OSSE
Student Hearing Office
October 31, 2013

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Parent,[1] on behalf of,
Student,*

Petitioner,

Date Issued: October 30, 2013

v.

Hearing Officer: Melanie Byrd Chisholm

District of Columbia Public Schools,
Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a seventeen (17) year old male, who is in an ungraded program at School A. The student's most recent individualized education program (IEP) lists Multiple Disabilities (MD) as his primary disability and provides for him to receive twenty-seven and one half (27.5) hours per week of specialized instruction outside of the general education environment, thirty (30) minutes per week of occupational therapy outside of the general education environment, sixty (60) minutes per week of speech-language pathology outside of the general education environment, and sixty (60) minutes per week of behavioral support services outside of the general education environment.

On August 16, 2013, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS) alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to allow the parent to participate in the provision of FAPE to her son; failing to issue procedurally sufficient prior written notice before altering the student's educational placement; failing to provide extended school year (ESY) services to the student; failing to assign the student to school that could implement his IEP; failing to conduct or provide for current evaluations and assessments; and failing to create an adequate IEP for the student. As relief for the alleged denials of FAPE, the Petitioner requested for the student to be placed in School A for the 2013-2014 school year and beyond;

*The student is a minor.

transportation to School A; compensatory education; reimbursement for independent psychoeducational, speech-language, occupational therapy and functional behavioral assessments; and for the student's IEP to be amended to include the specialized services the student receives at School A.

On August 27, 2013, Respondent filed an untimely Response to the Complaint. In its Response, Respondent asserted that: the student's current IEP is dated May 21, 2013 and prescribes 27.5 hours per week of specialized instruction outside of the general education environment, 30 minutes per week of occupational therapy, 60 minutes per week of speech-language therapy, 60 minutes per week of behavioral support services, assistive technology and transportation; the student is classified with MD; the student was reevaluated on November 11, 2012; the parent and the student participated in the November 11, 2012 reevaluation meeting; the November 11, 2012 IEP Team determined that no additional assessments were necessary; the student's November 29, 2012 and May 21, 2013 IEPs indicate that the student's speech-language services be provided outside of the general education environment and do not provide for speech-language consultative services; School A's 11-month program does not indicate that the student is eligible for ESY; during the 2012-2013 school year, DCPS conducted no less than five classroom observations of the student to assess the least restrictive environment for the student; on May 21, 2013, it was determined that the student's placement would change from a separate day school to a separate classroom; the student's parent was present at the May 21, 2013 meeting and had the opportunity to participate; prior written notice of the student's change in placement was provided to the parent; the prior written notice contains all of the information required by the Individuals with Disabilities Education Act (IDEA); School B is able to implement the student's IEP; and the student's IEP is reasonably calculated to provide educational benefit.

On August 27, 2013, the parties participated in a Resolution Meeting and failed to reach an agreement during the meeting 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 September 16, 2013, following the conclusion of the 30-day resolution period, and ends on October 30, 2013. The Hearing Officer Determination (HOD) is due on October 30, 2013.

On September 4, 2013, 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 September 9, 2013. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Prehearing Order.

In the September 9, 2013 Prehearing Order, the Petitioner was directed to provide the Respondent with a proposed compensatory education plan by October 1, 2013. On October 1, 2013, the Petitioner, via electronic mail, informed the Respondent and the Hearing Officer that the Petitioner was withdrawing its request for compensatory education as relief.

On October 4, 2013, Petitioner filed Disclosures including nineteen (19) exhibits and six (6) witnesses.[2] On October 4, 2013, Respondent filed Disclosures including eighteen (18) exhibits and two (2) witnesses.

The due process hearing commenced at approximately 9:04 a.m.[3] on October 11, 2013 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 1-13 and 17-18 were admitted without objection. The Hearing Officer did not admit Petitioner's Exhibits 14, 15 and 16 because the documents were duplicative of the hearing record. Petitioner's Exhibit 19 pages 1-12 were not admitted because the written testimony of an expert witness could present a situation where the Respondent would be unable to cross-examine the witness on statements in the documents. Petitioner's Exhibit 19 pages 13-14 were admitted. Respondent's Exhibits 1 and 3-18 were admitted without objection. The parties agreed to stipulate to the fact contained within Respondent's Exhibit 2 for which the Respondent proposed the exhibit, therefore Respondent's Exhibit 2 was not admitted because the Petitioner represented that statements in the exhibit mischaracterized statements made by the parent.

The hearing recessed at approximately 11:33 a.m. on October 11, 2013 and reconvened at approximately 8:58 a.m. on October 22, 2013. The hearing concluded at approximately 3:53 p.m. on October 22, 2013, following closing statements by both parties.

Jurisdiction

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

ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to afford the parent an opportunity to participate in the May 21, 2013 placement discussion regarding the student, and if so, whether this failure constitutes a denial of a FAPE?
2. Whether DCPS failed to provide sufficient prior written notice of the student's change in placement on May 21, 2013, and if so, whether this failure constitutes a denial of a FAPE?
3. Whether DCPS denied the student a FAPE by failing to include ESY services on the student's May 21, 2013 IEP?

[2] A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.
[3] At 9:00 a.m., the scheduled time to begin the hearing, the Hearing Officer and counsel for Petitioner and Respondent were present. The parent arrived at approximately 9:04 a.m.

4. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP for the student on May 21, 2013, specifically by failing to include integration of speech and language services into the classroom setting, opportunities for community interaction, opportunities for career participation and functional life skills on the student's IEP?
5. Whether DCPS denied the student a FAPE by assigning the student to a location of services for the 2013-2014 school year that is unable to implement the student's May 21, 2013 IEP?
6. Whether DCPS failed to conduct a triennial reevaluation of the student by April 2013, and if so, whether this failure constitutes a denial of a FAPE?

