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

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

v.

District of Columbia Public Schools,
Respondent.

Date Issued: January 16, 2013

Hearing Officer: Melanie Byrd Chisholm

Case No: 2012-0743

Hearing Date: January 8, 2012

Room: 2004

2013 JAN 17 AM 9:12
OSSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a [redacted], who is currently a 5th grade student attending School A. The student's current individualized education program (IEP) lists emotional disturbance (ED) as his primary disability and provides for him to receive three (3) hours per week of specialized instruction outside of the general education setting, three (3) hours per week of specialized instruction within the general education setting, sixty (60) minutes per month of behavioral support services within the general education setting, one hundred twenty (120) minutes per month of behavioral support services outside of the general education setting, sixty (60) minutes per month of behavioral support consultation services and three (3) hours per week of specialized instruction consultation services.

On October 23, 2012, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to develop an appropriate program for the student. As relief for this alleged denial of FAPE, Petitioner requested, *inter alia*, specialized instruction outside of the general education environment in all academic areas, related services and nonacademic activities; and placement in and funding for a nonpublic special education day school.

On November 20, 2012, Respondent filed an untimely Response to the Complaint. In its Response, Respondent asserted that the student's IEP was reasonably calculated to confer

---

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

educational benefit; the placement and hours of specialized instruction on the student's IEP were chosen to provide the student the least restrictive environment in which to implement his goals; the student's location of services is able to implement the student's IEP goals and placement; and the student has shown progress in his current placement and with his current IEP.

On November 1, 2012, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on November 23, 2012, following the conclusion of the 30-day resolution period, and ended on January 6, 2013. During the Prehearing Conference, although the parties initially identified December 17, 2012 as a date available for the parties and the Hearing Officer to hold the due process hearing, the Petitioner did not feel that holding the hearing on December 17, 2012 offered adequate time for the Petitioner to determine if Motions for Notices to Appear needed to be filed and adequate time for the Petitioner to prepare Disclosures. The other dates available for the attorneys and the Hearing Officer fell during the DCPS Winter Break. Both Petitioner and Respondent intended to call DCPS witnesses to testify. Thus, the parties jointly requested that the 45-day timeline be extended to allow the hearing to take place after the Winter Break. On December 10, 2012, the Chief Hearing Officer granted a 14 day extension of the 45-day timeline. Accordingly, the Hearing Officer Determination (HOD) is due on January 20, 2013.

On November 30, 2012, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on November 30, 2012. The Prehearing Order clearly outlined the issue to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. On November 30, 2012, Petitioner advised the Hearing Officer that the Prehearing Order did not contain the deadline for Respondent's counsel to inform Petitioner's counsel if DCPS witnesses would appear voluntarily. Neither party disputed the issues as outlined in the Order. A revised Prehearing Order, including the deadline for Respondent's counsel to inform Petitioner's counsel if DCPS witnesses would appear voluntarily, was issued on December 4, 2012.

On December 13, 2012, Petitioner filed Disclosures including seven (7) exhibits and four (4) witnesses.[2] On December 13, 2012, Respondent filed Disclosures including one (1) exhibit and four (4) witnesses.

The due process hearing commenced at approximately 9:30 a.m. on January 8, 2012 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed. Petitioner's Exhibits 1-10 were admitted without objection. Petitioner initially objected to all of Respondent's exhibits based on the fact that Respondent did not provide the Disclosures to the Petitioner by the date included within the Prehearing Order. The Hearing Officer noted that two of the exhibits, Respondent's Exhibits 1 and 3, were duplicative of Petitioner's Exhibits 1 and 6, respectively. After being

[2] A list of exhibits is attached as Appendix B. A list of witnesses who provided testimony is included in Appendix A.

asked to identify the specific harm to Petitioner should each of the remaining exhibits be admitted, the Petitioner withdrew the objection to Respondent's Exhibits 1-5 and 7-8. The Hearing Officer admitted Respondent's Exhibit 6, over Petitioner's objection to its relevance, only for the purpose of determining relief, should the Hearing Officer find that DCPS denied the student a FAPE.

