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

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

Date Issued: December 23, 2012

Hearing Officer: Melanie Byrd Chisholm

v.

District of Columbia Public Schools,
Respondent.

OSSE
STUDENT HEARING OFFICE
2012 DEC 26 AM 9:37

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is attending School A. The student's current individualized education program (IEP) lists specific learning disability (SLD) as her primary disability and provides for her to receive twenty-four and one half (24.5) hours per week of specialized instruction outside of the general education setting, sixty (60) minutes per week of behavioral support services outside of the general education environment, one (1) hour per week of speech-language pathology outside of the general education environment and one (1) hour per week of occupational therapy outside of the general education environment.

On October 9, 2012, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to implement the student's IEP during the 2012-2013 school year and by providing the student with an inappropriate placement and location of services for the 2012-2013 school year once DCPS "realized they could not implement the student's IEP." As relief for this alleged denial of FAPE, Petitioner requested, *inter alia*, placement in a private special education day school and compensatory education.

On October 11, 2012, Respondent filed a timely Response to the Complaint. In its Response, Respondent asserted that DCPS has developed and implemented an appropriate IEP for the student; location of services is an administrative issue within the discretion of the local educational agency (LEA). The Respondent's Response contained a Partial Motion to Dismiss.

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[1] Personal identification information is provided in Appendix A.

On October 12, 2012, the Petitioner filed an Opposition to Respondent's Partial Motion to Dismiss. Based on the discussion during the November 16, 2012 prehearing conference, the Respondent verbally, and followed by an electronic message, withdrew the Partial Motion to Dismiss.

On October 25, 2012, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on November 9, 2012, following the conclusion of the 30-day resolution period, and ends on December 23, 2012. The Hearing Officer Determination (HOD) is due on December 23, 2012.

On November 16, 2012, 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 November 29, 2012. The Prehearing Order clearly outlined the issue 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 December 2, 2012, the Petitioner's attorney communicated her disagreement with the specific language used in Issue #2 as outlined in the Prehearing Order while agreeing that the Prehearing Order accurately reflected the discussions held and conclusions reached during the prehearing conference.

On December 4, 2012, Petitioner filed Disclosures including twenty-five (25) exhibits and six (6) witnesses.[2] On December 4, 2012, Respondent filed Disclosures including two (2) exhibits and four (4) witnesses.

The due process hearing commenced at approximately 9:13 a.m.[3] on December 11, 2012 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2003. The Petitioner elected for the hearing to be closed. Petitioner's Exhibits 2-25 were admitted without objection. Petitioner's Exhibit 1 was admitted over Respondent's objection. The Hearing Officer noted that Petitioner's Exhibit 1 was drafted at the request of the Hearing Officer and submitted as a proposal not as a document to be adopted by the Hearing Officer without supporting facts. Respondent's Exhibits 1-2 were admitted without objection.

During opening arguments, counsel for the Respondent mentioned an offer of a location of services which was not contained within Respondent's Disclosures. The Petitioner acknowledged that an offer for an alternate location of services was communicated to the Petitioner's attorney on the morning of the Disclosures deadline and that the offer had not been communicated to the student's parent. The Petitioner objected to any evidence entering the record regarding the offered location of services, correctly indicating that the Respondent did not mention the offer, or a defense of an alternate location of services offer, during the prehearing conference and had not included any witness or exhibit in its Disclosures which pertained to the offer of an alternate

[2] A list of exhibits is attached as Appendix B. A list of witnesses who provided testimony is included in Appendix A.
[3] At 9:00 a.m., the scheduled time for the hearing, Petitioner's counsel was present however the Petitioner and the Respondent's counsel were not. Respondent's counsel arrived at 9:06 a.m. and the Petitioner arrived at 9:24 a.m.

location of services. The Hearing Officer indicated that objections would be heard at such time that the Respondent attempted to enter evidence of an offer of an alternate location of services.

Over Petitioner's objection, in order to preserve the record, the Hearing Officer allowed the testimony regarding the offered location of services, but informed the parties that the testimony may not be used in deciding the matter. The Hearing Officer also gave both parties the opportunity to brief the issue of whether the testimony of the witness regarding the offered location of services should be considered. The Hearing Officer indicated that briefs must be submitted by December 17, 2012.

The hearing concluded at approximately 5:26 p.m. following closing statements by both parties.

