

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
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OSSE
Student Hearing Office
February 18, 2014

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: February 4, 2014</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on February 4, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is child with a disability pursuant to IDEA with a disability classification of intellectual disability (“ID”). Until the student’s IEP was updated on November 12, 2013, the student’s disability classification was specific learning disability (“SLD”). Until November 19, 2013, the student attended her neighborhood school (“School A”).

On November 12, 2013, DCPS convened an individualized educational program (“IEP”) meeting to review independent evaluations and update the student’s IEP. Based upon the results of the evaluations the IEP team changed the student’s disability classification from SLD to ID, increased her special education services and determined she was in need of a more restrictive placement than School A.

At the November 12, 2013, meeting DCPS did not name a school that student would attend upon leaving School A, but indicated a school would be proposed by DCPS central office. The student’s parent did not attend the meeting but was represented at the meeting by his attorney and his educational advocate. The educational advocate requested that DCPS place the student at a private full time out of general education school (“School B”). DCPS declined.

On November 27, 2013, the student’s parent filed the due process complaint challenging DCPS’ failure to name a specific school for the student to attend and allegedly failing to involve the parent in the process of selecting the school. On December 10, 2013, the student’s parent unilaterally placed the student at School B where she has attended since that date.

On December 5, 2013, DCPS informed the student’s parent that it had selected a DCPS school (“School C”) as the location where the student’s IEP would be implemented and sent a letter of invitation setting a meeting date to discuss the student’s transition from School A to School C. On January 9, 2014, DCPS convened a meeting with the parent present and proposed School C as the school DCPS was offering for the student to attend.

The parent has not agreed for the student to attend School C but the complaint does not challenge School C's appropriateness and/or ability to implement the student's IEP. Petitioner is seeking an order directing DCPS to reimburse for his unilateral placement of the student at School B through the date that DCPS proposed the location/school on January 9, 2014², convene a 30 day review meeting at School B, amend the student's IEP to provide increased speech and language services.

DCPS filed a response to the complaint on December 9, 2013, asserting that the IEP team had a placement discussion at the November 12, 2013, meeting, but not discussion of where the student's IEP would be implemented which has subsequently been identified as School C. DCPS asserted that the parent was invited to participate in the November 12, 2013, meeting, but DCPS has the authority to determine the location where a student's IEP will be implemented and DCPS was attempting to convene a meeting to discuss the student's transition to her new school when the complaint was filed and subsequent thereto.

A resolution meeting was held December 13, 2013. No issues were resolved at the resolution meeting. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on December 28, 2014, and ended (and the Hearing Officer's Determination ("HOD") was originally due) on February 10, 2014.

This Hearing Officer convened pre-hearing conferences on January 2 & 14, 2014, after the case was reassigned.³ During the discussion with the parties the Hearing Officer determined the issues to be adjudicated would be revised. On January 25, 2014, the Hearing Officer issued a revised pre-hearing order.

The parties appeared for hearing on February 4, 2014. At the conclusion of the hearing Petitioner's counsel requested an extension of the HOD due date to allow the parties to submit written citations of authority. Petitioner filed the motion for extension and the motion was granted. Thus, the HOD due date was changed to February 17, 2014. The parties submitted the written citations of authority by February 12, 2014.

ISSUES: ⁴

² Petitioner asserts under the circumstances he is not required to notice DCPS pursuant to 34 C.F.R. § 300.148 of the unilateral placement. (Petitioner's Exhibit 9-3)

³ The case was initially assigned to another Hearing Officer who convened a pre-hearing conference on December 17, 2013, and issued a pre-hearing conference order on that date.

⁴ The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated. At the outset of the hearing the parties stipulated as to one of the three issues that had been certified in the revised pre-hearing order and agreed to resolve that issue by student's IEP be amended in this Order to include the additional speech/language services. Therefore, the following issue that was included in the revised pre-hearing order is considered moot because of the parties agreement: "Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing to provide the

The issues adjudicated are:

1. Whether DCPS impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE to the student by not promptly determining the location/school the student would attend when the IEP was revised on November 12, 2013.
2. Whether DCPS denied the student a FAPE by failing to implement the student's IEP after the IEP it was developed on November 12, 2013, due to DCPS not promptly identifying a location/school to implement the IEP.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 21 and Respondent's Exhibits 1 through 14)⁵ that were all admitted into the record and are listed in Appendix A. Witnesses a listed in Appendix B.

