

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Office of Dispute Resolution
810 First Street, NE – Second Floor
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

OSSE
Office of Dispute Resolution
December 29, 2014

Confidential

<p>Parents on Behalf of Student¹,</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Date Issued: December 25, 2014</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
---	--

¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to

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 on December 4, and 5, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006 both days. The record was closed with filing of written closing arguments on December 15, 2014.

BACKGROUND AND PROCEDURAL HISTORY:

The student is _____ diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”), mixed expressive-receptive language disorder, phonological and reading disorders, and a written language disorder. In April 2010 while the student was in third grade attending her neighborhood DCPS elementary school (“School A”) DCPS determined the student eligible for special education and related services pursuant to IDEA as a student with a disability classification of other health impairment (“OHI”).

The student continued at School A through fourth grade. The student’s parents unilaterally placed her at a private full-time special education day school (“School B”) for fifth grade during school year (“SY”) 2011-2012. The student has continued to attend School B since and is currently in eighth grade for SY 2014-2015. As a result of a June 28, 2012, Hearing Officer Determination (“HOD”) DCPS was ordered to reimburse Petitioners the cost of the student’s tuition at School B from January 21, 2010, through the end of SY 2011-2012. DCPS ultimately continued to fund the student at School B for SY 2012-2013.

In 2013 Petitioners filed another due process complaint that was settled on December 5, 2013, and DCPS agreed to continue to fund the student’s tuition at School B for SY 2013-2014. Pursuant to the settlement agreement DCPS convened an IEP meeting for the student on June 2, 2014, and developed an individualized educational program (“IEP”). The meeting was held at School A. Petitioners and staff from School B participated along with DCPS personnel. A short time after the IEP meeting Petitioners received a letter notifying them that the student’s location for services where the student’s IEP would be implemented was a DCPS middle school (“School C”).

Petitioners were not in agreement with the IEP DCPS developed and on August 25, 2014, filed this due process complaint. Petitioners assert the IEP prescribes an insufficient amount services and that DCPS refused to discuss placement. Petitioners do not believe that School C can support the student’s needs and want the student to continue her placement at School B. Petitioners allege DCPS denied the student a free appropriate public education (“FAPE”) by: (1) failing to propose an appropriate program or placement and (2) failing to provide the Petitioners with meaningful participation in the IEP process. Petitioners invoked stay-put protections.²

² On September 8, 2014, Petitioners filed a motion for stay-put protections for the student to remain at School B during the pendency of this due process proceeding. The Hearing Officer convened a second pre-hearing conference

DCPS filed a timely response to the complaint on September 4, 2014. DCPS denied any alleged violation(s) or denial of a FAPE to the student. DCPS asserted the December 5, 2013, settlement included DCPS continuing to fund the student at School B up to, and including, June 10, 2014, and required DCPS to conduct evaluations and convene a meeting to review evaluations, review and revise the student's IEP as appropriate. DCPS asserted that the settlement agreement specifically states that "[p]ost IEP meeting, DCPS would determine and issue a location of services ("LOS") and on or before July 25, 2014, Petitioners were to visit the proposed LOS.

DCPS asserted the settlement agreement also contained a release and waiver clause whereby the Petitioners waived any claims up to and including August 25, 2014, and they would not seek any relief prior to SY 2014-2015. DCPS asserted that based on the terms of the settlement agreement the alleged failure by DCPS to provide the Petitioners with meaningful participation in the IEP process should be dismissed.³

DCPS denied that it failed to propose an appropriate program/placement for the student for SY 2014-2015 and asserted the student's IEP was reasonably calculated to provide the student with educational benefit in her least restrictive environment ("LRE").

A resolution meeting was held on September 8, 2014, and the case was not resolved. The parties did not mutually agree to proceed to hearing. The 45-day period began on September 25, 2014, and ended [and the HOD was originally due] on November 8, 2014. On October 3, 2014, Petitioners' counsel filed a motion to continue and extend the HOD due date because of Petitioners' unavailability. DCPS counsel did not object. With the granting of the motion the HOD due date was December 15, 2014. At the conclusion of the hearing DCPS counsel filed a motion to extend the HOD due date to allow for written closing arguments. The motion was granted and the HOD is now due December 25, 2015.

The Hearing Officer convened a pre-hearing conference on October 3, 2014, and on October 12, 2014, issued a pre-hearing order, outlining, inter alia, the issues to be adjudicated.

on October 21, 2014, at which arguments on Petitioner's motion were heard and on October 31, 2014, the Hearing Officer issued an order directing that the student's stay-put placement was School B.

