

data and have been reasonably calculated to provide the student with educational benefit; the location assignment of the student is appropriate and within the discretion of DCPS; that the student's October 13, 2011 IEP reflects the decisions proposed by the student's IEP Team; DCPS did not refuse to convene an IEP Team meeting for the student; DCPS has made a FAPE available to the student and the Petitioner failed to accept it; and School A is not an appropriate placement for the student because the student does not require a full-time placement, School A is not the student's least restrictive environment and placement of the student at School A does not comply with District regulations.

On March 20, 2012, the parties held a Resolution Meeting and failed to reach an agreement during the meeting. The Resolution Period Disposition Form signed by the parties on March 20, 2012 stated that the parties agreed that no agreement is possible and request that the 45-day timeline begin the day after the written agreement. During the Prehearing Conference, Respondent's attorney informed the Hearing Officer that the option to begin the 45-day timeline the day after the Resolution Meeting was selected in error. Accordingly, the parties signed an updated Resolution Period Disposition Form on March 28, 2012, agreeing that no agreement was reached by the end of the 30-day resolution period. Thus, the 45-day timeline commenced on March 31, 2012, and ends on May 14, 2012.

On March 27, 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 March 29, 2012. The Prehearing Order clearly outlined the issues to be decided in this matter and confirmed May 8-9, 2012 as the dates for the due process hearing. 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 issue as outlined in the Order.

On May 1, 2012, Petitioner filed Disclosures including fifty-three (53) exhibits and five (5) witnesses.² On May 1, 2012, Respondent filed Disclosures including six (6) exhibits and twelve (12) witnesses.

The due process hearing commenced at approximately 9:33 a.m. on May 8, 2012 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2006. The Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-12, 15, 19, 21, 26-27, 33-36, 38, 45, 47-50 and 52 were admitted without objection. Petitioner voluntarily withdrew Petitioner's Exhibit 18 following Respondent's objection. The Petitioner initially objected to Respondent's Exhibits 1-6 but withdrew the objections to Respondent's Exhibits 1-2. The Hearing Officer admitted Petitioner's Exhibits 13, 14, 16, 17, 20, 22, 24, 30, 32, 40, 42-44 and 53 over Respondent's objections, finding the exhibits relevant, able to be authenticated, proper pursuant to 34 CFR §300.512, and/or not prejudicial to Respondent. Petitioner's Exhibit 14 was admitted with the deletion of the unidentified writing. The Hearing Officer did not admit Petitioner's Exhibits 23, 25, 28, 29, 31, 37, 39, 41, 46 and 51. Petitioner's Exhibits 28, 29 and 31 pertain to a non-educational incident which is irrelevant in deciding the issues presented. Petitioner's Exhibits

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

25, 37, 39, 41 and 46 are letters from the Petitioner's attorney to School B. Respondent would have no opportunity to cross-examine Petitioner's attorney and Petitioner is able to present this evidence through witnesses. Petitioner was able to enter evidence included in Petitioner's Exhibit 23 through other exhibits and witnesses. Respondent would have no opportunity to cross-examine the writer of Petitioner's Exhibit 51. The Hearing Officer admitted Respondent's Exhibits 2-5 over Petitioner's objections finding the exhibits relevant, able to be authenticated, and/or not prejudicial to Petitioner. The Hearing Officer notes that Respondent's Exhibits 4 and 5 are duplicative of Petitioner's 36 and 35, respectively. The Hearing Officer did not admit Respondent's Exhibit 6 because the Respondent did not call Dr. Lynn Barganier or Nicole Rachel to testify.

At the close of Petitioner's evidence, Respondent moved for a Directed Verdict on all four (4) issues in the Prehearing Order. The Hearing Officer denied the Motion for Directed Verdict on Issues 1-3, but granted the Motion for Directed Verdict for Issue 4 (*Whether DCPS failed to provide the student a FAPE by failing to make changes to the student's IEP as agreed upon by the student's IEP Team at the October 13, 2011 IEP Team meeting?*) finding that the evidence presented by Petitioner showed that the changes to the student's IEP that were agreed upon during the October 13, 2011 IEP Team meeting were indeed made to the IEP, that the changes the parents sought were not agreed upon by the IEP Team and that School B twice made changes to the October 13, 2011 IEP as requested by the parents after the conclusion of the October 13, 2011 IEP Team meeting.