FINDINGS OF FACT:⁶

1. The student is _____ with a disability pursuant to IDEA with a disability classification of ID. Until a recent unilateral placement by Petitioner to a private full time out of general education school, School B, the student attended her neighborhood DCPS school, School A. (Petitioner's Exhibit 8-1, Witness 1's testimony)
2. The student attended School A for a number of years and the student's parent did not believe the student's needs were being met there which was later confirmed for him by a School A staff member. Thereafter the parent believed the school has not been honest with him and from that day forward he obtained and had the assistance of an advocate in IEP meetings and refused sign the student's IEPs. The parent has come distrust that DCPS can provide the student an adequate education. (Parent's testimony)
3. The student's case manager/special education teacher at School A taught the student for two and half years. She describes the student as charismatic, loving and open about wanting to learn. The student as excellent recall skills but has difficulty with reading and

student an appropriate IEP as revised on November 12, 2013, because it lacks sufficient speech language services of 30 minutes per month rather than 30 minutes per week."

⁵ Respondent objected to a number of documents presented by Petitioner because they were documents already in the administrative record and were not being used as evidence. The Hearing Officer noted the objection but nonetheless admitted all documents disclosed by both Petitioner and Respondent.

⁶ The evidence that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

comprehension and has poor writing and math skills. She had problems testing because of her low reading level. The student bonds well with adults but she has had a difficult time bonding with her same age peers. (Witness 3's testimony)

4. In 2013 Petitioner requested and obtained public funding of the following independent evaluations: comprehensive psychological and speech-language. DCPS received the independent evaluations by July 2013, and in November 2013 received an addendum to the psychological evaluation that was completed on November 1, 2013. (Petitioner's Exhibits 6-1, 6-13, 7-1)
5. The independent psychological evaluation determined based on the student's cognitive and achievement performance that the student has an intellectual disability and her academic functioning at the kindergarten to first grade level in every area assessed. After assessing additional data of the student's adaptive functioning the evaluator reaffirmed her conclusion that the student met the ID classification. The evaluator recommended the student be in a full-time special education placement. (Petitioner's Exhibit 6-10, 6-12, 6-13)
6. DCPS completed a review of the psychological evaluation on October 29, 2013, and the speech language evaluation on September 12, 2013. (Petitioner's Exhibit 6-15, 7-9)
7. On November 12, 2013, DCPS convened an IEP meeting to review the independent evaluations and update the student's IEP. Based upon the results of the independent evaluations the IEP team changed the student's disability classification from SLD to ID. The team increased the student's special education services and reviewed her IEP goals. The IEP team determined the student was in need of a more restrictive placement and School A was no longer appropriate for the student as it offered only inclusion special education services. (Witness 2's testimony, Respondent's Exhibit 4-2, Petitioner's Exhibit 8-1, 8-11)
8. The student's current IEP developed at November 12, 2013, meeting prescribes the following services outside general education: 27 hours of specialized instruction, and the following related services per month: 30 minutes of speech/language pathology and 60 minutes/week behavioral support services. (Petitioner's Exhibit 8-1, 8-11)
9. The student's prior IEP dated May 6, 2013, prescribed the following services: 12 hours per week of specialized instruction outside general education and the following monthly services outside general education: 120 minutes per month of occupational therapy and 30 minutes per month of speech-language pathology. (Petitioner's Exhibit 5-1, 5-3, 15-12)
10. The student's parent did not attend the November 12, 2013, meeting but was represented by his attorney and his educational advocate. They both participated by telephone. The advocate, on the parent's behalf requested that DCPS place the student at School B. DCPS declined. The DCPS team members did not name a school at the meeting that student would attend but indicated a school would be proposed by DCPS central office. The advocate objected, but the DCPS representative maintained that her instructions

were that the IEP team may not discuss specific schools or programs. The parent's attorney asked how long would it be before the school was determined but no specific date was given. The student's parent was frustrated that a location was not determined and felt he had every right to know what school the student would be attending. (Witness 2's testimony, Witness 3's testimony)