Jurisdiction

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

Testimony of Yair Inspektor

On December 17, 2012, Petitioner filed a Post-Trial Brief, arguing that the IDEA provides the absolution prohibition of evidence by Petitioner if it was not timely disclosed by DCPS; IDEA regulations, case law and comments to the regulations all suggest that the Hearing Officer must not allow evidence into the record that is prohibited by 34 CFR §300.512; DCPS, not the Hearing Officer has an obligation to consider public school placements before considering non-public school placements; it would be inequitable for the Hearing Officer to consider this testimony under the circumstances in this case; and applying Rules of Evidence, by analogy, suggests that testimony regarding School C should not be considered as evidence. On December 17, 2012, Respondent filed a Post-Trial Memorandum of Law, arguing that 34 CFR §300.512 does not apply because information regarding the School C offer was disclosed five days prior to the due process hearing; there is no prejudice to Petitioner because Petitioner's attorney admitted in her Opening Statement that she was aware of the offer of School C; the Respondent's Disclosures could be read to include the offer of School C since the Resolution Meeting was not the last attempt by the parties to resolve this matter; a settlement offer, even one that occurs on the date of the due process hearing, should be considered by the Hearing Officer in determining appropriate relief; and Petitioner's attorney has not articulated how she would have prepared differently if the offer of School C had been included in Respondent's Disclosures.

After a review of the briefs by the parties and careful consideration, the Hearing Officer hereby strikes the testimony of DCPS witness Yair Inspektor regarding the offered location of services from the record. Even if the Hearing Officer had chosen to consider the testimony, the testimony offered provided neither adequate evidence that the offered location of services is able to implement the student's IEP nor adequate evidence that the offered location of services is appropriate to address the student's unique needs.

ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to implement the student's IEP by failing to provide 24.5 hours of specialized instruction outside of the general education setting, one (1) hour per week of speech language therapy outside of the general education setting, one (1) hour per week of occupational therapy outside of the general education setting and one (1) hour per week of behavioral support services outside of the general education setting since the beginning of the 2012-2013 school year and whether this failure constitutes a denial of a FAPE?
2. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate program given the student's level of intellectual functioning?

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 diagnosed with a SLD. (Petitioner's Exhibits 13 and 18; Educational Advocate's Testimony; Mother's Testimony)
3. In the past, the student was most successful in an inclusion setting. (Educational Advocate's Testimony)
4. The parent did not want her child to attend School A. (Petitioner's Exhibits 2, 14 and 15; Mother's Testimony)
5. Prior to the student's enrollment in School A, the parent enrolled the student in another LEA and visited and applied to School B because she did not want the child to attend School A. (Petitioner's Exhibits 13, 14 and 15; Educational Advocate's Testimony; Mother's Testimony)
6. The student's March 9, 2012 IEP prescribes 24.5 hours per week of specialized instruction outside of the general education environment, sixty minutes per week of behavioral support services outside of the general education environment, one hour per week of speech-language pathology outside of the general education environment and one hour per week of occupational therapy outside of the general education environment. (Petitioner's Exhibit 13)
7. The student's March 9, 2012 IEP Team determined that, based on her disability category, the student should be assigned to an LD program. (Educational Advocate's Testimony)
8. At the March 9, 2012 IEP Team meeting, the parent rejected the assignment to School A and requested School B. (Petitioner's Exhibits 14 and 15)
9. School A staff members informed the parent that the school did not have the services indicated on the student's IEP. (Mother's Testimony)