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. A psychological evaluation was completed for the student on April 19, 2010. (Petitioner's Exhibit 1)
3. The student has attended School A for nine years. (Petitioner's Exhibit 10; Respondent's Exhibit 8; Parent's Testimony)
4. The student attended School A for the 2012-2013 school year. (Stipulated Fact)
5. School A is a nonpublic special education day school. (Petitioner's Exhibit 17)
6. School A is an 11-month program. (Stipulated Fact)
7. School A has small class sizes and a low student-teacher ratio. (Special Education Teacher's Testimony)
8. Speech-language services are embedded in the School A program. (Petitioner's Exhibit 17; Special Education Teacher's Testimony; Vocational Teacher's Testimony; Counselor's Testimony; Parent's Testimony)
9. The student is classified as a student with MD based on a diagnosis of speech or language impairment and other health impairment (OHI) (Attention Deficit Hyperactivity Disorder (ADHD)). (Petitioner's Exhibit 1)
10. The student has difficulty with language and significant speech-language deficits. (Petitioner's Exhibits 2, 4, 5 and10; Respondent's Exhibits 8, 9 and 11; Special Education Teacher's Testimony; Vocational Teacher's Testimony; Counselor's Testimony)
11. The student is a "complex student" who needs small group instruction and a variety of related services to access the curriculum. (Petitioner's Exhibits 4 and 10; Respondent's Exhibits 8 and 9; Educational Consultant's Testimony; Vocational Teacher's Testimony; Counselor's Testimony; Parent's Testimony)
12. The student has an extremely low working memory. (Petitioner's Exhibit 1)
13. The student requires instruction in a classroom with a low student to teacher ratio. (Petitioner's Exhibit 1)

14. The student is on a certificate track. (Petitioner's Exhibits 4 and 10; Respondent's Exhibits 8 and 9)
15. The student is able to wash dishes, use the washing machine, use the dryer and make his bed. (Parent's Testimony)
16. The student relies on written checklists paired with auditory information to complete two to three step directions in an unstructured environment. (Petitioner's Exhibits 4; Respondent's Exhibit 9)
17. The student uses simple and compound sentences with one to two details to respond to questions, communicate with staff and peers and participate in class discussions. (Petitioner's Exhibits 4; Respondent's Exhibit 9)
18. The student requires support to improve organization of his verbal responses. (Petitioner's Exhibits 4; Respondent's Exhibit 9)
19. The student needs reminders to allow a peer to take an equal number of turns during a conversation. (Petitioner's Exhibits 4; Respondent's Exhibit 9)
20. The student has difficulty interpreting the facial expressions of others and reading social cues. (Petitioner's Exhibits 4; Respondent's Exhibit 9; Special Education Teacher's Testimony; Parent's Testimony)
21. The student is pleasant, friendly and outgoing. (Respondent's Exhibits 13, 14, 15, 16 and 17; Special Education Teacher's Testimony; Vocational Teacher's Testimony; Parent's Testimony)
22. The student, at times, has difficulty understanding directions. (Special Education Teacher's Testimony)
23. The student is academically behind his peers. (Petitioner's Exhibits 1, 4, 5 and 6; Respondent's Exhibits 9 and 12)
24. The student excels when he is given leadership roles and tasks involving acting as a role model. (Special Education Teacher's Testimony)
25. At times, the student does not ask for clarification when he is unable to understand language. (Special Education Teacher's Testimony)
26. When the student does not understand directions that are given the educational environment, the student has difficulty completing the required task. (Special Education Teacher's Testimony)
27. The student excels when he has additional verbal and gestural prompts, clear concise language from teachers and materials such as an ipad, markers or a whiteboard to "get the big picture." (Petitioner's Exhibits 4 and 10; Respondent's Exhibits 8 and 9; Special Education Teacher's Testimony)
28. The student is able to answer content questions based on highlighted information and generated notes. (Petitioner's Exhibits 4 and 10; Respondent's Exhibits 8 and 9)
29. The student has difficulty making logical connections between key words and details to provide an explanation. (Petitioner's Exhibits 4 and 10; Respondent's Exhibits 8 and 9)
30. The student relies on written checklists paired with auditory information to complete two-three step directions in unstructured environments. (Petitioner's Exhibits 4 and 10; Respondent's Exhibits 8 and 9)
31. The student needs reminders to allow a peer to take an equal number of turns during a conversation and tends to direct the conversation to a topic of his choice. (Petitioner's Exhibits 4 and 10; Respondent's Exhibits 8 and 9)

32. Following the completion of his certificate, the student plans to work for a tow truck company. (Petitioner's Exhibits 4; Respondent's Exhibit 9)
33. After school, the student rides in a tow truck with his mother and assists with dispatching tow trucks. (Petitioner's Exhibit 4; Parent's Testimony)
34. The student is aware of the steps needed to work for a tow truck company. (Petitioner's Exhibit 4; Respondent's Exhibit 9; Parent's Testimony)
35. At School A, the student is developing employability skills through participation in in-school vocational job experiences. During these experiences, the student is able to complete job tasks and work independently. (Petitioner's Exhibit 4; Respondent's Exhibit 9; Vocational Teacher's Testimony)
36. The student's areas of need in vocation include working appropriately with peers, having appropriate work conversations and behaviors and being able to work with others. (Petitioner's Exhibit 4; Respondent's Exhibit 9; Vocational Teacher's Testimony)
37. At times exhibits inappropriate behaviors, particularly related to appropriate interpreting social cues, the student is able to control his behavior and demonstrates strong leadership skills. (Respondent's Exhibits 13, 14, 15, 16 and 17; Special Education Teacher's Testimony; Counselor's Testimony; Parent's Testimony)
38. The student is able to interact appropriately in the community and is acquiring skills to function in a work environment. (Petitioner's Exhibit 4; Respondent's Exhibit 9; Vocational Teacher's Testimony; Parent's Testimony)
39. The student is diabetic however feels independent with managing his health although he makes inconsistent nutrition decisions. (Petitioner's Exhibit 4; Respondent's Exhibit 9)
40. The student successfully chooses his food options when shopping for supplies. (Petitioner's Exhibit 9)
41. The student is more comfortable around younger children. (Parent's Testimony)
42. On November 29, 2012, the student's IEP Team met for an annual review of the student's IEP and to reevaluate the student. (Petitioner's Exhibit 5; Respondent's Exhibit 10)
43. On November 29, 2012, the student's IEP Team agreed that the student continued to be eligible for special education and related services as a student with MD. (Petitioner's Exhibit 5; Respondent's Exhibit 10)
44. On November 29, 2012, the student's IEP Team determined that no further assessments were needed to determine the student's eligibility or the educational needs of the student. (Petitioner's Exhibit 5; Respondent's Exhibits 10 and 11)
45. The IEP Team reviewed the student disability worksheet for MD and the IEP Team agreed that the student continued to meet the eligibility criteria for MD. (Petitioner's Exhibit 5; Respondent's Exhibits 10 and 11)
46. The student's November 29, 2012 IEP Team used work samples, teacher reports, observation data, curriculum and teacher-made assessments, the Saxon placement test, A-Z running records, the Brigance Inventory of Essential Skills, informal assessments and therapy data to determine the student eligibility and the content of the student's November 29, 2012 IEP. (Petitioner's Exhibit 5; Respondent's Exhibits 10 and 11)