At the close of Petitioner's case, Respondent moved for a Directed Verdict. The Hearing Officer denied the motion. Following closing statement by both parties, the Hearing Officer noticed that the digital recorder was not recording. After a discussion with both attorneys and a review of the archived recording, it was ascertained that the recorder was not turned on prior to the final witness, [redacted]. The Hearing Officer offered to either read the Hearing Officer's notes of [redacted] testimony into the record or recall the witness. With the consent of both parties, the Hearing Officer read into the record the Hearing Officer's notes of [redacted] testimony. Both attorneys agreed that the Hearing Officer's notes and reading of [redacted] testimony was an accurate account of the testimony.

The hearing concluded at approximately 5:32 p.m.

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 develop an appropriate IEP for the student on October 4, 2012, specifically by failing to prescribe specialized instruction in all academic areas, related services and nonacademic activities outside of the general education environment given the student's behavior and social-emotional functioning and whether this failure constitutes a denial of a FAPE?
2. Whether DCPS failed to provide the student with a FAPE by failing to place the student in an appropriate program on October 4, 2012, specifically a program with a highly structured and supervised academic environment, an environment with limited distractions, small group instruction in a classroom with academic and behavioral support, access to mental health staff on a daily basis, a safe space for student breaks, predictable classroom activities and consistent behavioral guidelines?

FINDINGS OF FACT

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

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student is classified as a student with an emotional disturbance. (Stipulated Fact)
3. The student is diagnosed with Conduct Disorder and Attention Deficit Hyperactivity Disorder (ADHD). (Petitioner's Exhibits 1, 2, 5 and 6; Respondent's Exhibit 1; Psychologist's Testimony)
4. The student resided in Location A from 2008-2010 and resided in Location B from September 2010 through June 2012. (Petitioner's Exhibits 1, 2, 4 and 6; Respondent's Exhibits 1 and 3; Psychologist's Testimony; Mother's Testimony)
5. The student's IEP from Location A was drafted on May 28, 2010. (Petitioner's Exhibits 1 and 4; Respondent's Exhibit 1)
6. On May 28, 2010, the student's communication development, motor development, vocational skills, adaptive/daily living skills and health were appropriate to access the curriculum. (Petitioner's Exhibit 4)
7. On May 28, 2010, the student, when in positive mood, was able to follow directions, be compliant, able to transition with little difficulty and capable of discussing his feelings and triggers associated with his anger. While the student would leave an area, he generally remained within and area that could be monitored. (Petitioner's Exhibit 4)
8. On May 28, 2010, the student responded well to adult attention, praise and positive reinforcement. (Petitioner's Exhibit 4)
9. The student's May 28, 2010 IEP contained no academic goals and noted that the student was working at grade level in reading and reading comprehension and near grade level in math. (Petitioner's Exhibit 4)
10. The student's May 28, 2010 IEP provided a placement in a nonpublic school for the student based on the IEP Team's discussion during a manifestation determination meeting during which the IEP Team determined that the student needed a smaller school with components such as mental health counseling, smaller class size and specialized services. (Petitioner's Exhibit 4)
11. The student's May 28, 2010 IEP Team based its placement decision on the student's serious physical aggression, which was occurring from one time per month to three times per week. (Petitioner's Exhibits 1 and 4; Respondent's Exhibit 1)
12. The student did not attend school for the 2011-2012 school year. (Mother's Testimony)
13. Until the IEP drafted by DCPS on October 4, 2012, no IEP was subsequently drafted or implemented for the student. (Petitioner's Exhibit 1; Respondent's Exhibit 1; Psychologist's Testimony; Mother's Testimony)
14. The parent and student arrived in the District of Columbia on August 22, 2012. (Mother's Testimony)
15. On August 23, 2012, prior to his first day at School A, the student was hospitalized due to anxiety concerning starting school. (Petitioner's Exhibit 1; Respondent's Exhibit 1; Mother's Testimony)
16. The treating psychiatrist diagnosed the student with ADHD, Oppositional Defiant Disorder (ODD) and Conduct Disorder and recommended that the student be educated in an academic environment that is highly structured with limited distractions, a small class size, a high teacher to student ratio and ample in-class supports including a staff member readily available to help the student deescalate

when he gets angry. (Petitioner's Exhibits 1 and 6; Respondent's Exhibits 1 and 3; Psychologist's Testimony)