³ On October 17, 2014, DCPS filed a partial motion to dismiss seeking to dismiss the issue related to parental participation in the LOS decision. DCPS asserted that the terms of the settlement agreement stated that DCPS would select the student's LOS for SY 2014-2015; and in addition, as LEA DCPS has exclusive decision making authority on the ultimate location of services. Petitioners filed an opposition to the motion on October 21, 2014. Petitioners asserted in their opposition that the settlement agreement did not state that there would be no discussion that included the parents either before or after the location was determined by DCPS. Petitioners submitted the HOD issued June 28, 2012, as one of the exhibits to its opposition. The Hearing Officer discussed the motion at the outset of the hearing and declined to dismiss the issue prior to a presentation of evidence and stated the ruling on the issue would be made in this HOD.

ISSUES: ⁴

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to propose an appropriate program or placement.⁵
2. Whether DCPS denied the student a FAPE by failing to provide the Petitioners meaningful participation in the IEP process.⁶

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 36 and Respondent's Exhibits 1 through 26) that were all admitted into the record and are listed in Appendix A.⁷ Witnesses are listed in Appendix B.

FINDINGS OF FACT: ⁸

1. The student is _____ diagnosed with ADHD, mixed expressive-receptive language disorder, phonological and reading disorders, and a written language disorder. (Petitioner's Exhibit 14-6)
2. From kindergarten through fourth grade the student attended her neighborhood DCPS elementary school, School A. In April 2010 while the student was in third grade DCPS determined the student eligible for special education and related services pursuant to IDEA as a student with a disability classification of OHI. (Respondent's Exhibit 9-2)

⁴ The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

⁵ Petitioners assert the student should be provided all services outside general education. Petitioners are not challenging the IEP goals or any components of the IEP other than the amount of services that are prescribed outside general education.

⁶ Petitioners assert that DCPS did not provide them meaning participation in determining the location of services where the student's IEP would be implemented.

⁷ Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

⁸ The evidence that is the source of the Finding of Fact ("FOF") 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 more than one party separately the Hearing Officer may only cite one party's exhibit.

3. In March and April 2010 DCPS conducted a psychological evaluation of the student as part of her initial eligibility determination. The student's cognitive functioning was in the high average range with a Full Scale Score of 109. She earned superior scores in verbal comprehension and average scores in perceptual reasoning, working memory and processing speed. The student's academic achievement scores were generally average and at least third grade level except for math fluency and writing samples that were at high second grade level. (Respondent's Exhibit 4-1, 4-5, 4-6)
4. Toward the end of third grade the student was found eligible. In fourth grade she had a daily reading class for 45 minutes (Read 180) and support in the classroom once per week. The student's fourth grade year at School A was rough for her. In her reading class she was doing well. She struggled in her other classes, had trouble with homework and began to feel bad about herself. She was also being bullied and losing friends. (Parent's testimony)
5. As a result of their concerns about the student's performance at School A the student's parents engaged the services of an educational consultant who in February 2011 conducted an educational evaluation of the student and assisted in the parents identifying and obtaining a special education program and placement for the student. (Witness 1's testimony, Petitioner's Exhibit 2-1)
6. The educational consultant assessed the student, observed her at School A, reviewed her evaluations and educational records and interviewed the student and her parents. The consultant concluded based on her evaluation that due to the student's ADHD, dyslexia, and multiple learning disabilities she required a more intensive program than was being provided at School A. The consultant concluded the student needed a lower teacher to student ratio, counseling, intervention from an occupational therapist and speech language pathologist along with systematic instruction in strategies for attention and executive functioning. The consultant recommended her parents consider two schools, one of which was School B, a private full-time special education day school. (Petitioner's Exhibit 2-5, 2-6, 2-14)
7. The student's parents unilaterally placed her at School B for fifth grade during SY 2011-2012. (Respondent's Exhibits 9-2, 11-6)
8. As a result of a May 2012 due process hearing a HOD issued June 28, 2012, that ordered DCPS to reimburse Petitioners the cost of the student's tuition at School B from January 21, 2010, through the end of SY 2011-2012. The student has continued to attend School B with DCPS funding and is currently in eighth grade for SY 2014-2015. (Parent's testimony)
9. On January 1, 2013, School B administered the Woodcock Johnson-Third Edition (WJ-III) to the student. She had the following scores: Broad Reading SS = 97, Broad Math SS = 94, Broad Written Language = 86, Written Expression = 89, Academic Skills = 88. (Petitioner's Exhibit 12-2)

