

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened for three days on June 6, 2012, and June 7, 2012, and concluded on June 8, 2012, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Student Hearing Office, 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003 for all days.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____ in _____ grade and has been determined eligible as a child with a disability under IDEA with a classification of speech or language impairment ("SLI"). District of Columbia Public Schools ("DCPS") convened a multidisciplinary team ("MDT") meeting on September 7, 2011, to review the student's evaluations. At the time the student had been attending the _____, a private special education school since the start of the 2011-2012 school year ("SY"). Prior to attending _____ the student attended a private general education school, hereinafter referred to as "School A" from kindergarten through first grade.

DCPS determined on September 7, 2011, that the student met the eligibility criteria for special education services with the SLI classification but determined more information was needed to develop the student's individualized education program ("IEP"). DCPS stated the student could immediately begin attending his neighborhood DCPS elementary school, hereinafter referred to as "School B," while DCPS obtained the necessary data to formulate the student's IEP. The student's parent declined the offer for the student to attend School B at that time and agreed to DCPS' request to observe the student at _____ to collect additional data on the student's academic performance. The MDT agreed to reconvene on October 4, 2011, to review the additional data and develop the student's IEP.

DCPS conducted an observation of the student at _____ and on October 4, 2011, reconvened the student's IEP meeting. The results of the observation were reviewed as well as updated educational assessments provided by _____. DCPS considered the student to be operating academically in the average range but noted his need for specialized instruction particularly in reading. DCPS developed an IEP with goals in reading, written expression and communication/speech and language. The IEP prescribed 3 hours of specialized instruction per week: 2 hours in general education and 1 hour outside general education. The IEP also prescribed 1 hour of speech language pathology per week: 30 minutes in general education and 30 minutes outside general education.

DCPS agreed more data was needed on the student's response to intervention ("RTI") that had been provided by the student's reading specialist at School A, who was unavailable due to illness. DCPS also agreed that an occupational therapy ("OT") evaluation should be conducted.

DCPS offered for the IEP to be implemented at School B during the time the additional data was collected. The student's parents chose to keep the student at LSW until the IEP team reconvened to review RTI data and OT evaluation.

On October 30, 2011, LSW conducted an OT evaluation that recommended direct OT services. On January 24, 2012, DCPS reconvened the student's IEP meeting and reviewed the RTI data and the OT evaluation. The team did not determine the student met the criteria for a learning disability. The team agreed the student was in need of OT services and amended the IEP to include 45 minutes of OT services per outside general education. The team also agreed to increase the student's speech language pathology to 1.5 hours per week: 45 minutes in general education and 45 minutes outside general education. The team also included 30 minutes per week of behavioral support services outside general education with goals in this area to address the student's anxiety when presented with difficult or new academic and social activities.

On January 24, 2012, DCPS issued a prior written notice for the student to attend School B. The student's parent disagreed with the January 24, 2012, IEP and proposed placement at School B and asserted the student was in need of full time specialized instruction outside general education.

On March 30, 2012, the parents, through counsel, filed the current due process complaint asserting the DCPS proposed IEP and placement for the student was inappropriate and seeking DCPS funding of the student's attendance at LSW from October 4, 2011, to the end of SY 2011-2012.

DCPS filed a response to the complaint on May 3, 2012. DCPS asserted in its response that the proposed IEP which included services both in and out of general education is appropriate and reasonably calculated to provide the student educational benefit and the student's placement/location of services proposed by DCPS is appropriate and the decision as to location of services is solely in the discretion of the local education agency ("LEA"). As to the request for reimbursement DCPS asserted that the parent chose to place the student at LSW at the start of the SY 2011-2012 and did not comply with the requirement of a 10-day letter/notice under IDEA.

The resolution meeting was held April 30, 2012. No agreement between the parties was reached. The parties agreed that the 30-day resolution period would continue for the full thirty days. Thus, the 45-day period began on May 3, 2012, and ended (and the HOD was due) on June 16, 2012. On the final day of hearing on June 8, 2012, Petitioner's counsel submitted a written motion for continuance of the hearing and requested the record remain open so that the parties be allowed to submit written closing arguments and memorandum of law by June 19, 2012, and requested the HOD issuance date be extended 10 calendar days to allow for the post hearing submissions. The motion was granted by an interim order of continuance on June 2012, extending the HOD due date to June 26, 2012.