10. At School A, the student was assigned to a self-contained program for students with intellectual disabilities (ID). (Petitioner's Exhibit 2, 7 and 8; Educational Advocate's Testimony; Mother's Testimony)
11. The student is functioning at, at least, a beginning third grade level in reading, written language and math. (Petitioner's Exhibits 7, 8, 13, 16, 18; Educational Advocate's Testimony; Mother's Testimony)
12. The other seven students in the student's assigned program are reading on a level "B" which is a pre-primer level, while the student is reading on a level "M," which is in the beginning third grade range. (Petitioner's Exhibit 13; Educational Advocate's Testimony; Student's Testimony)
13. The majority of classroom instruction in the student's assigned program is presented on a pre-primer to second grade level. (Petitioner's Exhibit 12; Educational Advocate's Testimony; Student's Testimony; Mother's Testimony)
14. The work samples provided to the student's mother as examples of the student's work are below the student's level of academic functioning. (Petitioner's Exhibit 12; Educational Advocate's Testimony)
15. The student is functioning at a higher academic level than the other students in her assigned class. (Educational Advocate's Testimony; Student's Testimony)
16. The classroom teacher occasionally works individually with the student. (Student's Testimony)
17. Most often, the classroom teacher works with the student in small groups comprised of the students in each grade. In the student's assigned program, there are two other students in the student's 7th grade group. (Student's Testimony)
18. During the 2012-2013 school year, the student's teacher has addressed some, but not all, of the student's IEP goals. (Respondent's Exhibit 1; Student's Testimony)
19. The student's IEP goals that have not been addressed during the 2012-2013 school year have been introduced to the student in previous school years. (Student's Testimony)
20. The student is articulate, pleasant, friendly and cooperative. (Student's Testimony)
21. The student is attentive, motivated to learn and desires to be challenged academically. (Petitioner's Exhibit 18; Student's Testimony)
22. The student is functioning at a higher social level than the other student's in her assigned program. (Educational Advocate's Testimony; Mother's Testimony)
23. The student needs appropriate peer models. (Petitioner's Exhibit 18; Educational Advocate's Testimony; Mother's Testimony)
24. The student attends the self-contained program for all academic subjects and attends one elective course per quarter with the students in her self-contained classroom and nondisabled peers. (Petitioner's Exhibit 9; Student's Testimony)
25. Specialized instruction outside of the general education environment is provided in the self-contained classroom and is not provided in the elective courses or during the lunch period. (Petitioner's Exhibits 6 and 9; Student's Testimony)
26. The student is able to appropriately function during lunch. (Student's Testimony)
27. The student is able to appropriately function during physical education. (Student's Testimony)
28. The student is able to appropriately function during music however, at times, she has difficulty understanding the vocabulary used by the music teacher. (Student's Testimony)

29. The DCPS 2012-2013 school year began on August 27, 2012. (Respondent's Exhibit 1; Mother's Testimony)
30. The student did not attend school for the 2012-2013 school year until September 4, 2012 because of the annual family vacation which continues through Labor Day each year. (Mother's Testimony)
31. Between September 24, 2012 and October 17, 2012, the student missed three weeks of school after a non-educational incident occurred in the school building. (Petitioner's Exhibits 2, 5, 7 and 8; Respondent's Exhibit 2)
32. DCPS schools were closed November 29-30, 2012 due to Hurricane Sandy. (Respondent's Exhibit 2)
33. From September 4, 2012 through November 2, 2012 the student received one session of behavioral support services, lasting 60 minutes. (Petitioner's Exhibit 2; Respondent's Exhibit 2; Student's Testimony)
34. Since September 4, 2012, the student has not received any speech-language therapy. (Petitioner's Exhibits 2, 5, 7, 8 and 10; Respondent's Exhibits 1 and 2; Student's Testimony)
35. From September 4, 2012 through the end of November, 2012, the student did not receive any occupational therapy. (Petitioner's Exhibits 2, 5, 7, 8 and 10; Respondent's Exhibits 1 and 2; Student's Testimony)
36. The student began receiving occupational therapy services at the end of November 2012. (Student's Testimony)
37. Since the end of November 2012, the student has received occupational therapy three (3) times per week. (Student's Testimony)
38. As of November 2, 2012, School A did not have a speech-language therapist or an occupational therapist on staff. (Petitioner's Exhibits 2, 5, 7, 8 and 10; Respondent's Exhibit 1)
39. School B is a nonpublic special education day school, located in the State of Virginia, which is approved by the District of Columbia Office of the State Superintendent of Education (OSSE) to serve District of Columbia students with disabilities. (School B Admissions Director's Testimony)
40. School B offers classrooms with a 3:1 student/teacher ratio and language-based instruction. Instruction is differentiated and presented in multiple modalities. (School B Admissions Director's Testimony)
41. School B's LD program has approximately eight students (combined) in two middle school classrooms and a lead teacher, certified in special education, and an assistant in each classroom. (School B Admissions Director's Testimony)
42. School B has a speech-language therapist, an occupational therapist and a behavior counselor on staff. (School B Admissions Director'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 Court in *Rowley* stated that the Act does not require that the special education services 'be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" Instead, the Act requires no more than a "basic floor of opportunity" which is met with the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 200-203. The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seg., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The IEP is the primary vehicle for ensuring that a disabled child's educational program is individually tailored based on the child's unique abilities and needs. *See* 20 U.S.C. §1414(d); 34 CFR §§300.320-300.324. The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. *Seattle Sch. Dist. No. 1 v. B.S.,* 82 F.3d 1493, 1500 (9th Cir. 1996).