10. In October 2013 Petitioners filed a due process complaint against DCPS that was settled. The parties executed a settlement agreement on December 5, 2013, pursuant to which the student's tuition at School B continued to be funded by DCPS for SY 2013-2014. (Respondent's Exhibit 6-1, 6-2)
11. Pursuant to the settlement agreement DCPS was required conduct triennial evaluations of the student before May 1, 2014, and convene a meeting to review evaluations, review and revise the student's IEP as appropriate on or before June 19, 2014. The settlement agreement stated, inter alia, that "[p]ost IEP meeting, DCPS would determine and issue a location of services." The agreement also stated "[o]n or before July 25, 2014, Parent will visit the proposed LOS in accordance with the LOS visitation policy." (Respondent's Exhibit 6-2)
12. DCPS conducted a social work assessment for the student and the following reevaluations in April 2014: psychological, speech and language and occupational therapy ("OT"). The DCPS psychologist reviewed the student's School B records including the student's 2013 Woodcock Johnson-III (WJ-III) scores and conducted a classroom observation of the student at School B. She recommended that the student be found eligible with the OHI classification. The DCPS speech language pathologist assessed the student, surveyed her teachers, reviewed records and conducted a classroom observation. The speech language pathologist concluded the student does not have a speech language impairment but did not recommend discontinuation of the student's speech language services. The DCPS OT evaluator assessed the student, reviewed records and interviewed the student's parents and classroom teacher. The OT evaluator concluded the student needed OT support. The DCPS social worker reviewed the student's evaluations and school records and interviewed the student's School B teachers and her parents and prepared a social work assessment report. (Respondent's Exhibit 8, 9, 10, 11)
13. The DCPS speech language pathologist ("SLP") administered the Comprehensive Assessment of Spoken Language ("CASL") and measured the student's vocabulary, grammar and higher level thinking skills and social communication skills. The student scored average in every area assessed except working memory. The student had average scores in vocabulary and her pragmatic social problem solving skills were also in the average range. During the DCPS SLP's classroom observation the student was engaged and was social with her peers. However, each of the student's teachers indicated some area of concern in the student's oral communication in the survey forms they returned to the evaluator. (Witness 5's testimony, Respondent's Exhibits 5, 9)
14. The student's most recent School B IEP⁹ was developed on April 7, 2014. DCPS was invited the meeting but did not attend. At School B the student is provided 31.25 hours of specialized instruction per week, 1.5 hours of speech language services, 45 minutes of

⁹ Although the student's school B IEP has that title, in some places in the HOD the School B IEP is referred to as an individualized learning plan or ("ILP").

OT and 45 minutes of psychological services per week. (Petitioner's Exhibit 10-1, 10-22)

15. A DCPS special education teacher observed the student at School B for 30 minutes in May 2014. There were five students in the reading classroom during the observation with one teacher.

The student's off task behavior seemed to have increased since she was last at School A. (Witness 6's testimony, Respondent's Exhibit 16-6)

16. On June 2, 2014, DCPS convened an IEP meeting at School A with Petitioners and the staff from School B. The team reviewed the student's DCPS updated evaluations and determined the student remained eligible for special education with the OHI disability classification. While the student's parents believed the student should also qualify as a student with a specific learning disability that classification was not considered by the team. The team also determined that the student was not eligible for extended school year ("ESY") services. (Respondent's Exhibit 12, 13-1, 13-2, 13-3, 14, 15)

17. The DCPS special education teacher who participated in the June 2, 2014, IEP meeting had been the student's special education at School A for fourth grade and taught her reading every day for 75 minutes in a specialized reading recovery program. When the student attended School A her IEP prescribed four hours of specialized instruction in an inclusive setting and 1 hour of pull out. (Witness 6's testimony)

18. The DCPS members of the team concluded the amount of services that the student had been prescribed in her previous DCPS IEP remained appropriate and prescribed the student be provided 4 hours of specialized instruction per week in general education, 1 hour per week outside general education and related services of OT, behavioral support, speech language.¹⁰ (Respondent's Exhibit 16-1, 16-15, 16-16)

19. The DCPS speech language evaluator concluded the student's has vulnerability in mental control - being able hear information and manipulate the information and concluded her ADHD contributed to this difficulty. However, the evaluator concluded the student is able to formulate her thoughts and be able to express herself and that her weaknesses are more related to her ADHD than speech language impairment. The evaluator concluded the student does not meet the DCPS criteria for services but because of the teacher concerns she did not recommend eliminating speech language services but reduced them from 90 minutes the student receives at School B to and one hour per week in general education 1 hour pull out monthly. The IEP goals teach compensatory strategies to address the student's language weaknesses related to her ADHD that the student might have for the rest of her life. (Witness 5, Respondent's Exhibit 9)

¹⁰ The related services prescribed are: OT: 120 min. per month outside gen. ed. 60 min. per month inside gen. ed. & 30 min. of OT consult per month. Speech and language: 1 hr. per month outside gen. ed. 1 hr. per month inside gen. ed. Behavioral support: 120 min per month outside gen. ed.