The hearing concluded at approximately 5:03 p.m. on May 9, 2012, following closing statements by both parties.

Jurisdiction

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

ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to provide the student a FAPE by failing to develop an appropriate IEP for the student on October 13, 2011, specifically, appropriate goals and objectives, the appropriate amount of specialized instruction and appropriate accommodations and modifications?
2. Whether DCPS failed to provide the student a FAPE by failing to provide an appropriate placement for the student on her October 13, 2011 IEP?
3. Whether DCPS failed to provide the student a FAPE by failing to convene an IEP Team meeting on January 26, 2012, as requested by the parents, thereby denying the parents the right to participate in the decision-making process for their daughter's education?

FINDINGS OF FACT

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

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Petitioner's Exhibits 12, 13, 16; Respondent's Exhibit 2; Educational Consultant's Testimony)
2. The student is diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). (Petitioner's Exhibits 10, 16 and 40; Educational Advocate's Testimony; Mother's Testimony)
3. The student has a high average IQ and is functioning in the low average range in broad math and broad written language and is able to score in the average range in broad reading when given the accommodations of having the questions read to her and given multiple choice questions. (Petitioner's Exhibit 8, 10, 14, 16 and 40; Educational Advocate's Testimony)
4. The student was identified as a student with disabilities during her 3rd grade year at School B. The student was referred to special education because of concerns regarding her failure to make gains in reading and her need for continued support in math and writing. The student started off at a Guided Reading level "L" in August 2010 and remained on Guided Reading Level "L" as of November 2010. The student also exhibited difficulty with reading fluency and comprehending and following multi-step directions. (Petitioner's Exhibits 3, 12)
5. The student's March 1, 2011 IEP prescribes thirty (30) minutes per week of specialized instruction in reading in the general education setting, thirty (30) minutes per week of specialized instruction in reading outside of the general education setting, thirty (30) minutes per week of speech-language pathology in the general education setting and thirty (30) minutes per week of speech-language pathology outside of the general education setting. (Petitioner's Exhibit 13; Mother's Testimony)
6. The student's October 13, 2011 IEP Team agreed that the student required additional specialized instruction inside and outside of the general education setting because the student was struggling with her decoding skills, comprehension skills and fluency skills when reading; the student was struggling with her decoding and spelling skills, her organizational skills, and her revision skills when writing; the student had weaknesses in multiplication, division and regrouping; and the student's weaknesses could impact her in the classroom setting with regard to initiating and completing classroom assignments, recalling information in a logical order and with spontaneous recall. (Respondent's Exhibit 2)
7. The student's October 13, 2011 IEP Team changed the student's disability category to SLD and prescribed four and one half (4 ½) hours per week of specialized instruction inside of the general education setting (one and one half (1 ½) hours each of reading, written expression and math), three (3) hours per week of specialized instruction outside of the general education setting (one (1) hour each of reading, written expression and math), thirty (30) minutes per week of speech-language pathology inside of the general education setting and thirty (30) minutes per week of

speech-language pathology outside of the general education setting. (Respondent's Exhibit 2)

