DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE
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STUDENT HEARING OFFICE

STUDENT, **By and through PARENT,**[1] ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	)))))))))))	**Case No. 2012-0522** **Bruce Ryan, Hearing Officer** **Issued: September 27, 2012**

HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The complaint was filed July 31, 2012, on behalf of a 15-year old student (the "Student") who resides in the District of Columbia and who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. During the 2011-12 school year, the Student attended Public School A, a separate special education school operated by DCPS. Petitioner is the Student's mother. Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") under the IDEA by failing to provide him with an appropriate educational placement for the 2012-13 school year, and requests relief in the form of a private placement.[2]

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[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

[2] Petitioner's complaint also alleged that DCPS denied the Student a FAPE by failing to allow the parent to participate in the meeting to change the Student's placement pursuant to 34 C.F.R. §300.501 (c), but Petitioner subsequently withdrew this claim/issue at the August 22, 2012 prehearing conference following an August 14, 2012, resolution meeting in which a new school placement was discussed. *See Prehearing Order* (Aug. 31, 2012), p. 2; discussion *infra*.

DCPS filed a timely response to the complaint on August 10, 2012, denying the allegation that it failed to provide a FAPE to the Student. DCPS asserted that it was "in the process of determining a location of services for the student" that can implement the Student's individualized education program ("IEP"), and that Petitioner would be notified prior to the beginning of the 2012-13 school year. *Response, p. 1.*

On August 14, 2012, the parties held a resolution meeting, which did not resolve the complaint. At the meeting, DCPS proposed to place the Student at Public School B, a DCPS senior high school that it believed could provide the Student an appropriate, full-time special education program designed for learning disabled students. *See RSM Notes* (Aug. 14, 2012), p. 1 (Petitioner's Exhibit "P-5"). DCPS offered Petitioner a settlement agreement to resolve the issues in the complaint, by which DCPS would (a) place the Student at Public School B for the 2012-13 school year, and (b) convene an IEP meeting within 30 business days of his enrollment. *Id.*, p. 2. Because Petitioner disagreed with the proposed placement, she declined the offered settlement agreement and elected to go to hearing. *Id.* Accordingly, the parties agreed that no agreement was possible and that the case should proceed to a due process hearing. *See Resolution Period Disposition Form* (Aug. 14, 2012). The resolution period ended on August 14, 2012, and the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") is due to expire on September 28, 2012.

When Petitioner declined to enter into the proposed settlement agreement, DCPS went ahead and issued a Prior to Action Notice dated August 14, 2012, formally proposing to change the Student's placement from Public School A to Public School B. *See Prior to Action Notice* (Aug. 14, 2012) (DCPS' Exhibit "R-2"). [3]

On August 17, 2012, DCPS then filed a motion to dismiss the complaint based on the Prior to Action Notice. DCPS argued that the complaint should be dismissed because it had "provided the relief requested by the petitioner, a location of services that can implement the student's IEP." *Motion to Dismiss,* p. 2. On August 20, Petitioner filed a response to the motion, asserting that she had rejected DCPS' settlement proposal of placement at Public School B because she believes the program is unable to implement the Student's IEP. The Hearing Officer

[3] In issuing this Prior to Action Notice, DCPS neglected to provide any description and explanation of the agency action other than "Per SA," *R-2,* which no longer applied since the parties had not entered into the proposed settlement agreement. However, Petitioner has not challenged the procedural adequacy of the 08/14/2012 Notice.

denied the motion to dismiss because DCPS had not shown that Petitioner failed to state a claim upon which relief may be granted, since the very issue alleged and to be determined at hearing was whether the Public School B placement in fact can implement the IEP. *See Prehearing Order* (Aug. 31, 2012), p. 2.

On August 22, 2012, a Prehearing Conference ("PHC") was held to discuss and clarify the issues and requested relief. At the PHC, the parties agreed to schedule the due process hearing for September 12, 2012. A Prehearing Order ("PHO") was issued on August 31, 2012. The parties then filed their five-day disclosures, as required, by September 5, 2012.

