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OSSE
Student Hearing Office
June 27, 2013

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: June 20, 2013</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 for one day on June 20, 2013, at the Office of the State Superintendent (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____ and attends a DCPS school, (“School A”) where he has attended since early May 2013. The student has a disability under IDEA with a classification of specific learning disability (“SLD”).

The student’s most recent individualized educational program (“IEP”) prior to this due process complaint being filed was developed on May 17, 2012, and prescribed 10 hours per week of specialized instruction inside general education and 3 hours per week of specialized instruction outside general education and no related services. The student’s prior IEPs, dated March 30, 2012, and April 6, 2011, prescribed 10 hours per week of specialized instruction in general education and 180 minutes per month of speech-language pathology outside general education.

The student attended School A during school year (“SY”) 2010-2011 and SY 2011-2012 in fifth and sixth grade respectively. Because the student’s parent was not satisfied with the student’s performance at School A, and believed he could be better served in another school, she enrolled him at a private school for SY 2012-2013 (“School B”) after applying for and obtaining a scholarship for him to attend School B. Although the student had completed sixth grade at School A and was promoted to seventh grade, as a result of assessments conducted by School B, the student was placed in sixth grade at School B for SY 2012-2013. School B is a general education school and School B did not have or implement the student’s IEP from School A or develop or implement a new IEP.

The student did not perform well academically at School B and in January 2013, School B informed the student’s parent the student was failing sixth grade. Despite efforts to help improve the student’s academic performance, School B informed the parent the student would not be allowed to return to School B for SY 2013-2014. As a result, the parent removed the student from School B and returned him to his neighborhood school, School A, where he was placed in sixth grade.

On April 12, 2013, Petitioner filed this due process complaint. Petitioner alleged in the complaint that the student is operating below grade level in reading, math and written expression and made no academic progress during SY 2011-2012 as reflected in his final report card for that year, but he was nonetheless promoted to seventh grade. Petitioner asserted that at the April 6, 2011, IEP meeting Petitioner requested additional hours of specialized instruction outside

general education and DCPS indicated that inclusion was all they could offer at School A. Based on a then recent functional behavioral assessment (“FBA”) Petitioner also requested counseling and that a behavior intervention plan (“BIP”) be added to the student’s IEP. Petitioner alleges DCPS refused both and stated the student behaviors were not problematic and he could be easily redirected. Petitioner also asserted that DCPS did not fully implement the student’s IEP at School A during SY 2011-2012.

Petitioner seeks as relief: An order directing DCPS to amend the student’s IEP to increase hours of specialized instruction to at least 15 hours outside general education and include behavioral support services; conduct or fund a FBA²; and upon completion convene an IEP meeting to review the evaluation(s), review and revise the student’s IEP and discuss and determine placement³ and compensatory education.

DCPS filed a timely response to the complaint on April 22, 2013. DCPS denied all alleged denials of a FAPE to the student and specifically stated each of the student’s three IEPs during SY 2011-2012 (dated April 6, 2011; May 30, 2012; May 17, 2012 respectively) were all calculated to provide the student educational benefit at the time they were developed and the student had no behavioral difficulties that would have warranted counseling services.

DCPS asserted that the student was not entitled to any hours of specialized instruction outside general education until the May 17, 2012, IEP, when DCPS added the additional 3 hours of pullout instruction to assist student with developing verbal memory strategies. DCPS asserted that during the final month of the academic year the student received the pullout instruction in this area in accordance with his IEP.

A resolution meeting was convened on May 3, 2013. The resolution meeting was not successful in resolving the disputes. The parties did not agree to waive the remainder of the resolution period. Thus, the 45-day timeline began to run on May 12, 2013, and ends, and the Hearing Officer’s Determination (“HOD”) is due, on June 26, 2013.

A pre-hearing conference was held on May 14, 2013, and a pre-hearing conference order was issued May 19, 2013, outlining, inter alia, the issues to be adjudicated.