17. The student was treated with three medications. (Petitioner's Exhibits 1 and 6; Respondent's Exhibits 1 and 3; Mother's Testimony)
18. Upon the student's enrollment into School A, the Case Manager referred the case to the local educational agency's (LEA's) LRE Team to address concerns regarding the student's prior placement and the mother's request for a private placement. (Respondent's Exhibit 2; Psychologist's Testimony; Social Worker's Testimony; Case Manager's Testimony)
19. At the beginning of September 2012, the mother hospitalized the student twice because the student refused to do his homework and locked himself in the bathroom in their home. (Mother's Testimony)
20. The LRE Team observed the student on September 11, 2012 and September 25, 2012. During the observations, the student behaved appropriately in general education classes. (Respondent's Exhibit 2)
21. The Psychologist reviewed the student's May 28, 2010 IEP, a May 2009 Psycho-educational Assessment Report, the student's June 8, 2009 Positive Behavior Support Plan, a March 11, 2010 Functional Analysis Assessment Report, a July 11, 2012 evaluation, a July 18, 2012 Diagnostic Evaluation, the July 25, 2012 letter from the nonpublic school assistant principal, an August 30, 2012 letter from a psychiatrist and the student's September 4, 2012 Discharge Summary. (Petitioner's Exhibits 1 and 6; Respondent's Exhibits 1 and 3; Psychologist's Testimony)
22. The Psychologist conducted a Woodcock Johnson III assessment to ascertain the student's academic achievement. (Petitioner's Exhibit 1; Respondent's Exhibit 1; Psychologist's Testimony)
23. On the Woodcock Johnson III conducted by the Psychologist, the student scored in the average range for his age in Broad Reading, Brief Writing and Broad Math. The student showed a weakness in math and reading fluency and spelling. (Petitioner's Exhibit 1; Respondent's Exhibit 1; Psychologist's Testimony)
24. Weaknesses in fluency are common for students with ADHD. (Psychologist's Testimony)
25. Prior to the student's October 4, 2012 IEP Team meeting, the Psychologist observed the student in general education classes. (Petitioner's Exhibit 1; Respondent's Exhibit 1; Psychologist's Testimony)
26. During the Psychologist's observation, the student behaved appropriately in general education classes. (Petitioner's Exhibit 1; Respondent's Exhibit 1; Psychologist's Testimony)
27. Based on her review of records, observations of the student and interviews with the student's teachers, the Psychologist developed a list of recommendations for the student. (Petitioner's Exhibit 1; Respondent's Exhibit 1; Psychologist's Testimony)
28. Many of the recommendations were taken from prior evaluations since School A was still getting to know the student. (Psychologist's Testimony)
29. The student needs extra time to complete assignments. (Petitioner's Exhibits 1 and 6; Respondent's Exhibits 1, 2, 3 and 5; Psychologist's Testimony; CBI Worker's Testimony; Mother's Testimony)

30. The student relies on adult support when feeling confused or insecure. (Petitioner's Exhibit 1; Respondent's Exhibit 1; Psychologist's Testimony; Social Worker's Testimony; CBI Worker's Testimony)
31. The student is able to request one-on-one assistance from the classroom teacher when he needs additional academic support. (Petitioner's Exhibit 1; Respondent's Exhibits 1 and 2; Psychologist's Testimony; Social Worker's Testimony)
32. On October 4, 2012, the student's IEP Team met and reviewed all of the information available to the team. (Petitioner's Exhibit 6; Respondent's Exhibits 3 and 4; Psychologist's Testimony; Social Worker's Testimony)
33. The parent was present at the October 4, 2012 IEP Team meeting and was given the opportunity to participate in the meeting. (Petitioner's Exhibit 6; Respondent's Exhibit 3; Mother's Testimony; Case Manager's Testimony)
34. The October 4, 2012 IEP Team developed four math, three reading, three written expression and ten emotional/social/behavioral goals for the student. (Petitioner's Exhibit 6; Respondent's Exhibit 3; Mother's Testimony)
35. The October 4, 2012 IEP Team agreed to the goals on the student's IEP. (Petitioner's Exhibit 6; Respondent's Exhibit 3; Psychologist's Testimony; Social Worker's Testimony; Mother's Testimony; Case Manager's Testimony)
36. The October 4, 2012 IEP Team discussed classroom management techniques for the student and determined that a FBA should be conducted and a BIP developed. (Petitioner's Exhibit 6; Respondent's Exhibit 3; Psychologist's Testimony; Social Worker's Testimony)
37. With the exception of the student's mother, no member of the October 4, 2012 IEP Team felt that the child needed a more restrictive setting. (Case Manager's Testimony)
38. The amount of related service hours on the student's October 4, 2012 IEP is appropriate for the student. (Stipulated Fact)
39. The classroom to which the student is assigned is highly structured with limited distractions, has planned and predictable activities and provides small group instruction. (Psychologist's Testimony; Social Worker's Testimony; Case Manager's Testimony)
40. There are 15 students and two adults in the student's assigned classroom. (Respondent's Exhibit 2; Psychologist's Testimony)
41. The student is given extended time to complete tasks and is able to take breaks when needed. (Psychologist's Testimony; Social Worker's Testimony; Case Manager's Testimony)
42. Student is receiving individualized attention from his teachers. (Petitioner's Exhibit 1; Respondent's Exhibits 1 and 2; Psychologist's Testimony; Social Worker's Testimony; Case Manager's Testimony)
43. School A and the CBI Worker have developed and implemented strategies for the student to manage his behavior. (Psychologist's Testimony; CBI Worker's Testimony)
44. School A has regular communication with the student's mother. (Social Worker's Testimony; Mother's Testimony)
45. School A makes the psychologist, social worker, principal and teachers available to provide behavior intervention. (Psychologist's Testimony; Social Worker's Testimony; Principal's Testimony; Case Manager's Testimony)