The Due Process Hearing was held in Hearing Room 2006 on September 12, 2012. Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-5. [4]
Respondent's Exhibits: R-1 through R-4. [5]

In addition, the following Witnesses testified on behalf of each party:

Petitioner's Witnesses: (1) Parent-Petitioner; (2) Special Education Coordinator ("SEC"), Public School A; (3) SEC, Public School B; and (4) Administrative Head, Private School.

Respondent's Witnesses: (1) SEC, Public School B (recalled as witness); and (2) Special Education Teacher/Case Manager, Public School A.

Oral closing arguments were presented on the record at the conclusion of the hearing.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the

[4] Petitioner's exhibits consisted of (1) IEP dated April 12, 2012; (2) Amended IEP dated May 23, 2012; (3) comprehensive psychological evaluation dated May 23, 2012; (4) Private School acceptance letter dated August 30, 2012; and (5) resolution meeting notes dated August 14, 2012.

[5] DCPS' Exhibits consisted of (1) letter to Petitioner dated August 14, 2012; (2) Prior to Action Notice dated August 14, 2012; (3) IEP meeting notes dated April 12, 2012; and (4) IEP dated April 12, 2012.

Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*"). The statutory HOD deadline is September 28, 2012.

III. ISSUE AND REQUESTED RELIEF

As specified in the PHO, the sole issue presented for determination at hearing is:

> **Failure to Provide Appropriate Placement — *Has DCPS denied the Student a FAPE by failing to provide an appropriate school placement for the 2012-13 school year capable of implementing the Student's April 2012 IEP?***
>
> – The Complaint alleges that: (a) the April 2012 IEP requires 30.5 hours of specialized instruction, plus related services, in a 100% out of general education setting; (b) the IEP was implemented at Public School A through the end of the 2011-12 school year, when the Student completed 8th grade; and (c) in June 2012, DCPS informed her that the IEP would be implemented at the Student's Neighborhood School, which cannot provide such setting.
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> – At the PHC, Petitioner maintained that Public School B (the school location proposed in DCPS' August 14, 2012 Prior to Action Notice) similarly is incapable of implementing a 30.5 hour, 100% out of general education IEP, and thus DCPS still has not provided an appropriate school placement.[6]

Petitioner requests that the Student be prospectively placed into an appropriate 100% out of general education separate school program. At the PHC and in her five-day disclosures, Petitioner identified Private School as her proposed school placement for the Student. Petitioner further confirmed that she asserts no claim of denial of FAPE during the 2011-12 school year and does not seek any relief in the form of compensatory education services.

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issue specified above. 5-E DCMR §3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005).

[6] As this issue remained the same, the parties agreed at the PHC that an amendment of the complaint and restarting of the timeline was not required. It was further agreed that DCPS would be allowed to present the Public School B placement/location in defense of this issue. *See Prehearing Order* (Aug. 31, 2012), p. 2. As noted above, Petitioner withdrew the second issue raised in her complaint (*i.e.*, parent participation in placement decisions) in light of the August 14, 2012 meeting and Prior to Action Notice.

IV. FINDINGS OF FACT

Based upon the evidence presented at the due process hearing, this Hearing Officer makes the following Findings of Fact:

1. The Student is a -year old student who is a resident of the District of Columbia. Petitioner is the Student's mother. *See Parent Test.; P-2.*
2. The Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA. His primary disability is Specific Learning Disability. *See P-1; Parent Test.*
3. During the 2011-12 school year, the Student attended Public School A, where he was in the 8th grade. Public School A is a separate public school operated by DCPS that provides full-time special education and related services to students with disabilities in grades pre-K through 8th grade, primarily students with severe learning disabilities. There are no non-disabled students. *See SEC- Public School A Test.; Parent Test.*
4. On or about April 12, 2012, DCPS convened a meeting of the Student's multi-disciplinary team ("MDT" or "IEP Team") to develop an annual IEP for the Student. The IEP Team attending the meeting included Petitioner, a DCPS social worker, two special education teachers (one of whom was the Student's case manager), and the Special Education Coordinator ("SEC") at Public School A. *See R-3* (meeting notes); *SEC-Public School A Test.; Parent Test.*
5. At the April 12, 2012 meeting, the IEP Team discussed the Student's academic skills, progress and potential, as well as some behavior problems that had been observed in school. *See R-2, pp. 1-2*; *SEC A Test.* The Team decided to continue the Student in a 100% out-of-general education setting, with full-time specialized instruction and related services in the form of behavioral support and occupational therapy. *R-2, p. 3; P-1, p. 10* (marked *"P1-9"*); *SEC-Public School A Test.* In the Least Restrictive Environment ("LRE") section of the IEP, the team determined that "the student can only make progress on IEP goals and objectives by being removed from the general education classroom to receive these services." *P1-10.*