² Although Petitioner originally sought in the complaint a comprehensive psychological evaluation, at the outset of the hearing Petitioner’s counsel acknowledged that because the May 2012 psychological evaluation had been conducted Petitioner was no longer seeking this evaluation as a form of relief.

³ Although Petitioner is not asserting the student is in need of full time out of general education services Petitioner requested that the student be placed a private full-time special education school as a remedy.

ISSUES: ⁴

The issues adjudicated are:

1. Whether DCPS denied the student a free and appropriate public education (“FAPE”) by failing to develop an appropriate IEP on May 17, 2012, because the IEP (1) did not provide the student sufficient hours of specialized instruction (at least 15 hours) outside general education and (2) did not provide the student counseling despite Petitioner’s request and the results of the student’s functional behavior assessment (“FBA”).
2. Whether DCPS denied the student a FAPE by failing to implement the student’s IEP after May 17, 2012, meeting by failing to provide the student specialized instruction outside general education.
3. Whether DCPS denied the student a FAPE by failing to provide a location of services that could implement the student’s May 17, 2012, IEP and provide him specialized instruction outside general education.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties’ disclosures (Petitioner’s Exhibits 1-22 and DCPS Exhibit 1-11) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: ⁵

1. The student is age _____ and has a disability under IDEA with a classification of SLD. The student was first determined eligible in March 2010 prior to his attending a DCPS school. DCPS developed an IEP for the student following his eligibility determination but it was not implemented until the student began attending School A, his neighborhood

⁴ The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order do not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) in the pre-hearing conference order at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated. Petitioner had originally alleged that DCPS failed to conduct triennial evaluation(s). However, after the complaint was filed Petitioner obtained the student’s 2012 psychological re-evaluation. Thus, the issue of the alleged failure to re-evaluate was eliminated and not included in the list of issues to be adjudicated.

⁵ The evidence that is the source of the finding of fact 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 both parties separately the Hearing Officer may only cite one party’s exhibit.

school, at the start of SY 2010-2011 in fifth grade. (Parent's testimony, Respondent's Exhibit 3-1)

2. At his previous school, prior to attending School A, the student exhibited off-task behaviors and below grade level academic functioning. He was in fourth grade at his previous school and was due to be retained at the end of SY 2009-2010. However, School A placed the student in fifth grade at the start of SY 2010-2011 due to his age. Soon after he began attending School A, DCPS conducted classroom observations of the student in September and October 2010 as a part of a FBA to address the student's hyperactivity, off task behavior and disorganization. DCPS developed a proposed behavior intervention plan ("BIP") in March 2011 to address the student's behavioral issues. (Parent's testimony, Respondent's Exhibits 1-2, 1-3, 1-4, 2-1)
3. DCPS convened an IEP meeting for the student on April 6, 2011. At that meeting the parent was accompanied by an educational advocate. The advocate on behalf of the parent requested that the student be provided "pull-out" specialized instruction in light of his academic difficulties. The School A staff did not agree. The IEP team reviewed the student's FBA and noted the student was not a behavior problem and that he could be easily redirected. The student's IEP dated April 6, 2011, IEP prescribed the following services: 10 hours per week of specialized instruction in general education, 180 minutes per month of speech-language pathology outside general education. The IEP included accommodations including preferential seating, small group testing and extended time on tests to address the concerns raised in the student's FBA. This IEP listed the student's disability classification as speech language impairment ("SLI"). (Petitioner's Exhibit 17, Respondent's Exhibit 3-1, 3-5, 3-7)
4. At the end of SY 2011-2012 the student was promoted to _____ grade. (Parent's testimony)
5. During SY 2011-2012 the student's parent conducted a classroom observation of the student prior to Christmas break. During that observation the student was seated near the front of the class in all the classes the parent visited. The parent observed that the student's materials and space around his desk were generally unorganized and the student attempted to participate in classroom instruction but seemed to be struggling. The student performed well in Art and Music but was struggling in World Geography and was failing that class most of the year. (Parent's testimony, Petitioner's Exhibit 9)
6. The student's great grandmother observed the student in his classroom at School A on at least two occasions during SY 2011-2012 because of reports of the student's distractions in the classroom. She observed that the student attempted to elicit laughter from other students when he was called upon to read aloud in class in an attempt to distract from his inability to read fluently. The student has difficulty with homework and struggles with all subjects except math. Based on her observations of the student in class at School A during SY 2011-2012 and working with him on his homework the student's great grandmother believes the student works better with one to one attention and has difficulty