46. When the student gets angry, he "shuts down" and needs to talk about the situation with a staff member. School A has made available the social worker, principal and teachers when the student needs to communicate. (Social Worker's Testimony)
47. When the student becomes frustrated, he needs "time and space" to calm down. After he is able to get time and space, he is able to reengage in classroom activities. (Principal's Testimony)
48. The student is able to calm down more quickly if fewer people are in the vicinity. (Principal's Testimony)
49. The student has difficulty with appropriate peer relations during recess. (Psychologist's Testimony; CBI Worker's Testimony; Social Worker's Testimony)
50. The student has not exhibited the behaviors, to the extent and severity, as seen in his prior schools, at School A. (Psychologist's Testimony; Social Worker's Testimony; Mother's Testimony)
51. When the student exhibits inappropriate behavior, the staff members at School A are able to manage the student and the situation. (Psychologist's Testimony; Social Worker's Testimony; Principal's Testimony; Case Manager's Testimony)
52. The School A staff members are attentive to the student's needs, are able to address the student's needs, properly supervise the student and provide the student with the necessary support during the school day. (Psychologist's Testimony; Social Worker's Testimony; Principal's Testimony; Case Manager's Testimony)
53. The student has not been suspended or removed from School A. (Mother's Testimony)
54. The student's behavior has improved since he has been attending School A. (Psychologist's Testimony; CBI Worker's Testimony; Mother's Testimony; Principal's Testimony)
55. The student is progressing toward the mastery of his behavioral goals. (Social Worker's Testimony)
56. On October 24, 2012 the student eloped from school grounds. (Mother's Testimony; Psychologist's Testimony; Social Worker's Testimony; CBI Worker's Testimony; Principal's Testimony)
57. The October 24, 2012 incident occurred approximately one week after the student learned that he was adopted. (Respondent's Exhibit 5)
58. On October 24, 2012 School A security called the Metropolitan Police Department (MPD) based on the School's protocol to contact MPD when a student leaves school grounds. (Mother's Testimony; Principal's Testimony)
59. At all times while the student was off of the School A campus on October 24, 2012, the student was in the sight of the principal. (Principal's Testimony)
60. After the incident on October 24, 2012, the student was able to calm down and return to school. (Psychologist's Testimony; Social Worker's Testimony; Mother's Testimony; Principal's Testimony)
61. On December 19, 2012, the student threw a ball at another student then eloped from school grounds. (Respondent's Exhibit 5; Mother's Testimony)
62. At all times while the student was off of the School A campus on December 19, 2012, the student was in the sight of School A staff members. (Principal's Testimony)
63. After the incident on December 19, 2012, the student was able to calm down and return to school. (Mother's Testimony; Principal's Testimony)

