415(j). The parent seeking the stay-put injunction "must identify, at a minimum, a fundamental change in, or elimination of a basic element of the education program in order for the change to qualify as a change in educational placement." *Lunceford v. D.C. Bd. of Educ.,* 745 F.2d 1577, 1582 (D.C. Cir. 1984). The IDEA does not define the term "then-current educational placement," but the courts have explained that a child's educational placement "falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP." *Bd. of Educ. of Cmty High Sch. Dist. No. 218, Cook Cnty., Ill. v. Ill. State Bd. of Educ.,* 103 F.3d 545, 548 (7th Cir. 1996). In the event the school district cannot provide the child with his or her then-current educational placement, the school district has an "obligation to provide a 'similar' placement, on an interim basis." *Knight ex rel. Knight v. District of Columbia,* 877 F.2d 1025, 1029 (D.C. Cir. 1989).

Typically, the dispositive factor in deciding a child's "current educational placement" is the IEP actually functioning when stay put is invoked. *See Drinker ex rel. Drinker v. Colonial Sch. Dist.,* 78 F.3d 859, 867 (3d Cir. 1996) (citations omitted); *accord Mackey v. Bd. of Educ. for the Arlington Cent. Sch. Dist.,* 386 F.3d 158, 163-64 (2d Cir. 2004); *Thomas v. Cincinnati Bd. of Educ.,* 918 F.2d 618, 625 (6th Cir. 1990). In *Laster v. District of Columbia,* 394 F. Supp. 2d 60 (D.D.Cir. 2005), Judge Ricardo M. Urbina rejected the District's contention that placing the student at his prior school was impossible due to age restrictions, and granted the guardian's

request for a stay-put injunction, ordering the District to place the student in a location providing services equivalent to the student's last agreed upon IEP. *Id.* at 65-66.

In the current matter, in the May 7, 2012 IEP Team meeting, DCPS reduced the hours of specialized instruction on the student's IEP from 31.25 hours per week to ten (10) hours per week and changed the student's placement from a private special education day school to a DCPS public school. This change is a fundamental change in the student's education program which qualifies as a change in placement. However, the Petitioners argue that the stay-put provision mandates that the student remain in School A during the pendency of the due process complaint proceedings. The fundamental flaw in Petitioner's argument is the underlying assumption that the student's "educational placement" is the physical school he attends. *Ill. State Bd. of Educ.*, 103 F.3d at 548; *see also Johnson v. District of Columbia,* 839 F. Supp. 2d 173 (D.D.C. March 16, 2012). As discussed below, the Hearing Officer finds that School A is an inappropriate physical placement for the student because School A cannot provide the student the education that meets the standards of DCPS and is unable to implement the student's IEP. The stay-put provision was not designed to keep a child in a school that cannot provide the necessary services for a student. *See Johnson v. District of Columbia,* 839 F. Supp. 2d 173 (D.D.C. March 16, 2012).

While the due process complaint was filed on May 30, 2012, prior to the conclusion of the 2011-2012 school year, the student completed the 2011-2012 school year at School A. The 45-day timeline for the Hearing Officer to issue the HOD is August 13, 2012. The DCPS 2012-2013 school year begins on August 27, 2012. Therefore, the HOD will be issued prior to the student returning to school for the 2012-2013 school year, rendering the need for the stay-put protection moot. For purposes of the stay-put provision, should it become necessary by way of an appeal by either party, the student's "then-current educational placement" is the IEP agreed to by the parties on March 14, 2011, as amended on January 12, 2012, in other words, 31.25 hours per week of specialized instruction delivered in a private special education day school similar to School A.

Issues #2, #3, #4, #5 and #6

In *Board of Education v. Rowley,* 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The Court in *Rowley* stated that the Act does not require that the special education services 'be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" Instead, the Act requires no more than a "basic floor of opportunity" which is met with the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 200-203. The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seg., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools,* 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

On May 7, 2012, the student's IEP Team met to conduct a triennial review of the student's eligibility. Present at this meeting were, the parents, the School A Head of School, the School A Counselor, two of the student's School A teachers, the Progress Monitor acting as the LEA representative, the DCPS psychologist, a DCPS social worker, the School D special education coordinator, a School D general education teacher and a School D special education teacher. The Progress Monitor explained that representatives from School D attended because School D is the student's home school and School A could not guarantee that School A teachers would be available to attend the meeting and School A was unable to provide a certified special education teacher to attend the meeting. It is uncontested that the teachers from School D had not taught or met the student.