47. On November 29, 2012, the student's IEP Team determined that the student was not eligible for ESY based on the nature of the School A program. (Petitioner's Exhibit 6)
48. On March 22, 2013, the student was progressing toward mastery of all of his IEP goals. (Petitioner's Exhibit 8)
49. Prior to the May 21, 2013 IEP Team meeting, the parent and School A were informed that the student's May 21, 2013 IEP Team meeting was being convened to discuss the student's placement. (Parent's Testimony; Counselor's Testimony)
50. The student's IEP Team met on May 21, 2013 to discuss the student's placement for the 2013-2014 school year. (Petitioner's Exhibit 10; Respondent's Exhibit 8)
51. The May 21, 2013 IEP Team consisted of a DCPS LEA Representative, a School A speech-language pathologist, the student, the Special Education Teacher, a School A occupational therapist, the Counselor, the School A Director of Student Services, the Parent and a School A therapist.
52. On May 21, 2013, the student's IEP Team agreed on the student's IEP goals. (Petitioner's Exhibit 10; Respondent's Exhibit 8)
53. The goals and services on the student's May 21, 2013 IEP were appropriate for the student. (Special Education Teacher's Testimony; Vocational Teacher's Testimony; Counselor's Testimony)
54. The postsecondary transition plan in the student's May 21, 2013 IEP includes goals related to respecting others, utilizing strategies to improve social skills, identifying skills and requirements necessary to perform jobs in the industrial truck field, exploring requirements to obtain a learner's permit, accepting shared responsibility, participating in group activities to develop and improve social skills, independently preparing meals, practicing planning and shopping for materials to prepare his meals and improving kitchen safety skills and awareness. (Petitioner's Exhibit 9)
55. The postsecondary transition plan in the student's May 21, 2013 IEP provides for services inside and outside of a special education setting. (Respondent's Exhibit 9)
56. The student's IEP prescribes 27.5 hours per week of specialized instruction outside of the general education environment, 30 minutes per week of occupational therapy outside of the general education environment, 60 minutes per week of speech-language pathology outside of the general education environment and 60 minutes per week of behavioral support services outside of the general education environment. (Petitioner's Exhibit 10; Respondent's Exhibit 9)
57. The student's May 21, 2013 IEP provides for a location with minimal distractions, preferential seating and individual testing. (Respondent's Exhibit 9)
58. The student's math and reading annual goals on his May 21, 2013 IEP provide that the goals will be mastered in "a structured setting." (Respondent's Exhibit 9)
59. The student's speech-language annual goals on his May 21, 2013 IEP provide that the goals will be mastered in "structured and unstructured" settings. (Respondent's Exhibit 9)
60. The student's May 21, 2013 IEP Team did not discuss whether the student met the criteria for ESY. (Petitioner's Exhibit 10; Respondent's Exhibit 8)
61. The student's May 21, 2013 IEP does not include ESY. (Stipulated Fact)

62. On May 21, 2013 DCPS afforded the IEP Team members the opportunity to voice their opinions and concerns regarding the proposed change. (Special Education Teacher's Testimony; Counselor's Testimony; Parent's Testimony)
63. On May 21, 2013, the student informed the IEP Team that he desired to transition to another school. (Petitioner's Exhibit 10; Respondent's Exhibit 8)
64. On May 21, 2013, the student's IEP Team members expressed concerns of regarding class size, the student's inability to read social cues, the student's distractibility and whether the assigned location of services would provide all of the supports available at School A. (Special Education Teacher's Testimony; Counselor's Testimony; Parent's Testimony)
65. On May 21, 2013, the Parent was "very verbal" regarding her opinion of the student's change in placement. (Parent's Testimony)
66. On May 21, 2013, the student's placement was changed from a separate day school to a separate classroom. (Stipulated Fact)
67. On May 21, 2013, the parent and the School A staff did not agree with the decision to change the student's placement/location of services. (Petitioner's Exhibit 10; Respondent's Exhibits 7 and 8)
68. On May 21, 2013, DCPS noted that the IEP Team members disagreed with the change in placement. (Petitioner's Exhibit 10; Respondent's Exhibit 7 and 8)
69. The May 21, 2013 IEP Team did not discuss a specific location of services for the student. (Petitioner's Exhibit 10; Respondent's Exhibit 8)
70. On May 21, 2013, DCPS provided a Prior Written Notice to the parent which included a description of the action proposed, an explanation of why DCPS proposed to take the action, a statement that the parent has protections under the procedural safeguards, sources for parent to contact to obtain assistance in understanding the provisions of the IDEA, a statement that no other options were considered and a statement that the parent and School A staff members disagreed with the proposal. (Petitioner's Exhibit 11; Respondent's Exhibit 7)
71. On June 27, 2013, a letter was sent to the student's parent, which informed the parent of the student's location assignment to School B for the 2013-2014 school year. (Petitioner's Exhibit 12; Respondent's Exhibit 3)
72. On June 27, 2013, a letter was sent to the student's parent, which offered services to assist the student in his transition from a nonpublic school to School B. (Petitioner's Exhibit 13; Respondent's Exhibit 4)
73. School B is a public school within DCPS. (Petitioner's Exhibit 12; Respondent's Exhibit 3; Educational Consultant's Testimony; Parent's Testimony; LEA Representative's Testimony)
74. School B has five self-contained classrooms. (LEA Representative's Testimony)
75. Two of the five self-contained classrooms at School B serve students who are on a "certificate" track, which are generally for students classified as intellectually disabled (ID). (LEA Representative's Testimony)
76. The two ID classrooms at School B are divided by the chronological ages of the students. (LEA Representative's Testimony)
77. As of October 22, 2013, neither ID classroom at School B had more than six students. (LEA Representative's Testimony)

78. Both ID classes at School B are taught by a certified special education teacher and the classes share an instructional aide. (LEA Representative's Testimony)
79. School B has a Life Skills classroom where students are able to practice functional skills. (LEA Representative's Testimony)
80. At School B, the students arrive at 8:00 a.m. and are escorted by the instructional aide to the cafeteria. The students eat breakfast in the cafeteria, with nondisabled peers, until approximately 8:45 a.m. and then attend a first period elective class. The elective classes (music, art, gym and shoe repair) include nondisabled peers. The instructional aide divides time between the elective classes. At the conclusion of first period at 10:10 a.m., the students are escorted to the self-contained classroom. With the exception of lunch, which is with nondisabled peers, the students remain in the self-contained program for the remainder of the school day, which ends at 3:15 p.m. (LEA Representative's Testimony)
81. While in the hallways at School B, the students in the ID classes are escorted by the instructional aide. (LEA Representative's Testimony)
82. School B is able to provide 26.5 hours per day of specialized instruction outside of the general education environment. (LEA Representative's Testimony)
83. School B is able to provide the related services and accommodations included on the student's IEP. (LEA Representative's Testimony)
84. School B does not employ a "vocation instructor." (LEA Representative's Testimony)
85. The student's postsecondary transition plan can be implemented at School B. (LEA Representative's Testimony)
86. School B's relationships with community partners are in the "infancy stage." (LEA Representative's Testimony)
87. On August 27, 2013, DCPS agreed to conduct speech-language and comprehensive psychological evaluations of the student. (Stipulated Fact)

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 United States Supreme Court has established a two-part test for

determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seg., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

Issue #1

The Petitioner alleged that DCPS failed to afford the parent an opportunity to participate in the May 21, 2013 placement discussion regarding the student.

