

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

Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
September 09, 2013

Parent,<sup>1</sup> on behalf of,  
Student,\*

Petitioner,

Date Issued: September 8, 2013

v.

Hearing Officer: Melanie Byrd Chisholm

District of Columbia Public Schools,

Respondent.

Case No:

Hearing Date: August 29, 2013

Room: 2004

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND PROCEDURAL HISTORY**

The student is a sixteen (16) year old \_\_\_\_\_ who is a rising 11<sup>th</sup> grade student who attended School A for the 2012-2013 school year. The student's most recent individualized education program (IEP) lists Multiple Disabilities (MD) as \_\_\_\_\_ primary disability and provides for him to receive twenty-four (24) hours per week of specialized instruction outside of the general education environment, one (1) hour per week of occupational therapy outside of the general education environment, one (1) hour per week of speech-language pathology outside of the general education environment, and one and one half (1.5) hours per week of behavioral support services outside of the general education environment.

On \_\_\_\_\_, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS) alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to develop an appropriate IEP for the student; failing to include the parent in the group that made the placement decision for the student since DCPS had already predetermined that the student would return to a less restrictive environment prior to the meeting; failing to consider the harmful effects on the student when the DCPS unilaterally determined that the student should return to a less restrictive environment; and placing the student in an inappropriate placement. As relief for the alleged denials of FAPE, the Petitioner requested for the student to remain in School A for the 2013-2014 school year; for the student to remain at School A for stay-put purposes; and for DCPS to reconvene the student's

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<sup>1</sup> Personal identification information is provided in Appendix A.

\*The student is a minor.

IEP Team meeting to increase service hours to 100% outside of the general education environment.

On July 25, 2013, Respondent filed a timely Response to the Complaint. In its Response, Respondent asserted that: prior written notice was sent to the parent regarding the subject matter on June 4, 2013; the parent and the student participated in the placement meeting on June 4, 2013; the proposed placement can implement the student's IEP; location of services determination is within the discretion of the local educational agency (LEA); and the service hours on the student's IEP did not change.

On July 29, 2013, the parties participated in a Resolution Meeting and failed to reach an agreement during the meeting. During the Resolution Meeting, the parties agreed in writing that no agreement was possible. Accordingly, the parties agreed that the 45-day timeline started to run on July 30, 2013, the day after the parties agreed in writing that no resolution was possible, and ends on September 12, 2013. The Hearing Officer Determination (HOD) is due on September 12, 2013.

On August 2, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on August 2, 2013. 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 however on August 2, 2013 Petitioner informed the Hearing Officer that the Prehearing Order failed to include the parties' agreement that School A is the student's placement for stay-put purposes. On August 2, 2013, the Hearing Officer issued a Revised Prehearing Order indicating the parties' agreement that School A is the student's placement for stay-put purposes.

On August 19, 2013, Petitioner filed Disclosures including six (6) exhibits and five (5) witnesses.<sup>2</sup> On August 22, 2013, Respondent filed Disclosures including ten (10) exhibits and two (2) witnesses.

The due process hearing commenced at approximately 9:34 a.m.<sup>3</sup> on August 29, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-6 were admitted without objection. Respondent's Exhibits 1-10 were admitted without objection.

The hearing concluded at approximately 1:36 p.m. on August 29, 2013, following closing statements by both parties.

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<sup>2</sup> A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

<sup>3</sup> At 9:00 a.m., the scheduled time to begin the hearing, all parties and the Hearing Officer were present. The Petitioner's attorney requested a few minutes to speak with client prior to beginning the hearing.

## 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.

## ISSUES

The issues to be determined are as follows:

1. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP for the student on June 4, 2013, specifically by changing the student's placement from a private special education day school to a separate class in a public school and by failing to consider the harmful effects on the student in moving the student to a less restrictive environment?
2. Whether DCPS failed to provide the parent the opportunity to participate in the June 4, 2013 discussion regarding placement for the student by predetermining that the student would be placed in a less restrictive environment, and if so, whether this failure constitutes a denial of a 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. (Stipulated Fact)
2. The student is classified as a student with MD. disabilities include mild intellectual disabled (ID) and other health impaired (OHI), based on diagnosis of attention deficit hyperactivity disorder (ADHD). (Petitioner's Exhibit 1, 3, 4 and 6; Respondent's Exhibit 9)
3. The student needs to be educated in a small classroom environment and requires academic and social support. (Petitioner's Exhibits 1, 2, 3, 4 and 6; Respondent's Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9; Teacher's Testimony; School A Director's Testimony; Parent's Testimony; Progress Monitor's Testimony)
4. Since at least middle school, the student has been placed in a separate school. (School A Director's Testimony)
5. The student attended School A for the 2012-2013 school year. (Stipulated Fact)
6. In October 2012, the DCPS Progress Monitor acquired, from predecessor, a list of seven students at School A who were potential candidates to transition to a less restrictive environment. (Progress Monitor's Testimony)
7. In October 2012, the DCPS Progress Monitor and School A discussed the list of students at School A who were potential candidates to transition to a less restrictive environment. (School A Director's Testimony; Progress Monitor's Testimony)