There was much "passionate" debate at the May 7, 2012 IEP Team meeting, which, at one point, led to the parents leaving the meeting for approximately fifteen (15) minutes to "regain composure" and subsequently returning. The IEP Team was clearly divided in viewpoints of whether the student was/was not receiving specialized instruction at School A, whether School A was/was not implementing the student's IEP and whether the student was/was not successfully functioning in a general education environment. On one side of the debate was the parents and School A staff and on the other side of the debate was the DCPS and School D representatives. The parents and the School A staff felt as if they were not given an opportunity to contribute to the decisions made during the meeting.[4] There was also a discussion regarding whether the student did/did not continue to be eligible for special education and related services. Ultimately, the IEP Team agreed that the student continued to meet the eligibility criteria for SLD.

The student has a diagnosis of ADD, inattentive type, a language-based reading disorder, and a mood disorder, which is stabilized. Evaluators have also noted that the student has executive functioning "challenges." The student has a full-scale IQ of 84, which falls in the low average range however given the significant differences in the student's indexes, the student's IQ is not an adequate estimate of his overall cognitive abilities. For example, the student's verbal and visual categorization and classification skills are in the high average and very superior ranges, respectively; his verbal story recall is in the high average range; his verbal fluency is in the high average range. However, the student's visual-motor integration skills, free recall of visual information, psychomotor speed, impulse control and cognitive flexibility are in the mild-moderate deficit to borderline ranges. Two witnesses testified that the student is "consistent in his inconsistencies."

The student's overall reading skills showed some scatter, with relative strength in his reading vocabulary (low average to average ranges) and weaknesses in his single-word reading and phonics skills (borderline and low average ranges, respectively). His math skills were generally borderline, except for the test where the student was asked to solve simple math problems as quickly as possible, where the student scored in the low average range. The student's writing skills fell in the low average range, except in the Written Expression test, which fell in the mild deficit range.

[4] Parental participation is not an issue to be decided by the Hearing Officer in this matter.

Academically, the student is learning at the rate expected of his age. In other words, the student is making one year's worth of progress in one year. While the student is not performing on grade level in math and written language, the student took courses on grade level in all other subjects and received average to above average grades in classwork and projects. The student's exam grades lowered his final grade in Civics. The student has difficulty with math functions and received "remedial" support for math in School A. Specifically, the student received instruction one grade level below his current grade level in math. The student also received "remedial" support in writing by being placed in a $6^{th}/7^{th}$ grade writing class.

The student likes to be academically challenged and prefers an educational environment with a diverse student population. The student is easily distracted and needs a predictable and routinized schedule.

Student's IEP Goals, Accommodations and Modifications

The student's May 7, 2012 IEP Team reviewed the goals from the student's March 14, 2011 IEP, as amended on January 12, 2012, and agreed that the goals remained appropriate for the student. During the meeting neither the parents, School A, nor DCPS suggested any additional goals for the student. The IEP consists of goals pertaining to math, reading and written language. There is no issue before the Hearing Officer regarding the appropriateness of the academic goals on the student's May 7, 2012 IEP.

While the parents did not request additional goals during the May 7, 2012 IEP Team meeting, in the Due Process Complaint the parents argued that DCPS failed to provide the student a FAPE by failing to include goals and objectives, accommodations and modifications and assistive technology to address the student's executive functioning deficits on the student's May 7, 2012 IEP.

The Petitioner offered considerable evidence regarding the accommodations, modifications and technology inherent in School A's programming however offered scant evidence as to which of these accommodations, modifications and technology are needed for the student. For example, the Social Worker testified that the student "needs" technology but was only able to provide a partial list of technology offered at School A without being able to specifically state what technology the student uses or needs. Likewise, the Counselor, Head of School and Evaluator gave characteristics of supports in a learning disabled school environment but failed to specifically address which of the supports are necessary to address the student's unique needs. On School A's Possible Accommodations Checklist, of the nine accommodations checked for the student, five were directly related to testing accommodations (small group testing, additional time on tests, frequent breaks during tests, dictate answers on tests to writer or speech-to-text software, reader/text-to-speech software for testing), two related to checking for understanding of directions, on related to the use of a calculator and one related to the use of a word processing program for written work.