IEP Implementation

The IDEA at 34 CFR §300.323(c)(2) requires each public agency to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. A material failure to implement a student's IEP constitutes a denial of a free appropriate public education. *Banks ex rel. D.B. v. District of Columbia,* 720 F. Supp. 2d 83, 88 (D.D.C. 2010).

In failure-to-implement claims, the consensus among federal courts has been to adopt the standard articulated by the Fifth Circuit. *E.g., S.S. v. Howard Rd. Acad.,* 585 F. Supp. 2d 56, 67 (D.D.C. 2008). In *Houston Independent School District v. Bobby R.,* 200 F.3d 341 (5th Cir. 2000), the Firth Circuit held that "to prevail on a claim under the IDEA, 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 ... authorities failed to implement substantial or significant provisions of the IEP." *Id.* at 349; *see also Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J,* 502 F.3d 811, 822 (9th Cir. 2007) ("[A] material failure to implement an IEP violates the

IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."). "[C]ourts applying [this] standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." *Wilson v. District of Columbia,* 770 F. Supp. 2d 270, 275 (D.D.C. 2011). What provisions are significant in an IEP should be determined in part based on "whether the IEP services that were provided actually conferred an educational benefit." *Bobby R.,* 200 F.3d at 349, n. 2. Failure to provide the services must deprive the student of educational benefit. *See Savoy v. District of Columbia*, 2012 WL 548173, 112 LRP 8777 (D.D.C. 2012).

In the present matter, the student's March 9, 2012 IEP prescribes 24.5 hours per week of specialized instruction outside of the general education environment, sixty minutes per week of behavioral support services outside of the general education environment, one hour per week of speech-language pathology outside of the general education environment and one hour per week of occupational therapy outside of the general education environment. The facts regarding the implementation of the student's specialized instruction and related services are largely uncontested.

The student is assigned to a self-contained classroom for all academic subjects and attends one elective course per quarter with the students in her self-contained classroom and nondisabled peers. Likewise, the student attends lunch with nondisabled peers. Specialized instruction outside of the general education environment is provided in the self-contained classroom and is not provided in the elective courses or during the lunch period. However, the Petitioner presented no evidence of the length of the school day, the amount of time per week the student receives specialized instruction for academic subjects or the amount of time of the student spends per week in elective courses. Assuming *arguendo* that the length of a school day at School A is six and one half (6 ½) hours, that the student attends lunch for 30 minutes per day and attends her elective course for one (1) hour per day, the student would be receiving 25 hours per week of specialized instruction outside of the general education environment. Therefore, based on the facts contained within the record, the Hearing Officer cannot conclude that the student is not receiving 24.5 hours per week of specialized instruction. In fact, it is likely that the student is receiving at least 24.5 hours per week of specialized instruction outside of the general education environment.

DCPS stipulated that the student has not received all of the related services prescribed in her IEP. The student's November 2, 2012 Service Tracker indicates that, as of November 2, 2012, the student had not been provided any speech-language or occupational therapy services because School A had yet to hire providers for these services. The November 2, 2012 Service Tracker also documents that the counselor attempted to provide behavioral support services to the student prior to October 17, 2012 however the student was absent from school "for some time and has recently returned," that the student received sixty minutes of behavioral support services on October 25, 2012 and that school was closed on October 29 and 30, 2012 for Hurricane Sandy, dates which the counselor had scheduled sessions for small group counseling. The student testified that she began receiving occupational therapy at the end of November 2012. There is no reliable evidence indicating that the student received any speech-language therapy before the date of the due process hearing.

The student's mother testified that although the 2012-2013 school year began on August 27, 2012, the student did not begin attending school until September 4, 2012 because of the annual family vacation which does not conclude until Labor Day. On September 24, 2012, the student was involved in a non-educational incident. On October 15, 2012, the student had yet to return to school.