8. In October 2012, School A agreed that it was appropriate for some of the students on the list to transfer to a less restrictive environment, believed that some of the students on the list had potential to transfer to a less restrictive environment and disagreed that it was appropriate for some of the students to transition to a less restrictive environment. (School A Director's Testimony; Progress Monitor's Testimony)
9. In October 2012, School A disagreed that it was appropriate for this student to transition to a less restrictive environment. (School A Director's Testimony)
10. Ultimately, all seven students on the list of potential students at School A to transition to a less restrictive environment did not move to a less restrictive environment. (School A Director's Testimony; Progress Monitor's Testimony)
11. The student's December 11, 2012 IEP prescribes 24 hours per week of specialized instruction outside of the general education environment, one hour per week of OT outside of the general education environment, one hour per week of speech-language pathology outside of the general education environment and one and one half hours per week of behavioral support services outside of the general education environment. (Petitioner's Exhibits 1 and 3)
12. The student's December 11, 2013 IEP includes academic goals in the areas of reading, mathematics and written expression; related services goals in the areas of speech-language, social development and motor skills/physical development; and post-secondary transition goals. (Petitioner's Exhibits 1 and 3)
13. The student's December 11, 2012 IEP indicates that the student is on a diploma track. (Petitioner's Exhibit 1)
14. During the 2012-2013 school year, the DCPS Progress Monitor conducted seven monthly observations of the student to monitor the student's level of academic, behavioral and social/emotional functioning to determine if it was appropriate for the student to transition to a less restrictive environment. (Respondent's Exhibits 1, 2, 3, 4, 6 and 7; Progress Monitor's Testimony)
15. During the Progress Monitor's monthly observations of the student during the 2012-2013 school year, the student's affect, socialization skills, communications and task behaviors were largely appropriate and consistent. (Respondent's Exhibits 1, 2, 3, 4, 6 and 7; Progress Monitor's Testimony)
16. The Progress Monitor's observation notes were uploaded into the Special Education Data System (SEDS) database. (Progress Monitor's Testimony)
17. The School A Director has access to SEDS. (School A Director's Testimony; Progress Monitor's Testimony)
18. During the 2012-2013 school year, the student was functioning approximately seven grade levels behind in mathematics, approximately five grade levels behind in reading and approximately seven grade levels behind in writing. (Petitioner's Exhibits 1, 3 and 4; Respondent's Exhibits 2, 3, 4, 6, 7 and 9; Teacher's Testimony; Progress Monitor's Testimony)
19. During the 2012-2013 school year, the student did not exhibit inappropriate behaviors. (Petitioner's Exhibits 1, 2, 3 and 4; Respondent's Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9; Teacher's Testimony; School A Director's Testimony; Parent's Testimony; Progress Monitor's Testimony)
20. During the 2012-2013 school year, the student was introverted and socially awkward. (Teacher's Testimony; School A Director's Testimony; Parent's Testimony)