Evidence was presented which suggests that the student is in need of the accommodations/modifications of: extra time on examinations, extra time for projects, modified assignments, checking for understanding and repetition of directions. Both School A and the

student's summer tutoring program noted that the student is most comfortable working on a computer or with a word processing program.

The Social Worker testified that extended day allows the student to complete his homework so he "doesn't have to worry about it at home" and that it is helpful for the student because he has difficulty understanding directions and "may not ask his parents" for assistance. However, this is not the standard for programming within an IEP. Likewise, while the Petitioner asked for the accommodation of teacher support to track completion of assignments, the student's School A report cards and summer school reports indicate that the student is has a strong work ethic and is self-motivated to complete assignments.

The student's May 7, 2012 IEP includes the classroom and assessment accommodations of: repetition of directions, calculators, locations with minimal distractions, preferential seating, small group testing, breaks between subtests, extended time on subtests, breaks during a subtest, test administered over several days and test administered at best time of day for student. With the exception of checking for understanding of directions, use of a reader/writer or speech-to-text software and use of a word processing program, all of the accommodations specifically listed for the student in School A were included on the student's May 7, 2012 IEP. Based on the Mother's testimony regarding the student's anxiety and performance on tests, the Hearing Officer is not persuaded that School A was using the listed accommodation of reader/writer or speech-to-text software on tests for the student.

The record contained ample evidence that the student struggles with understanding verbal and written directions. The Psychologist, School A and the student's summer program noted the student's difficulty with understanding directions. While it is possible to include checking for understanding and repeat directions as accommodations for a student, the record indicates that the student requires specific assistance with understanding directions and ensuring that the student is correctly completing assignments in order for the student to be involved in and make progress in the general education curriculum. Therefore, the Hearing Officer concludes that the student's IEP needs to contain a goal related to understanding verbal and written directions. This goal needs to be addressed by teachers in all of the student's classes, most importantly, regular education classes. Specifically, the goal needs to be addressed fifteen (15) minutes per day inside of the general education environment.

Specialized Instruction

A student's IEP must contain a statement of the special education and related services and supplementary aids and services that will be provided to enable the child to advance appropriately toward attaining the annual IEP goals; to be involved in and make progress in the general education curriculum; and to be educated and participate with other children with disabilities and nondisabled children. *See* 34 CFR §300.320(4).

During the May 7, 2012 IEP Team meeting, the DCPS representatives determined that the student had been receiving instruction in a general education environment from a general education teacher and therefore only required thirty (30) minutes per day of specialized instruction in reading and thirty (30) minutes per day of specialized instruction in math since the student continued to function below grade level in these content areas. Since there was a

foundational question as to whether the student had been receiving specialized instruction and the parents continued to request 31.25 hours of specialized instruction for the student, the DCPS representatives increased its proposed specialized instruction for the student to one (1) hour per day, or five (5) hours per week, outside of the general education environment for math and one (1) hour per day, or five (5) hours per week, outside of the general education environment for reading. It was uncontested that the student requires specialized instruction outside of the general education environment in math and reading to address the student's math and reading annual IEP goals.

With regard to written language, the student has creative ideas however the student's writing is disorganized, his spelling is poor, he misuses words and he does not complete sentences. During his 8th grade year at School A, the student was in a mixed 6th and 7th grade writing class. While it is possible and, indeed, expected that all teachers, whether regular education or special education, strive to address all of a student's IEP goals, this ideal becomes less realistic in a high school environment. The student's May 7, 2012 IEP contains annual goals for written language yet the IEP contains no specialized instruction for written language. The Hearing Officer concludes that the student needs thirty (30) minutes per day, or two and one half (2.5) hours per week, of specialized instruction outside of the general education environment in written language to address the student's written language IEP goals and for the student to access the general education curriculum and receive educational benefit.