Pursuant to the IDEA regulations at 34 CFR §§300.327 and 300.501(c), each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child. In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 CFR §300.116(a)(1). The procedural inquiry should focus on whether there has been "full participation" of the parties throughout the IEP development process. *Rowley*, 458 U.S. at 206; *see also Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001). "A school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement." *K.D. v. Dep't of Educ., State of Haw.*, 665 F.3d 1110, 1123 (9th Cir. 2011) (*citing Spielberg v. Henrico Cnty. Public Sch.*, 853 F.2d 256 (4th Cir. 1988) and *W.G. v. Bd. of Tr. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479 at 1484 (9th Cir. 1992) (superseded by statute on other grounds by 20 U.S.C. § 1414(d)(1)(B) (internal citations omitted)).

On May 21, 2013, the student's IEP Team met to determine the student's placement for the 2013-2014 school year. The May 21, 2013 IEP Team consisted of a DCPS LEA Representative, a School A speech-language pathologist, the student, the Special Education Teacher, a School A occupational therapist, the Counselor, the School A Director of Student Services, the Parent and a School A therapist. At the meeting, the School A staff members and the parent disagreed with the determination to change the student's placement from a private separate school to a separate class in a public school.

It is uncontested that DCPS afforded the IEP Team members the opportunity to voice their opinions and concerns regarding the proposed change. The Team members expressed concerns of regarding class sizes, the student's inability to read social cues, the student's distractibility and whether the assigned location of services would provide all of the supports available at School A. The Parent testified that she was "very verbal" regarding her opinion of the student's change in placement. After the team members gave comments, the DCPS representative at the meeting informed the IEP Team that the student would be assigned to a DCPS public high school for the 2013-2014 school year. With the exception of the DCPS representative at the meeting, no other IEP Team members agreed with the change in placement. At the meeting, DCPS noted that the IEP Team members disagreed with the change in placement.

A district is required to allow "meaningful" participation by the parent in the decision making process. *See, e.g. Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 208 (1982) ("Congress sought to protect individual children by providing for parental involvement... in the formulation of the child's individual educational program.") (citation omitted); *Deal v. Hamilton Cnty. Bd. of Educ*., 392 F.3d 840, 858 (6th Cir. 2004) (citation omitted) ("Participation [of parents] must be more than a mere form; it must be meaningful."). The Petitioner argued that at the student's May 21, 2013 IEP Team meeting, DCPS made a unilateral decision to change the student's placement, evidenced by DCPS giving no options or alternatives, and that the decision was not based on meaningful participation by the parent. The Respondent argued that all of the witnesses testified that the May 21, 2013 IEP Team meeting was more of a discussion regarding location of services rather than a change in placement given that there was no disagreement regarding the student's IEP, and that the parent participated in the May 21, 2013 meeting.

The Hearing Officer agrees with the Respondent that the discussion during the May 21, 2013 IEP Team meeting was focused more on the location of services rather than the student's placement. The Special Education Teacher testified that his opinion regarding the "placement" was that "any proposed changes were outweighed by the School A's 11-month program" and that the student's placement was not the concern but rather whether the new location of services would be able to offer the supplementary aids and services needed by the student. The Special Education Teacher acknowledged that if the student's IEP was appropriate than it could be implemented in any location of services with the ability to implement the IEP. Likewise, the Counselor acknowledged that she did not have an appreciable understanding of the difference between placement and location of services. The Special Education Teacher, the Counselor and the Parent gave consistent testimony regarding their disagreement that the student be removed from School A.

However, regardless of the discussion during the meeting, DCPS changed the placement of the student at the May 21, 2013 IEP Team meeting. A continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. *See* 34 CFR §§300.115 and 300.39. The change from a private "special school" to a "special class" constitutes a change in placement. The Team members' concerns of regarding class sizes, the student's inability to read social cues, the student's distractibility and the supports needed by the student were legitimate concerns to address during a placement discussion.

DCPS had the obligation to consider the parent's concerns regarding the student's placement. The Hearing Officer concludes that other than noting the disagreement of the IEP Team members regarding the proposed change in placement, DCPS independently made the decision to change the student's placement. The Special Education Teacher, the Counselor and the Parent all testified that at the outset of the May 21, 2013 meeting, it "seemed like the decision had been made." While the parent was "very verbal" regarding her opinion of the student's change in placement, DCPS did not factor in the parent's opinion into the decision.

The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the

parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.

The Hearing Officer concludes that DCPS failed to afford the parent an opportunity to participate in the May 21, 2013 placement discussion regarding the student by failing to ensure that the placement decision was made by a group of persons, including the parents, and other persons knowledgeable about the child pursuant to 34 CFR §300.116(a)(1). In doing so, DCPS significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child.

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

Issue #2

Pursuant to 34 CFR §300.503, a public agency must give written notice to the parents of a child with a disability a reasonable time before the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. The notice must include a description of the action proposed, an explanation of why the agency proposes or refuses to take the action, a statement that the parents have protections under the procedural safeguards, sources for parents to contact to obtain assistance in understanding the provisions of the IDEA, a description of other options that IEP Team considered and the reasons why those options were rejected, and a description of other factors that are relevant to the agency's proposal or refusal.

The Parent and Counselor testified that the parent and School A were informed that the student's May 21, 2013 IEP Team meeting was being convened to discuss the student's placement. Although the witnesses were unable to recall the amount of time prior to May 21, 2013 meeting the information was shared, there was no evidence that DCPS did not inform the parent of its proposed change in placement a reasonable time before the public agency proposed to change the educational placement of the child.

On May 21, 2013, DCPS proposed to change the student's placement from a private special education day school to a separate program within a public school for the 2013-2014 school year. On May 21, 2013, DCPS provided a Prior Written Notice to the parent which included a description of the action proposed, an explanation of why DCPS proposed to take the action, a statement that the parent has protections under the procedural safeguards, sources for parent to contact to obtain assistance in understanding the provisions of the IDEA, a statement that no other options were considered and a statement that the parent and School A staff members disagreed with the proposal.