21. During the 2012-2013 school year, the student participated in group sessions with the School A social worker to increase ability to recognize social cues and ask questions when necessary. (School A Director's Testimony)
22. During the 2012-2013 school year, the student made progress with recognizing social cues and asking questions. (Petitioner's Exhibit 4; Respondent's Exhibits 1, 2, 3, 4, 6, 7 and 9; School A Director's Testimony; Parent's Testimony; Progress Monitor's Testimony)
23. During the 2012-2013 school year, the student made progress in expressing dislikes in the home environment. (Parent's Testimony)
24. During the 2012-2013 school year, the student began to "listen" to eldest sibling and learned to advocate for (Parent's Testimony)
25. On February 25, 2013, DCPS convened an IEP Team meeting for the student to discuss the student's possible transition to a less restrictive environment. (Petitioner's Exhibit 2; Respondent's Exhibit 5; Progress Monitor's Testimony; Teacher's Testimony; School A Director's Testimony; Progress Monitor's Testimony)
26. Present at the February 25, 2013 IEP Team meeting were the Grandmother, the student, the Progress Monitor, the Teacher, a speech-language pathologist, the School A Director and a social worker. (Petitioner's Exhibit 2; Respondent's Exhibit 5; Progress Monitor's Testimony; Teacher's Testimony; School A Director's Testimony; Progress Monitor's Testimony)
27. During the student's February 25, 2013 IEP Team meeting, no changes were made to the student's IEP. (Petitioner's Exhibit 2; Respondent's Exhibit 5)
28. During the February 25, 2013 IEP Team meeting, School A staff members questioned whether the label of ID was appropriate for the student. (School A Director's Testimony)
29. At the student's February 25, 2013 IEP Team meeting, School A requested that a comprehensive psychological evaluation of the student be conducted to determine the appropriate disability category for the student. (School A Director's Testimony)
30. At the student's February 25, 2013 IEP Team meeting, the School A personnel stated that the student needed to "put forth effort to achieve goals" in order to transition to a less restrictive environment. (Petitioner's Exhibit 2; Respondent's Exhibit 5)
31. At the student's February 25, 2013 IEP Team meeting, the Progress Monitor stated that data supported the theory that the student would be able to succeed in a less restrictive environment with proper accommodations and modifications and that DCPS would continue to monitor the student throughout the year to ensure that was making adequate progress to determine if it would be appropriate to transition him to a less restrictive environment. (Petitioner's Exhibit 2; Respondent's Exhibit 5; Progress Monitor's Testimony)
32. At the student's February 25, 2013 IEP Team meeting, the Progress Monitor did not provide copies of observation notes to the IEP Team. (School A Director's Testimony; Progress Monitor's Testimony)
33. At the February 25, 2013 IEP Team meeting, the Parent was adamant against the student moving to a less restrictive environment and threatened legal action if DCPS recommended that the student be moved from School A. (Petitioner's Exhibit 2; Respondent's Exhibit 5; Progress Monitor's Testimony)

34. By June 4, 2013, the student had put forth serious effort in improving grades. (Petitioner's Exhibit 4; Respondent's Exhibit 9)
35. On June 4, 2013, the student's IEP Team reconvened to discuss the student's placement for the 2013-2014 school year. (Petitioner's Exhibit 4; Respondent's Exhibit 9; Teacher's Testimony; School A Director's Testimony; Parent's Testimony; Progress Monitor's Testimony)
36. The parent and the student were present at the student's June 4, 2013 IEP Team meeting. (Stipulated Fact)
37. In addition to the parent and the student, the LEA representative, special education teacher, transition coordinator, social worker, school director and speech-language pathologist were present for the June 4, 2013 IEP Team meeting. (Petitioner's Exhibit 4; Respondent's Exhibit 9; Teacher's Testimony; School A Director's Testimony; Progress Monitor's Testimony)
38. At the student's June 4, 2013 IEP Team meeting, the team reviewed the student's grades for the 2012-2013 school year, the student's academic needs, the student's social and behavioral functioning, the student's speech-language functioning and needs, the student's occupational therapy functioning and needs, the student's post-secondary transition functioning and needs and the parent's concerns. (Petitioner's Exhibit 4; Respondent's Exhibit 9)
39. At the student's June 4, 2013 IEP Team meeting, School A requested that a comprehensive psychological evaluation of the student be conducted to determine the appropriate disability category for the student. (School A Director's Testimony)
40. During the student's June 4, 2013 IEP Team meeting, no changes were made to the student's IEP goals or services. (Petitioner's Exhibit 4; Respondent's Exhibit 9)
41. At the student's June 4, 2013 IEP Team meeting, the Progress Monitor requested data from School A indicating that the student would not be successful in a less restrictive environment. (Petitioner's Exhibit 4; Respondent's Exhibit 9; School A Director's Testimony; Progress Monitor's Testimony)
42. At the June 4, 2013 IEP Team meeting, the Progress Monitor did not provide copies of observation notes to the IEP Team. (School A Director's Testimony; Progress Monitor's Testimony)
43. On June 4, 2013, DCPS Progress Monitor determined that the student would be placed in a separate classroom for the 2013-2014 school year. (Petitioner's Exhibit 4; Respondent's Exhibits 8 and 9; Teacher's Testimony; School A Director's Testimony; Parent's Testimony; Progress Monitor's Testimony)
44. On June 4, 2013, the parent and the School A staff members disagreed with the change in placement. (Petitioner's Exhibit 4; Respondent's Exhibit 9; Teacher's Testimony; School A Director's Testimony; Parent's Testimony; Progress Monitor's Testimony)
45. The student's June 2013 transcript indicates that the student is earned credit toward graduation at School A for high school Algebra I, Art and Design Foundations I, Computer Application I, English I, Environmental Science, Keyboarding, Seminar in Visual Arts, World History and Geography I: Middle Ages to Industrial Revolution, Biology I, English II, From Bach to Rap, General Music, Geometry, Integrated Mathematics, Spanish I and World History and Geography II: Industrial Revolution to the "Pre." (Petitioner's Exhibit 5)