The Hearing Officer concludes that the failure of DCPS to provide related services to the student during the weeks the student attended school is more than a de minimis failure to implement all elements of her IEP. Instead, the failure is a material failure, in that significant provisions of the student's March 9, 2012 IEP were not implemented and deprived the student of educational benefit. While the Hearing Officer acknowledges that full-time related service providers were not hired for School A until November 2012, it is disheartening that DCPS allowed students to progress almost three months into the school year before providing required services to students without attempting alternate methods to deliver services such as utilizing outside providers or providers from other schools.

The Petitioner has met its burden with respect to Issue #1.

Appropriate Program

Designing an appropriate IEP is necessary but not sufficient. The public agency must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP. *See O.O. v. District of Columbia*, 573 F. Supp. 2d 41 (D.D.C. 2008). Placement decisions must be determined individually based on each child's abilities, unique needs and IEP, 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. *See Analysis and Comments to the Regulations*, 71 Federal Register 46540:46588 (14 August 2006); *see also Letter to Anonymous*, 21 IDELR 674 (OSEP 1994) (clarifying that the LEA does not have a "main goal" which it must achieve when making a placement decision and that what is pertinent in making the placement decision will vary based upon the child's unique and individual needs.)

"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)). The Comments to the Federal Regulations note that "placement" refers to points along the continuum of placement options available for a child with a disability and "location" refers to the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. 71 Federal Register 46540:46588 (14 August 2006).

The Petitioner neither alleged that the hours of specialized instruction on the student's IEP are inappropriate nor alleged that the student's IEP could not be implemented in a separate class, as a point along the continuum of placement options.[4] Further, and did not allege that School A,

[4] 34 CFR §300.115(b)(1) describes alternative placements as instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.

the "bricks and mortar," could not implement the student's IEP. Rather, the Petitioner's argument was that the student's IEP could not be implemented in an ID classroom because she is a child with an LD diagnosis.

Given the IDEA's strong emphasis on identifying a disabled child's specific needs and addressing them, a particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs. *Fort Osage R-1 Sch. Dist. v. Sims ex rel B.S.,* 641 F.3d 996 (8th Cir. 2011). A child's educational placement must be based upon the child's educational needs as described in his or her IEP, and the placement cannot be a categorical placement that is determined by the child's disability category. *Letter to Fascell*, 18 IDELR 218 (OSEP 1991).

The Petitioner argued that the student's assignment to the ID program at School A is inappropriate because the student has an LD classification and therefore needs to be assigned to an LD program. Likewise, the student's March 9, 2012 IEP Team determined that, based on her classification, the student's needs could only be met in an LD program. The Petitioner's assertion and the IEP Team's determination that the student be placed in an "LD classroom," based solely on her identified disability category, are in error. Notwithstanding this error, DCPS had an obligation to offer a program which was based on the student's educational needs and could implement her IEP.

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. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. *Id.*

Under *Rowley,* the factual showing required to establish that a student received some educational benefit is not demanding. A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. *Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130*; E.S. v. Independent School Dist.,* No. 196 (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450.

While the ID classroom to which the student is assigned is not inappropriate because of the disability category associated with the classroom, there is evidence that the program is inappropriate for the student. During the student's September 27, 2012 IEP Team meeting, the student's teacher stated that the student is functioning at a 6th grade level in reading and math. In a September 28, 2012 letter to School A, the Educational Advocate stated that the student is functioning almost at grade level. Both of these assertions do not align with the student's March 9, 2012 IEP which states that the student's present level of performance is in the 3rd grade range

for reading and math. While the record does not contain adequate evidence of the student's current level of functioning, it is uncontested that the student is able to function at least at a beginning third grade level in reading, written language and math.

The Petitioner presented evidence that the other students assigned to the program are reading at a pre-primer level and require a "functional" academic program. For example, the other seven students in the program are reading on a level "B" which is a pre-primer level, while the student is reading on a level "M," which is in the beginning third grade range. Based on the needs of the other students in the program, the majority of classroom instruction is presented on a pre-primer to second grade level. The student testified that the classroom instruction and classwork is "babyish" and that she goes "over and over" concepts and skills she has "already learned." While this evidence was frail, the Respondent presented no evidence to the contrary.