During the 2011-2012 school year at School A, in Civics the student produced quality work throughout the year although struggled with the Economics unit. In physical science, the student fully completed projects; produced a good Science Fair project, overcoming obstacles to do so; and earned a grade letter "B" in three of four quarters. The student earned a grade letter "A" in his computer class. He increased his typing speed and became "quite adept" at Office suite. In art, the student created creative projects, was conscientious and took the teacher's advice seriously. In physical education, the student earned a grade level "A" each quarter and as a final grade. The physical education teacher noted that the student improved his overall coordination and skill throughout the year and did so while being a great teammate during team activities. The student learned the sport of rugby quickly and used his speed to help his team succeed. The student's Civics, physical science, computer, art and physical education courses were taught by general education teachers pursuant to the State of Virginia general education curriculum.

The School A Head of School explained that School a teachers are general education teachers who have been trained by her to deliver specialized instruction. She further explained that the School A program mirrors instruction in inclusion programs, by offering the content expertise of a content certified general education teacher and the specialized strategies of a special education teacher with one teacher instead of the two teachers in standard inclusion programs. It is uncontroverted that the student functioned well in general education courses with general education teachers however the student's academic teachers noted that the student struggled with abstract concepts within the general education curriculum. In order to grasp these concepts, the student needed additional, individualized assistance. While the Hearing Officer declines to agree with School A that an inclusion model can be effectively implemented with one teacher, the Hearing Officer does conclude that an inclusion model is appropriate for the student

in academic courses where the student does not have specialized instruction outside of the general education environment.

While the Petitioner argued that the student is in need of 31.25 hours per week of specialized instruction outside of the general education environment, the Petitioner did not provide any evidence that the student needs specialized instruction outside the general education environment in areas other than math, reading and written language. With the exception of performance on exams in Civics, the student made suitable progress in general education courses in School A. The Hearing Officer concludes that 31.25 hours per week of specialized instruction outside of the general education environment is not appropriate for the student. The student is in need of specialized instruction outside of the general education environment in math, reading and written language and, as indicated above, specialized instruction inside of the general education environment in organizational/study skills.

Placement

The IEP is the primary vehicle for ensuring that a disabled child's educational program is individually tailored based on the child's unique abilities and needs. *See* 20 U.S.C. §1414(d); 34 CFR §§300.320-300.324. Pursuant to 34 CFR §300.116(b)(2), the child's placement must be based on the child's IEP. Placement decisions can only be made after the development of the IEP. *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 441 IDELR 178 (4th Cir. 1988). Moreover, the IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 Supp. 2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. §1412(a)(5)); 5 DCMR §3011 (2006). Children with disabilities are only to be removed from regular education classes "if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR §300.114(a)(2). The IDEA creates a strong preference in favor of "mainstreaming" or insuring that handicapped children are educated with non-handicapped children to the extent possible. *Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Ill. State Bd. of Educ.*, 184 F.3d 912, 915 (7th Cir. 1999).

On May 7, 2012, the student's IEP Team met and reduced the specialized instruction on the student's IEP from 31.25 hours per week outside of the general education setting to ten (10) hours per week outside of the general education environment and changed the student's placement from a private special education day school, specifically School A, to the student's neighborhood public school, later identified as School B. DCPS explained that the significant change in the student's specialized instruction was decided upon because School A enrolls students who have not been identified as special education students and does not have teachers certified to teach special education, therefore the student has been receiving specialized instruction in a general education environment and has displayed that he can make progress in the general education curriculum with nondisabled peers in a general education environment.

The Petitioner argued that the student is receiving specialized instruction throughout the school day at School A and that the student requires 31.25 hours per week of specialized instruction outside of the general education environment and a school which incorporates accommodations, modifications and AT to address the student's executive functioning deficits in order for him to receive educational benefit.

While School A is classified as a private special education day school, School A enrolls students who have not been identified as students with disabilities in need of special education and related services and students without IEPs. Further, School A does not have any instructional staff members who are certified as special education teachers. The teachers at School A teach the State of Virginia general education curriculum for each grade level. The Head of School testified that the grade level curriculum is then adapted to meet the needs of the students.