8. The student's October 13, 2011 IEP Team all agreed to the goals on the student's IEP. (Educational Advocate's Testimony; Mother's Testimony; General Education Math Teacher's Testimony; Special Education Teacher's Testimony; General Education Language Arts Teacher's Testimony; Speech-Language Pathologist Testimony)
9. Subsequent to the IEP Team meeting on October 13, 2011, the parents proposed changes to the IEP drafted on October 13, 2011. Some, but not all, of the parent's suggested changes were made to the IEP based on the two sets of suggestions. The parents made suggestions a third time however no changes were made to the IEP based on the third set of suggestions. The third set of suggestions included additional accommodations and modifications and suggestions for "cleaning up" the IEP. Specifically, the Educational Advocate did not believe that the goals were measureable or that the baselines were appropriately stated. With the exception of the measurement language, the parents made no suggested changes to the student's goals or suggestions for additional goals. (Petitioner's Exhibit 20; Respondent's Exhibit 2; Educational Consultant's Testimony; Mother's Testimony)
10. During the first two semesters of the 2011-2012 school year, the student made progress toward the mastery of her IEP goals and 4th Grade Standards of Learning. (Petitioner's Exhibits 19, 21, 35, 36 and 53; Respondent's Exhibits 4 and 5; General Education Math Teacher's Testimony; Special Education Teacher's Testimony; General Education Language Arts Teacher's Testimony; Speech-Language Pathologist Testimony)
11. During the first two semesters of the 2011-2012 school year, the student increased from the Guided Reading Level "L" to the Guided Reading Level "O" and a mathematics level "G" to a mathematics level "J." In the student's general education math class in School B, she was performing in the "middle" range in comparison to her classmates. In the student's general education Social Studies class in School B, she initially had difficulty with memorizing the 50 states, but was able to make progress with accommodations. In the student's general education spelling class in School B, she was in the lowest functioning small group and performed as well as her classmates. In the student's general education Language Arts class in School B, she was notably progressing in reading fluency and in writing organization with the use of graphic organizers and other accommodations. (General Education Math Teacher's Testimony; Special Education Teacher's Testimony; General Education Language Arts Teacher's Testimony; Speech-Language Pathologist Testimony)
12. The student benefits from interaction with non-disabled peers in academic and non-academic activities and is able to progress in regular education classes with appropriate aids and services. The student is able to participate in music, art, recess, assemblies and lunch with non-disabled peers without aids and services. (Petitioner's Exhibits 2, 10, 15, 16, 19 and 35; Respondent's Exhibit 5; Mother's Testimony; General Education Math Teacher's Testimony; Special Education Teacher's Testimony; General Education Language Arts Teacher's Testimony; Speech-Language Pathologist Testimony)

13. The student has “excellent” social skills, makes friends easily, is happy and likes to please. The student is able to “independently” exhibit all work habits and personal and social skills listed on the 4th Grade Report Card and is motivated by group work in her general education classes. (Petitioner’s Exhibits 9, 10, 16, 35, 40 and 53; Respondent’s Exhibit 5; Mother’s Testimony; General Education Math Teacher’s Testimony; Special Education Teacher’s Testimony; General Education Language Arts Teacher’s Testimony; Speech-Language Pathologist Testimony)
14. The parents spent more time with the student on homework than other parents with whom they spoke. The student received additional help before school in math two times per week and occasionally after school in Language Arts. The student enjoyed completing her homework with her teachers. Beginning in November 2011, the student began to lack motivation to complete her classwork. (Petitioner’s Exhibit 30; Mother’s Testimony; General Education Math Teacher’s Testimony; General Education Language Arts Teacher’s Testimony)
15. The student began the 2011-2012 school year at School B. In early December 2011, the parents applied for the student to attend School A. A non-educational incident caused the parents to “lose faith” in School B and because of this incident, the parents felt they had to remove the student from School B. The student began attending School A on or about February 2, 2012. The parents notified DCPS of their intention to enroll the student in School A on January 23, 2012, ten (10) calendar days prior to the removal of their child from DCPS. The parents would not consider the option of returning their child to School B. (Petitioner’s Exhibits 32 and 45; Mother’s Testimony)
16. The parents requested an IEP Team meeting on November 29, 2011. On December 12, 2011, the parent’s attorney’s legal assistant contacted School B’s special education coordinator to follow-up with the request. School B’s special education coordinator responded on December 16, 2011 with suggested dates. The parties agreed to meet on January 26, 2012. On January 24, 2012, School B postponed the IEP Team meeting due to the death of the special education coordinator’s father. After the student’s removal from School B, DCPS did not reschedule the IEP Team meeting because it classified the student as a student parentally-placed in a private school entitled to equitable services through an individual services plan (ISP) rather than a student entitled to FAPE through an IEP. The parents continued to request an IEP Team meeting. (Petitioner’s Exhibits 26, 27, 33, 34, 38, 42, 43, 44, 45 and 47; Mother’s Testimony; PRO Case Manager’s Testimony; Special Education Coordinator’s Testimony)
17. School A is a private special education day school. There are no non-disabled students enrolled at School A. The School A school day begins at 8:30 a.m. and ends at 3:15 p.m. At School A, the student’s daily schedule includes 40 minutes of Fluency, taught by a teacher certified in special education; 40 minutes of Social Studies/History (Renaissance Club), taught by a teacher certified in special education; 40 minutes of reading, taught by a teacher certified in special education; 40 minutes of physical education, taught by a teacher not certified in special education; 40 minutes of math, taught by a teacher certified in special education; 30 minutes of lunch, held in the student’s classroom with disabled peers; 30 minutes of art, taught by a teacher not certified in special education; 40 minutes of written language, taught