6. At the April 12, 2012 meeting, the IEP Team also decided that the Student's IEP could continue to be implemented at Public School A for the remainder of the 2011-12 school year. *R-2, p. 3.* [7]
7. A discrepancy exists between the MDT meeting notes and the text of the IEP document regarding the exact number of hours of specialized instruction to be provided to the Student as of April 12, 2012. The meeting notes clearly state that "[t]he total amount of Specialized Instruction is: 26 hours per week." *R-2, p. 3* (emphasis in original). However, the IEP document provides that the Time/Frequency of Specialized Instruction is "30.5 hr per wk." *P1-9; R-4, p. 10.*
8. The Hearing Officer finds that the IEP Team prescribed 26 hours of specialized instruction per week in an Outside General Education setting, and intended to reflect that amount of hours in the Student's IEP, as discussed at the April 12, 2012 meeting. The 30.5 hours referenced in the IEP document was entered (or not changed) in error, and does not reflect the amount of services actually called for by the IEP Team and discussed at the IEP Team meeting.[8]
9. On or about May 23, 2012, DCPS convened another meeting of the Student's MDT/IEP Team. The purpose of the meeting was to amend the IEP to remove transportation services to Public School A, since the Student would be transitioning to high school for the upcoming 2012-13 school year. *P-2, p. 1.* The IEP Team recommended the Student's neighborhood DCPS high school ("Neighborhood School") as a proposed placement, but the parent declined and indicated an interest in other placement options, including a public charter school. *Id.; SEC-Public School A Test.* The amended IEP made no changes to the services section of the April 12, 2012 IEP. *See P-2, p. 10. See also SEC-*

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[7] The 04/12/2012 meeting notes actually say "for the remainder of the 2012-2013 school year" (*R-2, p. 3*), but in context it is clear that the IEP Team meant to say the 2011-2012 school year. Neither party asserted that this was other than a typographical error.

[8] *See SEC-Public School A Test.* (testifying that 30.5 hours was a typographical error and did not reflect what the IEP Team decided; and that Public School A could not implement 30.5 hours of specialized instruction since the school day, minus lunch and recesses, totaled only about 27.5 hours); *Case Mgr. Test.* (testifying that no one recommended more than 26 hours per week of specialized instruction, that hours above that level would have required a private placement outside DCPS public high schools, and that the IEP Team did not believe the Student required such placement). To the extent the educators' testimony conflicts with the parent's testimony on this issue, the Hearing Officer finds the educators' testimony to be more credible based on its consistency with the meeting notes, its detailed nature, and observed witness demeanor.

Public School A Test. (testifying that the IEP Team "did not catch the error" in the hours of specialized instruction).