The Petitioner argued that the student is in need of a private special education day school because the student has difficulty reading and interpreting social cues, the student needs small class sizes and a small environment and that the student's anxiety level would hinder him from being successful in a school other than School A. The Social Worker testified that the student has difficulty reading and interpreting social cues. The student's March 14, 2011 IEP addressed these concerns with seven social-emotional goals however DCPS and the parents agreed to remove these goals and behavioral support services from the student's IEP on January 12, 2012. A student's placement must be based on his IEP. According to the Mother's testimony, the parents did not want these goals addressed on the student's IEP or supported through related services on the IEP. Additionally, the concerns noted in the March 14, 2011 IEP were not limited to nondisabled peers. In fact, the goals were written while the student attended School C, a school where the student desired to have peer relationships with students with higher cognitive functioning and fewer behavior problems.

The Petitioner further argued that the student is in need of a small school and class sizes. The Social Worker testified that the student needs a small school because "he has not been in a large school since 2nd grade" and that the student would have increased anxiety in a large school environment. The Social Worker and the Mother testified that a large school environment would not offer physical and emotional safety for the student because the student has a small physical structure and is effeminate in his mannerisms. The arguments that the student needs a private setting because he has been in one since the 2nd grade and that he is physically small and effeminate are neither convincing nor the standard for placement in an extremely restrictive setting. The student previously attended School C, a private special education day school with a student population closer to the size of School A, and experienced anxiety in that environment. The Mother also testified that a large school environment is not appropriate because the student does not like crowds. However, the student was able to independently travel to School A on the metro 45 minutes to one hour, one-way each day, during the standard morning rush hour. The Mother conceded that the metro is crowded during these times and also acknowledged that the student must learn to cope with crowds as "a part of getting through life." Therefore, absent of any other evidence, the Hearing Officer cannot conclude that a small school environment is necessary for the student to receive educational benefit.

The Petitioner also argued that the student needs no more than ten (10) students in each class. However, in School A, the student's physical education class had "no more than" twenty (20) students and up to fifteen (15) students in elective courses. The student performed very well in both his physical education and elective courses. The record indicates that the student needs a small class setting for academic subjects because he is easily distracted and requires assistance

with understanding directions and what is required for assignments. The need for a small class size in math, reading and written language is addressed by the student receiving specialized instruction outside of the general education environment. Further, the need for the student to have additional assistance with understanding directions and assignments in other academic areas is met by the student being assigned to inclusion classes where there is a smaller student to teacher ratio than non-inclusion general education classes thereby providing the structure for a teacher to check for the student's focus and understanding on assignments.

The student has a history of anxiety which is managed through medication and applying coping strategies. The Counselor testified that the student's anxiety increased when he learned that he would not be returning to School A. In order to address this anxiety, the Counselor assisted the student in performing relaxation exercises and the student was able to return to class. The Social Worker testified that the student is fearful and agitated by the possible move to School B however acknowledged that the student has been fearful and agitated by other situations in the past and was able to appropriately cope with the situation by taking a break, visualization, coaching or switching topics. The Evaluator conceded that the move from middle school to high school is a natural transition which causes anxiety for most students and any school move, regardless of grade level, would cause anxiety for most students. The student has taken a course related to the transition to high school and had a very positive transition from School C to School A.

The Petitioner presented no evidence suggesting that the student is unable to appropriately interact with nondisabled peers. In fact, while School A is geared toward students with learning disabilities, approximately 25% of School A's population are students without a diagnosis of a disability and only one of the student's classmates at School A had an IEP. In School A, the student's Civics, physical science, computer, art and physical education courses were taught by general education teachers pursuant to the State of Virginia general education curriculum. The student passed or excelled in all of these classes. The Social Worker argued that it is inappropriate for the student to interact with nondisabled peers because "other students are inconsistent" and "not nice." While the Hearing Officer acknowledges the student's need for a predictable and routinized schedule, it is improper to make an LRE determination for this student based on the inconsistencies and forecasted behavior of other students.

The Evaluator testified that a private special education day school is "desirable" for the student and would make the education program "more" accessible for the student. Likewise, the Evaluator testified that education for the student in a learning disabled school is "better than" special education in a public school. The psychologist who conducted the student's June 25, 2012 Psychological Reevaluation stated that "given the academic progress that he has made, the level and intensity of the support implemented for [the student] seem to appropriately and effectively address his educational needs." However, the psychologist who conducted the student's June 25, 2012 Psychological Reevaluation made it clear in the report that the reevaluation was conducted for the purpose of determining the student's continued eligibility for special education and related services and the evaluation was based on information from the parent, parent's private consultant and School A staff members.