20. The June 2, 2014, IEP team used the School B IEP and psycho-educational to draft the student's IEP goals in the DPCS IEP. School B scores indicated the student was reading at a 5th grade level. The IEP team reviewed the student's WJ-III scores and the student's scores were in the average range except calculation. The student's scores seemed to have fallen from when she was attending School A and the testing done in 2013 at School B. The School B members agreed to the IEP goals that had been drafted but not the hours of specialized instruction. DCPS held firm on the service hours but was willing to negotiate on the related services. The DCPS special education teacher agreed with the hours of specialized instruction proposed by DCPS because she believed the student responded well to that level of services at School A and the student liked working with a non-disabled peer when she attended School A. (Witness 6's testimony, Petitioner's Exhibits 2-16, 10-3)
21. The student's parents believe the student does not simply need specialized instruction in reading and math but she needs it throughout the school day. Her parents shared this concern at the June 2, 2014, meeting. DCPS' proposal for the hours of specialized instruction came at the end of the IEP meeting and DCPS discussed their position that the level of services the student had when she was in fourth grade was enough. School B objected to the hours of specialized instruction and shared reasons. There is just simply a disagreement between DCPS and School B and the student's parents about what it takes to educate the student. (Parent's testimony)
22. The student's June 2, 2014, DCPS IEP includes goals in math, reading, written expression, communication/speech and language, emotional, social, behavioral development and motor skills/physical development. The anticipated date of achievement for the IEP goals is June 1, 2015. The student's IEP has the following academic goals: 4 math goals¹¹, 3 reading goals¹², and 3 goals in written expression¹³. (Respondent's Exhibit 16-4, 16-5, 16-6, 16-7, 16-8)

¹¹ (1) [The student] will multiply and divide rational numbers to 10 with 90% accuracy in 4 out of 5 trials. (2) [The student] will solve real-world problems (word problems) involving the four operations with 80% accuracy in 4 out of 5 trials. (3) [The student] will multiply and divide fractions (including mixed numbers) with 80% accuracy in 4 out of 5 trials. (4) [The student] will correctly convert a fraction to a decimal with 80% accuracy in 4 out of 5 trials.

¹² (1) [The student] will be able to [cite] 2 pieces of textual evidence from a fictional reading passage on her reading level to support what the texts says explicitly as well as implicitly with 90% accuracy in 4 out of 5 trials. (2) [The student] will be able to 2 pieces of textual evidence from a nonfiction reading passage on her reading level to support analysis of what the texts says explicitly as well as inferences drawn from the text with 90% accuracy in 4 out of 5 trials. (3) [The student] will determine cause and effect in terms of how ideas influence individuals or events, or how individuals or events influence ideas with 80% accuracy in 4 out of 5 trials.

¹³ (1) Given a list of 15 sentences and fragments at her instructional level [the student] will correctly identify sentence fragments in 8 out of 10 trials. (2) Given a topic at her instructional level, [the student] will complete a graphic organizer, and write an expository paragraph that includes a topic sentence, supporting ideas, detail sentences, and a concluding sentence with 80% accuracy in 4 out of 5 trials. (3) Given a draft of a paragraph or multi-paragraph essay, [the student] will improve sentence quality of drafts by adding temporal and locative phrases, improving work choice, adding descriptive words, varying sentence structure and adding transitional phrases with 80% accuracy in 4 out of 5 assignments.

23. The student's DCPS IEP Present Levels of Academic Achievement and Functional Performance ("PLOP") in math cite the student's January 8, 2013, Woodcock Johnson scores and states that in her most recent individualized learning plan at School B (4/7/14) School A reports that the student demonstrates a strength in measurement (linear and money), and in calculations (addition/subtraction). They indicate that she struggles with two-digit multiplication, math facts (multiplication/division), fractions (both concepts and calculation) and decimals. The PLOP also cites the student's test scores and WJ-III scores from when the student attended School A in fourth grade. (Respondent's Exhibit 16-4)
24. The student's IEP PLOP in reading cites the student's January 8, 2013, WJ-III scores and states that in her most recent School B assessment the student was reading on a 5th grade level. The PLOP also cites the student's test scores and WJ-III scores from when the student attended School A in fourth grade and cites a classroom observation where she was off task. (Respondent's Exhibit 16-6)
25. The student's IEP PLOP in written expression cites the student's January 8, 2013, WJ-III scores and states that except for writing fluency the student's scores were below average and in her most recent School B IEP the student has strengths in writing fluency, maintaining a topic in her writing and writing in simple sentences, and difficulty in writing complex sentence with correct grammar, writing paragraphs, sequencing and taking the time to edit and revise her writing. (Respondent's Exhibit 16-7)
26. In the description of how the student's disability affects her progress in the general education curriculum in math from the student's DCPS IEP states: "[the student] has ADHD and while her Math scores on the Woodcock Johnson Test of Achievement were in the Average range, her assessment in Calculation was Below Average." (Respondent's Exhibit 16-4)
27. In the description of how the student's disability affects her progress in the general education curriculum in reading the student's IEP states that based on the WJ-III in reading "[the student] appears to be on grade level in Reading. However, [School B] indicates in [the student's] most recent Individualized Learning Plan (4/2014) that she struggles with some areas of Reading." (Respondent's Exhibit 16-6)
28. In the description of how the student's disability affects her progress in the general education curriculum in written expression the student's DCPS IEP states that based on the WJ-III "[the student] appears to require support in Writing in order to progress in the general education curriculum." (Respondent's Exhibit 16-7)
29. In the description of how the student's disability affects her progress in the general education curriculum in communication/speech and language the student's IEP states: "[The student's] weakness in auditory memory and grammar correction/sentence formulation might affect her ability to learn new information presented in the classroom as well as impact her ability to communicate her thoughts and ideas in a complete and

age-appropriate manner.” The student’s IEP has two speech and language goals.¹⁴ (Respondent’s Exhibit 16-9)