46. During a Summer 2013 trip to the zoo, the student was able to express knowledge of animals and asked many questions. (Teacher's Testimony)
47. The student is very pleasant, well-mannered and hardworking. (Petitioner's Exhibits 1, 2, 3 and 4; Respondent's Exhibits 1, 2, 3, 4, 5, 6, 7 and 9; School A Director's Testimony; Teacher's Testimony; Progress Monitor's Testimony)
48. The student withdraws in unfamiliar settings however engages when becomes familiar with the situation. (Petitioner's Exhibits 1 and 3; Respondent's Exhibit 2, 3, 4 and 6; Teacher's Testimony; School A Director's Testimony; Parent's Testimony; Progress Monitor's Testimony)
49. At home, the student enjoys playing with small objects and "games for little kids." (Parent's Testimony)
50. The student is able to interact appropriately with people in the community. (Teacher's Testimony; Parent's Testimony)
51. With assistance learning routes, the student is able to independently travel in the community. (Parent's Testimony)
52. The student is able to interact with teachers and peers in the school environment. (Petitioner's Exhibits 1 and 3; Respondent's Exhibits 1, 2, 3, 4, 6 and 7; School A Director's Testimony; Teacher's Testimony; Progress Monitor's Testimony)
53. School A is a nonpublic special education day school. (School A Director's Testimony)
54. Students attending School A do not have opportunities to interact with nondisabled peers. (School A Director's Testimony)
55. School A provides instruction in an environment with a small student-teacher ratio and instructs students on an individual level. (Teacher's Testimony; School A Director's Testimony)
56. School A has a teacher and a teacher's assistant in the classroom. (Teacher's Testimony; School A Director's Testimony)
57. School A offers the same curriculum as a DCPS school yet modified to meet the deficits of students. (School A Director's Testimony)
58. School A offers the spectrum of related services. (School A Director's Testimony)
59. School B offers instruction in a small, separate class with a low student-teacher ratio. (Special Education Coordinator's Testimony)
60. In the School B program, students are accompanied by either a teacher or a teacher's assistant during all transitions and have minimal interaction with nondisabled peers. (Special Education Coordinator's Testimony)
61. School B has a "self-contained" program for LD and ED students as well as two self-contained classrooms for ID students. (Special Education Coordinator's Testimony)
62. School B has a teacher and a teacher's assistant in the classroom. (Special Education Coordinator's Testimony)
63. School B offers the spectrum of related services. (Special Education Coordinator's Testimony)
64. Within the LD/ED program at School B, students attend general education classes to earn Carnegie units and return to the special education classroom for additional instruction and resource support. (Special Education Coordinator's Testimony)

65. At School B, the students in the ID programs remain in the self-contained classroom for all academic subjects but students do not earn Carnegie units for academics. (Special Education Coordinator's Testimony)

### 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).

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 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 seq., 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).

#### Issue #1

The Petitioner alleged that DCPS denied the student a FAPE by failing to develop an appropriate IEP for the student on June 4, 2013, specifically by changing the student's placement from a private special education day school to a separate class in a public school and by failing to consider the harmful effects on the student in moving the student to a less restrictive environment.

The student is classified as a student with MD. disabilities include mild ID and ADHD (OHI). In February 2013, School A staff members questioned whether the label of ID was appropriate for the student. The student functions approximately seven grade levels behind in mathematics, approximately five grade levels behind in reading and seven grade levels behind in writing. At home, the student enjoys playing with small objects and "games for little kids." The student is very pleasant, well-mannered and hardworking. The student does not exhibit inappropriate behaviors but is introverted and socially awkward. It is uncontested that the student has significant academic deficits, needs to be educated in a small classroom environment and requires academic and social support. The student is able to interact appropriately with people in the community and although needs assistance learning routes, is able to

independently travel in the community after being taught the route. The Parent testified that if the student is shown how to do something, is able to learn.