11. At the November 12, 2013, meeting the team discussed that until a new school was determined the student remain with her special education teacher the full school day. There were no disagreements about the type of setting the student ultimately needed. The full team agreed the student needed to be in a self-contained special education classroom. There was no discussion about the student being in a school where there are no general education students. No one mentioned any specific school except the parent's attorney mentioning School B. The reason no specific school was mentioned by DCPS was because prior to the November 12, 2013, meeting there had been no decision that the student would need anything more than the services she was provided at School A and the DCPS team members at the November 12, 2013, meeting were not fully versed about all the programs available in DCPS. At the conclusion of the meeting the student's case manager contacted and informed the DCPS location of service team that the student's IEP had been changed and that the student was in need of a school location. (Witness 4's testimony)
12. Following the November 12, 2013, School A implemented the student's IEP by having the student stay with the special education teacher all day. The student was the only student that remained with the special education teacher throughout the school day. The arrangement continued from November 13, 2013, until she stopped attending School A about a week later. (Witness 3's testimony)
13. On November 19, 2013, after the student's parent dropped her off in the morning at School A, but before school actually started for the day, the student was injured off school grounds. After this incident in which the student was injured the parent did not allow the student to return to School A. (Parent's testimony)
14. On November 27, 2013, Petitioner filed the due process complaint. Petitioner stated in the complaint that he had identified School B and asserted in the complaint that under the circumstances he is not required to notice DCPS pursuant to 34 C.F.R. § 300.148 of the unilateral placement. (Petitioner's Exhibit 9-3)
15. The School A assistant principal received an email from DCPS location of services team informing him that the student had been assigned to School C. On December 5, 2013, the assistant principal sent the letter to the parent and to his attorney informing the parent that he could enroll the student at School C. He also sent them letter indicating that a meeting was scheduled for December 11, 2013, at School A to discuss the student's transition to School C. The meeting was delayed until January 9, 2014, but the delay was not due to DCPS or School A action or inaction. (Witness 4's testimony, Respondent's Exhibits 2, 3)

16. On December 10, 2013, the student's parent unilateral placed the student in School B. School C services students with ID and SLD disability classifications offering IEP implementation of academics, vocational training, and related services. School C has 40 students all of whom are funded by the District of Columbia. The majority of the students are ages 11 to 13. (Witness 1's testimony)
17. The student has been attending School B on an assessment trial visit. She has been going for free; no one has been paying her tuition. The School B intake team decided to allow the student to attend based upon the parent's representation that he was attempting to obtain DCPS funding for the student and because he believed the student was not receiving appropriate services at her present school. The student's parent shared with the School B staff his frustration with School A and his belief that a school with a smaller student body would be more appropriate for the student. (Witness 1's testimony)
18. Once the parent was informed that DCPS was proposing that the student attend School C the parent and his educational advocate went to School C unannounced on December 17, 2013. School C's principal escorted the parent and advocate to see a classroom on the third floor when they observed a student in the hallway lying down refusing to get up. The principal told the student she would be sent home if she did not get up. The parent and advocate observed a special education class on the second floor and then went back to the third floor and observed another classroom from the hallway. In their opinion the school was rowdy and students with behavior problems. (Witness 2's testimony)
19. The School C special education coordinator received an email from the DCPS location of services team in early December 2013 informing her that the student would attend School C. During their visit to School C on December 17, 2013, the parent and advocate observed the School C program/classroom for students with emotional disability classification. However the student has been assigned to the School C program for student with ID classification. (Witness 5's testimony)
20. On January 9, 2014, DCPS convened a meeting with the parent present to discuss the student's transition to School C. There were no changes made the student's IEP. The DCPS representative read the location of services letter verbatim to the team and the special education coordinator from School C described the School C ID program and the student's proposed class schedule. There was discussion about the visit the parent and advocate took on December 17, 2013, but there no questions about the School C program from the parent or his advocate regarding the curriculum or service delivery. (Witness 3's testimony, Witness 4's testimony, Respondent's Exhibits 1, 4)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.⁷ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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

ISSUE 1: Whether DCPS impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE to the student by not promptly determining the location/school the student would attend when the IEP was revised on November 12, 2013.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS not promptly determining the student's new school location following the November 12, 2013, IEP meeting impeded his opportunity to participate in the decision making process regarding provision of FAPE to the student.

In determining the educational placement of a 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; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least

⁷ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

According to the Office of Special Education Programs (OSEP): [P]lacement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. 71 Fed. Reg. 46588 (August 14, 2006).

The evidence in this case demonstrates that parent was fully involved at the November 12, 2013, meeting, with representation of both his attorney and educational advocate, in determining of the student's new disability classification, a discussion of her IEP goals and the teams determining that the student would be placed in a self-contained classroom with all her services provided outside general. The evidence in the record that the student's least restrictive environment ("LRE") was changed and that the student's current IEP correctly prescribes full-time out of general education specialized instruction, behavioral support and services and speech language services.⁸ And the evidence demonstrates that the student's parent was able, albeit unannounced, to ultimately visit the school DCPS proposed.⁹

Petitioner asserts that DCPS excluded him from the placement decision for the student at and following the November 12, 2013, IEP meeting by DCPS not determining the student's new school location at that meeting or promptly thereafter and by unilaterally determining the student would attend School C. On the other hand DCPS asserts the parent was fully involved in the student's placement decision, specifically, the level of services in the student's IEP and her LRE and that the school location where her IEP would be implemented is a determination that is within the sole purview of DCPS as the location education agency ("LEA").