by a teacher certified in special education; 40 minutes of science, taught by a teacher not certified in special education; 30 minutes of dance, taught by a teacher not certified in special education; and 10 minutes of “homeroom.” School A is not teaching the 4th Grade District of Columbia Standards of Learning for Social Studies. (School A Director of Education’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).

Issues 1 & 2

The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Board of Education v. Rowley*, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

In *Rowley*, 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.” A student’s IEP must be designed to meet the student’s unique needs and be reasonably calculated to provide the student with some educational benefit, but the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student’s abilities. (*Rowley, supra*, 458 U.S. 176 at p. 200.)

In the present matter, the student was identified as a student with disabilities during her 3rd grade year at School B. The student was referred to special education because of concerns regarding her failure to make gains in reading and her need for continued support in math and writing. The student’s Referral Form states that she “started off at a Guided Reading level “L” in August 2010 and remains on that level as of” November 2010. The teacher also noted concerns with the student’s fluency and comprehending and following multi-step directions. In March 2011, the student was found eligible for special education and related services and was

prescribed thirty (30) minutes per week of specialized instruction in reading in the general education setting, thirty (30) minutes per week of specialized instruction in reading outside of the general education setting, thirty (30) minutes per week of speech-language pathology in the general education setting and thirty (30) minutes per week of speech-language pathology outside of the general education setting.

In October 2011, the student's IEP Team reconvened to discuss her progress and need for additional services. The student's IEP Team agreed that the student required additional specialized instruction inside and outside of the general education setting because the student was struggling with her decoding skills, comprehension skills and fluency skills when reading; the student was struggling with her decoding and spelling skills, her organizational skills, and her revision skills when writing; the student had weaknesses in multiplication, division and regrouping; and the student's weaknesses could impact her in the classroom setting with regard to initiating and completing classroom assignments, recalling information in a logical order and with spontaneous recall. Based on this justification, the student's IEP Team changed her disability category to SLD and increased her specialized instruction to four and one half (4 ½) hours per week of specialized instruction inside of the general education setting (one and one half (1 ½) hours each of reading, written expression and math), three (3) hours per week of specialized instruction outside of the general education setting (one (1) hour each of reading, written expression and math), thirty (30) minutes per week of speech-language pathology inside of the general education setting and thirty (30) minutes per week of speech-language pathology outside of the general education setting.

The student's October 13, 2011 IEP Team all agreed to the goals on the student's IEP. The parents and the Educational Advocate agreed that all of the goals on the student's October 13, 2011 IEP were appropriate but testified that they believed "additional" goals were needed. However, there was no evidence presented as to what additional goals were needed or requested. In fact, the Educational Advocate's notes state that the IEP needed to be "cleaned up" in that she did not believe that some of the goals were measureable and she did not believe that the baselines were appropriately stated. The notes do not contain suggestions for additional goals. The electronic communication from the Educational Advocate to School B containing her suggestions also includes additional requested accommodations and modifications, some of which were added to the October 13, 2011 IEP.

Pursuant to 34 CFR §300.116(b)(2), the child's placement must be based on the child's IEP. Placement decisions can only be made after the development of the IEP. *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 441 IDELR 178 (4th Cir. 1988). Based on the undisputed goals in the student's October 13, 2011 IEP, the hours of specialized instruction agreed upon by the IEP Team, in the general education setting and outside of the general education setting, were appropriate to implement the goals. While the Educational Advocate and the parent indicated that the student needed more specialized instruction, there was no evidence that a specific amount of specialized instruction was requested at the October 13, 2011 IEP Team meeting or that any justification for additional time outside of the general education environment was given. During the hearing, the Educational Advocate stated that additional "services" were need for the student because the student was not mastering her IEP goals. However, there was no evidence presented to support the contention that the student is not mastering her IEP goals.