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. *Id.* What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District,* 873 F.2d 563, 567 (2d Cir. 1989).

The Hearing Office acknowledges the Mother's concerns that the student will "fall through the cracks" at School B and that "systems are not in place to help him succeed." However, the Mother based these concerns on her experience with her older, typically developing son at School B. The special education program at School B is designed to provide the array of special education support that the student needs in order to help him succeed and track his individual progress. Even the School A Head of School conceded that a public school, with appropriate accommodations, would be appropriate for the student. School B is able to offer the organizational support, reading support, accommodations for reading and writing and access to technology listed as necessary accommodations by the Head of School. The Hearing Officer notes that the Head of School also listed a safe environment, which is impossible to measure, a fair behavior system, although there is no evidence that the student's behavior impedes his learning or the learning of others, and small class sizes, which is addressed above, as necessary accommodations for the student.

A private special education day school is not the LRE for the student. There is no evidence that the nature or severity of the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; that the student is unable to appropriately socialize with nondisabled peers; or that the student is unable to appropriately interact with nondisabled peers throughout the school day in academic and nonacademic activities. In fact, there is evidence that the student has been satisfactorily functioning in regular education classes with the use of supplementary aids and services. The Petitioner presented evidence that, while at School C, the student was unhappy because he was unable to socially interact with other students at his intellectual level and without behavioral disabilities. Confining the student to a private special education day school would be limiting his opportunity to develop relationships and participate in academic and nonacademic activities with his nondisabled peers. The Petitioner did not meet its burden with regard to this issue.

Harmful Effects

The Petitioner alleged that the student's May 7, 2012 IEP Team meeting did not consider the potential harmful effect on the student or on the quality of services that he needs in selecting the student's LRE. The record contains evidence to the contrary. While the IEP Team did not agree, the IEP Team's increase in specialized instruction from (5) hours per week to ten (10) hours per week was the result of the consideration of the quality of services the student needs based on the services he was receiving at School A. It was clearly DCPS' position, and genuine belief, at the IEP Team meeting that that student was receiving instruction in a general education environment so that a change from School A to School B would constitute a change the location of services for the student but not the nature of the services that the student was receiving at School A.

DCPS' change on the student's IEP from the proposed five (5) hours per week to ten (10) hours per week, as indicated in the May 7, 2012 Prior Written Notice, persuades the Hearing Officer that DCPS considered the harmful effects on the student when it attempted to create an IEP that mirrored the specialized instruction DCPS believed the student was receiving in School A. While the evidence is not overwhelming that DCPS considered the harmful effects on the student, the Petitioner did not meet its burden with regard to this issue.

Location of Services

While the Hearing Officer has concluded that a public school with 13.75 hours per week of specialized instruction is the LRE for the student, the Petitioner has also raised an issue regarding location of services. "Educational placement," as used in IDEA means the educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board,* 343 F.3d 373, 379 (5th Cir. 2003) (citations omitted); *see also, A.K. v. Alexandria City School Board,* 484 F.3d 672, 680 (4th Cir. 2007) *(citing AW v. Fairfax County School Board,* 372 F.3d 674, 676 (4th Cir. 2004)). Hence, school districts are afforded much discretion in determining which school a student is to attend. *See White, supra.* The Comments to the Federal Regulations note that "placement" refers to points along the continuum of placement options available for a child with a disability and "location" refers to the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. 71 Federal Register 46540:46588 (14 August 2006).

The Respondent argued that School A is an inappropriate location of services for the student because School A cannot provide the student the education that meets the standards of DCPS. DCPS further argued that School A is unable to implement the student's IEP because the student is not receiving the specialized instruction prescribed by his IEP because the student's teachers at School A are not certified to teach special education and that the student is not being taught outside of the general education setting.