During the 2012-2013 school year, the student participated in group sessions with the School A social worker to increase ability to recognize social cues and ask questions when necessary. The student made slow progression however did show progress with speaking up in the small group. The DCPS Progress Monitor testified that during observations of the student in the 2012-2013 school year, the student did not display problems with interacting with teachers or peers in the school environment. During a Summer 2013 trip to the zoo, the student was able to express knowledge of animals and asked many questions. The student's Parent also testified that the student has made progress in expressing dislikes in the home environment.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression." *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted). Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, *citing Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.

The student's December 11, 2012 IEP prescribes 24 hours per week of specialized instruction outside of the general education environment, one hour per week of OT outside of the general education environment, one hour per week of speech-language pathology outside of the general education environment and one and one half hours per week of behavioral support services outside of the general education environment. The IEP includes academic goals in the areas of reading, mathematics and written expression; related services goals in the areas of speech-language, social development and motor skills/physical development; and post-secondary transition goals. Although the student's IEP Team met on February 25, 2013 and June 4, 2013, no changes were made to the student's IEP goals or services. The Petitioner did not challenge the appropriateness of the goals or services on the student's December 11, 2012 IEP. The only issue to be decided is whether the goals and services in the student's December 11, 2012 IEP can be implemented in a separate classroom rather than a separate school.

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). 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). Furthermore, 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).

Since at least middle school, the student was placed in a separate school. School A is a nonpublic special education day school. Students attending School A do not have opportunities to interact with nondisabled peers. School A provides instruction in an environment with a small student-teacher ratio and instructs students on an individual level. School A offers the same curriculum as a DCPS school yet modified to meet the deficits of students. On June 4, 2013, DCPS proposed that the student be placed in a separate classroom in School B for the 2013-2014 school year. School B offers instruction in a small, separate class with a low student-teacher ratio. The students are accompanied by either a teacher or a teacher's assistant during all transitions and have minimal interaction with nondisabled peers.

Although the Parent did not desire for the student to be educated in a DCPS school, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. District of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (stating that the IDEA does not provide for an "education ... designed according to the parent's desires") (citation omitted). 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.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it. *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *affd*, 512 U.S. 246 (1994). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. The Hearing Officer is not persuaded that the student requires education in a separate school. The Petitioner's witnesses testified that the student required a separate school because the student "has more growing to do," "would get lost in a larger school," "won't ask for help," "needs extra time," "would regress academically and socially" and withdraws in unfamiliar settings. The arguments that the student "would get lost in a larger school" and "won't ask for help" are unsupported by the record. The record indicates that once the student is taught a route is able to independently follow the route and that the student made progress during the 2012-2013 school year in asking for help in both the school and home environments. Next, the argument that the student "would regress academically and socially" is likewise unsupported by the record. During time at School A, the student made minimal academic progress in a small classroom with a low student-teacher ratio. A separate class also offers a small classroom and a low student-teacher ratio. Socially, the student keeps to yet interacts appropriately with teachers and peers in the classroom.

There is no evidence that the student would not continue to socially interact in the same manner in a separate classroom. While there is some evidence that the student withdraws in unfamiliar settings, there is also evidence that the student engages when becomes familiar with the situation. Finally, the fact that the student requires extra time to complete assignments is not a valid reason to place a child in a more restrictive environment and the argument that the student “has more growing to do” is too vague to justify a more restrictive setting.

It is not contested that the nature and severity of the student’s academic disability are such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. However, there was no evidence presented which supports the contention that the nature or severity of the student’s disability is such that interaction with nondisabled peers in the school environment with the use of supplementary aids and services cannot be achieved satisfactorily. The Hearing Officer concludes that for this student, education with nondisabled peers, to the extent possible, means that the student can be educated in a separate classroom. The student has significant academic deficits however does not exhibit behaviors which would justify removal from a less restrictive environment. While the student is not vocal during unfamiliar activities and situations, the student is able to learn how to appropriately engage or participate in the activities and situations and appropriately interacts with teachers and peers after they become familiar.

The Petitioner failed to meet its burden with respect to Issue #1.

#### Issue #2

The Petitioner alleged that DCPS denied the student a FAPE by failing to provide the parent the opportunity to participate in the June 4, 2013 discussion regarding placement for the student by predetermining that the student would be placed in a less restrictive environment.