10. In June 2012, the Student completed the 8th grade at Public School A, and therefore required a new 9th grade high school placement where his IEP could be implemented.
11. Shortly thereafter, Petitioner learned that the Student's IEP had been sent to his Neighborhood School for proposed implementation. Because Petitioner did not agree that Neighborhood School could implement a 100% out-of-general-education IEP, she filed the complaint in this action on July 31, 2012. *See Complaint, p. 3.*
12. DCPS never formally proposed Neighborhood School as a school placement for the Student.
13. On or about August 14, 2012, DCPS issued a Prior to Action Notice proposing to change the Student's placement from Public School A to Public School B. *See R-2.*
14. Public School B offers a full-time, special education program for learning disabled students in a self-contained setting that is 100% outside general education. *See SEC-Public School A Test.; SEC-Public School B Test.*
15. Public School B is capable of implementing a full-time IEP during the 2012-13 school year, which includes at least 26 hours per week of specialized instruction, four hours per month of behavioral support services, and 30 minutes per week of occupational therapy services in an Outside General Education setting, consistent with the goals and objectives contained in the Student's April 12, 2012 IEP and May 23, 2012 Amended IEP.
16. Public School B cannot implement an IEP providing 30.5 hours of specialized instruction. *See, e.g., SEC-Public School B Test.; P-5.* Private School can, in part due to a longer school day. *See Private School Test.*
17. The Student currently attends Public School B as a 9th grader in a cluster program that consists only of disabled students. The Student has no interaction with non-disabled peers other than at lunch. The Student is receiving at least 26 hours per week of specialized classroom instruction (*i.e.,* seven classes of approximately 45 minutes in length each day), plus the related services specified on the IEP. *See SEC-Public School B Test.* His class sizes range from three to seven students, with a teacher and assistant in each class. *Id.* The student/adult ratio does not exceed that available at Private School. *Id.; Private School Test.*

V. DISCUSSION AND CONCLUSIONS OF LAW

As the party seeking relief, Petitioner carries the burden of proof. *See* 5-E DCMR §3030.3; *Schaffer* v. *Weast,* 546 U.S. 49 (2005). "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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a Free Appropriate Public Education (FAPE)." 5-E DCMR §3030.3. The hearing officer's determination is based on the preponderance of the evidence standard, which generally requires sufficient evidence to make it more likely than not that the proposition sought to be proved is true.

For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to meet her burden of proof on the sole issue presented for hearing.

FAPE means "special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include ***an appropriate preschool, elementary school, or secondary school education in the State involved***; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9) (emphasis added); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia,* 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe,* 484 U.S. 305, 311-12 (1988)). *See* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. "The IEP must, at a minimum, `provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid v. District of Columbia,* 401 F. 3d 516, 519 (D.C. Cir. 2005), *quoting Board of Education* v. *Rowley,* 458 U.S. 176, 200, 207 (1982). *See also Kerkam v. McKenzie,* 862 F. 2d 884 (D.C. Cir. 1988); *Anderson* v. *District of Columbia,* 109 LRP 18615 (D.D.C. 2009) ("IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.").

"Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes ***offering placement in a school that can fulfill the requirements set forth in the IEP.***" *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53

(D.D.C. 2008) (emphasis added). Moreover, statutory law in the District of Columbia requires that "DCPS shall ***place*** a student with a disability ***in an appropriate special education school or program***" in accordance with the IDEA. D.C. Code 38-2561.02 (b) (emphasis added). *See also Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005), *citing McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (affirming "placement based on match between a student's needs and the services offered at a particular school"). Educational placement under the IDEA must be "based on the child's IEP." 34 C.F.R. 300.116 (b) (2). DCPS must also ensure that its placement decision is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA. *See* 34 C.F.R. §§ 300.114-300.116.

In this case, Petitioner claims that DCPS has denied the Student a FAPE because Public School B does not constitute an appropriate educational placement for the 2012-13 school year. The sole basis for this claim is the fact that Public School B cannot implement 30.5 hours of specialized instruction, as specified in the text of the IEP document. Petitioner alleges that the IEP on its face requires this number of hours of specialized instruction. Moreover, even assuming that the IEP document does not accurately reflect the IEP Team's decisions at the April 2012 meeting, Petitioner argues that DCPS is now stuck with this requirement because no one at DCPS ever informed Petitioner of such error prior to the filing of her complaint (*Pet. Closing*).