Likewise, while the classroom teacher does occasionally work one-on-one with the student, the student's instruction is often presented in a small group comprised of the other two 7th grade students in the program. In *E.M v. New York City Dept. of Ed.*, (S.D.N.Y. 2012) 59 IDELR 274, 112 LRP 49410, the SRO found that the classroom would have provided the student a suitable grouping for instructional purposes because the student's academic functioning levels in reading and math fell within the range of other students in the class, and the students in the placement classroom had needs similar to the student's. Here, the student's current program does not provide suitable grouping for instructional purposes because the other students in the program are not at a similar academic or social level as the student.

Further, the student's November 2, 2012 Progress Report and the student's testimony suggest that the student is making progress however this progress is not commensurate with her abilities. "[A] school district fulfills its substantive obligations under the IDEA if it provides an IEP that is 'likely to produce progress, not regression,' and if the IEP affords the student with an opportunity greater than mere 'trivial advancement.'" *Cerra v. Pawling Central School District,* 427 F.3d 186, 195 (2d Cir. 2005). Although the student has been absent from school approximately four weeks during the 2012-2013 school year, the work samples provided by DCPS to the parent are below the student's level of functioning and are appropriate for students functioning at a kindergarten to second grade level. During the student's September 27, 2012 IEP Team meeting, subsequent to this meeting and during the due process hearing, no work samples were produced which document instruction to the student on her current level of academic functioning. While there is some evidence that the classroom teacher addresses some of the student's academic goals on her IEP, there is evidence that other goals have not been addressed during the 2012-2013 school year, although the goals were previously introduced to the student prior to the 2012-2013 school year.

The Hearing Officer does acknowledge that a portion of the student's lack of progress must be attributed to the fact that the student was not present at school for approximately four weeks during the first two quarters of the 2012-2013 school year. However, given the amount of specialized instruction provided in the student's March 9, 2012 IEP, and the student's motivation to learn and desire to be academically challenged, the repetition of previously mastered skills and the lack of fidelity to which the student's IEP goals are being addressed are hindering the student from making progress commensurate with her abilities. The Hearing Officer concludes that the

educational benefit offered by the student's current program provides the student only with opportunities for trivial advancement.

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

Relief

The Petitioner met its burden of proving that DCPS denied the student a FAPE by failing to implement the student's March 9, 2012 IEP, specifically the related services prescribed by the IEP, and by failing to provide the student an appropriate program given her current level of intellectual functioning. If an IDEA violation results in denial of a FAPE, a district court has discretion to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). Such relief could include reimbursement for a private placement. See 20 U.S.C. § 1412(a)(10)(C)(ii); *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370 (1985). The parent or guardian, however, must also establish that the particular private placement is itself appropriate. *See, e.g., Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175, 1183 (9th Cir. 2009). While the parents are not requesting reimbursement for a private school since the parents did not unilaterally place the student in a private school, the parents are requesting funding for a placement in a private school for DCPS' denials of FAPE.

The first step in the *Burlington/Carter* analysis is to determine if the services offered by the board of education were inadequate or inappropriate. As outlined above, the services offered by DCPS were inappropriate for the student. The second step in the *Burlington/Carter* analysis is determining if the services selected by the parents were appropriate. The parent has selected School B. School B is a nonpublic special education day school, located in the State of Virginia, which is approved by OSSE to serve District of Columbia students with disabilities. The school offers classrooms with a 3:1 student/teacher ratio and language-based instruction. Instruction is differentiated and presented in multiple modalities. School B's LD program has approximately eight students (combined) in two middle school classrooms and a lead teacher, certified in special education, and an assistant in each classroom. School B has a speech-language therapist, an occupational therapist and a behavior counselor on staff. The small group setting, differentiated instruction and language-based method are specific needs of the student evidenced in the record.

However, 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). Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act." *DeVries by DeBlaay v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). 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).

Presently, the student's IEP provides opportunities for the student to interact with nondisabled peers during lunch and transitions. Additionally, although not indicated in her IEP, the student is also interacting with nondisabled peers in elective courses and, despite the need for some accommodations in music, the student has been successful in these courses. In fact, evidence presented at the due process hearing indicated that, in the past, the student has been most successful in an inclusion setting. Likewise, both the Educational Advocate and the Mother noted the importance of the student spending time with appropriate peer models. The nature and severity of the student's disability is not such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily and the student's need for modeling nondisabled peers to acquire age-appropriate social skills argues against a more restrictive setting. *See N.B. v. Tuxedo Union Free Sch. Dist.*, 60 IDELR 2, 112 LRP 52148 (2nd Cir. 2012) (the great strides that a 4-year-old girl with PDD-NOS made by modeling nondisabled peers in her inclusion preschool class undermined a New York district's claim that she needed a more restrictive placement).