In fact, the evidence presented suggests that the student was making adequate progress toward the mastery of her IEP goals.

During the first two quarters of her 4th grade year, the student increased from the Guided Reading Level “L” to the Guided Reading Level “O” and a mathematics level “G” to a mathematics level “J.” On her second quarter report card, the student was “beginning” to develop the skills to be proficient in one of 18 4th Grade English Language Arts Standards; “developing” toward proficiency in nine of 18 4th Grade English Language Arts Standards; and “secure” in her proficiency in five of 18 4th Grade English Language Arts Standards. The remaining three 4th Grade English Language Arts Standards had not yet been introduced. The student was “beginning” to develop the skills to be proficient in two of 10 4th Grade Mathematics Standards; and “developing” toward proficiency in four of 10 4th Grade Mathematics Standards. The remaining four 4th Grade Mathematics Standards had not yet been introduced.

The student was “developing” toward proficiency in two of eight 4th Grade Science Standards; and “secure” in her proficiency in two of eight 4th Grade Science Standards. The remaining four 4th Grade Science Standards had not yet been introduced. The student was “beginning” to develop the skills to be proficient in two of 13 4th Grade English Social Studies Standards; and “developing” toward proficiency in three of 18 4th Grade Social Studies Standards. The remaining eight 4th Grade Social Studies Standards had not yet been introduced.

The five 4th Grade Music Standards and the five 4th Grade Art Standards had not yet been introduced. The student was “secure” in her proficiency in three of six 4th Grade Health & Physical Education Standards. The remaining three 4th Grade Health & Physical Education Standards had not yet been introduced.

The student has a high average IQ and is functioning in the low average range in broad math and broad written language and is able to score in the average range in broad reading when given the accommodations of having the questions read to her and given multiple choice questions. In the student’s general education math class in School B, she was performing in the “middle” range in comparison to her classmates. In the student’s general education social studies class in School B, she initially had difficulty with memorizing the 50 states, but was able to make progress with accommodations. In the student’s general education spelling class in School B, she was in the lowest functioning small group and performed as well as her classmates. In the student’s general education Language Arts class in School B, she was notably progressing in reading fluency and in writing organization with the use of graphic organizers and other accommodations.

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 Supp. 2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. §1412(a)(5)); 5 DCMR §3011 (2006). The IDEA creates a strong preference in favor of “mainstreaming” or insuring that handicapped children are educated with non-handicapped children to the extent possible. *Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Ill. State Bd. of Educ.*, 184 F.3d 912, 915 (7th Cir. 1999). Furthermore, children with disabilities are only to be removed from regular education classes “if the nature or severity of the disability

is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 CFR §300.550(b)(2).

The student’s mother testified that the activities in which the student participated with non-disabled peers were her favorite times of the day and it is appropriate for her to have recess, lunch and art with non-disabled peers. The parent also testified that specialized instruction in the general education classroom and outside of the general education classroom is appropriate for the student. While the Educational Advocate testified that School A “is not overly restrictive because [the student’s] needs are being met,” her June 2011 evaluation states that the student needs specialized support in all academic areas and that “some of this should be in a pull-out model and some should be provided in the classroom.” The student’s general education math teacher, general education language arts teacher and special education teacher all testified that the student benefits from interaction with non-disabled peers and the specialized instruction in the general education classroom and outside of the general education classroom is appropriate for the student and the student is progressing in her regular education classes.

There is overwhelming evidence that the student benefits from interaction with non-disabled peers in both academic and non-academic activities. The student has “excellent” social skills, makes friends easily, is happy and likes to please. The student is able to “independently” exhibit all work habits and personal and social skills listed on the 4th Grade Report Card and is motivated by group work in her general education classes. While the student’s disabilities create the need for some specialized instruction outside of the general education setting, the evidence supports the Respondent’s position that the education of the student in regular classes with the use of supplementary aids and services can be achieved satisfactorily. The evidence was undisputed that it is appropriate for the student to participate in music, art, recess, assemblies and lunch with non-disabled peers.