To be sure, "one of the purposes of the IEP is to ensure that the services provided are formalized in a written document that can be assessed by parents and challenged if necessary." [9] However, courts in this jurisdiction have stated that hearing officers may rely on evidence of "what services were actually called for by the IEP ***or adequately discussed at the IEP meeting***."[10]

Here, the contemporaneous meeting notes and testimony of IEP Team participants indicates that the Student was to receive 26 hours of specialized instruction, rather than the 30.5 hours listed in the IEP document. Given such evidence – and the fact that Public School A could not possibly implement the larger amount of specialized instruction hours at the time the IEP was developed – it appears that the 30.5 hours was an inadvertent procedural error on the part of the

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[9] *N.S. v. District of Columbia,* 709 F. Supp. 2d 57, 73 (D.D.C. 2010), *citing Alfono v. District of Columbia,* 422 F. Supp. 2d 1, 6 (D.D.C. 2006) ("a written, complete IEP is important to serve a parent's interest in receiving full appraisal of the educational plan for her child").

[10] *N.S. v. District of Columbia,* 709 F. Supp. 2d at 72 (emphasis added).

case manager responsible for inputting the correct information into the DCPS computer database. There is no suggestion that such error gave Petitioner an "incomplete picture of the educational services" [11] being provided at Public School A during the 2011-12 school year, or to be provided at Public School B or another educational placement during the 2012-13 school year. The bottom line is that Public School B can implement the IEP as the IEP Team intended and discussed at the team meeting in April 2012.

Even under Petitioner's interpretation of the IEP, moreover, the Hearing Officer concludes that providing a placement capable of delivering at least 26 hours of specialized instruction (or roughly 85% of the 30.5 hours per week Petitioner says the IEP requires) would not constitute a material deviation from IEP requirements in this particular case.[12] Public School B will still provide a full-time special education program designed to meet the needs of learning disabled students such as the Student. It will do so in a self-contained, small-classroom setting that is 100 percent outside of general education for all academic courses throughout the school day. And it will provide the full amount of related services called for in the IEP. There also is no dispute that the specialized instruction and related services would be delivered in conformity with the goals and objectives of the IEP.

Nor has Petitioner shown that the nature and severity of the Student's disability is such that providing no more than 26 hours per week of specialized instruction would deprive him of a meaningful educational benefit. Thus, notwithstanding DCPS' administrative sloppiness, Petitioner has not demonstrated that the school system has denied her child a FAPE under all of the circumstances of this case. *See Board of Education* v. *Rowley, supra.* A "hearing officer's determination of whether a child received a FAPE must be based on substantive grounds." 34 C.F.R. § 300.513 (a) (1). In this case, the procedural inadequacy relating to the Student's IEP

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[11] *Id.*

[12] *See, e.g., Wilson v. District of Columbia,* 111 LRP 19583 (D.D.C. March 18, 2011) ("party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEPs, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit."); *Catalan* v. *District of Columbia,* 478 F. Supp. 2d 73 (D.D.C. 2007), *quoting Houston Indep. Sch. Dist. v. Bobby R.,* 200 F.3d 341,349 (5th Cir. 2000) (to constitute a denial of FAPE, aspects of an IEP not followed must be "substantial or significant," and "more than a *de minimus* failure"; in other words, the deviation from the IEP's stated requirements must be "material.").

document has not been shown to have (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. *Id.,* § 300.513 (a) (2); *see Lesesne v. District of Columbia,* 447 F.3d 828 (D.C. Cir. 2006).

Finally, Petitioner has not shown that a private school placement is appropriate in this case. D.C. Code §38-2561.02 (c) requires that appropriate special education placements be made, in order, to (1) DCPS schools, (2) private or residential District of Columbia facilities, and lastly, (3) facilities outside of the District of Columbia. "Although the District must pay for private school placement '[i]f no suitable public school is available, ... if there is an appropriate public school program available ... the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." *N.T. v. District of Columbia,* 58 IDELR 69 (D.D.C. 2012), slip op. at 4, *quoting Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir. 1991). Moreover, Private School is located outside of the District of Columbia.

VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby **ORDERED**:

1. Petitioner's requests for relief in her Due Process Complaint filed July 31, 2012, are hereby **DENIED;** and

2. The Complaint is **DISMISSED, With Prejudice.**

Dated: September 27, 2012

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).