64. Each of the student's hospitalizations since August 2012 has been at the request of the mother or the student's private therapist. (Mother's Testimony; Principal's Testimony)
65. The student's CBI worker is provided through the Department of Mental Health. (CBI Worker's Testimony; Social Worker's Testimony)
66. CBI Worker did not begin working with the student until after October 4, 2012. (Respondent's Exhibit X; CBI Worker's Testimony; Case Manager's Testimony)
67. School A worked collaboratively with the student's CBI worker to ensure that the student would have support on days when the social worker is working at another school. (CBI Worker's Testimony; Social Worker's Testimony)
68. The CBI worker frequently visits School A to assist the student regardless of the social worker's schedule. (CBI Worker's Testimony)
69. School A is a public elementary school which serves pre-kindergarten to 5th grade students. The school is a high performing school with approximately 400 students. (Principal's Testimony)
70. School B is a nonpublic special education day school, located in the State of Maryland, which is approved by the District of Columbia Office of the State Superintendent of Education (OSSE) to serve District of Columbia students with disabilities. (School B Admissions Director's Testimony)

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley,* 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The Court in *Rowley* stated that the Act does not require that the special education services 'be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" Instead, the Act requires no more than a "basic floor of opportunity" which is met with the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 200-203. The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20

U.S.C. §§1400 et seg., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C.C. 1991). 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 (D.C. Cir. 2005) (quoting *Bd. Of Educ. Of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203 (1982)).

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

"Educational placement," as used in IDEA, means the educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board,* 343 F.3d 373, 379 (5th Cir. 2003) (citations omitted); *see also, A.K. v. Alexandria City School Board,* 484 F.3d 672, 680 (4th Cir. 2007) *(citing AW v. Fairfax County School Board,* 372 F.3d 674, 676 (4th Cir. 2004)). In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. *Id.*

In the present matter, the student resided in Location A from 2008-2010 and resided in Location B from September 2010 through June 2012 and arrived in the District of Columbia on August 22, 2012. The student's IEP from Location A was drafted on May 28, 2010. The student's May 28, 2010 IEP provided a placement in a nonpublic school for the student based on the IEP Team's discussion during a manifestation determination meeting during which the IEP Team determined that the student needed a smaller school with components such as mental health counseling, smaller class size and specialized services. Until the IEP drafted by DCPS on October 4, 2012, no IEP was subsequently drafted or implemented for the student.

The student is diagnosed with Conduct Disorder and ADHD. The student's May 28, 2010 IEP contained no academic goals and noted that the student was working at grade level in reading and reading comprehension and near grade level in math. The IEP also noted that the student's communication development, motor development, vocational skills, adaptive/daily living skills and health were appropriate to access the curriculum. The May 28, 2010 IEP Team acknowledged that the student, when in positive mood, was able to follow directions, be

compliant, able to transition with little difficulty and capable of discussing his feelings and triggers associated with his anger. While the student would leave an area, he generally remained within and area that could be monitored. The IEP Team also stated that the student responds well to adult attention, praise and positive reinforcement. The IEP Team based its placement decision on the student's serious physical aggression, which was occurring from one time per month to three times per week.

Pursuant to 34 CFR §300.323(f), if a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency conducts an evaluation (if determined to be necessary by the new public agency); and develops, adopts, and implements a new IEP, if appropriate. While the Petitioner did not base its argument on this specific regulation, the Petitioner eluded to this provision during the course of the hearing.

In this case, 34 CFR §300.323(f) does not apply. First, the regulation refers to an IEP that was *in effect* in a previous public agency in another State. Upon enrollment in DCPS, the student's May 28, 2010 IEP was no longer in effect. Next, the regulation states that the transfer to the new public agency in the new State must occur within the same school year. Here, the student entered School A three school years after the development the May 28, 2010 IEP. It was reasonable for DCPS to conduct observations, perform assessments and "get to know" the student before placing him in an extremely restrictive setting determined by an IEP Team more than two years prior to his entry into DCPS. While the assistant principal from a nonpublic school near Location A, wrote a letter on July 25, 2012 stating that the student would threaten his own safety and the safety of others if he were to be placed in any setting other than a private placement designed to meet the needs of students with severe emotional and behavioral problems, there is no evidence this school developed an IEP for the student or educated the student for a significant time period following the 2009-2010 school year.

On August 23, 2012, prior to his first day at School A, the student was hospitalized due to anxiety concerning starting school. The September 4, 2012 Discharge Summary indicated that the student exhibits suicidal feelings, ADHD, ODD and Conduct Disorder. The student was treated with three medications. The treating psychiatrist recommended that the student be educated in an academic environment that is highly structured with limited distractions, a small class size, a high teacher to student ratio and ample in-class supports including a staff member readily available to help the student deescalate when he gets angry.