A pre-hearing conference was conducted on May 18, 2012, at which the issues to be adjudicated were discussed and determined. On May 23, 2012, the Hearing Officer issued a pre-hearing order stating the issue to be adjudicated and setting hearing dates. On May 24, 2012, the Hearing Officer issued a revised pre-hearing order amending the language expressing the issue to be adjudicated.

The hearing was convened on June 6, 7, and 8, 2012. As previously stated, on the final day of hearing on June 8, 2012, Petitioner's counsel submitted a written motion for continuance of the hearing and requested the record remain open so to allow the parties to submit written closing arguments and memorandum of law by June 19, 2012. On June 19, 2012, both counsel submitted their post hearing submissions and the record was closed.

ISSUE: ²

The issue adjudicated is:

Whether DCPS denied the student FAPE by failing to provide the student an appropriate IEP³ and placement/location of services (School B) for SY 2011-2012 by failing to prescribe sufficient specialized instruction and that all prescribed services in the IEP be provided in an "out of general education" setting (a full-time special education IEP & placement⁴).

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-30 and DCPS Exhibit 1-14) that were admitted into the record and are listed in Appendix A. Any documents not admitted into the record are so noted in Appendix A. Witnesses are listed in Appendix B. The Hearing Officer also considered the post hearing submissions by both counsel submitted on June 19, 2012.

² The alleged violation(s) and/or issue(s) listed in the complaint do not directly correspond to the issue outlined here. The Hearing Officer restated the issue in the pre-hearing order and at the outset of the hearing and the parties agreed that this was the issue to be adjudicated.

³ Petitioner alleged in the complaint that both the October 4, 2011, and January 24, 2012, IEPs were inappropriate because they both fail to prescribe full-time special education services. Petitioner asserted the January 24, 2012, IEP prescribes the following weekly services: 2 hours of specialized instruction inside the general education classroom, 1 hour of specialized instruction outside the general education classroom, 45 minutes of speech/language services inside general education and 45 minutes outside general education, 45 minutes of occupational therapy outside general education and behavior supports of 30 minutes outside general education. Petitioner asserted in the complaint the IEP is inappropriate because of (1) insufficient specialized instruction, (2) reliance upon inclusion classes, (3) the lack of appropriate peers, (4) the large general education class size for social studies, science and specials, and (5) the pace of the social language in the general education environment. (Due to the student's significant language disorder he has difficulty with the pace of social language with typical students his age). Petitioner did not challenge the appropriateness of the related services prescribed in the IEP(s) nor challenged the IEP(s)'s present levels of performance, goals and objectives and/or accommodations.

⁴ Petitioner alleges the student should be in a separate special education day school with no general education students. However, in response to a direct inquiry by the Hearing Officer at the outset of the hearing Petitioner's counsel asserted the student IEP was inappropriate because it does not prescribe sufficient hours of specialized instruction outside the general education setting. Of the 32.5 hours in the school week 5 hours are spent at lunch and recess. Petitioner asserts the number of hours the IEP should prescribe of specialized instruction and related services per week should be 27.5 hours.

FINDINGS OF FACT:⁵

1. The student is age in grade and has been determined eligible as a child with a disability under IDEA with a classification of SLI. DCPS convened a MDT meeting on September 7, 2011, to review the student's independent evaluations. At the time the student was attending a private special education school, where his parents enrolled him at the start of the SY 2011-2012. Prior to attending in kindergarten and first grade the student attended School A, a private general education school. (Parent's testimony, Petitioner's Exhibits 4-1, 9-1)
2. During his kindergarten year at School A (SY 2009-2010) the student demonstrated difficulty with emerging reading skills. As a result he was provided additional one-to-one instruction from a reading specialist at School A for 30 minutes per day five days per week. testimony)
3. Because of the student's reading and language difficulties the School A reading specialist recommended to the student's parents, during his kindergarten year, that the student be evaluated by a speech language specialist at testimony)
4. In January 2010 conducted a speech language assessment of the student. The evaluator diagnosed the student with a Mixed Receptive-Expressive Language Disorder and recommended the student receive 45 minutes of speech-language therapy per week during the school year and intensive intervention during the summer. (Petitioner's Exhibit 23-14)
5. The school speech language therapist began to provide the student therapy at in the afterschool program through the remainder of his kindergarten year. testimony, Petitioner's Exhibit 21-2)
6. During his first grade year at School A (SY 2010-2011) the student's homeroom class consisted of 12 or 13 students who were assigned to reading groups of five students each based on their reading skill level. The student participated in his reading class 1 hour per day five days per week. In addition, the reading specialist worked with him one-to-one for 30 minutes per day five days per week. The student continued to display difficulty with reading skills including difficulty recalling sounds of letters and blending sounds to make words. In addition, it was difficult for him to produce timely answers because of slow processing abilities. The student did not have difficulty in math but in activities (in and around) reading the student became increasingly unhappy. testimony)
7. In October 2010 the student's parent engaged a neuropsychologist, Dr. William Stixrud, to conduct a neuropsychological evaluation conducted of the student.⁶ Dr. Stixrud