30. In the description of how the student’s disability affects her progress in the general education curriculum in emotional, social, behavioral development the student’s IEP states: “Per [the student’s] most recent Independent Educational Program dated 4/7/2014 from [School B], she struggles to interact with her peers and has some social skills difficulties. This impacts her overall self-esteem, which in turn impacts her ability to function in the general education curriculum.” The student’s IEP has three behavioral support goals.¹⁵ (Respondent’s Exhibit 16-11)
31. In the description of how the student’s disability affects her progress in the general education curriculum in motor skills/physical development the student’s IEP states: “[The student’s] decreased self-regulation skills and poor organizational skills affect her ability to make progress in the general education curriculum. The student’s IEP has four OT goals.¹⁶ (Respondent’s Exhibit 16-4)
32. At the June 2, 2014, IEP team meeting the location where the student’s IEP would be implemented was not discussed. On June 5, 2014, DCPS sent the student’s parents notification that the that the student’s location for services for the student’s IEP to be implemented was School C, a DCPS middle school. (Parent’s testimony, Respondent’s Exhibit 20)

¹⁴ (1) Given fading cues and oral language activities, [the student] will improve her auditory memory skills by identifying and using compensatory strategies (e.g. rehearsal, visual imagery, requesting for repetitions, etc.) in the classroom setting in 4/5 opportunities across three sessions. (2) Given fading verbal cues and visual supports, [the student] will formulate concise and complete sentence with appropriate grammar when given a targeted word in 4/5 opportunities across three sessions.

¹⁵ (1) [The student] will improve her self-esteem and self-concept as evidenced in her ability to verbally express personal strengths and weaknesses in four out of five observed opportunities. (2) [The student] will improve her social skills as evidenced by her ability to initiate and sustain appropriate interactions, accurately read social cues, appropriately seek attention and maintain appropriate boundaries with her peers and others in four out of five observed opportunities. (3) [The student] will increase and maintain attending behaviors with decreasing prompts in 4 out of 5 instances. This goal includes a focus on the following: Work steadily with attention focused on task; Engage in productive activity while waiting for the teacher’s assistance; Ignore distractions (especially peers) occurring around her in the school setting.

¹⁶ (1) [The student] will demonstrate improved organizational skills as evidenced by independently initiating and completing the organization of her binder, backpack, and locker in 3/5 opportunities. (2) [The student] will demonstrate improved self-regulation skills as evidenced by requesting and utilizing a sensory strategy, when appropriate, to achieve an optimal level of alertness for school based tasks, with fading adult prompts in 4/5 opportunities. (3) With use of adaptive devices as needed, [the student] will demonstrate improved postural control as evidenced by maintaining a functional sitting posture for 5 consecutive minutes in 4/5 opportunities. (4) With accommodations as needed [the student] will demonstrate improved handwriting organization as evidenced by use of consistent line orientation, word spacing, and letter size in 4/5 opportunities.

33. School C can provide the related services in the student's current DCPS IEP and can provide the specialized instruction in the IEP. The School C's assistant principal had a conversation with the student's parents during the summer of 2014. (Witness 7's testimony, Respondent's Exhibit 16-15)
34. On June 12, 2014, the student's parents, through counsel, notified DCPS that they were in disagreement with and rejected the IEP DCPS proposed for the student for SY 2014-2015. (Respondent's Exhibit 21)
35. The last day of school at DCPS for SY 2013-2014 was June 20, 2014. (Stipulation)
36. In accordance with the December 5, 2013, settlement agreement, on or before July 25, 2014, Petitioners were to visit the proposed LOS. The settlement agreement also contained a release and waiver clause whereby the Petitioners fully released and waived the claims asserted, or which could have been asserted in the complaint, including any and all relief that does, or could, result from the claims, as of date of their signatures up to, and including August 25, 2014. The petitioners also agreed that they would not seek any relief prior to the 2014-2015 school year. (Respondent's Exhibit 6)
37. After getting the location letter the student's parents visited School C, met with the assistant principal and asked how the IEP would be implemented. The parents were informed that a special education teacher is paired with general education teacher in reading and math with classes of about 28 students. The student would not be provided special education in the other classes. The student's parents believe the class sizes and the overall school size of 1200 to 1300 students at School C is too large for the student. They believe the student would have difficulty with transitions, lunchtime and during before and after school in that kind of setting. The parent asked the School C staff what support would the student get with her executive functioning such as being able to organize her notebook, locker, paragraphs and inferred that the student would receive very little. (Parent's testimony)
38. School B serves student's with average to above average intelligence with learning disabilities and has an OSSE certificate of approval. At School B the student receives specialized instruction and related services and her classes are instructed by special education teachers. However, it is unclear whether the student's drama and physical education teachers are special education certified. The student's smallest class has 4 students and her physical education class has 23. Her largest academic class is science with 10 students. The student's largest classes is where she is most easily distracted and pulled off task by social dynamics. The student can get back on task and topic with prompts. (Witness 4's testimony, Petitioner's Exhibit 31)
39. The School B administrator's primary concern with the DCPS proposed IEP is the student to teacher ratio and whether the level and frequency of support would be adequate to meet the student's need. The School B administrator does not believe that student could be educated in a less restrictive setting than School B. However, the