Upon his enrollment in DCPS, the Psychologist reviewed the student's May 28, 2010 IEP, a May 2009 Psycho-educational Assessment Report, the student's June 8, 2009 Positive Behavior Support Plan, a March 11, 2010 Functional Analysis Assessment Report, a July 11, 2012 evaluation, a July 18, 2012 Diagnostic Evaluation, the July 25, 2012 letter from the nonpublic school assistant principal, an August 30, 2012 letter from a psychiatrist and the student's September 4, 2012 Discharge Summary. The Psychologist also conducted a Woodcock Johnson III assessment to ascertain the student's academic achievement and the Case Manager

referred the case to the LEA's LRE Team to address concerns regarding the student's prior placement and the mother's request for a private placement.

Academically, the student scored in the average range for his age in Broad Reading, Brief Writing and Broad Math on the September 2012 Woodcock Johnson III conducted by the DCPS psychologist. The student showed a weakness in math and reading fluency and spelling. The student's weaknesses in fluency are common for students with ADHD. The Psychologist testified that she was "surprised" by the student's average academic achievement given that the student did not attend school during the 2011-2012 school year.

The Psychologist also observed the student during his general education 5th grade class and interviewed the student's teachers, although the student had attended School A for only two days prior to the interviews. During the Psychologist's observation, the student was attentive and although initially did not participate, after be provided with attention from the teacher, worked appropriately with his partner. The student remained on task and focused with seat work although he needed more time than his peers to complete the assignment. The student appeared to rely on teacher support when feeling confused or insecure. During testing, the student required excessive time to complete questions. The School A teachers found that the student was able to adjust to the routines and expectations in School A and responded well to structure and consistency. When able to speak to teachers one-on-one, the student was able to process difficult situations, use thoughtful language and display good instincts. The student displayed anxiety especially during transitions and often needed adult reassurance.

Based on her review of records, observations of the student and interviews with the student's teachers, the Psychologist developed a list of recommendations for the student. The Psychologist testified that many of the recommendations were taken from prior evaluations since School A was still getting to know the student. The Psychologist testified that she recommended that the student receive support in and outside of the classroom to access the general education curriculum, a BIP, counseling, an environment with structure and limited distractions, nurturing staff members who are aware of the student's needs and opportunities for the student to leave the classroom to take breaks.

On September 11, 2012 and September 25, 2012, the DCPS LRE Team conducted observations of the student. During the observations, the student was pleasant, controlled and situation appropriate. The student cooperated with individual requests, cooperated with routine, interacted appropriately with peers, interacted appropriately with adults, worked independently with minimal directions, demonstrated self-control, contributed positively to the group, responded positively to the group and responded appropriately to the classroom management system. The student listened and responded appropriately, expressed himself clearly, displayed appropriate task behaviors (e.g. using materials, completing tasks). The student did not display immature verbal behaviors, verbal behaviors that were intrusive or interfered with the learning process or disrupt the lesson. The student required continuous support and required additional time to complete assignments. The student appropriately requested assistance, was able to patiently wait for assistance, when necessary, and received assistance well. The student needed additional time to comply with directions regarding transitioning from activity to activity but complied without incident after given additional time. The student did not exhibit aggressive, inappropriate, dangerous or volatile behavior during either of the observations.

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. On October 4, 2012, the student's IEP Team met and reviewed all of the information available to the team. This information included the student's May 28, 2010 IEP, prior evaluations, the parent's report of the student's behavior at home, the September 4, 2012 Discharge Summary, the Psychologist's academic assessment of the student, the LRE Team's summary of observations and the IEP Team member's observations and interactions with the student. The parent was present at the October 4, 2012 IEP Team meeting and was given the opportunity to participate. The IEP Team developed math, reading, written expression and emotional/social/behavioral goals for the student. The IEP Team, including the parent, agreed to the goals on the student's IEP. The IEP Team also discussed classroom management techniques for the student and determined that a FBA should be conducted and a BIP developed.

Additionally, the IEP Team reviewed the recommendations included in the Psychologist's Review of Independent Evaluations. The IEP Team concluded that the recommendations of an environment with structure and limited distractions, a BIP, planned and predictable activities, frequent behavior intervention, counseling, small group instruction, extended time and communication with the parent either had been or were being put in place at School A. The classroom to which the student is assigned is highly structured with limited distractions, has planned and predictable activities, has a 15:2 student-teacher ratio and provides small group instruction. The student is given extended time to complete tasks and is able to take breaks when needed. The school communicates often with the parent and makes the psychologist, social worker, principal and teachers available to provide behavior intervention.