Both parties submitted legal authority both within and outside of this jurisdiction to support its position. The Hearing Officer will not discuss all the cited cases but will point to those that seem most applicable to the facts of this case. The Hearing Officer notes, however, that neither IDEA nor D.C. Code or regulations clearly define the distinction between educational placement and the actual school that a student will attend. Even the D.C. Code seems to use the term placement to indicate a particular school.¹⁰

Petitioner has cited a case that has held that where the failure "to identify the school at which special education services are expected to be provided will prevent parents from effectively evaluating a proposed placement" the IEP must identify the particular school in which a student will be placed. *A.K. ex rel. J.K. v. Alexandria City School Bd.*, 484 F.3d 672, 680-81 (7th Cir.

⁸ FOF # 10

⁹ FOF # 18

¹⁰ Pursuant to D.C. Code § 38-2561.02. (c) Special education placements shall be made in the following order of priority, provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

2007). However, that decision is not controlling in this jurisdiction and other cases in this jurisdiction have indicated that the school selection is not a placement decision that necessitates the parent's participation but is within the discretion of the local education agency.

The IDEA does not define "educational placement" and the interpretation of the phrase has been left to the courts. Courts have defined the term "educational placement" as meaning something "between the physical school attended by a child and the abstract goals of a child's IEP." Laster v. District of Columbia, 394 F. Supp. 2d 60, 64-65 (D.D.C. 2005) (citing Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Ill. State Bd. of Educ., 103 F.3d 545, 548 (7th Cir. 1996)). The term means more than the physical school building that a child attends. The Fifth Circuit defined "educational placement" as a term of art meaning "educational program—not the particular institution where that program is implemented." White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 (5th Cir. 2003). The Second Circuit agreed, noting that educational placement refers to "the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school." T.Y. v. N.Y.C. Dep't of Educ., 584 F.3d 412, 419 (2d Cir. 2009).

The D.C. Circuit has explained that if a parent cannot identify a fundamental change in, or elimination of, a basic element of the education program, there has been no change in "educational placement" and the stay put provision does not apply. Lunceford, 745 F.2d at 1582; see also A.W. ex rel. Wilson v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 682 (4th Cir. 2004) ("educational placement" under the IDEA refers to the general education program and environment, not to a location); Johnson v. District of Columbia, 839 F. Supp. 2d 173, 178 (D.D.C. 2012) (physical placement and educational placement are not synonymous); Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,588-89 (Aug. 14, 2006) (codified at 34 C.F.R. Pts. 300 and 301) ("[M]aintaining a child's placement in an educational program that is substantially and materially similar to the former placement is not a change in placement." (emphasis added)) D.K. v. District of Columbia, Civ. 13-110, p. 10 (D.D.C. 2013).

It is understandable under the facts of this case that at the November 12, 2013, IEP meeting when the student's IEP was amended and her educational placement changed that DCPS had not identified a school where the student's IEP would be implemented. To have anticipated such a change and to have pre-determined a school or location might have smacked of a pre-determination that did not involve the parent of the child. Although IDEA generally requires that the agency have a representative at the meeting who is knowledgeable of the resources of the agency the DCPS witness acknowledged that an additional reason a school location was not offered by DCPS was that no DCPS representative at that meeting knew all the school placement options that were available within DCPS.¹¹ 34 C.F.R. 300.321(a)(4) as well as the DCMR¹²

¹¹ FOF #11

¹² 5E DCMR 3003.1 The IEP team for each child with a disability shall include: (a) The parents of the child; (b) At least one regular education teacher of the child, if the child is or may be participating in the regular education environment, or if the child is being evaluated for SLD; (c) At least one special education teacher, or, if appropriate, at least one special education provider of the child; (d) A representative of the LEA who is: (1) Qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, and (2) Knowledgeable about the general curriculum and about the

requires that the IEP team include someone who is knowledgeable about the resources of the LEA.

DCPS was under an obligation to promptly provide a location for the student's IEP to be implemented. A placement decision that includes a parent's participation is meaningless without a location to implement a student's IEP. Even though the location of where the student's IEP is to be implemented may be within the discretion of the LEA reason dictates that the parent should be informed of the location the LEA is offering and provided some information about the school to allow for a reasonable determination by the parent whether he or she agrees with or disagrees with the location, because the recourse if he does not agree is to challenge that location or school in due process hearing before the student begins attend and assert stay-put and/or assert rights pursuant to 34 C.F.R 300.148.