According to the IDEA regulations, student placed in a private school by a public agency must be provided an education that meets the standards that apply to education provided by the State educational agency (SEA) and local educational agency (LEA), except for highly qualified teacher and personnel requirements. 34 CFR §300.146(b). The Petitioner argued that the IDEA definition of highly qualified special education teachers does not apply to teachers in private schools. *See* 34 CFR §300.18. While 34 CFR §300.18(h) does state that the requirements in 34 CFR §300.18 do not apply to teacher hired by private elementary schools and secondary schools, the District of Columbia does not allow the exception included within the IDEA regulations. The District of Columbia requires nonpublic special education schools or programs that serve District of Columbia students with disabilities to provide special education and related services in accordance with the student's IEP and afford the student all the rights he or she would have if served by a public agency. 5 DCMR §A-2805.1.

In fact, the District of Columbia specifically requires private school teachers teaching District of Columbia students to hold special education certifications required for public school special education teachers. Effective no later than school year 2011-2012, each member of the teaching staff at a nonpublic special education school shall hold a teaching certification from the

state or district in which the school is located, to the same level as required for teaching staff in public schools of that state or district. 5 DCMR §A-2823.2. No instructional staff members at School A hold a special education teaching certification.

Additionally, the School A Head of School testified that School A teaches a curriculum designed according to the Virginia Standards of Learning and that content taught by teachers mirrors the minimal requirements for the Virginia Standards of Learning. School A offers a Virginia History course and a Virginia Government. The District of Columbia requires that nonpublic special education school or programs that serve District of Columbia students with disabilities ensure instructional alignment with the District of Columbia's learning standards, grades, promotion, and graduation requirements. 5 DCMR §A-2805.2. School A is not teaching the student in alignment with the District of Columbia learning standards and does not offer all courses needed for the student to meet District of Columbia graduation requirements.

Moreover, in the January 12, 2012 IEP amendment, DCPS removed the social-emotional goals and behavioral support services from the student's IEP because "School A does not provide these services." The Hearing Officer finds this fact particularly disturbing. Removing services from a student's IEP because a school does not "offer" those services is in direct conflict with the purposes of an IEP and the protections of the IDEA. The fact that the parents agreed with this action does not excuse DCPS from allowing a private special education day school to tailor a DCPS student's IEP to fit the private school's program when the private school was unable to implement the student's IEP. This practice is in direct violation of 5 DCMR §A-2805.1, requiring that a nonpublic special education school provide special education and related services in accordance with the student's IEP and afford the student all the rights he or she would have if served by a public agency.

The Hearing Officer agrees with the Respondent that School A is not the LRE for the student and cannot provide the student the education that meets the standards of DCPS. Therefore, the Hearing Officer concludes that School A is an inappropriate location of services for the student.

School B is public school located within one (1) mile of the student's home. School B offers an array of special education services including inclusion classes, pull-out services and self-contained classes, a combination of which is appropriate for the student. There was no evidence presented which suggested that School B is not able to offer a predictable and routinized schedule for the student. In fact, the Psychologist conceded that a public school can offer a structured and routinized environment. The Petitioner has shown that the student needs access to computers and School B has a computer lab. Additionally, the Mother, the Social Worker and the student, during psychological testing, indicated that the student desires to be educated in a diverse environment. School B has a diverse student population. The Hearing Officer concludes that School B is an appropriate location of services for the student. The Petitioner did not meet its burden with regard to this issue.

Issue #7

The IDEA imposes strict procedural requirements on educators to ensure that a student's substantive right to a "free appropriate public education" is met. 20 U.S.C. § 1415. The IDEA

regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.

Pursuant to 34 CFR §300.503, a public agency must give written notice to the parents of a child with a disability a reasonable time before the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. The notice must include a description of the action proposed, an explanation of why the agency proposes or refuses to take the action, a statement that the parents have protections under the procedural safeguards, sources for parents to contact to obtain assistance in understanding the provisions of the IDEA, a description of other options that IEP Team considered and the reasons why those options were rejected, and a description of other factors that are relevant to the agency's proposal or refusal.

The Petitioner argued that written notice given to the parent on May 8, 2012 was not appropriate because it was "incorrect, incomplete and misleading." Specifically, the Petitioner argued that the proposed change on the written notice from 31.25 hours of specialized instruction outside of the general education environment to ten (10) hours of specialized instruction outside of the general education environment was "incorrect" because student not achieving at levels that show that the student can function in a general education curriculum, omits information from a written notice in May 2011 and does not consider meeting notes from May 2011. There is no requirement that the written notice contain information from previous written notices or meeting notes from a previous IEP Team meeting. Additionally, a parent's disagreement with the proposed change does not render the written notice "incorrect."