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). Additionally, 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 §300.114(a)(2).

The IEP developed by the October 4, 2012 IEP Team contained four math, three reading, three written expression and ten emotional/social/behavioral goals. The student had demonstrated that he was able to request one-on-one assistance from the classroom teacher when he needed additional academic support and was able to successfully complete grade-level classwork, with additional time and assistance. On October 4, 2012, the IEP Team had not witnessed the serious physical aggression or dangerous behaviors exhibited by the student prior the development of his May 28, 2010 IEP or in his home environment from 2010 through August

23, 2012. The October 4, 2012 IEP Team prescribed three hours per week of specialized instruction outside of the general education setting, three hours per week of specialized instruction within the general education setting and three hours per week of specialized instruction consultation services to address the student's math, reading and written language IEP goals. The IEP Team prescribed 60 minutes per month of behavioral support services within the general education setting, 120 minutes per month of behavioral support services outside of the general education setting and 60 minutes per month of behavioral support consultation services to address the student's emotional/social/behavioral IEP goals.

When the student entered School A, based on the mother's request for a more restrictive environment and the student's prior IEP, the Case Manager referred the case to DCPS' LRE Team. The LRE Team was provided with the student's prior IEP, prior evaluations and other information provided to School A by the student's mother. The LRE Team conducted observations of the student and drafted recommendations based on the observations of the student. Although the Petitioner suggested that the student's placement was determined by the LRE Team rather than the IEP Team, the report by the LRE Team clearly indicates that the report is in no way a determination of placement for the student but rather a tool to be used by the IEP Team when determining an appropriate setting for the student. Likewise, the evidence on the record indicates that the student's October 4, 2012 IEP Team thoughtfully considered the student's unique needs, the nature and severity of his disability and the student's progress in School A when determining the student's placement. With the exception of the student's mother, no IEP Team member felt that the child needed placement in a more restrictive setting.

The Petitioner also argued that the Psychologist's recommendation was for the student to be placed in a nonpublic school. The Psychologist clearly testified that many of the recommendations included in her Review of Independent Evaluations, were from her review of the evaluations provided to DCPS by the parent, not her personal recommendations for the student's placement. The student's most recent placement was determined by a May 28, 1020 IEP Team. Since that time, the student moved from Location A to Location B, back to Location A, then to DCPS, was home-schooled and hospitalized multiple times.

There was no evidence presented which suggested that the student does not currently interact appropriately with nondisabled peers during class time. In fact, observations conducted by the Psychologist, the LRE Team and the Social Worker prior to the October 4, 2012 IEP Team meeting indicated that the student is able to interact appropriately with nondisabled peers during academic activities. The October 4, 2012 IEP Team members, including the LEA representative, two special education teachers, two general education teachers, the Psychologist, the Social Worker and intermittently, the Principal, agreed that the student was able to appropriately access the general education curriculum in the general education classroom with the use of supplementary aids and services. The Present Level of Performance for the student's emotional/social/behavioral development on the student's October 4, 2012 IEP includes information reported by the student's mother and contained within prior evaluations. The October 4, 2012 IEP does not contain behavioral data noted by School A or demonstrated by the student while at School A. On October 4, 2012, with the exception of anxiety related to timed tests and transitions, the student had not exhibited the inappropriate behaviors at School A that were prevalent in his educational history and reported by his mother.

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.

Since entering School A, the student has made progress with all academic goals which have been introduced. While the CBI workers testified that the student becomes frustrated by academics, there was no other evidence presented which suggested that the student is unable to complete grade level work with supports. The student is receiving extended time for assignments, individualized attention from his teachers and opportunities to take breaks within the classroom. Additionally, both the Social Worker and the CBI Worker have worked with the student to identify strategies for managing his behavior within the classroom.

The student has shown progress with some behavioral goals and has not shown progress with others. The student has displayed "intermittently appropriate" behavior. The majority of the inappropriate behavior exhibited by the student occurs during recess. When the student becomes angry, typically with other students during recess, he "shuts down" and needs to talk about the situation with a staff member. School A has made available the social worker, principal and teachers when the student needs to communicate. School A worked collaboratively with the student's CBI worker to ensure that the student would have support on days when the social worker is working at another school. The CBI worker frequently visits School A to assist the student regardless of the social worker's schedule.