⁵ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

⁶ The evaluator conducted the following assessments: Wechsler Intelligence Scale for Children-Fourth

assessed the student's cognitive and academic and behavioral functioning. The student demonstrated cognitive abilities in the high-average range with particularly strong competencies in nonverbal skill areas. (Petitioner's Exhibit 21-5).

8. Dr. Stixrud noted the student's reading performance was solidly average for his age and at a late first grade level on an untimed measure of phonetic decoding skills. He scored below average on a reading comprehension task and he could not read short sentences well enough to complete a reading fluency task. He was significantly above average in math on untimed pencil and paper tasks. (Petitioner's Exhibit 21-9)
9. Dr. Stixrud found that the student demonstrated significant trouble with word retrieval and oral sentence construction and language organization that "affected his ability to define words, explain the conceptual similarity between two things, and formulate grammatically correct sentences... He had difficulty "finding" desired words, sequencing words to make grammatically correct sentences and organizing his ideas in a logical, succinct and well-organized manner. Dr. Stixrud noted that the student's performance in math was above grade level. However, he noted the student demonstrated weaknesses in expressive language and rapid ? that placed the student at risk for being slow to fully automatize math facts, multiple step math operations and mechanical rules for writing, e.g. capitalization and punctuation. (Dr. Stixrud's testimony, Petitioner's Exhibit 21-6, 21-9)
10. Dr. Stixrud noted the student was vulnerable to anxiety and perfectionism. He diagnosed the student with Expressive Language Disorder, Reading Disorder and Disorder of Written Expression and suggested continued observation of the student for possible diagnosis of Attention and/or Anxiety Disorder. Dr. Stixrud indicated in his report he thought the student was well placed at School A, "which is presently able to provide what is necessary for him to progress academically, including small class size, a warm, nurturing environment and academic program that is stimulating but not overwhelming... I strongly support [the student's] continuing in the small reading group... and twice-weekly speech/language therapy..." Beyond first grade Dr. Stixrud encouraged the parents to explore school programs that are designed to meet the needs of students with language based learning difficulties, in which he could be "a bigger fish in a? smaller pond." (Dr. Stixrud's testimony, Petitioner's Exhibit 21-11, 21-12, 21-13)

The students had the following WJ-III scores in October 2010:

(Petitioner's Exhibit 21-18)

Edition (WISC-IV); Boston Naming Test; Automatic Verbal Sequencing, SCAN-C; Selective Reminding Test; Klove Grooved Pegboard Developmental Test of Visual Motor Integration (VMI), Woodcock Johnson WJ-III Tests of Achievement; Test of Word Reading Efficiency (TOWRE); Child Behavior Rating Inventory of Executive Function (BRIEF); Teachers Report From (TRF); Children's Depression Inventory (CDI), Revised Children's Manifest Anxiety Scale, (RCMAS); Clinical Interview. The following selected subtests of WJ-II: Oral and Written Language Scales, Wide Range Assessment of Memory and Learning-Second Edition, Test of Language Competence – Expanded Edition, Comprehensive Test of Phonological Processing; NEPSY-II; Test of Everyday Attention – Children's Version.

	Standard Score	PR	Grade Equivalent
Broad Reading	----	-----	-----
Letter-Word Identification	91	28	1.3
Passage Comprehension	82	12	1.0
Reading Fluency	Could not be administered		
Word Attack	101	53	1.8
Broad Math	118	88	2.5
Calculation	118	89	2.6
Applied Problems	116	86	2.8
Math Fluency	93	33	1.5
Broad Written Lang	-	-	-
Spelling	93	32	1.4
Writing Samples	96	39	1.5
Writing Fluency	Could not be administered		