The Petitioner also argued that the written notice fails to list other options considered by the IEP Team and the reasons for refusal to allow the student to remain at School A. The May 7, 2012 written notice contains a description of the proposed or refused action and a description of the information used as a basis for the proposed or refused action but does not contain a description of other options considered by the IEP Team and the reason for rejecting them or a description of other factors related to the proposal or refusal. The failure of DCPS to include this required content on the written notice is a procedural violation.

However, there is no evidence that this procedural violation impeded the child's right to a FAPE. Likewise, the violation did not significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child. The parents were present at the May 7, 2012 IEP Team meeting where DCPS proposed the change in placement and the change in the provision of services to the child. While the parents testified that they were not permitted to participate in the discussions during the May 7, 2012 IEP Team meeting, that specific issue is not before the Hearing Officer. Further, the lack of the necessary elements in the written notice is not the cause of the parent's alleged lack of participation. Finally, the procedural violation did not cause a deprivation of educational benefit for the child. The student's parents filed a due process complaint prior to the end of the school year and the student completed the 2011-2012 school year at School A.

Therefore, the Hearing Officer concludes that while DCPS committed a procedural violation by not including the required content on the May 7, 2012 written notice, this procedural violation does not constitute a denial of FAPE. The Petitioner failed to meet its burden with regard to this issue.

Proposed Remedies

Petitioner met its burden in proving that ten (10) hours per week of specialized instruction is inappropriate for the student however did not meet its burden in proving that the student needs 31. 25 hours per week of specialized instruction or that School B cannot implement the student's IEP. The Petitioner met is burden in providing that the student needs goals and objectives on his IEP to address his executive functioning deficits and requires the accommodations and modifications of checking for understanding of directions, modified assignments, and use of computer or word processer in addition to the accommodations listed in the student's May 7, 2012 IEP.

With regard to the proposed accommodations and modifications specifically requested by the Petitioner at the Prehearing Conference, the Petitioner presented no evidence that the student's IEP needs to include the accommodations/modifications of: dual set of books; extra time to complete assignments; absence of block scheduling; and interactive/hands-on teaching style. The Petitioner did not prove that the student needs a small environment; teacher support to track completion of assignments; extended school day for additional instruction and tutoring; supervised study hall which includes tutoring services; or nurturing school environment.

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003). In the present matter, the Petitioner is requesting prospective relief not relief for a past harm. Therefore, an appropriate remedy is ordering DCPS to provide with necessary supports and the specialized instruction, accommodations and modifications on the student's IEP in order for the IEP to be reasonably calculated to enable the student to receive educational benefit.

ORDER

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

1. Issue #1 is **dismissed** as moot.
2. Issues #4, #5, #6 and #7 are **dismissed.**
3. Within 10 business days of the date of this Order, DCPS convene an IEP Team meeting to revise the IEP to indicate five (5) hours of specialized instruction per week outside of the general education environment for math, five (5) hours of specialized instruction per

week outside of the general education environment for reading, two and one half (2.5) hours of specialized instruction per week outside of the general education environment for written language and fifteen (15) minutes per day of specialized instruction inside of the general education environment for organizational/study skills; instruction in an inclusion environment for classes in academic areas other than math and Language Arts; develop IEP goals for the student related to organization/study skills, specifically a goal related to understanding verbal and written directions; and add the daily classroom accommodations of checking for understanding of directions, modified assignments, and use of computer or word processer to the accommodations listed in the student's May 7, 2012 IEP.

4. Within 12 calendar days of the date of this Order, DCPS arrange for the student to visit School B in order to tour the school, meet his teacher(s), visit his classroom(s), review and discuss the School B behavior expectations, identify a School B staff member as a contact for the student to assist the student throughout the school year in understanding and managing the environment, locate his locker and "run through" his daily schedule.
5. All other relief sought by Petitioner herein is **denied**.

NOTICE OF RIGHT TO APPEAL

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

Date: August 13, 2012

Melanie Byrd Chisholm
Hearing Officer