administrator has not observed her in any other setting other than School B. (Witness 4's testimony)

40. The student has difficulty transitioning to class and in class and needs more processing time, structure and repeated prompts to access content. She needs supports and accommodations such as assistive technology and having content read aloud. The student's written language needs support and feedback, but she was able to communicate in paragraphs. The student is often concerned about her peers and social interactions and relationships. If other students were distracting she would have to be prompted to stay focused. Her social and emotional functioning sometimes requires an adult to address her concerns and remind her of strategies she has to use in order to be available for instruction. (Witness 4's testimony)
41. The student's instructional level is actually lower than her most recent WJ-III scores indicate. In written language the student is at a 5th grade instructional level. The student's instructional level on math is 5th to 6th grade instructional level. The student is making progress at School B. She has gone from 5th grade to 6th grade instructional level and made a year's academic progress in a school year. (Witness 4's testimony, Petitioner's Exhibit 10, 26)
42. At School B the student receives 90 minutes of speech language therapy per week one individual session and one small group session. In the classroom the student displays word retrieval deficits. The School B speech language pathologist ("SLP") reviewed the testing in the DCPS speech language evaluation and agrees that the document captures the student's speech and language profile. However, the School B SLP does not agree that the student does not have a language disorder. She believes the DCPS assessment does not take into account the contextual difficulties the student will have in the classroom daily. The student's sentence structure declines with more lengthy sentences, her note taking can be problematic, her social language is often problematic and she has difficulty taking her peer's perspective and sometimes comes across as aggressive which can interfere with her group work. The student requires teacher redirection and support and at School B a SLP confers with the student's classroom teacher on how to best address these concerns as they appear in the classroom. The School B SLP is aware of the DCPS IEP proposal for the amount of specialized instruction and is concerned about the student's ability to access and engage with the curriculum without the support she currently has at School B. However the School B SLP has not been to School C or talked to anyone there and has never observed the student anywhere other than at School B. (Witness 2's testimony, Petitioner's Exhibit 10-6, 11-6)
43. The student is provided 45 minutes of individual OT services per week at School B. The services focus on the student's organization and sensory modulation and handwriting. The OT provider occasionally will push into the student's advisory class to assist all students in organization and assistive technology once per week. The student's OT services are focused on the student's executive functioning planning, organization and handing in assignments. The student's handwriting is improving but

continues to need monitoring. OT also provides strategies to assist the student with attention issues. The School B OT is aware of the DCPS IEP proposal and expressed an opinion on its appropriateness. She is most concerned with the student's ability to focus and attend if there were a lot of students, her sensitiveness to noise and her need for redirection. If the student were not to receive the level of redirection she currently receives she would not likely be getting adequate instruction. (Witness 3's testimony, Petitioner's Exhibit 10-6)

44. The student's parents' educational consultant has continued to observe the student annually since 2011 and most recently observed the student at School B in October 2014 and observed her in three classes. Petitioner's educational consultant stated her opinion based on review of the student's evaluations and educational records and observing her at School B that the student's School B IEP it is appropriate and the student requires this level of support because there are no areas where she does not need specialized instruction. She believes the student should be in a smaller special education environment for lunch. She believes the student needs "specialized instruction supervision" in art and music and health classes.
45. The student's parents' consultant believes based upon her visit to School C a year ago that at School C the classes are too large, there is too much moving around the building and the pace of instruction is too fast for the student and she would get lost and attempt to escape from the classroom. She believes the lack of specialized instruction and the pace and demands of common core standards without sufficient supports makes School C, in her opinion, an inappropriate school placement for the student. (Witness 1's testimony)
46. The student currently has exposure to non-disabled students outside of school through the Washington Ethical Society and Girl Scouts. The student has to be coached on how to deal with her peer interactions and what to say. At department stores she gets overstimulated and the student's parents believe a class size of 25 students would be difficult. Currently when the student is having a tough time academically she leaves the classroom and skips class and this behavior may likely increase in a setting as large as School C. (Parent's testimony)

CONCLUSIONS OF LAW:

DCPS asserts the nature and severity of the student's disability is not such that education in a general education classroom with supplementary aids and services cannot be achieved. DCPS also asserts in order to provide the student a FAPE, and that School C is an appropriate placement for the student. DCPS claims that they made FAPE available to the student; however, petitioners declined the offer and therefore, DCPS is relieved of its obligation to provide a FAPE for the 2014-2015 school year.