In the present case the IEP team discussed a change in placement at the November 12, 2013, IEP team meeting and the team determined a more restrictive setting was appropriate for the student and the parent was involved as IDEA requires in that placement determination. The team further determined the student's school location would be changed from School A but no specific school was offered, except on behalf of the parent, to implement the student's IEP until three weeks after the meeting.¹³ Although this might seem and inordinate time to a parent it was not clear from the evidence in this case that it was such an inordinate time that it impeded the parent's participation in the decision making process regarding provision of FAPE to the student.

Although the student was to remain at School A until the new location was identified the parent wound up removing the student it seems because the student was injured at or around School A one morning a week following the November 12, 2013, meeting.¹⁴ The parent based upon his own testimony had become distrustful of School A and by the time of the January 9, 2014, meeting when a team could discuss the student's transition to the identified school location, School C, the parent no longer trusted DCPS to educate his child at all.¹⁵

The parent has the right to place his child wherever he thinks she will be best served, but he does not have the right, absent just cause, for the LEA to pay for private school placement when an adequate public placement has been made available.

The standard set out by the United States Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity" is whether the child has access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley* 458 U.S. at 201. The IDEA, according to *Rowley* imposes "no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." *Id* at 198 A.I ex rel. *Iapalucci v. District of Columbia* 402 F. Supp. 2d 152, 167 (D.D.C. 2005)

A school district is not required to implement a program that will maximize the handicapped

availability of resources of the LEA;

¹³ FOF #15

¹⁴ FOF #13

¹⁵ FOF #2

child's potential. *Rowley, 458 U.S. at 198-99*. Rather, a handicapped child has a right to "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley, 458 U.S. at 203*. Rowley explained that implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . . We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley, 458 U.S. at 200-02*.

Petitioner herein has asserted that he did not have to comply with the notice requirements of this pro 300.148 but presented no specific evidence or legal authority why this provision does not apply. However, the facts of the case indicate that DCPS provided a location prior to the Petitioner unilaterally placing the student at School B and although Petitioner filed this due process complaint prior to placing the student at school B or knowing DCPS had proposed school C, there was no attempt to amend the complaint to challenge the appropriateness of School C. Although the parent expressed during his testimony his discomfort and dissatisfaction with School C when he visited on December 17, 2013, School C is the student's current DCPS placement and its adequacy to implement the student's IEP and provide her a FAPE was not an issue adjudicated in this case.

After a review of controlling decisions in this jurisdiction the Hearing Officer concludes that decision to place the student at School C was a location of services decision that was within DCPS discretion. The Hearing Officer empathizes with the parent's travails in ensuring that this student receives an appropriate education, but under facts as presented and issues before the Hearing Officer, there is insufficient evidence that the student was denied a FAPE or the parent's rights were impeded by DCPS not proposing a location of services or school to implement the student new IEP until December 5, 2013. Consequently, the Hearing Officer does not conclude DCPS is obligated and should be required to pay for the student's attendance at School B from December 10, 2013, through January 9, 2013.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to implement the student's IEP after the IEP it was developed on November 12, 2013, due to DCPS not promptly identifying a location/school to implement the IEP.

Conclusion: Petitioner did not sustain the burden of proof by preponderance of the evidence.

5E DCMR 3002.3 provides that:

- (c) The LEA shall ensure that an IEP is developed and implemented for each eligible with a disability served by the LEA.
- (d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP...
- (f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

“To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the IEP “*Savoy v. District of Columbia* (DC Dist. Court) February 2012 adopted *Houston Indep. School District v. Bobby R.* 200 F3d 341 (5th Circ. 2000)

The evidence in this case is that that the team determined School A was no an appropriate placement for the student and the team changed the level of services so the student would be outside general education the full school day. The evidence indicates that while she remained at School A following the November 12, 2013, the student was provided services pursuant to her amended IEP outside of general education for the full school day until she stopped attending a week later.¹⁶

DCPS notified the parent of the proposed location, albeit three weeks after the November 12, 2013, meeting prior to the parent placing the student at School B. There was no evidence presented by Petitioner that DCPS failed to implement the IEP following the November 12, 2013, meeting and when the student stopped attending. Thus, in this case there is insufficient basis to order that DCPS reimburse the cost of the student attending School B. Accordingly, the relief granted herein is only that relief the parties agreed to the at the outset of the hearing regarding the change to the student’s IEP. All other requested relief is denied.

ORDER:

1. The student’s IEP is hereby amended to prescribe the student be provided 30 minutes of speech/language pathology per week rather than per month.
2. All other requested relief is denied.

APPEAL PROCESS:

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

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.
Hearing Officer
Date: February 17, 2014

¹⁶ FOF #12