When the student becomes frustrated, he needs "time and space" to calm down. After he is able to get time and space, he is able to reengage in classroom activities. The student is able to calm down more quickly if fewer people are in the vicinity.

After the development of the October 4, 2012 IEP, the student has had two incidents of eloping from school grounds. The first was on or about October 24, 2012 and the second was on or about December 19, 2012. Both incidents stemmed from interactions with another student during recess. The October 24, 2012 incident occurred approximately one week after the student learned that he was adopted. During the October 24, 2012 incident, the student walked up a hill behind the school, off of school grounds, and stopped at the house of a neighbor to the school. School A security called MPD based on the School's protocol to contact MPD when a student leaves school grounds. At all times, the student was in the sight of the principal. Likewise, the student remained within the sight of School A staff members during the December 19, 2012 incident. On December 19, 2012, the student threw a ball at another student before eloping from school grounds. On both occasions, the student was able to calm down and return to school. The parent testified regarding a third incident of the student eloping from school grounds during the beginning of October however there was no other evidence in the record of this incident.

When the student exhibits inappropriate behavior, the staff members at School A, with the assistance of the student's CBI worker, are able to manage the student and the situation. The School A staff members are attentive to the student's needs, are able to address the student's needs, properly supervise the student and provide the student with the necessary support during the school day. While the student has had to be "calmed down" at School A, he has not needed to be suspended or removed. All witnesses testified that the student's behavior, as compared to previous school years, has improved since he has been attending School A. The principal remarked that the student is becoming a part of the school and community.

Although the Petitioner was 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).

The student's mother is clearly a loving, involved and concerned parent. The Mother articulately expressed her concerns for child's safety and the safety of other students. However, the mother's perception of the student's ability to function in the school setting is different than school staff's perception of the student's ability to function in the school setting. The Mother testified that the student's behavior is to the extreme that he has had to be hospitalized four times since August 2012. The first hospitalization was before the student began school. The Mother testified that because of the student's anxiety of beginning school, he "barricaded" himself in his room therefore she called for medical assistance. The second and third hospitalizations were during the beginning of September and initiated by the mother because the student refused to do his homework and locked himself in the bathroom in their home. The fourth time was after the October 24, 2012 incident when the student eloped from school grounds. After school, the student met with his private therapist and wrote on the therapist's whiteboard "I hate school," "No one likes me," and "The police came." The Mother testified that the student's therapist characterized this behavior as a "meltdown" and suggested that the student be hospitalized. Each of the hospitalizations was at the request of the mother or the student's private therapist and, with the possible exception of the October 24, 2012 incident, involved behaviors not exhibited by the student at school.

The Mother also expressed her concern that the student feels a stigma because of his behavior and is cognizant that he is "different" because his peers witnessed him eloping from the school campus and the arrival of MPD. The Mother testified that the student feels as if he is not liked by his peers and that his peers do not want to play with him. The Mother testified that she struggles each morning with getting the student up and ready for school.

The Mother stated that she is concerned that the student is functioning below grade level and that the school staff is unable to address the student's behaviors. However, until his

enrollment in DCPS, the student had not received consistent education since September 2010. Since entering School A, the student has made progress with all academic goals which have been introduced and all witnesses testified that the student's behavior has improved since he has been attending School A. While a private placement may offer the student more behavioral support, allow the student to feel less "different" and result in a greater educational benefit to the student, DCPS is mandated to offer only an appropriate education which is reasonably calculated to confer educational benefit.

The Hearing Officer finds that DCPS developed an appropriate IEP for the student on October 4, 2012 and offered services and placement on the student's October 4, 2012 IEP which were designed to meet the student's unique needs, comported with the student's IEP, and were reasonably calculated to provide the student with some educational benefit in the least restrictive environment.[3] The Petitioner failed to meet its burden with regard to Issues #1 and #2.

ORDER

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

The due process complaint in this matter is **dismissed** with prejudice. All relief sought 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: January 16, 2013

Melanie Byrd Chisholm
Hearing Officer

[3] After the filing of the Complaint, DCPS the sent parent a letter of invitation to review the student's FBA and draft BIP. Nothing in this Order prohibits the parties from meeting as soon as possible to discuss these or any other additional supports needed for the student.