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

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. ¹⁷ *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.

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. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied the student a FAPE by failing to propose an appropriate program or placement.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student was denied a FAPE by DCPS failing to propose an appropriate program or placement. However, the Hearing Officer does not conclude that School B is the student's LRE.

A primary purpose of the enactment of IDEA was "to ensure 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); § 1412 (a)(1)(A) ("A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21").

¹⁷ 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.

To ensure access to a free appropriate public education for children with disabilities, "the child's parents, teachers, school officials, and other professionals collaborate in a 'multi-disciplinary team' to develop an individualized educational program [IEP] to meet the child's unique needs." *Smith v. Dist. of Columbia*, No. 12-2058, 2014 WL 1425737 (D.D.C. Mar. 14, 2014) (citing *D.K. v. Dist. of Columbia*, 983 F. Supp. 2d 138, 141 (D.D.C. 2013) (citing 20 U.S.C. § 1414(d)(1)(B)); see also *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 519 (D.C. Cir. 2005); *Dist. of Columbia v. Wolfire*, No. 12-01527, 2014 WL 169873 (D.D.C. Jan. 16, 2014); *Dist. of Columbia v. Oliver*, No. 13-00215, 2014 WL 686860 (D.D.C. Feb. 21, 2014).

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

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

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits." *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009).

Once the IEP has been developed, "the school system must provide an appropriate placement that meets those needs and, if an appropriate public placement is unavailable, the school system must provide an appropriate private placement or make available education-related services provided by private organizations to supplement a public placement." *Petties v. Dist. of Columbia*, 238 F. Supp. 2d 114, 116 (D.D.C. 2002) (citing 20 U.S.C. § 1412(a)(10); 34 C.F.R. §§ 300.349, 300.400-402.); see also *S.S. ex rel. Street v. Dist. of Columbia*, No. 13-557, 2014 WL 4650885 (D.D.C. Sept. 19, 2014) ("A student's IEP determines whether an educational placement is appropriate; the placement does not dictate the IEP.") (citations omitted).

Conformity with the dictates of IDEA also requires that children with disabilities be educated in the least restrictive environment: "To the maximum extent appropriate, children with disabilities[] ... are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A); see also *N.T. v. Dist. of Columbia*, 839 F. Supp. 2d 29, 35 (D.D.C. 2012) (IDEA requires local education agencies to place students with disabilities in "the least restrictive environment possible") (citations omitted).

In this jurisdiction, the educational placement is based upon the child's IEP, and the school designated by the public agency to implement the child's IEP is the location of services. *Johnson v. District of Columbia*, 2012 L 883125 (D.C.C., March 16, 2012). The school district is not required to maximize or provide the best program; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit the child to benefit from the instruction. *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982).

The IDEA only mandates a "basic floor of opportunity." *Id.*; *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995). To accomplish this, an IEP must only "be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." *Chambers v. Sch. Dist. of Philadelphia Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir. 2009) (quoting *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004)).

An inadequate IEP is a necessary but insufficient condition for private school placement and reimbursement. Although the District must pay for private school placement "if 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." N.T., 839 F. Supp 2d at 34 (citation omitted), 35 n.3 (hearing officer could consider whether parental placement was the least restrictive environment in evaluating whether tuition reimbursement was the proper remedy for denial of FAPE) (citations omitted); see also K.E., 2014 WL 242986 ("Since the IDEA does not require a school district to pay for a private school education simply because that opportunity would be ideal for a student, the Court is unpersuaded by the plaintiffs' contention that any private school that provides a child an educational benefit is appropriate.") (citation omitted). *Pinto, et al., Plaintiffs, v. District of Columbia* 64 IDELR 103 (D.C.C. 2014)

Petitioners assert the student should be provided all services outside general education. Petitioners are not challenging the IEP goals or any components of the IEP other than the amount of specialized instruction prescribed outside general education. The overwhelming evidence demonstrates, despite the DCPS witnesses' testimony to the contrary, that the student has academic deficits, attention and impulsivity concerns as well as speech and language and occupation therapy concerns that impact her significantly throughout all classes. The School B staff credibly testified that the student benefits from the level of intervention and low student to teacher ratio the student has at School B.