11. The evaluation determined the student had cognitive abilities in the high average range with a full scale IQ of 113 and the student's verbal comprehension and processing speed index was in the average range. The student's most striking challenge was expressive language and anything that involved talking. He demonstrated difficulties finding words and could not recite the alphabet and had difficulty making content fully automatic where he did not have to think. There was an enormous difference between his intellectual ability and his language expression. (Dr. Stixrud's testimony, Petitioner's Exhibit 20, 21)
12. Despite the reading interventions School A provided the student in first grade, he was not successful enough in developing reading skills to remain at School A for second grade. The student was aware that his reading abilities were less developed than his peers. The School A reading specialist concluded that the student needed a slower pace and longer time to develop reading skills than was expected for students at School A. (testimony, Petitioner's Exhibit 3-6)
13. In March 2011, the School A staff concluded that because of the student's reading and language processing difficulties School A could not meet the student's needs and that the parents should seek an alternative school for the following school year. The School A staff recommended (Petitioner's Exhibit 4)

14. In May 2011 the student's parent's contacted DCPS to initiate the eligibility process for the student. In early June 2011, the parent's completed the student's registration as a non-attending student with the DCPS. (Petitioner's Exhibits 3-1, 5-1)
15. DCPS and the parent attempted to schedule initial meeting dates to review the student's evaluation data during the summer of 2011. Because of scheduling difficulties of both the parents and DCPS personnel September 7, 2011, was the first date DCPS and the parents met to review the student's evaluation data. DCPS offered for the student to enroll in and attend School B while the process of determining his eligibility for special education was in process. By that time the parents had already enrolled the student at (Petitioner's Exhibit 9-1)
16. In August 2011 Dr. Stixurd prepared an addendum to his report. Based on the results of the student's full first grade year performance at School A and a June 2011 speech language evaluation, Dr. Stixrud recommended the student be placed at for his second grade year. (Petitioner's Exhibit 20-3)
17. A DCPS speech and language pathologist reviewed the School speech and language evaluation in August 2011. She reviewed the document and completed a review report and agreed the student met the criteria for speech and language services and goals were written and services were recommended. testimony, Petitioner's Exhibit 22, 23)
18. DCPS determined on September 7, 2011, that the student met the eligibility criteria for special education services with the SLI classification but determined more information was needed to develop the student's IEP. DCPS stated the student could immediately begin attending his neighborhood DCPS elementary school, School B, while DCPS obtained the necessary data to formulate the student's IEP. The student's parents declined the offer for the student to attend School B at that time and agreed to DCPS' request to observe the student at to collect additional data on the student's academic performance. The MDT agreed to reconvene on October 4, 2011, to review the additional data and develop the student's IEP and DCPS issued a prior written notice noting the same. (DCPS Exhibit 7-1, 7-2, DCPS Exhibit 6)
19. DCPS conducted an observation of the student at and on October 4, 2011, reconvened the student's IEP meeting. The results of the observation were reviewed as well as updated educational assessments provided by DCPS considered the student to be operating academically in the average range but noted his need for specialized instruction particularly in reading. DCPS developed an IEP with goals in reading, written expression and communication/speech and language. The IEP prescribed 3 hours of specialized instruction per week: 2 hours in general education and 1 hour outside general education. The IEP also prescribed 1 hour of speech language pathology per week: 30 minutes in general education and 30 minutes outside general education. On October 4, 2011, the IEP team determined that the student did not have an educational need for special education in the area of math and no goals were developed for math. testimony, Petitioner's Exhibit 14-9)

20. On October 11, 2011, [redacted] prepared its own IEP for the student. The [redacted] IEP prescribed specialized instruction, integrated speech language and OT services, and group and individual speech language services for 45 minutes each per week. (Petitioner's Exhibit 25-1)

21. On September 26, 2011, [redacted] also conducted update educational testing of the student. The students had the following WJ-III scores:

(Petitioner's Exhibit 25-4)

	Standard Score	PR	Age Equivalent
Broad Reading	78	7	6-10
Letter-Word Identification	87	18	7-2
Passage Comprehension	83	13	6-10
Reading Fluency	87	2	<4.0
Word Attack	95	37	7-6
Broad Math	118	89	8-11
Calculation	100	50	8-0
Applied Problems	127	97	10-7
Math Fluency	97	42	7-10
Broad Written Lang	82	11	7-1
Spelling	86	17	7-1
Writing Samples	95	36	7-6
Writing Fluency	73	4	5-4