In the Complaint, the Petitioner alleged that the prior written notice given to the parent was not sufficient because it failed to identify the location of services to which the student was assigned and did not sufficiently describe the basis for DCPS' determination to change the student's placement to a public high school. During the hearing, the Petitioner made no specific argument related to this issue.

The Hearing Officer acknowledges that the prior written notice given to the parent did not identify the location of services to which the student was assigned however there is no requirement that prior written notice contain that level of detail. Educational placement refers to "the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school." *T.Y. v. N.Y.C. Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009). The prior written notice included a description of the action proposed, specifically that DCPS proposed to change the student's placement. DCPS proposed this action because of the belief that the student was able to interact with nondisabled peers during lunch and in non-academic setting. In this specific case, the location of services where the student's IEP would be implemented was not necessary for the placement discussion. The Hearing Officer also disagrees with Petitioner's argument that the prior written notice did not sufficiently describe the basis for DCPS' determination to change the student's placement to a public high school. The prior written notice indicated that the basis for DCPS' determination was the student's ability to interact with nondisabled peers during lunch and non-core academic settings.

The Hearing Officer concludes that DCPS did not fail to provide sufficient prior written notice of the student's change in placement on May 21, 2013.

The Petitioner failed to meet its burden with respect to Issue #2.

Issue #3

The Petitioner alleged that DCPS denied the student a FAPE by failing to include ESY services on the student's May 21, 2013 IEP.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression." *Walczak v. Florida Union Free Sch. Dist.,* 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted). Further, the Special Education Teacher, Vocational Teacher, and Counselor testified that the goals and services on the student's May 21, 2013 IEP, were appropriate for the student.

ESY services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§300.320 through 300.324, that the services are necessary for the provision of FAPE to the child. 34 CFR §300.106(a)(2). ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months. *M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cnty.,* 303 F.3d 523, 537-38 (4th Cir. 2002); *see also S.S. ex rel. Shank v. Howard Rd. Acad.,* 585 F. Supp. 2d 56, 68-69 (D.D.C. 2008) (adopting the standard from *M.M.)* and *Jackson Johnson v. District of Columbia*, 873 F. Supp. 2d 382 (D.D.C. July 10, 2012).

In the present matter, the student's November 29, 2012 and May 21, 2013 IEP Teams did not determine that ESY services were necessary for the student. In fact, the student's IEP Team did not discuss the student's individual need for ESY services. The Parent testified that on May 21, 2013 she inquired about services during the summer for the student however ESY was not

discussed during the meeting. The Special Education Teacher testified that "because [School A] is an 11-month program, ESY is usually declined." The Special Education Teacher also testified that education during the summer months is an "important part of the [School A] program to prevent regression of established skills" or to develop new skills.

The record is clear that the student is a "complex student" who needs small group instruction and a variety of related services to access the curriculum. Additionally, while the student is friendly and outgoing, the student has difficulty interpreting the facial expressions of others and reading social cues. The student, at times, has difficulty understanding directions, is academically behind his peers however excels when he is given leadership roles and tasks involving acting as a role model. While the student has an extremely low working memory, the record does not contain evidence of how this specific deficit impacts the student's ability to retain acquired skills.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it. *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), affd, 512 U.S. 246 (1994). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. There is no evidence in the record that supports the necessary finding that ESY services were necessary for the student. While the student is behind grade level, the record does not establish either that the student had specific emerging skills, or that the student's gains would be significantly jeopardized without the reinforcement that a summer program would provide. ESY services are not recommended on the student's IEPs and the Petitioner's expert did testify regarding services required for the student that would need to be provided during ESY. While the Special Education Teacher testified that education during the summer months is an "important part of the [School A] program to prevent regression of established skills" or to develop new skills, that is not sufficient to establish that ESY was "necessary" for this student to be provided a FAPE. *See M.M.*, 303 F.3d at 538 (finding that "the mere fact of likely regression is not a sufficient basis" to establish the need for ESY). Furthermore, "all students, disabled or not, may regress to some extent during lengthy breaks from school. ESY Services are required under the IDEA only when such regression will substantially thwart the goal of 'meaningful progress.'" *Id., citing Polk v. Centr. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir. 1988).

It is uncontested that School A is an 11-month program. However, there was no evidence presented which supports the contention that the student required an 11-month program in order to receive a FAPE. The Hearing Officer is disturbed by the statement that "because [School A] is an 11-month program, ESY is usually declined." ESY is a component of the IEP which should be discussed for all students regardless of the schedule of the student's location of services. Nonetheless, while ESY was not discussed during the student's May 21, 2013 IEP Team meeting, the Petitioner did not provide evidence supporting the contention that ESY was necessary for the student.

The Petitioner failed to meet its burden with respect to Issue #3.

Issue #4

An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability. 34 CFR 300.320(a)(2)(i). The content of an IEP is a team decision 34 CFR §§300.320-300.323. *See also*, D.C. Code §§ 30.3007.1 & 3008.1. IEP Teams are required to consider all the relevant information before them. *Id.* In reviewing whether an IEP provides a student a FAPE as required by IDEA, a hearing officer must consider whether the district complied with IDEA's procedural requirements and determine whether the program was reasonably calculated to enable the student to receive educational benefit. *Rowley*, 458 U.S. at 207.

The student has difficulty with language and significant speech-language deficits. At times, the student does not ask for clarification when he is unable to understand language. When the student does not understand directions that are given the educational environment, the student has difficulty completing the required task. The student excels when he has additional verbal and gestural prompts, clear concise language from teachers and materials such as an ipad, markers or a whiteboard to "get the big picture." The student is able to answer content questions based on highlighted information and generated notes. The student has difficulty making logical connections between key words and details to provide an explanation. The student relies on written checklists paired with auditory information to complete two-three step directions in unstructured environments. The student needs reminders to allow a peer to take an equal number of turns during a conversation and tends to direct the conversation to a topic of his choice.

The student's May 21, 2013 IEP prescribes 60 minutes per week of speech-language services outside of the general education setting. The student's May 21, 2013 IEP notes the need for the student to master speech-language goals in both structured and unstructured settings. The Special Education Teacher, the Vocational Teacher, the Counselor and the Parent all testified that speech-language services are embedded in the School A program but provided little testimony of how or why these services are needed for the student. The Vocational Teacher testified that the speech-language services on the student's IEP are appropriate for the student if the student is in the School A program however would need to include speech-language consultation and an additional "scripting" goal if the student is not in the School A program. The Educational Consultant also testified that in addition to speech-language services as a "pull-out" service, the student also requires consultative services.

The student is interested in working as a tow truck driver, a dispatcher or working in an office. The student is aware of the steps to take to achieve this goal. After school, the student accompanies his mother at her job at a towing company and, at times, provides assistance. At School A, the student is developing employability skills through participation in in-school vocational job experiences. During these experiences, the student is able to complete job tasks and work independently. His areas of need in vocation include working appropriately with peers, having appropriate work conversations and behaviors and being able to work with others.