making any progress in the inclusion setting he has had at School A. (Great Grandmother's testimony)

7. The student's next IEP was developed on March 30, 2012, and prescribed the following services: 10 hours per week of specialized instruction: in general education, 180 minutes per month of speech-language pathology outside general education. (Petitioner's Exhibit 5-5)
8. The student's IEP progress reports from in SY 2011-2012 and SY 2012-2013 indicate the student was making progress relative to his IEP goals. (Respondent's Exhibit 6-1, 6-2, 6-3)
9. In May 2012 DCPS conducted a psychological reevaluation of the student. The evaluation included assessments of the student's cognitive, academic and executive functioning. The student's cognitive functioning was determined to be in the average range; however, his processing speed was deficient. The evaluator noted the student's Attention Deficit and Hyperactivity Disorder ("ADHD") and noted that the student's academic functioning was in the low average range in math and written expression and borderline range in reading. The student's executive functioning at home and the classroom was determined to be an area of concern. The evaluator determined the student was performing below expected levels and below cognitive functioning in reading despite receiving specialized in instruction and that he was reading and comprehending at approximately a third grade level. (Petitioner's Exhibit 1-1, 1-9, 1-10, 1-11, 1-14, Respondent's Exhibit 4-2)
10. Although the student's cognitive functioning was determined to be in the average range, his slow processing speed was a cause of concern and consequently the evaluator calculated the student's intelligence quotient ("IQ") differently which resulted in a IQ of 98 rather than 89 with the usual calculation. The student's slow processing consequently causes the student to be prone to fall behind in classroom assignments and tests that are timed. Thus, the student benefits from accommodations such as testing in small groups and repeated directions. Because the student is so far behind his grade and aged peers in his academic functioning, Petitioner's expert witness recommended the student be in a full time out of general education placement.⁶ (Witness 1's testimony, Petitioner's Exhibit 1-14)
11. On May 17, 2012, DCPS convened an IEP meeting at which the student's disability classification was changed from SLI to SLD. The IEP team changed the student's services to prescribe that 3 hours per week of specialized instruction be provided outside general education ("pull-out") and 10 hours per week be provided inside general education. The student's speech language services were discontinued. The accommodations in the IEP were continued. The parent participated in the IEP meeting and requested that the staff increase the student's specialized instruction outside of general education to 15 hours per week. Prior to the meeting the student seemed to be

⁶ This witness neither evaluated nor met the student and did confer with any of his current or past teachers regarding his educational abilities and/or performance.

failing but somehow at this last meeting the School A staff produced work that indicated the student would pass grade. School A staff did not agree to the requested level of services outside general education but agreed on 3 hours per week outside general education and those hours were to be implemented immediately following the meeting. (Parent’s testimony, Petitioner’s Exhibit 4-1, 4-5, 4-7)

12. The parent was satisfied at the end of the May 17, 2012, IEP meeting with the 3 hours of specialized instruction that were in the IEP and hopeful that would be sufficient for the student to show some improvement. However, the parent did not expect much change in the student’s performance in the final month of school for SY 2011-2012 despite the increased services. The parent does not believe, however, that the student was actually provide the “pull-out” hours in that last month of school but could not personally attest to that fact. (Parent’s testimony)