22. DCPS agreed data was needed to assess the student's response to interventions that had been provided by the student's reading specialist at School A. The readings specialist was unavailable for the meeting due to illness. DCPS also agreed that an OT evaluation should also be conducted. DCPS offered for the IEP to be implemented at School B during the time the additional data was collected. The student's parents requested that DCPS place and fund the student at the [redacted] for the 2011-12 school year. DCPS declined. The student's parents chose to keep the student at [redacted] until the IEP team reconvened to review RTI data and OT evaluation. (Dr. Wood's testimony, Parent's testimony, [redacted] testimony, Petitioner's Exhibits 10, 11, 16, DCPS Exhibit 9-1, 9-2,)

23. On October 30, 2011, _____ conducted an OT evaluation that recommended direct OT services (Petitioner's Exhibit 24-6)
24. On January 24, 2012, DCPS reconvened the student's IEP meeting and reviewed the RTI data and the OT evaluation. The team determined the student met the criteria for a learning disability. The team agreed the student was in need of OT services and amended the IEP to include 45 minutes of OT services per week outside general education. The team also agreed to increase the student's speech language pathology to 1.5 hours per week: 45 minutes in general education and 45 minutes outside general education. The team also included 30 minutes per week of behavioral support services outside general education with goals to address the student's anxiety and when presented with difficult or new academic and social activities. (DCPS Exhibit 10-2)
25. DCPS issued a prior written notice for the student to attend School B. The student's parent disagreed with the January 24, 2012, IEP and the proposed placement at School B and asserted the student was in need of full time specialized instruction outside general education. On March 30, 2012, the parents, through counsel, filed the current due process complaint asserting DCPS proposed IEP and placement for the student was inappropriate and seeking DCPS funding of the student's attendance at _____ from SY 2011-2012. (DCPS Exhibits 1, 7, 10-1, 10-2)
26. On January 24, 2012 the DCPS members of the team determined that a combination setting remained appropriate for the student and that the student's placement at School B was the least restrictive environment ("LRE") for the student. All members of the team agreed that the goals and accommodations in the IEP were appropriate. School B has at all times during the 2011-2012 school year been able to provide all services in the October 4, 2011, and January 24, 2012 IEPs (Dr. Wood's testimony, _____ testimony, _____ testimony, DCPS Exhibits 5, 10)
27. DCPS proposed to implement the student's IEP at School B. School B is an inclusion model school that favors delivering special education services to students inside the general education classroom. Class size at School B is approximately 23 students. The student, had he attended School B, would have been one of three special education students in the second grade. (Dr. Wood's testimony, _____ testimony)
28. The student's parents rejected the proposed IEP as providing an insufficient amount of special education instruction, and thereby constituted an inappropriate IEP/placement and renewed their request for DCPS to place and fund the student at LSW. (Dr. Wood's testimony, DCPS Exhibit 10, Petitioner's Exhibits 17, 18, 19)
29. The DCPS members of the IEP team determined that a combination setting of specialized instruction both outside general and education and inside the general education setting remained appropriate for the student and that the student's placement at School B was the least restrictive environment ("LRE") for the student. All members of the IEP team including the student's parents and their representatives agreed to the goals and accommodations in the IEP and that they were appropriate. School B was at all times during SY 2011-2012 school year able to provide all services in the October 4, 2011, and

January 24, 2012, IEPs. (Dr. Wood's testimony, testimony, testimony, DCPS Exhibits 5, 10)