Pursuant to the IDEA regulations at 34 CFR §§300.327 and 300.501(c), each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child. In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that the placement decision 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. 34 CFR §300.116(a)(1). The procedural inquiry should focus on whether there has been “full participation” of the parties throughout the IEP development process. *Rowley*, 458 U.S. at 206; *see also Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001). “A school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement.” *K.D. v. Dep’t of Educ., State of Haw.*, 665 F.3d 1110, 1123 (9th Cir. 2011) (*citing Spielberg v. Henrico Cnty. Public Sch.*, 853 F.2d 256 (4th Cir. 1988) and *W.G. v. Bd. of Tr. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479 at 1484 (9th Cir. 1992)(superseded by statute on other grounds by 20 U.S.C. § 1414(d)(1)(B) (internal citations omitted)).

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.

In this matter, the DCPS Progress Monitor acquired, from predecessor, a list of seven students at School A who were potential candidates to transition to a less restrictive environment. The DCPS Progress Monitor discussed the list with School A. School A agreed that it was appropriate for some of the students on the list to transfer to a less restrictive environment, believed that some of the students on the list had potential to transfer to a less restrictive environment and disagreed that it was appropriate for some of the students to transition to a less restrictive environment. School A disagreed that it was appropriate for this student to transition to a less restrictive environment.

Although School A did not agree that this student was "ready" to transition to a less restrictive environment, the DCPS Progress Monitor began monthly observations of the student to monitor the student's level of academic, behavioral and social/emotional functioning to determine if it was appropriate for the student to transition to a less restrictive environment. The Progress Monitor's observation notes were uploaded into the SEDS database.

On February 25, 2013, DCPS held an IEP Team meeting to discuss the possible transition to a less restrictive environment. Present at the February 25, 2013 IEP Team meeting were the Grandmother, the student, the Progress Monitor, the Teacher, a speech-language pathologist, the School A Director and a social worker. The Grandmother was "adamant" against the student moving to a less restrictive environment and threatened legal action if DCPS recommended that the student be moved from School A. The School A personnel stated that the student needed to "put forth effort to achieve goals" in order to transition to a less restrictive environment. The Progress Monitor stated that data supported the theory that the student would be able to succeed in a less restrictive environment with proper accommodations and modifications and that DCPS would continue to monitor the student throughout the year to ensure that was making adequate progress to determine if it would be appropriate to transition him to a less restrictive environment.

On June 4, 2013, the student's IEP Team reconvened to discuss the student's placement for the 2013-2014 school year. The parent, student, LEA representative, special education teacher, transition coordinator, social worker, school director and speech-language pathologist were present for the meeting. The team reviewed the student's grades for the 2012-2013 school year, the student's academic needs, the student's social and behavioral functioning, the student's speech-language functioning and needs, the student's occupational therapy functioning and needs, the student's post-secondary transition functioning and needs and the parent's concerns. The meeting concluded with the LEA representative determining that the student, with similar interventions, accommodations and modifications used at School A, would receive instruction and services in a less restrictive environment. The parent and the School A staff members disagreed with the change in placement.

The Petitioner argued that the decision to place the student in a less restrictive environment was made in September 2012. The Hearing Officer rejects this argument. While DCPS provided a list of seven students identified as being potentially ready to transition to a less

restrictive environment, all seven students did not ultimately move to a less restrictive environment. Additionally, the Progress Monitor conducted seven observations throughout the year to monitor the student academic, behavioral and social/emotional functioning. During these observations, the student's affect, socialization skills, communications and task behaviors were largely appropriate and consistent. While the student continued to function below grade level academically, consistent with cognitive level, the student did not demonstrate behaviors which indicated to the Progress Monitor that would not be successful in a separate classroom environment. The Progress Monitor creditably testified that the decision to change the student's placement was not made at the time the student's name was put on the list.

The Petitioner also alluded that the student's placement was determined by the Progress Monitor in October 2012 because the Progress Monitor did not share the observation notes with other IEP Team members. The Hearing Officer is not persuaded by this argument. The Progress Monitor testified that the observation notes were routinely uploaded into SEDS within 48 hours of the observation. The School A Director testified that she has access to SEDS. While the Progress Monitor may not have provided copies of the notes at the February 25, 2013 and June 4, 2013 meetings, School A had access to the notes and could have reviewed and/or discussed the notes at either meeting.