The student is diabetic however feels independent with managing his health although he makes inconsistent nutrition decisions. The student is able to wash dishes, use the washing machine and dryer and make his bed.

The postsecondary transition plan in the student's May 21, 2013 IEP includes goals related to respecting others, utilizing strategies to improve social skills, identifying skills and requirements necessary to perform jobs in the industrial truck field, exploring requirements to obtain a learner's permit, accepting shared responsibility, participating in group activities to develop and improve social skills, independently preparing meals, practicing planning and shopping for materials to prepare his meals and improving kitchen safety skills and awareness.

The Petitioner alleged that DCPS denied the student a FAPE by failing to develop an appropriate IEP for the student on May 21, 2013, specifically by failing to include integration of speech and language services into the classroom setting, opportunities for community interaction, opportunities for career participation and functional life skills on the student's IEP.

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

In the present matter, the Special Education Teacher, the Vocational Teacher and the Counselor testified that the goals and services on the student's May 21, 2013 IEP were appropriate for the student. However, the School A staff also indicated that the student's May 21, 2013 IEP was appropriate with the supports of the "School A program." The Hearing Officer is somewhat disturbed by this testimony. A student's IEP Team is charged with developing an IEP which meets the unique needs of the student. *See* 34 CFR §§300.320, 300.321 and 300.324. While an IEP does not need to include all aspects of a specific program to which a student is assigned, in the District of Columbia, when a student is assigned to a private special education day school, the private special education day school is responsible for planning for the student's reintegration to a less restrictive environment and discussing a student's transition status

annually. See 5 DCMR §§E-2824.1(f) and 2810.1. Here, the student had attended School A for nine years. School A's reliance on its program to develop the student's IEP without consideration of the student's unique needs and transition to a less restrictive environment was contrary to the relevant provisions of the IDEA and the DCMR.

Nonetheless, the Hearing Officer concludes that the student's May 21, 2013 IEP should have included speech-language consultative services. The student has significant speech-language deficits and has difficulty understanding language across the school environment. The student requires assistant to understand directions and needs additional materials to be able to appropriately respond to questions. The speech-language pathologist at School A works collaboratively with the student's teachers in order to provide written checklists, written fill-in-the-blank prompts and highlighted information for the student. This additional support for the student's classroom teachers is necessary for the student to successfully participate in the classroom environment. Although all of the members of the student's IEP Team agreed that the student's May 21, 2013 IEP was appropriate, the IEP Team members did not discuss any changes to the student's IEP based on the proposed change of placement.

The Petitioner also alleged that the student's May 21, 2013 IEP should have included opportunities for community interaction, opportunities for career participation and functional life skills on the student's IEP. The Hearing Officer disagrees the student's IEP was not sufficient in these areas. First, DCPS' proposal for the student to transition to separate classroom in a public school provided for opportunities for the student to interact with his community in a manner not provided by School A. Next, the student participates daily in the career of his choice by accompanying his mother to work. Finally, the student has already acquired many basic functional life skills and has goals on his IEP to address other functional life skills in addition to goals to address appropriate interaction with others in the community and career preparation. While School A may have an exceptional program related to postsecondary preparation, DCPS was not required to provide the student with the best education available or to provide instruction or services that maximize a student's abilities. The student's IEP Team agreed that the goals and services on the student's IEP were appropriate for the student. With the exception of speech-language services as discussed above, the Petitioner did not prove by a preponderance of the evidence that the student's May 21, 2013 IEP was not reasonably calculated to enable the student to receive educational benefit.

The Petitioner met its burden with respect to Issue #4 related to speech-language services.

<u>Issue #5</u>

The Petitioner alleged that DCPS denied the student a FAPE by assigning the student to a location of services for the 2013-2014 school year that is unable to implement the student's May 21, 2013 IEP.

In order to provide a student with a FAPE, the student's education must be "provided in conformity with the IEP" developed for him, and therefore, the educational agency must place the student in a setting that is capable of fulfilling the student's IEP. *See* 20 U.S.C. § 1401(9); 34 CFR §300.116 (providing that a child's educational placement "[i]s based on the child's IEP"); *O.O. v. Dist. of Columbia,* 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (citing 20 U.S.C. § 1401(9));

see also Savoy v. District of Columbia, 844 F. Supp. 2d at 31 (characterizing the plaintiff's claims that the school to which the student was assigned after he aged out of his prior placement "failed to provide the number of hours and types of services required by [the student's] IEP" as failure-to-implement claims).

On June 27, 2013, DCPS informed the parent that the student was assigned to School B for the 2013-2014 school year. School B is a public school within DCPS. School B has five self-contained classrooms to serve students with disabilities in need of this level of service. Two of the five classrooms serve students who are on a "certificate" track, which are generally for students classified as ID. The two ID classrooms are divided by the chronological ages of the students. Currently, neither classroom has more than six students. Both classes are taught by a certified special education teacher and the classes share an instructional aide. School B has a Life Skills classroom where students are able to practice functional skills.

At School B, the students arrive at 8:00 a.m. and are escorted by the instructional aide to the cafeteria. The students eat breakfast in the cafeteria, with nondisabled peers, until approximately 8:45 a.m. and then attend a first period elective class. The elective classes (music, art, gym and shoe repair) include nondisabled peers. The instructional aide divides time between the elective classes. At the conclusion of first period at 10:10 a.m., the students are escorted to the self-contained classroom. With the exception of lunch, which is with nondisabled peers, the students remain in the self-contained program for the remainder of the school day, which ends at 3:15 p.m. While in the hallways, the students are escorted by the instructional aide.

The student's IEP prescribes 27.5 hours per week of specialized instruction outside of the general education environment, 30 minutes per week of occupational therapy outside of the general education environment, 60 minutes per week of speech-language pathology outside of the general education environment and 60 minutes per week of behavioral support services outside of the general education environment. The student's IEP also provides for a location with minimal distractions, preferential seating and individual testing. The student's math and reading annual goals on his May 21, 2013 IEP provide that the goals will be mastered in "a structured setting." The student's speech-language annual goals on his May 21, 2013 IEP provide that the goals will be mastered in "structured and unstructured" settings. The postsecondary transition plan in the student's May 21, 2013 IEP provides for services inside and outside of a special education setting.

The LEA Representative provided creditable testimony that School B is able to provide 26.5 hours per day of specialized instruction outside of the general education environment. Additionally, School B is able to provide all related services and accommodations included on the student's IEP. While the LEA Representative testified that School B does not employ a "vocation instructor," a staff person with this title is not required by the student's postsecondary transition plan. The LEA Representative testified that the student's postsecondary transition plan can be implemented although relationships with community partners are in the "infancy stage."