30. DCPS issued a prior written notice for the student to attend School B. The student's parents disagreed with the January 24, 2012, IEP and the proposed placement at School B and asserted the student was in need of full time specialized instruction outside general education. (DCPS Exhibits 7, 10-1, 10-2)
31. DCPS proposed to implement the student's IEP at School B. School B is an inclusion model school that favors delivering special education services to students inside the general education classroom. Class size at School B is approximately 23 students. The student, had he attended School B, would have been one of three special education students in the second grade. (Dr. Wood's testimony, testimony)
32. At School B there are generally 23 students in a second grade classroom. The classroom teacher is responsible for general education instruction. Teaching is done mostly in small groups and students are grouped based on ability. The students are self-paced and the teacher has the flexibility to move the students among groups where it is appropriate to promote reading and literacy. Each teacher has a full time assistant in the classroom. The school's speech pathologist and OT provider come in and work with students in the classroom, and they consults with teachers before and after school. (testimony)
33. The DCPS speech language pathologist who reviewed the student's evaluation provides services to students at School B. She collaborates with the school's reading specialist and also works with students on writing. When she works with students in the classroom she collaborates with the teacher and may work one to one and with small groups and may pull the student out to work on something and then go back in. She may do a co-teaching model with the teacher. (testimony, Petitioner's Exhibit 22, 23)
34. The student's parents rejected the proposed January 24, 2012, IEP as providing an insufficient amount of special education instruction, and thereby constituting an inappropriate IEP/placement and renewed their request for DCPS to place and fund the student at (Dr. Wood's testimony, DCPS Exhibit 10, Petitioner's Exhibits 17, 18, 19)
35. is a private special education school that serves students with average to above average cognitive abilities and language-based learning disabilities. Many of the students at LSW have significant reading difficulties. has a certificate of approval ("COA") from OSSE and OSSE has placed students at . The program is ungraded but the students are grouped by age. At the student is in a class of less than twelve students, with a special education teacher and two classroom assistants. Some of the student's teachers at are not certified teachers, and not all of this student's teachers at are special education teachers. Speech/language and OT services are integrated into the classroom and academics are taught using multi-sensory instruction. Social skills and behavioral supports are provided to the student by his special education classroom

teacher. He gets along well with his school peers. acknowledges the student has a strength in math and is functioning at or above grade level in calculation skills and can solve some word problems. He has been peer tutoring his classmates in math. (Dr. testimony, testimony, Petitioner's Exhibits 25-14, 26-7, 26-12)

36. At the student is still operating at a beginning first grade level in reading. He struggles with processing time and has difficulty completing work within time limits. He talks around things and needs help with language output which is also reflected in his writing. He has good ideas but it is hard for him to get them out – he takes it safely and uses words he knows to be correct and thus produces simplistic sentences even though he has more complex thoughts. The student is reluctant to read in front of other students. When it time to practice he will not read in front of another student. He has great oral comprehension, but reading comprehension is a struggle. He is anxious, not wanting to take the risk to be wrong and thus, he takes few risks. The staff believe he is making progress at and it is an appropriate placement for him. testimony; Dr. Stixrud's testimony; Petitioner's Exhibit, 26-4, 26-12)

37. The student's parents have paid to On May 29, 2012, invoiced the student's parents for the student's annual tuition and costs at for a total amount of of which is for speech language services and is for the OT evaluation the school conducted. (Parent's testimony Petitioner's Exhibit 27)

CONCLUSIONS OF LAW:

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

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive a? FAPE only if the procedural inadequacies impeded the child's right to a? FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of a? FAPE, or caused the child a deprivation of educational benefits.

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking

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

ISSUE: Whether DCPS denied the student a FAPE by failing to provide the student an appropriate IEP and placement/location of services (School B) for SY 2011-2012 by failing to prescribe sufficient specialized instruction and that all prescribed services in the IEP be provided in an “out of general education” setting (a full-time special education IEP & placement).

Conclusion: The evidence demonstrates the student was denied a FAPE because the student’s October 4, 2011, and January 24, 2012, IEPs were and are inappropriate and do not prescribe sufficient specialized instruction and thus do not prescribe an appropriate educational placement. However, the Hearing Officer is not convinced by the evidence that the student must be totally removed from all general education peers and thus concludes that the parents’ remedy for reimbursement of is inappropriate because the school is not the least restrictive environment for the student.

The IDEA ensures that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. §1400(d)(1)(A). The IDEA guarantees children with disabilities the right to a FAPE. *Id.* In seeking an appropriate education for students with disabilities, the child's parents, teachers, school officials, and other professionals collaborate to develop an IEP to meet the child's unique needs. See 20 U.S.C. §1414(d)(1)(B). "The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir.2005) (quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458U.S. 176, 203 (1982)). Local school officials utilize the IEP to assess the student's needs and assign a commensurate environment. See 20 U.S.C. § 1414(d)(1)(A).

The IEP team, consisting of the student's parents, teachers, and other local education personnel, examines the student's educational history, progress, recent evaluations, and parental concerns prior to implementing a free appropriate public education for the student. *Id.* To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003).

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education (“FAPE”). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in

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

conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also *Scott v. District of Columbia*, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")").

20 U.S.C. 1414(a)(i) defines IEP as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes a statement of the child's present levels of academic achievement and functional performance." It includes measurable goals, statements of related services, assistive technology and other appropriate accommodations. It is developed by the IEP team which consists of the child's parent, general education teachers, LEA special education teachers and anyone deemed a necessary participant by reason of the services provided to the student. The IEP is the centerpiece or main ingredient of special education services.