Notwithstanding the student's ability to interact appropriately and to participate in elective courses and other activities with nondisabled peers, DCPS has not offered an appropriate less restrictive program for the student. At the student's September 27, 2012 IEP Team meeting, when it became clear that the student was not receiving a FAPE in her assigned program, at the October 25, 2012 Resolution Meeting, during the resolution period and at any time prior to the Disclosures deadline, DCPS had the opportunity to offer an appropriate alternate program for the student and failed to do so. While School B is not the least restrictive environment for the student, the Hearing Officer concludes that the *services* selected by the parent are appropriate. *See C.B. v. Garden Grove Unified School District*, 635 F.3d 1155 (9th Cir. 2011) (the court held that "proper" did not mean that all of the student's educational needs were met, but only that the services provided were "proper" and beneficial).

The equitable considerations of the parent's claim ultimately balance. The record clearly indicates that the parent did not want her child to attend School A. Even one year prior to the student's enrollment in School A, the parent enrolled the student in another LEA and visited and applied to School B because she did not want the child to attend School A. At the March 9, 2012 IEP Team meeting, the parent rejected the assignment to School A and requested School B without the giving DCPS an opportunity to implement the student's IEP. However, the Respondent had multiple opportunities and could have utilized other resources to ensure that the student was receiving necessary services and educational benefit. Additionally, upon arrival at School A on September 4, 2012, School A staff members informed the parent that the school did not have the services indicated on the student's IEP and School A continued to inform the parent that the school was "doing the best we can do."

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).

In addition to funding for School B, the Petitioner also requested compensatory education in the form of an assessment in math, reading and written language by the Linda Mood Bell program and the courses recommended as a result of the assessments. The Respondent argued that the Compensatory Education Plan proposed by the Petitioner is "woefully deficient," does not include the amount of missed services or any indication of where the student would be should DCPS have provided the missed services, includes no evidence of regression and provides no basis for the appropriateness of the Linda Mood Bell program. The Hearing Officer agrees with the Respondent. The Educational Advocate, as author of the proposed Compensatory Education Plan, acknowledged that the proposed Compensatory Education Plan does not indicate where the student is functioning or would be functioning if not for the missed services and does not specify the hours of services missed or the hours of compensatory education requested.

Further, the Court in *Rowley* stated that the Act does not require that the special education services 'be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" *Rowley* at 200-203. A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. The services offered by School B are designed to maximize the student's potential and will result in greater educational benefit to the student then had DCPS implemented the student's IEP and offered an appropriate program. Given that DCPS did not offer an appropriate program for the Petitioner or the Hearing Officer to consider, the Hearing Officer must ensure that the student receives educational benefit, even if in a maximizing program, rather than entrust the LEA with continuing to search for an appropriate program for the student while she fails to receive related services and opportunities to make more than trivial advancement. Therefore, the Hearing Officer concludes that an additional award of compensatory education would be excessive based on the facts of this case. An equitable remedy is funding for the tuition and related services for the student at School B, at the expense of the LEA, for the remainder of the 2012-2013 school year.

ORDER

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

1. DCPS shall fund the cost of the student's tuition, including the costs of related services, to School B for the remainder of the 2012-2013 school year.
2. By May 30, 2013, DCPS shall complete an educational evaluation of the student to determine the student's present levels of performance in reading, written language and math.
3. Between May 30, 2013 and June 13, 2013[5], DCPS shall convene an IEP Team meeting to review the results of the educational evaluation, develop an appropriate IEP with accurate present levels of performance and determine an appropriate placement, in the least restrictive environment, for the student.
4. All other relief sought by Petitioner herein is **denied**.

[5] Nothing in this Order excuses DCPS from conducting an annual review of the student's March 9, 2012 IEP pursuant to 34 CFR §§300.324(b)(1) and 300.116(b)(1).

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: December 23, 2012

Melanie Byrd Chisholm
Hearing Officer