The Petitioner argued that School B is an inappropriate location of services for the student because School B cannot implement the student's IEP and that School B does not have

the "depth and breadth" of the speech-language services and vocational services needed by the student.

In failure to implement claims, the Petitioner must demonstrate that the LEA failed to implement "substantial or significant provisions of the IEP" in order to prevail. *Catalan,* 478 F. Supp. 2d at 75 *(quoting Bobby R.,* 200 F.3d at 349), *aff'd sub nom. E.C. ex rel. Catalan v. Dist. of Columbia,* No. 07-7070, 2007 U.S. App. LEXIS 21928 (D.C. Cir. Sept. 11, 2007). Courts applying this standard "have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." *Wilson v. Dist. of Columbia,* 770 F. Supp. 2d 270, 275 (D.D.C. 2011) (citations omitted). The Petitioner must show "more than a de minimis failure to implement all elements of [the] IEP" in order to succeed on their claim. *Johnson v. District of Columbia,* 113 LRP 34866 (August 27, 2013) *(quoting Catalan ex rel. E.C. v. Dist. of Columbia,* 478 F. Supp. 2d 73, 75 (D.D.C. 2007)). In this matter, the fact that the claim is a "prospective" challenge, which arises "at [a] different point[ ] in the process of implementing and developing an IEP" from a claim which alleges that a school has failed to implement a student's IEP during the student's attendance there, is a distinction without a difference. *Johnson v. District of Columbia,* 61 IDELR 286, 113 LRP 34866 (D.D.C. August 27, 2013).

The Petitioner was not specific in its argument regarding the portions of the student's May 21, 2013 IEP School B allegedly cannot implement. The majority of the Petitioner's argument focused on the reasons the student should be assigned to School A rather than any evidence that the assigned location of services was unable to implement the student's May 21, 2013 IEP. Likewise, the Educational Consultant testified regarding School B's program, indicating services not provided by School B or opining on the "virtual impossibility" of the classroom teacher to meet all of the needs of the student's in the classroom, however provided no testimony regarding services in the student's May 21, 2013 IEP which could not be implemented by School B.

In *Hinson v. Merritt Educational Center,* 579 F. Supp. 2d 89 (D.D.C. 2008), the plaintiff argued that the school designated by DCPS was an inappropriate placement because it could not meet the plaintiff's proposed standards for her child's IEP. *Id.* The Court concluded that "to show that placement is inappropriate, plaintiff must show that [the school] is unable to implement the IEP as written." Therefore, whether a placement is able to implement a student's IEP is evaluated from the standpoint of how the IEP is actually drafted, and not from the perspective of how a parent believes the IEP ought to be written. *Johnson v. District of Columbia,* 61 IDELR 286, 113 LRP 34866 (D.D.C. August 27, 2013).

In *Johnson v. District of Columbia,* the Court found that the difference between 31 and a little over 28 hours of specialized instruction did not constitute a material deviation from the requirements of the student's IEP. In *Savoy v. District of Columbia,* 844 F. Supp. 2d 23 (D.D.C. 2012), the Court found that a difference of less than one hour per week was not material. However, in *Van Duyn v. Baker Sch. Dist.5J,* 502 F.3d 811 (9th Cir. 2007), the Court found that a 50% deprivation of hours was material. Likewise, in *Sumter Cty. Sch. Dist. 17v. Heffernan,* 642 F.3d 478 (4th Cir. 2011), the Court found that providing seven and a half to ten hours of the

required fifteen hours, in combination with the school's failure to use the teaching method specified in the IEP, was material.

In this matter, the Hearing Officer concludes that the facts more closely align with the facts in *Johnson* and *Savoy* than with those in *Van Duyn* and *Heffernan*. The deviation of 26.5 hours per week of specialized instruction outside of the general education, from the 27.5 hours of specialized instruction outside of the general education environment prescribed by the student's IEPs is relatively slight. There is no other area of the student's May 21, 2013 IEP which the Hearing Officer can find that cannot be implemented by School B. Here, there is "no logical reason to require perfect compliance with a student's IEP in determining an appropriate placement when imperfect compliance with the IEP would be permissible once the student begins attending the school." *See Johnson v. District of Columbia*, 61 IDELR 286, 113 LRP 34866 (D.D.C. August 27, 2013).

The Hearing Officer concludes that the difference in 27.5 hours per week of specialized instruction outside of the general education environment and 26.5 hours of specialized instruction outside of the general education environment does not constitute a material deviation from the requirements of the student's May 21, 2013 IEP. School B is able to substantially implement the student's May 21, 2013 IEP, therefore, DCPS did not deny the student a FAPE by assigning the student to a location of services for the 2013-2014 school year that is unable to implement the student's May 21, 2013 IEP.

The Petitioner failed to meet its burden with respect to Issue #5.

<u>Issue #6</u>

A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with 34 CFR §§300.304 through 300.311 if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or if the child's parent or teacher requests a reevaluation. 34 CFR §300.303(a). A reevaluation conducted under paragraph (a) of this section may occur not more than once a year, unless the parent and the public agency agree otherwise; and must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 CFR §300.303(b).

In the present matter, the Petitioner alleged that DCPS failed to conduct a triennial reevaluation of the student by April 2013.

Evaluation is defined as, "procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 CFR §300.15. In conducting an evaluation, an LEA must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability" and the content of the child's IEP. 34 CFR §300.304(b).

On November 29, 2012, the student's IEP Team met for an annual review of the student's IEP and to reevaluate the student. The November 29, 2012 IEP Team determined that no additional assessments were needed in order to determine the student's eligibility. The IEP Team reviewed the student disability worksheet for MD and the IEP Team agreed that the student continued to meet the eligibility criteria for MD.

While not specifically argued by the Petitioner during the due process hearing, in the Complaint, the Petitioner concluded that the student was not reevaluated because a comprehensive psychoeducational assessment of the student had not been conducted since April 2010. Here, it is important to note the distinction between "evaluation" and specific assessment tools. The IDEA does not require LEAs to administer every test requested by a parent or educational advocate. Rather, to ensure that a child with a disability receives a FAPE, an LEA must use "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information." *Long v. District of Columbia*, 780 F. Supp. 2d 49, (D.D.C. March 23, 2011) (quoting 20 U.S.C. § 1414(b)(2)(A)). A district has the prerogative to choose assessment tools and strategies. *See Amanda Ford v. Long Beach Unif. Sch. Dist.*, 291 F.3d 1086 (2002) (parents did not provide any empirical grounds on which to base a challenge to the district's choice in assessment tools and strategies).