13. During SY 2011-2012 the student was assigned a special education teacher who assisted the student and other special education students in his general education math class. The student was performing about average relative to his peers in his math class. There were 18 students in his class that school year. The special education teacher would help the student get organized and help him with manipulatives and other tools to grasp math concepts being taught in the general education classroom. The special education teacher took the student and other special education students out of the classroom on occasion to give him instruction. Between May and June 2012 the special education teacher would leave the general education classroom with the student alone and sometimes with other students at least two to three times during the week for the majority of the math class period. (Witness 3’s testimony)

14. At the end of SY 2011-2012 the student was promoted to grade. The student attended Extended School Year (“ESY”) during summer 2012 at a DCPS middle school. (Parent’s testimony, Petitioner’s Exhibit 9-1)

15. During SY 2011-2012 at School A the student earned the following grades in the following subjects:

(Petitioner’s Exhibits 9-1)

Subject:	Adv 1	Adv 2	Adv 3	Adv 4	Final Grade
Middle School Math	C	B	C	C	C
Language Arts	D	B	B	C	C
Science	F	B	D	D	D
World Geography	F	F	F	A	C
Art 6	C				C
Health & Phys Ed		B			B

Library Media		A		A
Music			D	D
Elective	P			P
Elective		P		P
Elective			P	P
Elective			D	D

16. Because the student's parent was not satisfied with the level of services School A was providing the student and not satisfied with his academic progress, at the start of SY 2012-2013 she placed the student in a private school, School B, after applying for and obtaining a scholarship. Although the student had completed sixth grade at School A and was promoted to seventh grade, as a result of assessments conducted by School B, the student was placed in sixth grade at School B for SY 2012-2013. School B is a general education school and School B did not have or implement the student's IEP from School A or develop a new IEP for the student. While the student attended School B he was given reading material below grade level but struggled even with those materials. (Parent's testimony)

17. The student did not perform well academically at School B and in January 2013, School B informed the student's parent the student was failing sixth grade. Despite efforts to help improve the student's academic performance with some pull out instruction, the student did not perform well academically and School B informed the parent the student would not be allowed to return to School B for SY 2013-2014. As a result, the parent removed the student from School B in early May 2013 and returned him to his neighborhood school, School A, where he was placed in sixth grade. (Parent's testimony, Petitioner's Exhibit 13-1)

18. School A has ten special education teachers and approximately 100 special education students out of total school student population of approximately 400. The student's current special education teacher and case manager has 26 students on her caseload. Three hours of "pull-out" instruction is the most that any special education student at School A current receives. (Witness 5's testimony)

19. Since the student has returned to School A he has displayed a pleasant attitude in class and jumped right into instruction. The student's special education teacher administered an informal academic assessment to the student after his return and student appears to be operating at approximately fifth grade level. He is being provided accommodations in the classroom and on tests is to account for his ADHD, memory and his slow processing speed. (Witness 5's testimony)

20. Since May 2013 the student has been provided reading instruction from a special education teacher two days per week for about an hour and a half each day. School A considers this to be the student's "pull-out" instruction. However, the special education

teacher provides this instruction to all the male students in the grade together. The grade class is separated by gender with all boys taking all classes together. There are approximately 13 to 15 male students in the grade. Only four of the male students in the sixth grade have IEPs, although all of them display reading deficits and can benefit from the reading instruction from the special education teacher. However, the student receives no instruction that is either provided to him one on one or only with other special education students by a special education teacher. (Witness 5's testimony)