Although the Plaintiffs are not satisfied with DCPS’ offer of FAPE, an IEP need not conform to a parent’s wishes in order to be sufficient or appropriate. *See Shaw v. District of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (stating that the IDEA does not provide for an “education ... designed according to the parent’s desires”) (citation omitted). In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. *Id.* What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In the present matter, the parents are clearly loving and dedicated parents who showed reasonable concern for their daughter’s education and rate of progress. The parents became understandably frustrated when they were spending more time with the student on homework than other parents and then, when a non-educational incident caused the parents to “lose faith” in the school, the parents felt they had to “get her out of the school.”

It is unfortunate that the parents, who previously had a positive working relationship with School B, felt they had to remove their child from the school because of a loss of trust and concerns that their daughter was not functioning on grade level. However, 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 parents were spending more time with their daughter on homework than other parents, the student is a student with ADHD and SLD and while the student was not performing on grade level in all areas, she was making progress at School B.

Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, *citing Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041. The Hearing Officer concludes that at the October 13, 2011 IEP Team meeting, the student's IEP Team developed an appropriate IEP for the student and determined an appropriate placement, in the least restrictive environment for the student, based on the IEP developed. On October 13, 2011, the nature or severity of the student's disability did not warrant additional removal from the general education environment. There is no evidence that supports the contention that this student who is able to appropriately interact with non-disabled peers in non-academic activities, benefits from interactions with peers in academic classes, and was making academic progress toward grade level standards required additional specialized instruction, additional accommodations and modifications or placement in a more restrictive environment.

Issue 3

Pursuant to the IDEA regulations at 34 CFR §300.324(b), each public agency must ensure that the IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals and in the general curriculum, if appropriate; the results of any reevaluation conducted under §300.303; information about the child provided to, or by, the parents, as described under §300.305(a)(2); the child's anticipated needs; or other matters. The U.S. Department of Education Office of Special Education Programs (OSEP) has interpreted this section to mean that there should be as many meetings a year as any one child may need, and public agencies should grant any reasonable parent request for an IEP meeting. If the public agency refuses to convene an IEP meeting to determine whether the child's IEP should be changed, the public agency must provide written notice to the parent of the refusal, including an explanation of why the agency determined that conducting the meeting is not necessary to ensure that provision of FAPE to the student. 64 Federal Register 12476-12477 (March 12, 1999).

In the present matter, the parents requested an IEP Team meeting on November 29, 2011. On December 12, 2011, the parent's attorney's legal assistant contacted School B's special education coordinator to follow-up with the request. School B's special education coordinator responded on December 16, 2011 with suggested dates. The parties agreed to meet on January 26, 2012. On January 24, 2012, School B's special education coordinator contacted the parents and the parent's attorney to inform them that, due to a death in her family, the IEP Team meeting needed to be postponed. When the special education coordinator returned on February 1, 2012, the student had been withdrawn from the School B and enrolled in School A.

Although the parents had unilaterally placed the student in School A, the parents continued to request an IEP meeting with School B. However, the parents were informed that DCPS considered the student a Private-Religious Office (PRO) student and would only consider providing the student with an ISP. The PRO Case Manager informed the parents that in order for the student to have an IEP, the student must reenroll in and attend School B. DCPS informed the parents, through their attorney, that DCPS did not agree to bear the cost of a private placement in this case.

The IDEA and the regulations promulgated under it contemplate that when disagreements between parents and school boards concerning placement decisions arise, they will be resolved by a Hearing Officer. *See Yates v. Charles County*, 212 F. Supp. 2d 470, 37 IDELR 124 (D.MD 2002). The regulations expressly provide that either a "parent or a public agency may file a due process complaint" when there is a dispute about a child's educational placement or the provision of FAPE to the child. *See* 34 CFR §300.507(a)(1). While DCPS did not agree with the parent's contention that FAPE was not being provided to their child, DCPS had the opportunity to file a due process complaint to challenge the parent's action. The parents provided clear notice to DCPS that their intention was to withdraw the student from School B and seek funding for the placement at School A. Based on this information, DCPS inappropriately classified the student as a student parentally-placed in a private school as defined by 34 CFR §300.130 rather than a student unilaterally placed in a private school when FAPE is at issue pursuant to 34 CFR §300.148. Therefore, the parents retained the right to request and have an IEP Team meeting held for their daughter.