The student's November 29, 2012 IEP Team used work samples, teacher reports, observation data, curriculum and teacher-made assessments, the Saxon placement test, A-Z running records, the Brigance Inventory of Essential Skills, informal assessments and therapy data to determine the student's eligibility and the content of the student's November 29, 2012 IEP. The IEP Team agreed that the goals on the student's November 29, 2012 IEP were appropriate for the student. Further, the Special Education Teacher, Vocational Teacher, and Counselor testified that the goals and services on the student's May 21, 2013 IEP, which were identical to the goals and services on the student's November 29, 2012 IEP, were appropriate for the student.

The Hearing Officer concludes that DCPS was not required to reevaluate the student in April 2013, as less than three years had elapsed since the student's prior reevaluation. Although formal psychological or speech-language assessments of the student were not administered prior to the student's November 29, 2012 reevaluation, the student's IEP Team determined that additional assessments were not necessary to determine the student's eligibility or the content of the student's IEP.

The Petitioner failed to meet its burden with respect to Issue #6.

<u>Requested Relief</u>

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

In the present matter, the Hearing Officer concluded that DCPS denied the student a FAPE by failing to afford the parent an opportunity to participate in the May 21, 2013 placement discussion regarding the student and failing to include integration of speech and language services into the classroom setting on the student's May 21, 2013 IEP. As relief, the Petitioner requested placement in and funding for School A for the 2013-2014 school year; and for the student's IEP to be revised to include integration of speech and language services into the classroom setting.

For the denial of FAPE for DCPS' failure to include integration of speech and language services into the classroom setting on the student's May 21, 2013 IEP, it is appropriate for the Hearing Officer to order that the student's IEP be revised to include speech and language services in the student's classroom. Specifically, the Hearing Officer will adopt the suggestion of the Vocational Teacher and Educational Consultant to include consultative speech-language services on the student's IEP. Additionally, the record indicates that the student requires an additional speech-language "scripting" goal to be addressed in the classroom environment and the addition of checking for understanding as a classroom accommodation.

Typically, for a denial of FAPE related to the failure of providing a parent the opportunity to participate in a placement discussion, the remedy would be for the Hearing Officer to order that the LEA reconvene an IEP Team meeting in order for the parent to have an opportunity to participate in a placement discussion. In this matter, it is appropriate to consider what changes would have been made to the student's IEP had the parent been affording the opportunity to participate in the placement discussion and to consider the parent's request for relief.

The Parent testified that she did not agree with DCPS' proposed change in placement because she was not informed regarding the assigned location of services, that she believed that the student would be bullied in a general education environment, that the student would not have someone to "guide" him, that no one would know how to calm the student, that no one would be aware of the student's health issues and that she wanted to ensure that the student was in a small class size. After the parent learned of the location assignment, the parent "heard that [School B] was a 'bad school.'" At that point, the parent concerns were that there was only one teacher in the student's classroom, the class size and that the student would have to interact with general education peers during lunch, in the hallways and possibly during one class. In general, the mother is concerned that the student is more comfortable around younger children. The Special Education Teacher and the Counselor expressed their concerns that the student would have difficulty in a general education environment due to his inability to appropriately read social cues and his difficulty generally with socialization skills.

Given the Petitioner's request for prospective placement in School A for DCPS' denials of FAPE, the Hearing Officer will consider the factors in *Branham v. District of Columbia*, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005). These considerations include the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the private school; the placement's cost; and the extent to which the placement represents the LRE.

The student's IEP prescribes 27.5 hours per week of specialized instruction outside of the general education environment which can be achieved at a private special education day school or in a separate classroom in a public school. While the student at times exhibits inappropriate behaviors, particularly related to appropriate interpreting social cues, the student is able to control his behavior and demonstrates strong leadership skills. Additionally, the student is able to interact appropriately in the community and is acquiring skills to function in a work environment. The Hearing Officer concludes that while the student has significant academic deficits and difficulty reading social cues, the student's deficits are not so severe as to require specialized instruction in a private school.

Both School A and School B are able to provide the services on the student's IEP. Both programs offer a small class size and a low student-teacher ratio. Additionally, both programs provide the related services as prescribed by the student's IEP. Next, the Petitioner did not present evidence of the cost of School A. However, given the private nature of the program, it can be inferred that the cost of School A is significantly higher than the cost of a separate classroom.

Finally, 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). In determining the least restrictive environment, consideration is given to the types of services that the child required." *Id.* 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). 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). Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act. *DeVries by DeBlaay v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). In selecting the least restrictive environment, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs. 34 CFR §300.116(d).

The record contains ample evidence of why School A is superior to School B. The Hearing Officer acknowledges that School A is an exemplary program however the record does not contain adequate evidence that a private special education day school is the student's least restrictive environment. While the student has difficulty reading social cues and can misinterpret the facial expressions of others, the student maintains those difficulties in all environments. Interacting with students in a general education environment may present more opportunities for the student to misinterpret social cues however will also provide the "outside special education" setting required by the student's IEP to address these needs. The Hearing Officer concludes that a review of the *Branham* factors does not support placement in a private special education day school.

As a remedy, the Hearing Officer also could have order reimbursement for School A for the time period prior to the issuance of the HOD. However, the student has been attending School A, at the expense of the District of Columbia, pursuant to the stay-put provision since the filing of the Complaint. The Hearing Officer believes that it is appropriate to address the parent's concerns related to the student's placement. "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)). An LEA is afforded much discretion in determining which school a student is to attend (*see White, supra.)*. Had the parent had the opportunity to participate in the May 21, 2013 placement discussion, the student's IEP should have been revised to include additional support regarding the student's social skills, to support the student should the student feel "bullied," to provide additional "guidance" to the student and to assist the student in developing skills to remain calm in frustrating situations; speech-language consultative services; and consultative health services.

ORDER

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

1. Issues #2, #3, #5, and #6 are **dismissed** with prejudice.
2. Within 10 school days of the date of this Order, DCPS convene an IEP Team meeting to amend the student's May 21, 2013 IEP to include one hour per week of consultative speech-language services; increase the student's behavioral support services to 90 minutes per week; add 15 minutes per month of consultative health services to assist the student in managing his diabetes; develop a "scripting" speech-language goal to be addressed by all of the student's teachers; and add "check for understanding" as a classroom accommodation.
3. During the meeting described in #2, DCPS develop a plan, inclusive of School A and School B staff, to ensure a coordinated and supported transition for the student from School A to School B; and discuss which classroom is appropriate for the student based on his unique needs rather than his chronological age.
4. All other 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: October 30, 2013

Melanie Byrd Chisholm
Hearing Officer