21. The student has not shied away from work and has displayed more confidence in his general education math class since returning to School A. The student performance has been average and he is approaching sixth grade standards. In the opinion of the student's current general education math teacher who also taught the student during SY 2011-2012 since he has returned to School A in May 2013 the student has not demonstrated any need behavioral counseling he conducts himself well in class. The student's major difficulty in his math class the previous school year was his disorganization. Since he returned to School A, his math teacher has noticed improvement in his note taking and his basic math skills. (Witness 4's testimony)
22. DCPS convened an IEP meeting for the student on June 7, 2013. At that meeting the parent requested that the student be provided 15 hours of specialized instruction per week outside general education and that he be placed in a smaller setting. The School A members of the team expressed concerns about the student's self-esteem with his peers if he were pulled out of class for any greater number of hours. The team agreed to provide the student 6 hours per week of "pull-out" services so the student would be provided some "pull-out" services every day along with 10 hours of inclusion instruction per week. However, the increased services were not to start until SY 2013-2014. The parent felt she had no choice but to accept that level of services or continue to argue with the School A members of the team. The student's special education teacher confirmed at that meeting that the student had not received "pull out" instruction because of end of year activities. (Parent's testimony)
23. The parent educational advocate prepared a proposed compensatory education plan for the alleged denials of a FAPE to the student for him allegedly having an inappropriate IEP during 2011-2012 and his IEP not being properly implemented during that school year. The proposal requested 25 hours of individual tutoring at School C because of the school's specialty in working with students with learning disabilities. She believes that the student's academic deficits can significantly improved with these services. However, in developing the proposal the advocate did not speak to any of student's teachers and was not at the student's most recent IEP meeting. (Witness 2's testimony, Petitioner's Exhibit 9)
24. The student interviewed at and visited, and was accepted to School C. During his visit School C conducted an informal academic assessment of the student. The assessment demonstrated the student's has reading deficits and he is generally operating at the grade functional level. School C is a special education school that serves students with special needs including students with learning disabilities. There are no non-disabled students at School C. School C offers and 30 hour per week summer program to assist

students' reading, written expression and math. The standard admissions process was followed for this student and the School C staff believes the school can meet the student's educational needs. If the student comes to School C his IEP would be amended to include the appropriate level of specialized instruction to meet his needs in all academic areas. School C can provide the student counseling and can provide any other appropriate related services. (Witness 6's testimony)

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). The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP on May 17, 2012, because the IEP (1) did not provide the student sufficient hours of specialized instruction (at least 15 hours) outside general education and (2) did not provide the student counseling despite Petitioner's request and the results of the student's FBA.

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.

Conclusion: Petitioner failed to demonstrate by a preponderance of the evidence that the student's IEP when developed on May 17, 2012 was inappropriate either because it did not prescribe 15 hours of specialized instruction outside general education or counseling services.

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34C.F.R. § 300.550; see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

The evidence demonstrates that when the student entered School A he was operating below grade level and was provided specialized instruction in the general education setting. Although the student's parent may have expected much more progress for the student and he was demonstrating greater deficits in reading than in math, the student was apparently making educational progress and able to access the general education curriculum. Although the parent requested that the student be provided more specialized instruction and that some instruction be provided outside general education, during the student's fifth grade and sixth grade years at School A, the student made educational progress as evidenced by his IEP progress reports and the passing grades he received during SY 2012-2013.

DCPS conducted a reevaluation of the student in May 2012 that indicated the student has average cognitive abilities and confirmed that the student had a learning disability for the first time. Based upon the student's academic performance it seems reasonable that DCPS would have increased the student's specialized instruction gradually in an attempt to effect greater academic gains given the recent evaluations. The evidence⁸ demonstrates that the IEP seemed to have been reasonably calculated to provide the student educational benefit at the time it was developed.

Despite the Petitioner's expert witnesses testimony that the student should have been provided full-time out of general education services at that point, the evidence does not support that conclusion and the Hearing Officer does not give her opinion great weight. She neither

⁸ FOF #s 8, 15

evaluated nor met the student personally. When compared to the testimony of at least one teacher who worked with the student during SY 2011-2012 and testified that the student was an average student in her classroom⁹, the Hearing Officer does not conclude that Petitioner met the burden of demonstrating that the student's May 17, 2013, IEP was inappropriate because it did not include 15 hours of specialized instruction outside general education or include counseling services. The evidence demonstrates that the student did not have disruptive behaviors and that the issues that were identified in the student's FBA in 2011 were being addressed with accommodations prescribed in the IEP.¹⁰ Petitioner presented no evidence to demonstrate that the student was in need of counseling services.