Petitioner alleged in the complaint that both the October 4, 2011, and January 24, 2012, IEPs were inappropriate because they both failed to prescribe full time special education services, specifically, insufficient specialized instruction. At the outset of the hearing in response to the Hearing Officer's ? Petitioner's counsel asserted the IEP should have prescribed 27.5 hours of special education services outside general education. The student's October 4, 2012, IEP did not contain OT or behavior support services that were added to the January 24, 2012, IEP. Petitioner did not challenge these additional 1.25 hours outside of general education related services. Rather, Petitioner focused on the broader issue that the remaining time that the student received instruction during the school week pursuant to the IEP was inappropriate. Thus, Petitioner asserts the October 4, 2011, IEP should have prescribed at least 27.5 hours of specialized instruction outside general education and the January 24, 2012, IEP should have prescribed at least 26.25 hours of specialized instruction all outside general education.

Petitioner did not challenge the appropriateness of the related services prescribed in the IEP(s) and there is no challenge to the IEP(s)'s present levels of performance, goals and objectives and/or accommodations.

To support this claim that the IEP was inappropriate, Petitioner asserts the student demonstrating significant reading and language deficits coupled with his emotional vulnerability and tendency toward perfectionism and self-judgment requires that he receive all instruction in a special education setting.

The evidence demonstrates the student has average to above average intellectual abilities but because of his language and reading disabilities the student has not performed near grade level in reading and written language. The evidence demonstrates the student is operating at the beginning first grade level in reading.

The student was last educated with non-disabled peers when he attended first grade at School A. The evidence demonstrates that at School A he was being provided small group and individual instruction by a reading specialist who is a special education teacher. Despite the interventions

the student's reading abilities barely improved and his confidence to even attempt reading diminished. and Dr. Stixrud's credible testimony as well as that of the witnesses and the student's evaluations clearly show the student has significant reading and writing and language deficits that require that he be in a small group setting out of general education setting in most if not all subjects that require him to read, write and respond orally. The Hearing Officer concludes based on this evidence that the student's IEP should have provided far more specialized instruction outside general education than the scant two hours per week that the DCPS IEPs provided.

Petitioner asserted that that student should have been provided 26.25 hours of specialized instruction, and presumably this would include instruction in math. The student's math abilities, are, however, clearly above grade level. The evidence demonstrates the student's reading and language deficits impact his math performance but the student can read some math problems and at he is actually tutoring other students in math. None of the student's DCPS IEPs contained math goals and Petitioner did not assert they should have. However, Petitioner presumably asserts the student should receive specialized instruction in math. The Hearing Officer is not convinced by the evidence that the student requires specialized instruction in math or requires that his math instruction be only with non-disabled peers.

The evidence presented did not indicate how much instruction in math the student would have or is being provided. The Hearing Officer thinks it reasonably certain the student would receive at least 3 hours of instruction in math per week. Thus, even if the student was provided all instruction other than math in a special education setting the student's IEP should have at least prescribed 23.25 hours of specialized instruction outside of general education. Consequently, based on the evidence presented by Petitioner the Hearing Officer concludes that both the October 4, 2011, IEP and the January 24, 2012, IEP DCPS provided the student included insufficient hours of specialized instruction and were inappropriate.

The hearing officer concludes, therefore, that the student's IEP was deficient in the amount of specialized instruction that was prescribed and that he should have been provided at least 23.25 hours of specialized instruction in addition to his related services. There was insufficient evidence the student could not be with general education peers for lunch and recess and needed to be in a school building with only special education students. Consequently, the Hearing Officer will order that the student's DCPS IEP be amended to prescribe 23.5 hours of specialized instruction in an out of general education setting and that DCPS meet to amend the IEP and to determine an appropriate placement/location of services for the student for ESY and or SY 2012-2013.

If DCPS has been unwilling or unable to modify the IEP to meet the student's needs for specialized instruction in all academic areas then private placement and reimbursement might be an appropriate remedy. See, e.g. *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

Petitioner rejected DCPS' proposed placement at School B and placed the student at LSW and is seeking reimbursement. The evidence demonstrates that can provide the student special education and related services in all subject areas. However, the Hearing Officer is not convinced by the evidence that student should be totally removed from a setting that will allow him contact

with any non-disabled peers. The evidence demonstrates that an opportunity to interact with non-disabled peers does not afford the student

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

In addition, a school district is not required to implement a program that will maximize the handicapped child's potential. *Rowley*, 458 U.S. at 198-99. Rather, a handicapped child has a right to "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. Rowley explained that implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . . We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 200-02.