The Hearing Officer also rejects School A's theory that the student needed to "put in effort to achieve goals" before being considered to transition to a less restrictive environment. The IDEA does not require that a student "put in effort" or "achieve goals" prior to transitioning to a less restrictive environment. The IDEA requires students with disabilities to be placed in least restrictive environment possible, not that students remain in more restrictive environments until they display some level of effort to meet IEP goals. *See Roark*, 460 Supp. 2d at 43 (D.D.C. 2006). Additionally, during the June 4, 2013 IEP Team meeting, the teachers noted the student's hard work and one teacher commented that the student's "grade reflects the serious effort has put in improving grade."

Despite the rejection of these arguments, the record clearly indicates that the student's placement decision was not made by a group of persons. The Progress Monitor testified that the decision to transition the student to a less restrictive environment was based on data however was made solely by him. Whether the decision was predetermined is not as clear.

In *Deal v. Hamilton Cty. Bd. Edu.*, 392 F.3d 840 (6th Cir. 2005), the finding of the denial of a FAPE was based on the school district's outright preclusion of certain services thus the school district did not have "open minds" and were not willing to consider the provision of a particular program. The Court explained that the clear implication was that no matter how strong the evidence presented by the Deals, the school district still would have refused to provide the services and concluded, "this is predetermination." *Deal*, 392 F.3d at 858. Here, the Progress Monitor was open to data from School A indicating that the student would not be successful in a less restrictive environment. When School A did not provide the requested data, DCPS held firm to its position that the student could be appropriately served in a less restrictive environment.

The Hearing Officer disagrees with Petitioner's argument that DCPS did not come to the June 4, 2013 IEP Team meeting with an "open mind" however also rejects the Respondent's

argument that the parent was provided an opportunity to participate in the June 4, 2013 meeting. DCPS was “open” to considering data that the student could not function in a less restrictive environment however independently made the student’s placement decision when no data were provided. Although the parent was present, the parent’s concerns were not addressed nor were the positions of the parent and other team members considered. The Hearing Officer also notes that while the Parent testified that she would have considered the student’s transition to a less restrictive environment had a transition plan been put into place, during the February 25, 2013 IEP Team meeting, the parent clearly indicated that she would seek legal recourse if the student was transitioned to a less restrictive environment and stated during the June 4, 2013 meeting that she believed that DCPS would fail to educate the student and prepare him for a future. Regardless of the parent’s position, DCPS had the obligation to consider the parent’s concerns regarding the student’s placement. DCPS was equally as rigid and was not willing to consider the position of the other IEP Team members. Other than noting the parent’s position, the DCPS Progress Monitor, as a sole member of the IEP Team, made the decision to move the student to a less restrictive environment.

The Hearing Officer concludes that DCPS failed to provide the parent the opportunity to participate in the June 4, 2013 discussion regarding placement for the student and failed to ensure that the placement decision was made by a group of persons, including the parents, and other persons knowledgeable about the child pursuant to 34 CFR §300.116(a)(1). In doing so, DCPS significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to her child.

The Petitioner met its burden with respect to Issue #2.

#### Requested Relief

In this case, the denial of FAPE is DCPS’ failure to provide the parent the opportunity to participate in the June 4, 2013 discussion regarding placement for the student. As relief, the Petitioner requested that the Hearing Officer place the student in School A for the 2013-3014 school year.

While the Petitioner did not meet its burden in proving that DCPS denied the student a FAPE by changing the student’s placement from a private special education day school to a separate class in a public school, the Hearing Officer has questions regarding the adequacy of the school district’s proposed program. The School B Special Education Coordinator testified that there is a “self-contained” program for LD and ED students at School B as well as two self-contained classrooms for ID students. Both programs have a teacher and a teacher’s assistant in the classroom, both have small class sizes and both offer the spectrum of related services. However, within the LD/ED program, students attend general education classes to earn Carnegie units and return to the special education classroom for additional instruction and resource support. The students in the ID programs remain in the self-contained classroom for all academic subjects but students do not earn Carnegie units for academics. The School B Special Education Coordinator was unable to testify regarding which program in which the student was placed.

The student's December 11, 2012 IEP indicates that the student requires 24 hours per week of specialized instruction outside of the general education environment and is on a diploma track. Should the student be placed in the LD/ED program at School B, the hours of specialized instruction on the student's December 11, 2012 IEP could not be implemented. Should the student be placed in the ID program at School B, the student could not earn Carnegie units toward a diploma. Although the student's transcript indicates that the student is earning credit toward graduation at School A, given the student's level of academic functioning, it is not logical to conclude that the instruction provided to the student at School A is such that the student has truly mastered the requirements for high school biology, geometry, English, Spanish and World History as awarded. Nonetheless, the record is clear that the School B ID program does not award Carnegie units toward the diploma track included on the student's IEP.