The evidence demonstrates that the IEP that DCPS developed on June 2, 2014, and the amount of specialized instruction therein was primarily based upon the level of specialized instruction the student was provided four years prior when the student was in elementary school. The Hearing Officer is incredulous that DCPS would base the amount of specialized instruction in the student's current IEP on the amount of services that she received nearly four years prior rather than taking into account that the student's current instructional performance and crafting an individualized education program that meets the student's needs where she is operating currently.

Although the academic assessments that were conducted of the student reflected that she was operating in average range in most of her academic areas, the School B staff credibly testified that the student's actual instructional level when taking into account how her disability affects her in the classroom resulted in her operating on a grade level up to two years behind her current grade. In addition, there was credible testimony that the extensive goals that are in the student's DCPS IEP that School B helped draft cannot be implemented in the scant number of hours of specialized instruction in the DCPS IEP as it was drafted on June 2, 2014.

Consequently, this Hearing Officer concludes that the IEP DCPS developed was not reasonably calculated to provide the student educational benefit at the time it was developed and based upon the information available to the IEP team on June 2, 2014.

Although many of the School B staff testified as well as the student's parent and her educational consultant about their concern that the student would be overwhelmed and would attempt to escape a school setting that did not provide her structure, class size and individualized attention she receives at School B, the Hearing Officer was not convinced by their testimony that the student must be totally removed from her nondisabled peers despite her need for and benefit from specialized instruction in all her classes. At School B the student has no interaction with students who do not have a disability. IDEA clearly mandates that to the greatest extent possible students shall be educated with their non-disabled peers.

There is evidence that the student can and does have social interaction with non-disabled peers outside of school and in those situations is coached by her parents on peer interaction and communication. In addition, at School B the student is sometimes in a class with as many as 23 students and it appears that not all the instruction provided to the student is provided by special education teachers. Based on this evidence the Hearing Officer concludes that School B where the student is totally removed from non-disabled peers is not the student's least restrictive environment. Petitioner did not sufficiently demonstrate by the evidence that a separate school is the student's LRE on continuum of placements.

Consequently, in the order below the Hearing Officer directs that the student's IEP be amended to prescribe that all her instruction be in special education and that the student's IEP be amended to reflect at least 25 hours of specialized instruction outside general education per week¹⁸ and that DCPS promptly convene a placement meeting with the student's parents and determine an appropriate location of services for the student for the remainder of SY 2014-2015.

Although Petitioner's expert witnesses among others testified that the student requires total removal from general education the Hearing Officer did not find this portion of the testimony convincing. At School B the student takes physical education with a group as large as 23 students and this instruction is not conducted by special education teacher. IDEA defines special education to include instruction in physical education. Based upon these factors the Hearing Officer is not convinced that the student must be totally removed from her non-disabled peers and that a separate school is the student's least restrictive environment on the continuum of

¹⁸ The Hearing Officer has derived this number of hours by excluding the number of related service hours prescribed in the student's IEP from the total number of instructional hours per week that is typically in a DCPS IEP based upon 27.5 hours per week of instruction.

placements. Therefore, the Hearing Officer will not grant the requested remedy of the student's prospective placement at School B.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to provide the Petitioners meaningful participation in the IEP process.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student was denied a FAPE by DCPS failing to provide Petitioner's meaningful participation in the IEP process.

The evidence demonstrates that Petitioners meaningfully participated in the development of the student's June 2, 2014 IEP, including the goals and services that would be provided to the student. The evidence reflects that DCPS was receptive to School B input and incorporated many of their recommended goals into the student's DCPS IEP. While the IEP team reached an impasse over specialized instruction hours, it was able to agree on the related services. Petitioners' disagreement with one component of the IEP does not establish that they were prohibited from meaningfully participating in developing the IEP.

Petitioners assert that DCPS did not provide them meaningful participation in determining the location of services where the student's IEP would be implemented. On its face, the December 5, 2013, settlement is unambiguous in that "Post IEP meeting," DCPS "would determine and issue a location of service." The Hearing Officer concludes the language is clear and there was no evidence presented that was contrary to the plain language of the agreement. Although the agreement also stated that the student's parents would visit the LOS, there was no provision in the agreement for any subsequent meeting or input by the parents as to this decision. The Hearing Officer infers that if the parents were not satisfied with the determination DCPS made as to LOS they would exercise their rights as they have done so by filing for due process hearing. Consequently, the Hearing Officer concludes that DCPS did not deny the student a FAPE by failing involve the parents in the determination of the location of services once the IEP was finalized.

ORDER:¹⁹

1. The student's IEP is hereby amended to prescribe 25 hours per week of specialized instruction outside general education in addition to the current related services.
2. DCPS shall, within fifteen (15) school days of the issuance of this order convene a meeting with Petitioners' participation and make a determination regarding the student's educational placement and location of services for the remainder of SY 2014-2015.
3. All other requested relief is denied.

¹⁹ Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

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: December 25, 2014