When the student left School A to attend School B it is not surprising that in a general education private school the student would have been assigned to the a sixth grade classroom despite having been promoted to the seventh grade at School A. The student was clearly operating below grade level but with IEP services provided at School A the student was able to make progress and access the general education curriculum.

The evidence demonstrates that while the student was at School B he did not have an IEP and it's not clear what he gained academically while at School B.¹¹ Nonetheless, his current teachers at School A note that the student has had a good start academically since he returned and in a short time demonstrated some progress.¹²

The parent, however, remains dissatisfied that the student's level of specialized instruction outside general education, even with the increase made at the June 7, 2013, IEP meeting. Time may quickly tell whether that level of services is sufficient. The student's academic and behavioral performance should be closely monitored and a relatively quick determination made as to whether the student's is making tangible gains in his reading and written expression deficits from the services in his current IEP. The student may very well be in need of more services but as of the date the complaint was filed it was certainly reasonable for DCPS to have implemented the IEP the student left School A with in June 2012.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to implement the student's IEP after May 17, 2012, meeting by failing to provide the student specialized instruction outside general education.

Conclusion: Petitioner failed to demonstrate by a preponderance of the evidence that DCPS did not provide the student the 3 hours of specialized instruction outside general education from May 17, 2012 to the end of SY 2011-2012.

⁹ FOF #s 13, 21

¹⁰ FOF #s 3, 11

¹¹ FOF # 16, 17

¹² FOF #s 19, 21

Although the parent testified that she did not believe the student received “pull-out” specialized instruction during this last month of school, she could not attest to this through personal knowledge. On the other hand, the student’s general education math teacher credibly testified¹³ that during that last month of school the special education teacher assigned to her classroom regularly pulled the student and other special education students out of the classroom for instruction a couple of days per week.¹⁴ Although she could not attest to the exact number of hours, her testimony was sufficient to counter the parent’s testimony.

A party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. Thus, a court reviewing failure-to-implement claims under IDEA must ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material." *Catalan et al., v. District of Columbia*, 478 F Supp 2^d 73 (2007), 47 IDELR 223.

Since the student has returned to School A (after this due process complaint was filed) the evidence may demonstrate something different. It seems now that the student’s “pull-out” instruction required by the IEP is not being delivered outside general education but delivered in a setting with all students whether they have an IEP or not.¹⁵ However, the issue adjudicated in this proceeding was limited to implementation during SY 2012-2013. Thus, the Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to provide a location of services that could implement the student’s IEP and provide him specialized instruction outside general education.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that School A cannot provide the student specialized instruction outside general education.

The evidence demonstrates that School A has a total of 10 special education teachers and that there are IEPs for students that currently prescribe up to 3 hours per week of “pull-out” specialized instruction outside general education. The evidence demonstrates that this student was provided services outside general education during SY 2011-2012.¹⁶ Therefore, the Hearing Officer concludes that School A has the ability to implement specialized instruction

¹³ The witness was forthright and unhesitating in her testimony.

¹⁴ FOF # 13

¹⁵ FOF #s 20, 22

¹⁶ FOF #s 13, 18

outside general education, albeit no student currently is prescribe more than 3 hours per week. Petitioner on the other hand did not present any sufficient evidence to contrary. As mentioned above, the fact that the student may not be getting “pull-out” services in this final month of SY 2012-2013 is a different issue than whether School A is capable of implementing instruction outside general education. Consequently, the Hearing Officer concludes that Petitioner failed to sustain the burden of proof on this issue by a preponderance of the evidence.

ORDER:

The claims raised in the due process complaint are hereby dismissed with prejudice and all 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: June 26, 2013