Although a parental placement need not be the least restrictive environment. See *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 83-84 (3rd Cir. 1999); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 775, 770 (6th Cir. 2001), the Hearing Officer can determine whether LSW is the least restrictive environment in evaluating whether private placement was the proper remedy. See, e.g., *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005); *Kerkham v. Superintendent, D.C. Public Schools*, 931 F.2d 84, 87 (D.C. Cir.)

34 C.F.R. § 300.114 provides:

- LRE requirements.(a) General. (1) Except as provided in Sec. 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and Sec. Sec. 300.115 through 300.120.
- (2) Each public agency must ensure that--
 - (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
 - (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only 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.

In addition, pursuant to D.C. Code § 38-2561.02 (c)

Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA

and this chapter:

- (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
- (2) Private or residential District of Columbia facilities; and
- (3) Facilities outside of the District of Columbia.

Petitioner did not contest that any part of the student's IEP other than the level of instructional services (specialized instruction) and thus the placement was inappropriate. Petitioner seeks reimbursement for tuition and costs at _____ because the January 24, 2012, IEP was inadequate. An inadequate IEP is a necessary but insufficient condition in this instance for private school placement and reimbursement.

Although the District must pay for private school placement "[i]f no suitable public school is available[,] ... if there is an appropriate public school program available ... the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991) (citations and quotations omitted).

34 C.F.R. § 300.148 provides:

- (a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with Sec. Sec. 300.131 through 300.144.
- (b) Disagreements about FAPE. Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in Sec. Sec. 300.504 through 300.520.
- (c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

In this case Petitioner did not argue or demonstrate that School B or another D.C. public school could not provide the student an appropriate education with specialized instruction in all academic areas. Petitioner asserted that the student's January 24, 2012, IEP violated the IDEA because it did not provide for full time out of general education level of services. Full time out of general education services does not necessarily mean a student is totally removed from the general education setting and has no contact with non-disabled peers.

To support this claim Petitioner asserts the student demonstrating significant reading and language deficits coupled with his emotional vulnerability and tendency toward perfectionism and self-judgment prevents him from being able to be educated with nondisabled peers. There was insufficient evidence that the student cannot have lunch and recess with non-disabled peers.

Despite the evidence and testimony presented by Petitioners' witnesses who were experts in their field the Hearing Officer was not convinced the student should be totally removed from his general education peers and be educated in a separate school only for special education students.

At School A the student was in a class size of twelve students with one teacher for subjects other than reading. Although at School B the student instruction in general education may have been provided with a group of children as large as 23 students, there is no evidence that instruction at School B could not have been provided in a smaller group as the student was being provided when he attended School A. The evidence belies that the student even with his demonstrated reading and language difficulties must be totally removed from his non-disabled peers in order to be appropriately educated. The DCPS witnesses clearly testified that although the classrooms in second grade at School B consist of 23 students, the students are grouped by ability levels and work in smaller groups for instruction. In addition, there was credible testimony from the DCPS witnesses that related services are often provided in the classroom.

The Hearing Officer concludes that [redacted] has no non-nondisabled students. Thus, [redacted] would not be the least restrictive environment for the student and is not appropriate. It was also not demonstrated that DCPS cannot provide the student an appropriate placement. Therefore the Hearing Officer concludes DCPS is not required to pay for the student's placement at [redacted]. See *N.T. et al v. District of Columbia* 58 IDELR 69 citing *Jenkins, 935 F.2d at 305; cf. School Comm. Of Town of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359, 373-74 (1985) (parents who unilaterally place their children in private school "do so at their own financial risk.")

ORDER:

1. The student's January 24, 2012, IEP is hereby amended to prescribe 23.25 hours per week of specialized instruction in the out of general education setting.
2. DCPS shall within ten (10) business days of the issuance of this order convene an IEP meeting to amend the student's IEP as prescribed above and to determine whether the student is in need of ESY services and to determine an appropriate placement/location of services for the student for ESY and/or SY 2012-2013.
3. The remedy for reimbursement for the student's attendance at [redacted] is hereby denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process

hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/s/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: June 26, 2012