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). Typically, for a denial of FAPE related to the failure of providing a parent the opportunity to participate in a placement discussion, the remedy would be for the Hearing Officer to Order that the LEA reconvene an IEP Team meeting in order for the parent to have an opportunity to participate in a placement discussion. However, the facts of this specific case do not lead to that particular approach.

Given the Hearing Officer's concerns with the adequacy of DCPS' proposed placement, the Hearing Officer will consider the factors in *Branham v. District of Columbia*, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005). These considerations include the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the private school; the placement's cost; and the extent to which the placement represents the LRE.

The student's IEP prescribes 24 hours per week of specialized instruction outside of the general education environment which can be achieved at a private special education day school or in a separate classroom in a public school. The student does not exhibit behaviors which would warrant exclusion from the general education environment and although is socially awkward, is able to interact appropriately in the community and with nondisabled siblings. In fact, the student is beginning to “listen” to eldest sibling and is learning to advocate for

The Hearing Officer concludes that while the student has significant academic deficits, the deficits are not so severe as to require specialized instruction in a private school.

Both School A and a separate classroom are able to provide the services on the student's IEP. Both programs offer a small class size and a low student-teacher ratio. Additionally, both programs provide the related services as prescribed by the student's IEP. Next, the Petitioner did not present evidence of the cost of School A. However, given the private nature of the program, it can be inferred that the cost of School A is significantly higher than the cost of a separate

classroom. Finally, as discussed in Issue #1, the Petitioner did not meet its burden in proving that a nonpublic school is the LRE for the student.

The Hearing Officer concludes that a review of the *Branham* factors does not support placement in a private special education day school. However, the Hearing Officer also cannot Order that the student be immediately placed in the School B program. First, the record is clear that no plan to transition the student to School B was developed or implemented. Next, the School A Director testified that during the student's February 25, 2013 and June 4, 2013 IEP Team meetings, School A requested that a comprehensive psychological evaluation of the student be conducted to determine the appropriate disability category for the student. While a student's placement must be determined by the student's needs, not by the student's disability category, the Hearing Officer believes that having a better understanding of the student's disability classification, a data-driven and expert opinion of the most appropriate exit category for the student and information regarding appropriate supports the student would need to transition to a less restrictive environment will assist the student's IEP Team in making the most appropriate decisions for the student.

Finally, while School A is not the LRE for the student, School B may not be an appropriate location of services for the student. "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)). While DCPS is afforded much discretion in determining which school a student is to attend (*see White, supra.*), the school must be able to implement the student's IEP. It is likely that the student's exit category on December 11, 2012 IEP is not the most appropriate exit category. If it is appropriate for the student to be on a certificate track rather than a diploma track, School B would be able to implement the student's IEP. If the student's IEP Team determines that it is appropriate for the student to remain on a diploma track, then School B is not an appropriate location of services for the student.

### **ORDER**

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

1. Within 45 days of the date of this Order, DCPS complete a comprehensive psychological evaluation of the student to ascertain the appropriate supports the student needs in order to transition to a less restrictive environment, the appropriate disability category for the student and the appropriate exit category for the student.
2. Within 10 school days of the date of this Order, DCPS convene an IEP Team meeting for the student to discuss the student's transition to a less restrictive environment and develop a transition plan for the student to transition to a less restrictive environment.
  - a. The IEP Team must include representatives from School A and a DCPS location of services (LOS) able to implement the student's IEP, who have

worked or will be working directly with the student, in addition to the standard IEP Team members.

- b. The transition plan must include transition activities for the student, extended at least until Winter Break, where the student has guided opportunities to meet the staff members and students at the LOS, learn the physical layout of the LOS and practice transitioning in and around the LOS.
  - c. The transition plan must include the mode of transportation DCPS will provide to the student to participate in transition activities during the school day. Transportation required for transition activities will be funded by DCPS.
  - d. DCPS is to reconvene the student's IEP Team within 10 school days of the completed comprehensive psychological evaluation listed in #1 and within three days of December 4, 2013 to discuss the student's progress with the transition plan and to revise the student's transition plan as necessary.
  - e. Prior to the student's final transition to the LOS, upon return from Winter Break, the student will attend School A, at DCPS expense.
  - f. If both parties agree, the student's transition may be finalized at the end of Spring Break or the end of the 2013-2014 school year rather than at the end of Winter Break. If both parties do not agree, the student's transition will be finalized at the end of Winter Break.
3. 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: September 8, 2013

  
Hearing Officer