The IDEA imposes strict procedural requirements on educators to ensure that a student's substantive right to a "free appropriate public education" is met. 20 U.S.C. § 1415. The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.

In this case, the parents noticed that after an increase in the student's specialized instruction services in October 2011, the student continued to need assistance with homework. Additionally, both the parents and the student's teachers noticed that in November 2011, the child began to "lack motivation." School B worked with the parents to schedule an IEP Team meeting to discuss the parent's concerns and an IEP meeting was indeed scheduled for January 26, 2012. On January 24, 2012, the IEP Team meeting was reasonably postponed however

DCPS failed to reschedule the IEP Team meeting as required. The failure of DCPS to reschedule the IEP Team meeting significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to their child. The parents had reasonable concerns regarding the provision of FAPE to their child and had the right to an IEP Team meeting to discuss these concerns. The Hearing Officer expressly declines to find that the failure of DCPS to convene an IEP Team meeting impeded the child's right to a FAPE or caused a deprivation of educational benefit.

Requested Relief

In this matter, the parents seek an award of reimbursement for tuition for School A from February 2, 2012. A board of education *may* be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parent, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parents' claim. (emphasis added). *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 (2d Cir. 2005).

The first step in the *Burlington/Carter* analysis is to determine if the services offered by the board of education were inadequate or inappropriate. The Hearing Officer has determined that the student's October 13, 2011 IEP was appropriate. While DCPS significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, the Petitioner did not prove by a preponderance of the evidence that the services offered by the board of education after October 13, 2011 were inadequate or inappropriate.

While the student began to "lack motivation" after the implementation of her October 13, 2011 IEP, the student was making adequate progress toward her IEP goals and toward the 4th Grade Standards of Learning. The Petitioner argues that the student's lack of motivation was based on her difficulty understanding the concepts taught in school while the Respondent argues that the student's lack of motivation was based on her knowledge that she was leaving School B and enrolling in School A. There is evidence to contradict both of these positions. First, while the student continued to need help with completing homework, the evidence shows that the student was making academic progress in all subject areas. Next, while the student may have known that her parents intended to enroll her in School A, the student was not accepted to School A until January 2012. Likewise, while the student continued to need assistance with her homework before and after school, the student enjoyed completing her homework with her teachers and was making progress in School B commensurate with her abilities.

Further, even if the Hearing Officer found that the services offered by the board of education were inadequate or inappropriate, equitable considerations would bar the parent's claim. First 34 CFR §300.148(d) states that the cost of reimbursement described in paragraph (c) of this section may be reduced or denied if (i) at the most recent IEP Team meeting that the parents attended prior to removal of the child from public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a

private school at public expense; or (ii) at least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in (d)(1)(i) of this section.

Here, the parents did not inform the October 13, 2011 IEP Team that they were rejecting the placement proposed and intended to enroll their child in a private school. While the parents and School B had an IEP Team meeting scheduled for January 26, 2012, the parents' written notice of their intent to remove the child from the public school was sent on January 23, 2012, one day *before* the parents learned that the IEP Team meeting was being postponed, thereby not giving the public agency an opportunity to propose a placement or a provision of FAPE. Further, the written notice from the parents to School B was sent ten (10) calendar days prior to the removal of the child from the public school, not ten (10) business days as required by 34 CFR §300.148(d)(1)(ii).

Next, on direct examination, the parent stated that while she was concerned about her daughter's progress, it was not until after a non-educational incident occurred that she decided to remove her child from the school. When asked by the Hearing Officer to clarify her position, the parent again indicated that the non-educational incident was the determining factor in her removal from the child from School B. Likewise, the parent testified that it was her intention to enroll the student in School A for the 2012-2013 school year and that she submitted the application for School A for the student in early December 2011 because "it took [her] son two years to get into School A and [she] did not want it to take [the student] as long."

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003).

In the present matter, the Petitioner only requested, as relief, reimbursement for School A from February 2, 2012 and placement and funding at School A. The Hearing Officer concludes that these remedies are inappropriate for DCPS' failure to conduct an IEP meeting at the request of the parents. However, when a local educational agency (LEA) deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or Hearing Officer fashioning appropriate relief may order compensatory education. *Reid* at 522-523. *See also Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36, 49 IDELR 38 (D.D.C. 2007). If a parent presents evidence that her child has been denied a FAPE, she has met her burden of proving that the child may be entitled to compensatory education. *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 49 IDELR 183 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010).

While the Petitioner did not request compensatory education, the Hearing Officer has the obligation to determine an equitable remedy, based on the facts in this specific case, given that

there has been a denial of FAPE. In this case, DCPS' failure to convene an IEP meeting, as requested by the parent, thereby significantly impeding the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, caused harm to the child in that the IEP Team was not able to determine whether the services on the student's October 13, 2011 IEP continued to be appropriate given the student's lack of motivation and continued need for assistance with her homework. Further, the student was harmed by DCPS' inappropriate classification of the student as a student parentally-placed in a private school and entitled to equitable services rather than classification of the student as a student unilaterally placed in a private school when FAPE is at issue entitled to FAPE.

The starting point for calculating a compensatory education award is when the parent knew or should have known of the denial of a FAPE. The duration is the period of the denial. 20 U.S.C. §1415(f)(3)(C); 20 U.S.C. §1415(b)(6)(B); *See also Reid*, 401 F.3d at 523; *Brown v. District of Columbia*, 568 F. Supp. 2d 44, 50 IDELR 249 (D.D.C. 2008) *citing Peak v. District of Columbia*, 526 F. Supp. 2d 32, 49 IDELR 38 (D.D.C. 2007). The Hearing Officer finds that the starting point of the denial of FAPE is February 3, 2012, the date that DCPS informed the parents, in writing, of its refusal to convene an IEP Team meeting for the student. The end point of the denial of FAPE is March 20, 2012, the date that the parent informed DCPS that any placement other than School A was "not an option," even if DCPS held an IEP Team meeting.

An award of compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued. *Reid*, 401 F.3d at 524. During the period of February 2, 2012 – March 20, 2012 the student was enrolled at School A, a private special education day school, and was receiving specialized instruction in academic subjects for at least four hours per day (20 hours per week) outside of the general education setting. Granting additional educational services is inappropriate in that the student was already receiving educational benefit during the relevant time period. The student's October 13, 2011 IEP prescribes seven and one half (7 ½) hours per week of specialized instruction. Additionally, while at School B, the student received additional help before school in math two times per week and occasionally after school in language arts. Therefore, the Hearing Officer concludes that an appropriate compensatory education award is for DCPS to share the cost of the child's education at School A for the period of February 3, 2012 – March 20, 2012.

The Hearing Officer concludes that the student's October 13, 2011 IEP is reasonably calculated to confer educational benefit and that the student's placement pursuant to her October 13, 2011 IEP is appropriate. The Petitioner failed to meet its burden with regard to Issues 1 and 2. The Hearing Officer concludes that DCPS' failure to reschedule the January 26, 2012 IEP Team meeting constitutes a denial of FAPE in that the procedural violation significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child. The Petitioner has met its burden with regard to Issue 3.

ORDER

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

1. Within 10 business days, or on a date mutually agreed upon by both parties, that DCPS hold an IEP Team meeting to review the student's current IEP;
2. Within 60 calendar days, as compensatory education, that DCPS reimburse the parents for one half (1/2) of the tuition³ of School A from February 3, 2012 – March 20, 2012;
3. All other relief sought herein by Petitioner herein is **denied**.

NOTICE OF RIGHT TO APPEAL

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

Date: May 14, 2012


Hearing Officer

³ Tuition does not include application fees, enrollment fees, transportation or any optional fees such as tutoring, activities or after-school care.